

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

### **Decision notice**

**Date:** 6 February 2024

**Public Authority:** London Borough of Lambeth  
**Address:** Lambeth Town Hall  
Brixton Hill  
London SW2 1RW

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

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1. The complainant submitted a refined four-part request for information relating to the tenders for a project known as Roman Rise. London Borough of Lambeth (the Council) responded to each part in turn but refused to provide the information requested at part three citing regulation 12(4)(b) (manifestly unreasonable) of EIR.
2. The Council subsequently amended its position citing regulation 12(5)(e) (Confidentiality of commercial or industrial information) to withhold part of the requested information and stating it did not hold some of the requested information.
3. The Commissioner's decision is that the Council was entitled to rely on regulation 12(5)(e) to withhold part of the information in scope of the request and that the public interest favours maintaining the exception.
4. He further finds that, on the balance of probabilities, the Council has provided the information it holds in scope of the request subject to the exception above and therefore regulation 12(4)(a) is also applicable.
5. However, the Council breached regulation 14 of the EIR by failing to issue its refusal notice within 20 working days and regulation 11 of the EIR by failing to complete its internal review within 40 working days.

6. The Commissioner does not require the public authority to take any steps as a result of this decision.

## **Request and response**

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7. On 23 February 2023, the complainant wrote to the Council stating they wished to refine their request as per decision notice: IC-194704-Z2V8<sup>1</sup> as follows:
  - The dates on which all tenders were submitted.
  - The tender opening pro-forma. Can you please indicate who from Homes for Lambeth witnessed the opening of the tenders.
  - Any tender clarification correspondence or queries between Homes for Lambeth and the tenderers.
  - The tender report recommending the appointment of Myco Ltd.”
8. The Council responded on 13 April 2023, providing a response to parts one, two and four and citing regulation 12(4)(b) to withhold information for part three.
9. The complainant wrote to the Council on 21 April 2023 raising further points of concern with its response and requesting an internal review.
10. During the Commissioner’s investigation and his subsequent intervention, the Council conducted its internal review on 2 November 2023. It answered each point in turn and cited regulation 12(5)(e) for the withheld information and redactions in the disclosed information.

## **Scope of the case**

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11. The complainant contacted the Commissioner on 7 August 2023 to complain about the way their request for information had been handled.
12. They believed that: ‘All the relevant information should be held on Lambeth’s ADAM portal, so it would be very easy to find.’ Additionally,

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<sup>1</sup> [ic-194704-z2v8.pdf \(ico.org.uk\)](https://www.ico.org.uk/for-organisations/our-work/our-cases/194704-z2v8)

the complainant had not received an internal review response from the Council as noted in paragraph 8.

13. The Commissioner has therefore considered whether the Council is entitled to rely on regulation 12(5)(e) to refuse to provide some of the requested information and whether it holds any further information in scope of the request under regulation 12(4)(a).

## **Reasons for decision**

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

14. As the request is for information relating to the tender for works to a building project, the Commissioner agrees that the requested information is likely to be environmental as per regulation 2(1)(c) and 2(1)(d)<sup>2</sup> and therefore, the Council was right to handle the request under the EIR.

### **Regulation 12(4)(a) – information not held**

15. Regulation 12(4)(a) of the EIR states that a public authority may refuse to disclose information “to the extent that it does not hold that information when an applicant’s request is received.”
16. Where there is some dispute between the amount of information identified by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions must decide whether, on the civil standard of the balance of probabilities, the public authority holds any information which falls within the scope of the request (or was held at the time of the request). For clarity, the Commissioner is not expected to prove categorically whether the information is held.
17. The Council’s position is that it provided the information it held within scope of the request, which was focused on the tender report and costings.
18. The Council included the unredacted versions of the information provided to the complainant in its submissions to the Commissioner, and

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<sup>2</sup> <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/regulation-2-1-what-is-environmental-information/>

in order to ensure that information within scope of the request was identified the Council consulted with relevant departments to confirm it had provided all relevant information.

19. The Commissioner is satisfied that the Council has provided all the information it holds in scope of the request, subject to the exception at paragraph 10 above.
20. The Commissioner is satisfied in this case that, on the balance of probabilities, no further information within the scope of the request is held by the Council.

