

Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice

Date: 5 March 2025

Public Authority: Birmingham City Council
Address: Council House
Victoria Square
Birmingham
B1 1BB

Decision (including any steps ordered)

1. The complainant asked for information provided to Birmingham City Council (the "Council") by developers St Joseph/Berkeley Homes in relation to the proposed redevelopment of Ladywood. The Council withheld the requested information under the exception for commercial confidentiality (regulation 12(5)(e)).
2. The Commissioner's decision is that the Council was entitled to rely on regulation 12(5)(e) to withhold the requested information.
3. The Commissioner does not require further steps.

Request and response

4. On 9 May 2024, the complainant wrote to the Council and requested the following information:

"I am writing to request St Joseph's 'Illustrative Vision' for Ladywood. This 'Illustrative Vision' previously referred to as the 'indicative masterplan' the attached cabinet report."

5. The Council responded on 14 June 2024 and confirmed that it was withholding the information under regulation 12(5)(e).
6. On 22 July 2024 the complainant asked the Council to carry out an internal review. The Council provided its internal review response on 6 September 2024. The review confirmed that the Council was maintaining its position.

Scope of the case

7. On 11 September 2024 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. The Commissioner has considered whether the Council was entitled to withhold the requested information.

Reasons for decision

Is the requested information environmental?

9. Regulation 2(1) of the EIR defines environmental information as being 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);

- (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)...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);
10. In this case the requested information relates to a proposed redevelopment. The Commissioner considers that the information is on "measures" as defined in regulation 2(1)(c) and, for procedural reasons, he has assessed this case under the EIR.

Regulation 12(5)(e) – commercial confidentiality

11. 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.
12. For the Commissioner to agree that the withheld information is exempt from disclosure by virtue of regulation 12(5)(e) of the EIR, the authority must demonstrate that:
- the information is commercial or industrial in nature;
 - the information is subject to confidentiality provided by law;
 - the confidentiality provided is required to protect a legitimate economic interest; and
 - that the confidentiality would be adversely affected by disclosure.

(i) The information has to be commercial or industrial in nature

13. The Council has explained that the illustrative plans were prepared and submitted by St Joseph's (the "developer") in response to the Council's key design principles that formed part of the contracting authority's procurement strategy. It explained that the purpose of the key design principles is to identify the best technical design solutions relating to a complex project that are subject to evaluation by the Council for the appointment of development partner. The Council confirmed that it is during stage 1 of the procurement process that bidders submit an illustrative plan to form part of a confidential Competitive Dialogue Procedure (CDP) that is set out in the Public Contracts Regulations 2015 (PCR).
14. The Council confirmed that regulation 26 of the PCR covers the CDP whereby a contracting authority enters into a dialogue with bidders about its requirements before inviting them to submit a final tender. It explained that the CDP is designed to identify and define the means best suited to satisfying the contracting authority's needs and is usually used in complex projects where one or more criteria applies, such as "design or innovative solutions" which is the case for the regeneration of Ladywood.
15. The Council has confirmed that the illustrative plans constitute the developer's innovative designs or solutions for the regeneration of Ladywood that formed of the structured negotiations with the Council during the CDP. The Council has explained that, as a consequence, it received this as part of the overall bid document from the developer setting out how they would like to deliver the 8 key principles in the community and the regeneration of the estate. It confirmed that these principles were set out at the start of the procurement process and were fundamental as these required innovative designs or solutions from the bidders for a detailed evaluation and moderation by the Council¹.

¹ Further details are here:

<https://birmingham.cmis.uk.com/Birmingham/Document.ashx?czJKcaeAi5tUFL1DTL2UE4zNRBcoShgo=HwDG3h1DCnBJqIrvGFeO82GtZXE6gMoN2RWAslw0bRPtHLarXI1wMg%3D%3D&rUzwRPf%2BZ3zd4E7Ikn8Lyw%3D%3D=pwRE6AGJFLDNlh225F5QMaQWctPHwdhUfCZ%2FLUQzgA2uL5jNRG4jdQ%3D%3D&mCTIbCubSFfXsDGW9IXnlq%3D%3D=hFfIUdN3100%3D&kCx1AnS9%2FpWZQ40DXFvdEw%3D%3D=hFfIUdN3100%3D&uJovDxwdjMPoYv%2BAJvYtyA%3D%3D=ctNJff55vVA%3D&FgPIIEJYlotS%2BYGoBi5olA%3D%3D=NHdURQburHA%3D&d9Qjj0ag1Pd993jsyOJqFvmyB7X0CSQK=ctNJff55vVA%3D&WGewmoAfeNR9xqBux0r1Q8Za60lavYmz=ctNJff55vVA%3D&WGewmoAfeNQ16B2MHuCPMRKZMwaG1PaO=ctNJff55vVA%3D>

