

IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL
(INFORMATION RIGHTS) UNDER SECTION 57 OF
THE FREEDOM OF INFORMATION ACT 2000

EA/2013/0162

BETWEEN:

THE MAYOR AND BURGESSES OF SOUTHWARK COUNCIL

Appellant

- and -

- (1) THE INFORMATION COMMISSIONER**
(2) LEND LEASE (ELEPHANT AND CASTLE) LIMITED
(3) MR ADRIAN GLASSPOOL

Respondents

THE SECOND RESPONDENT'S RESPONSE TO THE GROUNDS OF APPEAL

Introduction

1. The Appellant (“the Council”) appeals against decision notice FER0461281 issued by the First Respondent (“the Commissioner”) on 16 July 2013. The decision notice concerns a request made to the Council on 10 May 2012 by the Third Respondent (“Mr Glasspool”) for a copy of a detailed financial report dated 9 May 2012, referred to in this Response as “the Viability Assessment”.

2. The Viability Assessment was commissioned by the Second Respondent (“Lend Lease”), who voluntarily shared it with the Council on a confidential basis. It assessed the commercial viability of the proposed redevelopment of the Heygate Estate in London’s Elephant and Castle area.

3. In the course of the Commissioner's investigation of Mr Glasspool's complaint, Lend Lease agreed that some of the information in the Viability Assessment could be disclosed by the Council. Following the request and before the decision notice, the Council published the report recommending the grant of planning permission with 25% affordable housing, details of the results of consultations and objections, the minutes of the planning committee granting planning permission and its details, the July 2010 regeneration agreement with Lend Lease and the section 106 agreement with Lend Lease.
4. The Commissioner ordered the disclosure of the Viability Assessment in its entirety, including all of its 22 appendices, the last of which sets out Lend Lease's financial model for a 15-year period in comprehensive detail. The Commissioner did not consider any redactions or the possibility of partial disclosure. The information contained in the Viability Assessment, other than the information disclosed with Lend Lease's consent in the course of the Commissioner's investigation, is referred to herein as "the disputed information".
5. Disclosure of the disputed information would have been and would continue to be very harmful to the commercial interests of both Lend Lease and the Council, and would undermine the viability of this large-scale redevelopment. By contrast, any public interest in disclosure was and remains relatively weak, in particular having regard to the other information (including a redacted version of the Viability Assessment) already in the public domain regarding the proposed redevelopment.
6. Lend Lease therefore supports the Council's appeal, in summary for the following reasons.

- (1) The applicable legislation

The decision notice is made under the Environmental Information Regulations 2004 ("EIR"). That is wrong. The disputed information is not "environmental information" within regulation 2 of the EIR. It should therefore have been considered under the Freedom of Information Act 2000 ("FOIA"). Alternatively, part of the disputed information should have been considered under FOIA and not the EIR.

(2) Engagement of exemptions/exceptions

If the Commissioner was to any extent right to apply the EIR, then he was also right to find that the exceptions under regulations 12(5)(e) (confidentiality of commercial information) and (f) (interests of the confider) are engaged. Furthermore, the disputed information, or part of it, (in particular but not limited to Appendix 22) constitutes Lend Lease's trade secrets and/or intellectual property; hence the Commissioner ought to have found that the exception in regulation 12(5)(c) EIR is also engaged.

If FOIA applies, then the exemptions under ss. 41(1) (actionable breach of confidence) and 43(2) (prejudice to commercial interests) are engaged in respect of the whole of the disputed information. The exemption under section 43(1) (trade secrets) is engaged in respect of the whole, or alternatively part, of the disputed information.

(3) The public interest balance:

The Commissioner was wrong to find that the public interest favoured disclosure of the disputed information. He ought to have found that it favoured the maintenance of the applicable exemptions (under FOIA) and/or exceptions (under the EIR), whether taken individually or in aggregate.

7. Lend Lease explains below the nature and context of the Viability Assessment, and then develops its case under each of the three headings above.

The Viability Assessment

8. The Council has been seeking to redevelop the Heygate Estate site since 1997 for the improvement of the area and the community. Prior to Lend Lease's involvement, large-scale plans by two other developers had fallen through.