### **Regulation 12(5)(e)- Confidentiality of commercial or industrial information**

21. The Council relied on regulation 12(5)(e) of EIR to refuse the complainant's request for information about the increased amounts agreed to be paid to the contractor above its original tender quotations.
22. The complainant has argued: "there is still no clear trail of documentation or explanation of how the price submitted by Myco increased by £1.6M between tender and contract award. The HFL Board meeting minutes of January 2022 states "The Board approved... MyCo Projects Ltd be appointed...as detailed within the Gateway 3 report." Where is this Gateway 3 report? Please provide this. I fail to see how prices which were submitted in April 2021 and have been superseded on three occasions by updated prices can be deemed to be commercially confidential. These prices would be of no use whatsoever to any of the contractor's competitors." They further argued "There is a substantial amount of correspondence between Myco and HFL that is missing. There is a gap in the correspondence between March 2021 and September 2022, a period of 18 months. During this time, the contractor's contract sum was increased by £1.6M. There must surely be correspondence during this period."
23. Regulation 12(5)(e) of the EIR 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.
24. The Commissioner considers four tests when deciding whether regulation 12(5)(e) is engaged. All four elements are necessary for the exception to be engaged:
  1. The information is commercial or industrial in nature.
  2. The confidentiality is provided by law.

3. The confidentiality is protecting a legitimate economic interest.
4. The confidentiality would be adversely affected by disclosure.

**Is the information commercial or industrial in nature?**

25. The Council has stated that:

“The Roman Rise project is a live project and some information concerning this project is commercial information. We consider that disclosure would be detrimental to both the supplier and the Council as it could provide detailed financial information which could be used by competitors of the supplier to undermine future contractual bids in a busy commercial market.

Disclosure could also damage the relationship the Council has with the contractor making it more difficult for the Council to attract similar future contracts which may make it more difficult to achieve good value for money for our residents.”

26. The Commissioner is satisfied that information about monies paid or forfeited, by the contractor, is commercial in nature. It relates to the performance of an individual contract, which is a commercial matter.

**Is the information subject to confidentiality provided by law?**

27. The Commissioner considers this to include confidentiality imposed on any person by the common law duty of confidence, contractual obligation, or statute. The exception can cover information obtained from a third party, or information jointly created or agreed with a third party, or information created by the public authority itself.

28. With regard to the common law of confidence, there are two issues that need to be considered:

- Does the information have the necessary quality of confidence? In the Commissioner’s view if the information is not trivial nor in the public domain, it has the necessary quality of confidence.
- Was the information shared in circumstances creating an obligation of confidence?

29. The Council argues that the withheld information is subject to confidentiality by contractual obligations, under both the terms of the original contract and any subsequent amendments of the contract, and that there is an inherent duty of confidentiality when information is submitted to Councils in procurement exercises.

30. The information is not trivial. In this case it includes information which could potentially be used by competitors to their own advantage, and to the disadvantage of the contractor/suppliers/bidders. Elements within the information would disclose a package of information brought together using the skills and experience of the contractor over time, which would be advantageous to other businesses in the area.
31. The information held encompasses aspects that are unique to the contractor/bidder and as such are not available by other means and have not been passed into the public domain.
32. Taking the above into account, the Commissioner is satisfied that the information is covered by a common law duty of confidence. The information clearly has the necessary quality of confidence and was shared with the Council on the understanding that it would be treated confidentially. In addition, the Commissioner also accepts that there is a contractual obligation of confidence.

**Is the confidentiality provided to protect a legitimate interest?**

33. The First-tier Tribunal confirmed in *Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd*<sup>3</sup> that, to satisfy this element of the test, disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. It is not enough that disclosure might cause some harm to an economic interest. The public authority needs to establish that, on the balance of probabilities, ie more probable than not, disclosure would cause some harm.

34. The Council argues that:

“The provided information by the contractors/bidders relate to how the contract will be carried out and the provision of the specified services. Some of this information is proprietary in nature and provides a detailed overview of the way the contractor(s) approaches such contracts. Disclosure could provide information on the contractor(s)’ methods of business which may be of advantage to direct competitors, thereby negating the ability to develop a commercial advantage when tendering for other contracts. We accept that the legitimate economic

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[https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i479/%5b2011%5dUKFTT\\_EA20100106\\_\(GRC\)\\_20110104.pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i479/%5b2011%5dUKFTT_EA20100106_(GRC)_20110104.pdf)

interests of the contractor could be adversely affected by the disclosure of this information.”

35. Included in its submissions to the Commissioner, the Council provided details of the contractor’s commercial interests and explained the redacted information contains the pricing and commercial position which the contractor negotiated over a period of time whilst the project was being developed and further explained that this information is not publicly available and argued that disclosing it would harm the contractor’s ability to secure future negotiations with counterparties.
36. In terms of its own commercial interests, the Council works with a wide range of businesses. The expectation of confidentiality in negotiating and agreeing financing and facilities is a key characteristic. It is generally expected that the terms they negotiate are confidential between themselves and the third parties. The prospect that documentation could be released is therefore regarded with real concern.
37. The Commissioner notes that the common theme running through the commercial risks to each party is the fact that disclosure of the information would impact their respective negotiating positions in respect of future transactions. The Commissioner accepts, as a general principle, that disclosure of information that would harm a party’s commercial bargaining position in the context of a future or existing negotiation is a legitimate commercial interest. Based on the submissions provided to him by the Council, both those set out above and the additional submissions which refer to the withheld information, the Commissioner accepts that there is a real and genuine risk that disclosure of the information would harm the commercial interests of parties in a number of different future negotiating scenarios.
38. Furthermore, for the reasons set out by the Council, the Commissioner accepts that disclosure of the information risks causing a reputational damage such that its commercial standing, and in turn its interests, would be harmed in the future.
39. The Commissioner is therefore satisfied that this limb of the test is met for all parts of the information on the basis of regulation 12(5)(e).

**Would the economic interest and thereby its confidentiality be adversely affected by disclosure?**

40. Although this is a necessary element of the exception, once the first three elements are established, the Commissioner considers it is inevitable that this element will be satisfied. Disclosure of truly confidential information into the public domain would inevitably harm

the confidential nature of that information and would also harm the legitimate economic interests previously identified.

41. For the reasons set out above the Commissioner accepts that regulation 12(5)(e) applies.

### **Public interest test**

42. Regulation 12(2) of EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions.
43. The Council identified that disclosure would increase the public's understanding of this issue and note the general benefit in transparency where possible. There is also the general public interest in disclosure to ensure the Council is accountable for its use of the public purse and its appropriateness during an economic downturn.
44. There is a wider public interest in preserving the principle of confidentiality. The relationship between the Council and the businesses it engages with in the tender process relies on trust and the free flow of information. Releasing this information would impair this trust and would be likely to discourage other businesses from dealing with the Council as there would be no assurance that confidential information would be kept in confidence. Ultimately, this would have an impact on the Council's ability to operate in the market and would impact its ability to carry out its statutory function, fulfil its mandate, and serve the public interest by achieving value for the taxpayer.
45. In the Commissioner's view disclosure of the withheld information would provide considerable further transparency in respect of the information, and more broadly, the Council's, not inconsiderable increased expenditure for the specific project. The Commissioner agrees that there is a legitimate and clear public interest in allowing the public to understand the details of such transactions to provide insight into how the Council decides to spend public monies.
46. However, the Commissioner agrees that there is an underlying public interest in ensuring that the confidentiality of commercial information is protected. Furthermore, in the specific circumstances of this case the Commissioner recognises that disclosure of the withheld information risks harming the commercial interests of a variety of parties, the Council, the contractors, and the third-party suppliers in a variety of future transactions unconnected to the one which is the focus of this request.
47. The Commissioner accepts that it is in the public interest for third parties to be able to protect their commercial interests in future

transactions. Furthermore, the Commissioner considers there to be a significant public interest in ensuring that commercial interests of the Council are not harmed. Similarly, the Commissioner considers it would be firmly against the public interest to disclose information which would impact on the Council's statutory function and the Commissioner accepts that disclosing information which impacts on the Council being viewed as a trusted partner could lead to this. Given the widespread risks in disclosure of the information, and despite the public interest arguments identified above and even considering the presumption in favour of disclosure, the Commissioner is satisfied that the public interest favours maintaining the exception.

### **Procedural matters**

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48. The Commissioner notes that the complainant submitted their request on 23 February 2023, however, the Council did not respond until 13 April 2023.
49. Regulation 14 of the EIR requires a public authority wishing to withhold information to issue a refusal notice within 20 working days. the Council failed to issue a refusal notice within 20 working days and consequently breached regulation 14 of the EIR.
50. Regulation 11(4) of the EIR requires a public authority to complete a reconsideration (internal review) of its response within 40 working days of being asked to do so. The public authority failed to inform the complainant of the outcome of its internal review within 40 working days and consequently breached regulation 14 of the EIR.

### **Other matters**

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51. Had the Commissioner accepted that the request was manifestly unreasonable, it is likely that he would have found that the Council breached its regulation 9 duty to provide advice and assistance.
52. Where a public authority claims that regulation 12(4)(b) is engaged on the basis of cost, it should provide the requester with advice and assistance where reasonable to help them refine the request so that it can be dealt with within the appropriate cost limit. This is in line with the duty under regulation 9(1) of the EIR.
53. When it first responded, the Council provided no guidance that would have helped the complainant to work out what a more reasonable

request would be. Nor did the Council take the opportunity to explain how the burden of the request might be reduced.

54. A public authority must explain how the request might be narrowed – such as by narrowing the time parameters or restricting the number of officers whose email accounts must be searched – or it must state that, in the circumstances, there is no reasonable advice and assistance that can be offered.

## Right of appeal

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55. 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)

56. 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.
57. 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

**Susan Duffy**  
**Senior Case Officer**  
**Information Commissioner's Office**  
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