16. In light of the above, the Commissioner is satisfied that the information is commercial in nature.

(ii) The information has to be subject to a duty of confidence provided by law

17. The Council confirmed that regulation 21 of PCR, as amended imposes a duty of confidentiality upon contracting authorities in respect of information forwarded by tenderers that has been designated as confidential. The Council confirmed that the illustrative vision was accepted on a confidential basis to protect the commercial interests of a bidding company to ensure a fair and competitive bidding process.
18. The Council confirmed that, during and after the procurement process, the illustrative vision has retained the necessary quality of confidentiality as the information is not trivial and has not been shared more widely within the Council nor put in the public domain.
19. Having considered the Council's evidence and referred to the withheld information, the Commissioner considers that the circumstances in which the information is held, and the Council's reason for holding it would, in the Commissioner's view, be sufficient to impose an obligation of confidence upon the Council and its employees. The information, therefore, has the necessary quality of confidence.

(iii) The confidentiality has to be required to protect an economic interest

20. In order to satisfy this element of the exception, disclosure of the withheld information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect.
21. In the Commissioner's view it is not enough that some harm might be caused by disclosure. Rather it is necessary to establish that, on the balance of probabilities, some harm would be caused by the disclosure.
22. Given the nature of the requested information, the Council confirmed that it conferred with the developer about the illustrative plan and sought its views on disclosure. The Council that the developer considers that the information was included in their bid documents on a "commercially confidential" basis for the Council's evaluation, and if released would damage their commercial economic interests.
23. The Council has argued that releasing the documents would provide competitors with insights into the developer's approach and its strategies. These insights would enable competitors to change their own commercial strategies to the detriment of the developer, with there

being no reciprocal disclosures which might offset this imbalance in the flow of information. Withholding the information, the Council has argued, will protect the developer's commercial bargaining position in the context of existing or future negotiations.

24. In determining whether the Council has correctly applied regulation 12(5)(e) in this case, the Commissioner has referred to a decision notice he issued in relation to a previous request made to the Council². The notice ("IC-296584-X5W6") considered the application of regulation 12(5)(e) to information provided to the Council by the developer in relation to the proposed redevelopment of Ladywood, Birmingham. The Commissioner concluded that the Council was entitled to withhold the information.
25. The Council has confirmed to the Commissioner that the withheld information in this case is the illustrative plan (also known as 'illustrative vision') that was withheld in IC-296584-X5W6. The Council has further confirmed that there have been no material changes in the circumstances since the information was originally withheld or since 19 August 2024 when IC-296584-X5W6 was issued.
26. The Commissioner considers that the Council has identified the relevant effects of disclosing the withheld information and has shown a causal link between the possible and likely effects, and the withheld information. The withheld information comprises information which forms part of the ongoing process of negotiations and decision making in respect of the proposed development. It is clear from the withheld information that these processes are ongoing and premature release of information would jeopardise them. This would consequently harm the legitimate economic interests of the council and the developer.
27. In reaching this conclusion the Commissioner notes that there has been no material change in circumstances since IC-296584-X5W6 was issued and he, therefore, considers that his conclusions in that case are transposable here.

The confidentiality would be adversely affected by disclosure

28. The Commissioner considers that although a necessary element of the exception, once the first three elements are established, he considers it is inevitable that this fourth 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

² <https://ico.org.uk/media2/migrated/decision-notice/4030839/ic-296584-x5w6.pdf>

legitimate economic interests already identified. Consequently, the Commissioner considers that the Council was entitled to engage regulation 12(5)(e) in this case.

Public Interest Test

29. The test, set out in Regulation 12(1)(b), is whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
30. When carrying out the test there is a presumption towards the disclosure of the information as set out in Regulation 12(2).

The public interest in the information being disclosed

31. The complainant has argued that the Council's position does not reflect what they consider to have been an uncompetitive, single bidder process. In their view, this means that there are no competitors and disclosure should not result in harm to the sole bidder's interests.
32. The complainant has argued that public scrutiny of single bidding processes will improve what companies propose to provide with public funds. The complainant has also argued that the proposed development is one of the largest regenerations in Europe, with the developer planning to acquire all the land, including 6,000 people's freehold houses, leaseholds, churches, and businesses. The complainant considers that ensuring a fair and competitive process that is transparent is of the utmost importance for obtaining optimal outcomes.
33. The Council has acknowledged the general principles of openness, accountability and transparency and has accepted that a disclosure of the information would give the public a clearer understanding of the proposed development.