9. In July 2010, the Council and Lend Lease entered into a regeneration agreement for the redevelopment of the site. The contents of that agreement were in the public domain by the time of the decision notice.
10. On 2 April 2012, Lend Lease submitted its main outline planning application to the Council in respect of the proposed redevelopment (followed by an addendum to the application over the next two months).
11. A great deal was at stake not only for Lend Lease, but also for the Council and the public. Significant sums of both private and public money had been invested in the plans, thousands of homes were to be built, and the Council and Lend Lease were to share equally in the net profits from the redevelopment. The approximate value of the project is £1.5 billion on completion. The project was (and is) to be executed over a 15-year period, likely to involve about 12 separate more detailed planning applications.
12. The Council's policy provides for new developments in this area to include 35% affordable housing, but also provides for flexibility as to that percentage so as to accommodate the particular circumstances of the proposed project. This flexibility is reflected in the fact that Southwark have not in every case insisted on 35% affordable housing. Lend Lease's view was that in relation to the Heygate Estate, 35% was not commercially viable. It proposed to devote 25% of the site to affordable housing. Even then, it considered the project to be very challenging in terms of commercial viability.
13. Seeking an independent professional assessment of the scheme, Lend Lease commissioned the Viability Assessment from Savills. Savills were instructed "to examine the development economics of the submitted scheme so that the level of affordable housing and section 106 contributions can be considered" (section 2.1 of the Viability Assessment). Their report drew on analysis by experts at a number of other firms and the existing detailed financial business model which Lend Lease had already developed for and was applying to the project internally.
14. Paragraph 1.15 of the Viability Assessment sets out the frank conclusion that:

"The proposed scheme in its current form with the level of planning obligations detailed derives a developer's return of [redacted] % profit on cost and [redacted] %

IRR [internal rate of return], when compared to the viability benchmark this is not commercially viable”.

15. This opinion, together with the methodology and benchmarks upon which it is based, is then explained. Chapter 11 discusses recommended options for improving the commercial viability of the project. In chapter 12, the Viability Assessment concludes that:

“12.1 In our opinion and based on the economic viability assessment carried out in accordance with the defined guidelines of the Greater London Authority and the emerging guidance from the RICS, it is evident that the scheme cannot afford to provide the proposed level of planning obligations.

...

12.4 The proposals for the Heygate Masterplan represent many years of collaborative work between the Applicant and Southwark Council in order to bring forward this significant regeneration project. Whilst the appraised scheme does not currently work in viability terms, as detailed in chapter 11, there are a number of ways in which we believe the impact of the proposed planning obligations could be mitigated and the viability of the scheme enhanced.

12.5 As such, we would recommend that the value enhancement options are discussed and appraised in order to arrive at a mutually beneficial conclusion”.

16. Notwithstanding the challenging conclusions reached by Savills, Lend Lease was determined to make a success of the project on the basis of a 25% affordable housing ratio.

17. Very shortly after receiving the completed Viability Assessment, Lend Lease voluntarily shared it with the Council, in order to assist the Council in better understanding Lend Lease’s application for outline planning permission based on an affordable housing ratio of 25%. Lend Lease provided the Council with a copy of the Viability Assessment on 16 May 2012, after the submission of Mr Glasspool’s request but prior to the Council’s response to that request.

18. At that time, scrutiny of the Valuation Assessment was to be conducted not only by the Council but also by HMRC’s District Valuer Service (“the DVS”), as an independent expert for the Council, and by the Greater London Authority (“the GLA”).

19. The Viability Assessment was provided to Lend Lease by Savills under conditions of strict confidentiality. Paragraph 2.2 says:

"Due to the commercially sensitive nature of some of the information provided as part of the viability assessment, this report is provided on a strictly private and confidential basis. We understand that the report will be submitted to Southwark Council and the Greater London Authority (GLA) as a supporting document to the planning application. The report must not be recited or referred to in any document, or copied or made available (in whole or in part) to any other person (save the consultants instructed by the Council and the GLA to review the report) without our express prior written consent."

Likewise, Lend Lease disclosed the Viability Assessment to the Council on a confidential basis, and the DVS and the GLA received it from the Council on a confidential basis.

20. In the course of the Commissioner's investigation, Lend Lease agreed that the Council could disclose much of the body of the report, with some redactions, together with 5 of the 22 appendices (Appendices 1, 2, 3, 5 and 21), which appendices were released without any redactions. Appendix 22 was among the appendices which were withheld. It is a spreadsheet model comprising many thousands of pages of financial data, comprehensively detailing Lend Lease's business model over a 15-year period. It is extremely detailed and complex. Appendix 22 contains its own confidentiality term, which states that:

"All information in this Financial Model is confidential and proprietary to Lend Lease and may not be copied or disclosed in whole or in part to any person other than those to whom it is addressed and their professional advisers without Lend Lease's prior written consent."

21. The Council considered the information submitted by Lend Lease. It explained its conclusion in a public document. The minutes of the relevant meeting of the Council's Planning Committee on 15 January 2013 refer to a report in relation to item 6.1 of the minutes. That supporting document states as follows at paragraph 150:

"The viability assessment has been scrutinised by the District Valuer on behalf of the Local Planning Authority. Having considered the extensive range of data that is required to provide a detailed assessment of such a vast scheme and over a very extended build programme – circa 15 years – the advice received is that applicants' financial appraisal presents a reasonable account of the viability of the scheme. In broad terms the DV accepts the applicant's appraisal and agrees that the scheme cannot support the policy requirement of 35% affordable housing. The level of affordable housing that could be provided on a viable scheme is 9.4%. (Whilst some of the precise figures supplied aren't necessarily agreed the overall conclusion as to the lack of viability is. There is a difference of opinion on the scale of the deficit but not that a significant deficit exists nor that the scheme is not viable)." [Lend Lease's emphasis]

22. The disputed information in this appeal consists of the information redacted from the body of the Viability Assessment (which consists very largely of financial data, all of which is extracted from Appendix 22) and the withheld appendices (which provide the detailed basis of supporting evidence for that financial data). The disputed information details Lend Lease's business operations, projections, targets, asset values, budgets, costs, cash flows and proposed terms of business with suppliers and customers, including proposed sale prices and grounds rent levels, together with any available discounts, discount periods and sales windows.
23. Lend Lease contends that the disputed information was (and is) exempt from disclosure for the following reasons.

Issue 1: the applicable legislation

24. To the extent that the disputed information does not constitute "environmental information", it is to be considered under FOIA rather than the EIR.
25. "Environmental information" is defined by regulation 2(1) EIR, which provides in relevant part that:

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form 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) and (b) as well as measures or activities designed to protect those elements;
- ...
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c)...

26. In his decision notice, the Commissioner did not address the submissions put to him that the disputed information was not "environmental information". Lend Lease presumes that the

Commissioner considered parts (c) and/or (e) of the above definition to be satisfied (though the Commissioner does not say so). Whatever the Commissioner's reasoning, however, he was wrong to consider the disputed information to fall within regulation 2(1) EIR.

27. Lend Lease recognises that the Viability Assessment relates to a planning application. The information in the Viability Assessment that relates to planning matters, and that deals with matters likely to impact upon environmental elements or factors, has largely been disclosed by the Council (with the consent of Lend Lease) in the course of the Commissioner's investigation.
28. The disputed information, however, is not about planning matters. It is about the financial analysis of a business proposal. The content of the financial data, particularly Appendix 22, is largely drawn from Lend Lease's own internal financial business model for the project which was developed before and independently from the planning application and used for other business purposes. In particular, the disputed information is about the commercial viability of a proposal based on an affordable housing ratio of 25%. The difference between the proposed 25% and the Council's usual requirement of 35% was irrelevant to environmental elements and factors. Likewise, the implementation of any of Savills' recommended options for improving the financial return on the redevelopment would have had no impact on environmental elements or factors.
29. In short, the disputed information is on commercial and not environmental matters. While the information relates to a planning proposal, it is too remote from any environmental elements or factors to come within part (c) of regulation 2(1) EIR. As part (c) does not apply, nor does part (e).
30. The distinction is well illustrated in guidance from the Department for the Environment, Food and Rural Affairs ("DEFRA") on the boundary between FOIA and the EIR. DEFRA suggests that information on "social and economic matters" such as the "composition of housing in a given area, [or] the ratio between affordable and non-affordable [housing]" should be dealt with under FOIA rather than the EIRs.
31. More broadly, the remoteness principle is well established in the context of the definition of environmental information: see for example, in relation to Directive 90/313, Eva

Glawischniq v Bundesminister für soziale Sicherheit und Generationen C-316/01 [2003] ECR I-05995. The same applies as regards Directive 2003/4/EC which is implemented by the EIR: see for example *Nottinghamshire CC v IC & Veolia & UK Coal Mining Ltd* (EA/2010/0142), concerning parts of a waste management contract relating to prospective commercial leasing arrangements.

