



Mr A Glasspool

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16 August 2012

Dear Mr Glasspool

Re: Your appeal 225434(0) against request for information: 225434

We have considered your appeal against the response to your original Environmental Information Regulations 2004 ('the EIR's) request number 225434 received on 11 June 2012. Although you asked for a review under the Freedom of Information Act as you are aware the council determined your original request fell under the EIR's. The EIR's require the council to deal with a request for an internal review within a maximum of 40 working days from the time the request is received. I apologise for the delay which has occurred in providing you with this decision on this occasion.

Your appeal has been dealt with in accordance with our appeal procedure and the matter fully considered.

In your e-mail sent on 11 June you stated as follows:

Please pass this on to the person who conducts Freedom of Information reviews.

I am writing to request an internal review of Southwark Borough Council's handling of my FOI request 'Viability Assessment for Planning Application 12/AP/1092'.

I feel that the public interest in this case far outweighs concerns about commercial sensitivity, and that the decision not to provide the information should be reviewed. The council has signed a deal with developers to demolish 1200 council homes and replace them with 2500 new ones. Southwark's own planning policy requires that 35% of these homes should be affordable (Core Strategy E&C Opportunity Area). If the planning application concerned contained a guarantee of this 35% affordable housing it would be in line with policy and there would be no need for further redress. However, the planning application contains no minimum guarantee and states that the level of affordable housing will be wholly dependent on the outcome of the financial viability assessment. This the largest planning application in its history, and in light of the fact that it doesn't comply with policy it is in the public's interest to see why it isn't able to comply with planning policy.

A large number of people have already objected to the application on the grounds that it doesn't conform to the affordable housing requirements. This demonstrates that there is widespread public concern

and interest in the case. The council's decision to keep the document secret is a failure of openness, transparency and democracy. Please review the decision and publish the financial viability assessment without further delay.

The first part of my review has focused on whether the council correctly determined that your request fell under the EIR's rather than the Freedom of Information Act.

Regulation 2 of the the EIR's defines 'environmental information' and Regulation 2(c) states this includes "*measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements affecting or likely to affect the elements referred to in (a) and (b) as well as measures or activities designed to protect those elements;*"

In my view the Financial Viability Assessment for Planning Application 12/AP/1092, which you have requested, constitutes a policy or plan as specified above. In the circumstances I am satisfied that your request falls within the scope of the EIR's.

In its original response, the council relied on the exception set out in Regulation 12(5)(e) of the EIR's to withhold the information requested. This exception is engaged where disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest. The council was of the view that the public interest in maintaining the exception outweighed the public interest in releasing the information requested.

In your request for a review you state "*I feel that the public interest in this case far outweighs concerns about commercial sensitivity*". The second part of my review has therefore focused on whether the exception in Regulation 12(5)(e) is engaged and whether the balance of the public interest test was correctly applied.

The Secretary of States Code of Practice on the discharge of the obligations of public authorities under the EIR's issued under Regulation 16 of the same recommends that a public authority consult with third parties before disclosing information which affects that third party where it considers it appropriate to do so. Disclosure of the information you have requested would in this instance affect a third party and I can confirm the council considered it appropriate to consult with that third party.

The exception in Regulation 12(5)(e) can be broken down into a four-stage test, which was adopted by the Information Rights Tribunal in Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association (EA/2010/0012, 24 May 2010). For the exception to be engaged all the following four elements must exist:

- the information is commercial or industrial in nature.
- confidentiality is provided by law.
- the confidentiality is protecting a legitimate economic interest.
- the confidentiality would be adversely affected by disclosure.

Taking each of these elements in turn.

The information is commercial or industrial in nature

The information relates to the viability by a third party of the Heygate Estate at Elephant & Castle and sets out the commercial assumptions and calculations applied by the third

party in respect of the development. The venture is commercial in nature involving the development of a series of mixed use properties by the third party.

Confidentiality is provided by law

Under clause 33.2.1 of the Regeneration Agreement dated 23 July 2010 ('the Agreement') made between the council and third party, the council agrees to maintain the confidentiality of all confidential information provided to it by the third party. The information is not publicly available and is expressed to be confidential at paragraph 2.2 of the Agreement.

The Agreement only enables the council to disclose such information to the extent **necessary** under the EIR's, and clause 33.5.3 of the Agreement imposes an obligation on the council to apply all lawful exceptions under the EIR.

The confidentiality is protecting a legitimate economic interest

The third party has advised that as the future developer and long leaseholder of the Heygate Estate site, they will be economically interested in the disposals and sub-letting of property at the development, and the success of the development as a whole. If information relating to the financial viability assessments and calculations (including strictly confidential analysis of potential rents, rent free periods and margins) is made public, this will detrimentally affect their negotiating position in such disposals and sub-lettings, and accordingly the viability of the development as a whole.

Furthermore the information requested contains confidential financial calculations and assumptions on which the third party will develop the site. If this information were to be made public in response to this request, this may put the third party at a competitive disadvantage in the future against rival developers.

The confidentiality would be adversely affected by disclosure

As the information is confidential disclosing the same into the public domain would inevitably harm the confidential nature of that information by making it publicly available, and would also harm the legitimate economic interests that have been identified above.

I am therefore satisfied that the exception in Regulation 12(5)(e) of the EIR's is engaged.

The exception in Regulation 12(5) (e) is subject to the public interest test. I have considered the following factors in both maintaining the exception and in releasing the information requested.

Factors in favour of release:-

- the promotion of transparency and accountability of the council.
- the fact it will promote greater public awareness and understanding of environmental matters.
- the fact it will promote a free exchange of views and more effective public participation in environmental decision making.
- the accountability of spending public money.

Factors in favour of maintaining the exemption:-

- the fact the public interest in planning applications for the local area is adequately protected by the planning application process itself. Such interests are

safeguarded by the role the council plays on behalf of the public in reviewing and discussing the application.

- the fact disclosure would reveal confidential information about a third party which is not already in the public domain which could be used by their competitors to gain an advantage.
- the fact disclosure would reveal confidential financial information about a third party's development of the Heygate Estate which may affect the commercial viability of the entire development.

The council accepts that releasing the information may achieve the factors identified above which favour disclosure of the same. However the council has balanced this against the fact the third parties must be able to conduct commercial transactions without fear of suffering commercially as a result of market sensitive information, or information of potential usefulness to its competitors being released. It would not be in the public interest to disclose information about a third party which, as here, is not common knowledge and would be likely to be used by the third party's competitors to gain a competitive advantage

Disclosure would as a consequence make it more difficult for third parties to be able to conduct commercial transactions with the council. This in turn may make it more difficult for the council to ensure the widest possible competition for public sector contracts and this is likely to impact on the council's ability to ensure it achieves value for money. In addition in the current instance the potential commercial and economic effect of disclosing confidential financial information relating to a third party's development of the Heygate Estate may affect the commercial viability of the whole project. Were this to happen this could undermine the council's relationship with the third party in question or affect the parties ability to do similar business in the future which would not serve the public interest.

In the circumstances the council is of the view that the public interest in favour of maintaining the exemption outweighs the public interest in disclosing the same.

If you are dissatisfied with this decision you may request the Information Commissioner to investigate, and you should contact him within 2 months of the outcome to your internal appeal. You may contact the Commissioner at the:

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire. SK9 5AF
Telephone: 01625 545745 or 0303 1231113
Internet: www.ico.gov.uk

Yours sincerely,

Ian Mark
Senior Lawyer (Corporate Team)
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