The public interest in the exception being maintained

34. The Council has argued that there is a public interest in protecting the integrity of public procurement exercises. It considers that this involves a relationship of trust and confidentiality with bidders, and the reputation of the Council as a public body to allow for fair competition to best serve the protection of public funds.
35. The Council has argued that it is important to note that the withheld information does not form an agreed masterplan. It explained that a 'Masterplan' document needs to be developed jointly between the developer and the community, with the Council acting as an enabler. Therefore, the document cannot be agreed or formalised without full consultation with the community. Disclosing the information at this time

will create a misleading impression that it represents the final position on the matter, which is likely to prejudice the effectiveness of the consultation process.

36. The Council confirmed that this work will begin once the developer is formally in contract, and a draft Masterplan will then be subject to the formal statutory decision-making processes of the Council, as the local planning authority, which will be shared and consulted upon, and will likely go through several iterations before it is formally adopted. The Council, therefore, considers that there is an underlying public interest in ensuring the confidentiality of commercial information is protected whilst these processes are ongoing.

Balance of the public interest

37. The Commissioner considers that weight must always be given to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities. Such disclosures assist the public in their understanding of how public authorities make their decisions, and in turn they are likely foster greater trust in public authorities.
38. Furthermore he considers that in many circumstances the disclosure of recorded information may allow greater public participation in the decision making process.
39. The Commissioner acknowledges the compelling public interest arguments for disclosure to give transparency to the decisions that the Council is making about the proposed development. Furthermore he recognises that there is significant local interest in the development and concerns about its potential impact. The Commissioner considers that these are legitimate public interest reasons for transparency in this matter.
40. The Commissioner considers that the timing of this particular request is an important factor when balancing the public interest arguments for and against disclosure. The Commissioner accepts that disclosure of the withheld information would provide interested parties with insights into proposals and strategies regarding land acquisition and/or land use which would harm the ability of the developer and the Council to secure best value and/or to negotiate effectively. A result of this would be harm to the developer's legitimate economic interests and, through a loss of trust via the disclosure of confidential information, harm to the Council's ability to engage with third parties and secure maximum public benefits.
41. The Commissioner is also mindful that the Council has identified public consultation as a forthcoming stage in the decision making process. The

Commissioner, therefore, understands that there will be opportunities for public engagement.

42. The Commissioner considers that a central plank of the complainant's public interest case for disclosure of the information is the contention that the Council's procurement process only involved one bidder. The Council has disputed the complainant's contention and confirmed to the Commissioner that its procurement process involved submissions from three bidders. The subsequent selection of the developer only took place after the other two bidders withdrew from the process.³
43. In view of this the Commissioner considers that, in this specific respect, the public interest grounds for disclosure provided by the complainant are weakened. In short, other bidders were initially involved in the procurement process and it follows that competitors would benefit from disclosure of the developer's strategy. More broadly, the Commissioner considers third party contractors, land owners and property owners would also benefit from insights into the developer's proposals.
44. The Commissioner cannot be certain of the level of risk that disclosure poses to the proposed development, however he is conscious that at the time of the request, the process of formulating a masterplan were ongoing. He is also satisfied that disclosure would prejudice the consultation process, which may lead to difficulty in obtaining engagement from the community in the process. Any detriment to the full consultation of the community would not be in the public interest.
45. The Commissioner has decided, with due consideration of the timing of the request and the available evidence, including the decision that he reached in IC-296584-X5W6, that the public interest arguments in favour of disclosure are outweighed by the public interest arguments in favour of maintaining the exception.

³ See paragraph 7.4 of the Council's Report to Cabinet:

<https://birmingham.cmis.uk.com/Birmingham/Document.ashx?czJKcaeAi5tUFL1DTL2UE4zNRBcoShgo=HwDG3h1DCnBJqIrvGFeO82GtZXE6gMoN2RWAslw0bRPtHLarXI1wMg%3d%3d&rUzwRPf%2bZ3zd4E7Ikn8Lyw%3d%3d=pwRE6AGJFLDNih225F5QMaQWcPHwdhUfCZ%2fLUQzgA2uL5jNRG4jdQ%3d%3d&mCTIbCubSFfXsDGW9IXnlq%3d%3d=hFfIUdN3100%3d&kCx1AnS9%2fpWZQ40DXFvdEw%3d%3d=hFfIUdN3100%3d&uJovDxwdjMPoYv%2bAJvYtyA%3d%3d=ctNJff55vVA%3d&FgPIIEJYlotS%2bYGoBi5oIA%3d%3d=NHdURQburHA%3d&d9Qjj0ag1Pd993jsyOJqFvmyB7X0CSQK=ctNJff55vVA%3d&WGewmoAfeNR9xqBux0r1Q8Za60lavYmz=ctNJff55vVA%3d&WGewmoAfeNQ16B2MHuCPMRKZMwaG1PaO=ctNJff55vVA%3d>

Right of appeal

46. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

47. 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.
48. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Christopher Williams
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF