

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 5 July 2023

**Public Authority:** London Borough of Southwark  
**Address:** PO Box 64529  
London  
SE1P 5LX

#### **Decision (including any steps ordered)**

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1. The complainant has requested, from the London Borough of Southwark (the Council), a 'closed' report titled 'Future of Aylesbury Estate'.
2. The Council is withholding some information under regulations 12(5)(b) and 12(5)(e) (the exceptions for the course of justice and confidentiality of commercial or industrial information).
3. The Commissioner's decision is that whilst regulation 12(5)(b) is engaged and should be maintained (with the exception of two sentences), the Council has not demonstrated that regulation 12(5)(e) is engaged.
4. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
  - Disclose the first two sentences of paragraph 26 of the closed report.
  - Disclose the information withheld solely under regulation 12(5)(e).
5. The Council must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner

making written certification of this fact to the High Court pursuant to section 54 of the Freedom of Information Act 2000, and may be dealt with as a contempt of court.

## **Request and response**

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6. The complainant made the following information request to the Council on 29 January 2022:

“Please supply me with the closed report, with all and any appendices and annexes, referred to in the minutes of the Council Cabinet Committee meeting, 18 Jan 2021 ... 'Future of Aylesbury Estate' ...”.
7. The final position of the Council (9 June 2022) was to uphold its original (14 March 2022) application of regulations 12(5)(b) and 12(5)(e).

## **Scope of the case**

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8. The complainant contacted the Commissioner on 30 July 2022 to complain about the way their request for information had been handled.
9. The complainant challenged the exceptions that the Council is relying on:

“... the exemptions cannot be properly engaged, if the intention is to make the information public at a future date ... the balance of public interest lies with full disclosure ... similar information was provided unredacted for previous changes to the agreement ... I cannot think of a way that the complaint can be resolved without full disclosure of the information, particularly because Southwark has said it will do this ...”.
10. To explain, the Council has indicated that once an agreement with the developer (Notting Hill Genesis) has been reached to vary the Development Partnership Agreement (DPA), an unredacted copy of the report will be published.

11. However the Council has recently published a document<sup>1</sup> explaining that “despite extensive negotiations, it has not proved possible to agree the detail of the intended variation of the [DPA]”.
12. Following the Commissioner’s intervention, the Council issued a revised redacted disclosure (24 April 2023). However the Council maintains redactions at paragraphs 5, 8, 11, 12, 21, 23 and 26 – 29 of the closed report.
13. The present decision notice will therefore focus on the Council’s revised disclosure and the information that the Council is still withholding under regulations 12(5)(b) and 12(5)(e).
14. Based on the Council’s submissions, and the Council’s responses to the Commissioner’s requests for clarification, the Commissioner’s understanding is that the Council is applying regulation 12(5)(b) alone to the withheld information at paragraphs 26 – 29 of the closed report; and regulation 12(5)(e) alone to the withheld information at paragraphs 5, 8, 11, 12, 21 and 23.

## **Reasons for decision**

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### **Is the requested information environmental?**

15. Regulation 2(1) of the EIR defines environmental information as being:
  - “... any information ... on—
  - (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
  - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

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<sup>1</sup> <https://moderngov.southwark.gov.uk/documents/s113311/Report%20-%20Aylesbury%20DPA%20variation.pdf>

- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
  - (d) reports on the implementation of environmental legislation;
  - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
  - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c) ...”.
16. In this case, the requested information relates to the regeneration of a housing estate, and the agreements between the Council and the developer. The Commissioner considers that the requested information falls under regulation 2(1)(c). He has therefore assessed this case under the EIR.

### **Regulation 12(5)(b)**

17. Regulation 12(5)(b) provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.
18. It is necessary to establish that disclosure **would** have an adverse effect, and in this context would means more probable than not (ie more than a 50% chance).
19. The Council indicated that it has applied regulation 12(5)(b) to material covered by legal professional privilege.

20. As the Commissioner's published guidance<sup>2</sup> explains, the 'course of justice' element of regulation 12(5)(b) covers a wide range of information, including material covered by legal professional privilege.
21. The Council has redacted all of the information at paragraphs 26 – 29 of the closed report.
22. The Commissioner notes that some of the redacted information has already been disclosed elsewhere by the Council, in an 'open' version of the report.
23. The Commissioner highlights the first two sentences of paragraph 26 in the closed report. Those sentences can be matched with sentences disclosed in the open report under the sub-heading 'Director of Law and Governance'.
24. The Commissioner therefore requires the Council to disclose the first two sentences of paragraph 26, as they cannot be considered confidential.
25. Turning to the rest of the withheld information at paragraphs 26 – 29, the Commissioner accepts that it is legal advice. It is described as 'supplementary advice' from the Council's Director of Law and Governance. The Commissioner is satisfied that it is subject to legal professional privilege.
26. For regulation 12(5)(b) to apply to legally privileged information, it must be shown that disclosure would adversely affect the course of justice.
27. As the Commissioner's guidance explains, the Upper Tribunal has stated that an adverse effect on the course of justice can result from the undermining of the general principles of legal professional privilege and of the administration of justice. Whilst the Upper Tribunal accepted that it was not inevitable that the disclosure of privileged information would adversely affect the course of justice, it suggested that there would need to be special or unusual factors in play for this not to be the case.
28. In this instance, the Commissioner accepts that the disclosure of legal advice would undermine the principle of legal professional privilege. He therefore considers that it is more probable than not that disclosure

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<sup>2</sup> <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/regulation-12-5-b-the-course-of-justice-and-inquiries-exception/>

would adversely affect the course of justice. Consequently the exception is engaged.

### **Public interest test**

29. The Council said that "it is always in the public interest to withhold advice between parties and their legal advisers".
30. The concerns that the complainant raised with the Commissioner were quoted at paragraph 9 above. In their internal review request of 20 April 2022, the complainant also asked the Council to reconsider its refusal because without a full copy of the closed report "there can be no proper public scrutiny and consideration of the value of any deal with developer Notting Hill Genesis".
31. The Commissioner considers that some weight must always be attached to the general principles of accountability and transparency. These can help to increase public understanding, trust and participation in the decisions taken by public authorities, including environmental decisions.
32. The Commissioner notes that the redevelopment of the housing estate in question has been a large and expensive project, which has attracted media coverage.
33. However, he also considers that the public interest inherent in regulation 12(5)(b) will always be strong.
34. In this instance, the Commissioner notes that the Council has emphasised that the DPA variation and related negotiations are not yet resolved, and he considers that this adds weight to the public interest in maintaining the exception.
35. The Commissioner also had due regard to the content of the withheld information, and to the information the Council has already disclosed (its content, and the amount).
36. The fact that the Council has expressed an intention to publish the full closed report once the DPA variations have been agreed does not prevent the Council applying the exception in the period before agreement is reached, despite the complainant's belief to the contrary.
37. As noted above, the complainant told the Commissioner that "similar information was provided unredacted for previous changes to the agreement". In their internal review request, the complainant explained that:

"... a previous cabinet report on financial arrangements between Southwark and Notting Hill Genesis, for an earlier phase of the

Aylesbury redevelopment, was published in its entirety, with costs and figures ...”.

38. The complainant was referring to a report dated 14 July 2020<sup>3</sup> on the Council's website.
39. The Commissioner raised this point with the Council, and it replied that the 2020 report was published **after** the variations in question had been agreed.
40. Having considered the factors involved, the Commissioner is satisfied that the public interest favours maintaining the exception, rather than the matter being equally balanced. This means that the Commissioner's decision, whilst informed by the 'presumption in favour of disclosure' under the EIR (regulation 12(2)), is that the exception provided by regulation 12(5)(b) was applied correctly to the complainant's request.

### **Regulation 12(5)(e)**

41. Regulation 12(5)(e) provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
42. In this instance the information withheld under this exception is about the substance of a proposed deal with the developer to vary the DPA, including related expenditure; and risks and mitigations associated with the DPA variation.
43. The Council has said that the interests being protected are its own and the developer's.
44. In line with his guidance<sup>4</sup> on this exception, the Commissioner will consider the below four questions, or tests, to determine whether the exception is engaged:

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<https://moderngov.southwark.gov.uk/documents/s89813/Report%20Aylesbury%20Regeneration%20programme%20-%20Delivery%20of%20New%20Council%20Homes.pdf>

4 <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/commercial-or-industrial-information-regulation-12-5-e/>

- Is the information commercial or industrial in nature?
  - Is the information subject to confidentiality provided by law?
  - Is the confidentiality protecting a legitimate economic interest?
  - Would the confidentiality be adversely affected by disclosure?
45. The exception is subject to the public interest test, so if the above four tests are satisfied the Council must also demonstrate that the public interest factors in favour of disclosure are outweighed by those in favour of maintaining the exception.
46. The Council argues that the withheld information relates to a commercial transaction involving a third party (the developer) and the provision of a commercial service (a housing development). Having seen the withheld information, the Commissioner accepts that it is commercial in nature.
47. The Council states that the information is commercially sensitive and is subject to a common law duty of confidentiality between the negotiating parties. Commenting on some withheld information relating to expenditure, the Council also emphasised an “expectation that this type of information is treated as confidential” and indicated that the developer has expressed concerns about disclosure. In line with his guidance on the common law of confidence in the context of regulation 12(5)(e), the Commissioner accepts that the withheld information has the necessary quality of confidence – it is not trivial, nor in the public domain. The Commissioner is therefore satisfied that the second test is met.
48. To satisfy the third test, disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. The public authority needs to consider the sensitivity of the information at the date of the request and the nature of the harm that would be caused by disclosure. The public authority needs to establish that disclosure would cause harm (on the balance of probabilities – ie more probable than not). If a third party’s interests are at stake, the public authority needs to consult with them.
49. The Commissioner considers that the Council has failed to demonstrate that the third test is satisfied, as explained below.

### **The developer’s interests**

50. The Council has said that the developers interests are “commercial” and “economic” (14 March 2022), but has not been any more specific.



51. The Commissioner notes that the Council listed four envisaged impacts of disclosure, on 14 March 2022, however it was not clear which of the four relate(s) to the developer (if any).
52. On 14 March 2022 the Council also spoke of ensuring that projects are not jeopardised, "in avoidance of harm to commercial interests", but it is not clear whether the Council was referring to the developer's interests.
53. The information that the Council argues would harm the developer's interests, if disclosed, is information about expenditure.
54. However the Council has not explained how disclosure of the information about expenditure would cause harm to the interests of the developer.
55. The Commissioner asked the Council for some further detail and clarity about regulation 12(5)(e), and the interests that would be harmed by disclosure. The Council responded briefly, saying that both the Council's and developer's interests would be harmed; that disclosure would have a "significantly detrimental effect" on both parties (and third parties in similar future commercial activities); and that the developer has concerns about disclosure as the information in question is commercially confidential.
56. Given their lack of clarity and detail about the developer's interests and the harm resulting from disclosure, the Council's arguments have not satisfied the third test. Therefore, they have not engaged the exception.

### **The Council's interests**

57. As noted above, the Council originally listed four impacts of disclosure (14 March 2022). It said that disclosure would affect "commercial negotiating position" and "ability to engage with third parties, "create confusion as to affect commercial reputation" and "delay implementation of or frustrate the development".
58. The Commissioner accepts that those are legitimate economic interests, and the Commissioner's understanding is that the Council listed them as its own interests. However, without explaining how disclosure would cause harm in each case, the Council went on to the public interest test.
59. The Commissioner read the Council's comments on public interest considerations to see whether there were any helpful details there about how disclosure would harm its interests.
60. The Commissioner found no explanation about how disclosure would "create confusion as to affect commercial reputation" in the 14 March 2022 response. Nor did the Council's submissions to the Commissioner

elaborate on this. The Commissioner therefore does not accept that disclosure of the withheld information would cause this type of harm.

61. He notes some comments in the 14 March 2022 response that appear to relate to the "ability to engage with third parties" and how disclosure would cause harm. The Council said that disclosing confidential information provided by a developer would deter partners from sharing similar information, impacting the Council's ability to form partnerships.
62. The Commissioner considered the particular information that the developer provided to the Council. The Council itself appears to acknowledge that it would be in a developer's interests to provide such information, commenting (14 March 2022) that "developers have a clear interest in sharing appropriate information".
63. The Commissioner's guidance (albeit guidance on the public interest test) notes that in the context of commercial confidences, an important consideration is whether it is in the third party's interests to provide the information.
64. The guidance also comments that much depends on the actual harm that disclosure would cause to the third party. In the present case, as highlighted above, the Council has not clearly explained the harm to the developer.
65. In light of these issues, the Commissioner does not accept that disclosure in the present case would affect the Council's ability to engage with third parties, such as forming partnerships with developers.
66. The Commissioner now turns to the remaining two interests listed by the Council on 14 March 2022 – "commercial negotiating position" and "delay implementation of or frustrate the development". He has some comments to make about what the Council has said in its submissions.
67. The relevant withheld information is about the substance of the proposed deal with the developer; and information about risks and mitigations associated with the existing DPA and the proposed, amended DPA.
68. The Council has emphasised (15 May 2023) that negotiations with the developer about the proposed variation to the DPA have not yet concluded. However, the Council has not explained sufficiently how in the present case disclosure of information about the deal, for example, would cause the harm claimed.
69. On the withheld risks and mitigations, the Council did say (21 April 2023) that disclosure would "affect the relations with [the developer]" whilst the Council is still in negotiations, however it did not explain why.

70. The Commissioner considers that it is also relevant to have regard to information that the Council has already disclosed, in the open report.
71. Furthermore, he notes a degree of ambiguity in the Council's correspondence about the likelihood of the negotiations being harmed by disclosure of the withheld information. The Council told the Commissioner that negotiations "might" fail (15 May 2023). As already explained, however, the public authority needs to establish that disclosure **would** cause harm (on the balance of probabilities – ie more probable than not).
72. Consequently the Commissioner is not persuaded that disclosure of the information about the proposed deal with the developer, or the risks and mitigations associated with the DPA variation, would harm the Council's commercial negotiating position or delay or frustrate the development.
73. The Commissioner ultimately finds that regulation 12(5)(e) is not engaged for any of the withheld information, as the third test is not satisfied. As set out above, this is largely due to the lack of clarity and detail from the Council in its arguments about both the Council's and the developer's interests.
74. The Commissioner therefore requires the Council to disclose all of the information currently being withheld solely under regulation 12(5)(e).

## Right of appeal

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75. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

76. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

77. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Daniel Kennedy**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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**SK9 5AF**