32. Lend Lease agrees with DEFRA's guidance and with the First-Tier Tribunal's approach in EA/2010/0142. By application of the remoteness principle, the disputed information was not environmental information within the meaning of regulation 2(1) EIR. FOIA, rather than the EIR, is the applicable legislation.

Issue 2: engagement of exemptions/exceptions

Engagement of EIR exceptions

33. In his decision notice, the Commissioner agreed with the Council (and Lend Lease) that regulations 12(5)(e) and (f) EIR were engaged. These provide that:

... a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—

...

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;

(f) the interests of the person who provided the information where that person—
(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;

(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and

(iii) has not consented to its disclosure

34. If and insofar as the Commissioner was correct to apply the EIR (contrary to Lend Lease's submissions above), then he was plainly correct to find these exceptions to be engaged. This is clear from the confidentiality and commercial sensitivity of this information, from the circumstances in which it was imparted to the Council and from its impact if disclosed.

35. Further, if and insofar as the EIRs apply, then the Commissioner ought to have found that regulation 12(5)(c) EIR applied to the disputed information (wholly or in part). This provides that:

... a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—
(c) intellectual property rights;

36. The disputed information in this case is Lend Lease's intellectual property. Appendices 4 and 22 involved substantial originality and investment by Lend Lease in the obtaining, selecting, verifying and arranging of their contents. Both database rights, copyright and trade secrets apply. Lend Lease's loss of control over that information would cause harm to Lend Lease which could not be prevented by Lend Lease seeking otherwise to enforce its intellectual property rights.

37. Lend Lease also notes that, in its grounds of appeal, the Council has also relied on regulation 12(5)(d) EIR (confidentiality of proceedings). Lend Lease agrees with the Council that regulation 12(5)(d) EIR is engaged.

Engagement of FOIA exemptions

38. If and insofar as Lend Lease is correct that FOIA applies, then for essentially the same reasons it is plain that the whole of the disputed information comes within the exemptions under FOIA sections 41(1) and 43(2).

39. FOIA s. 41(1) provides that:

41(1) Information is exempt information if—
(a) it was obtained by the public authority from any other person (including another public authority), and
(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

40. If the Council had disclosed any part of the disputed information otherwise than under FOIA, then Lend Lease would have been able to take legal action for that breach of confidence, which action would be likely to succeed on the balance of probabilities. FOIA section 41(1) is engaged in respect of the whole of the disputed information.

41. FOIA s. 43(2) of FOIA provides that:

43(2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

42. Disclosure of the disputed information would have created a very significant and weighty chance of real, actual or substantial prejudice to the commercial interests of Lend Lease and the Council. FOIA section 43(2) is engaged in respect of the whole of the disputed information.

43. The disputed information, or part of it, would also come within s. 43(1) of FOIA, which provides that:

43(1) Information is exempt information if it constitutes a trade secret.

44. It is clear from the Commissioner's own guidance on s. 43 that, had he considered this case under FOIA, he would have found s. 43(1) to be engaged. The disputed information is used for the purposes of Lend Lease's 'trade' or business, it is obvious from the nature of the information that its disclosure would cause Lend Lease harm and be advantageous to its competitors (and Lend Lease in any event made that clear), the information is not known by competitors and it would be very difficult for competitors otherwise to discover or reproduce that information. These points apply most obviously to Appendices 4 and 22, but also to the other financial data redacted from the Viability Assessment itself (particularly where extracted from Appendix 22) and to Appendices 6, 7, 9, 10, 12, 14-17, 19 and 20.

Issue 3: the public interest balance

45. The Commissioner understated the strength of the public interests in maintaining the exemptions or exceptions referred to above and overstated the strength of the public interest in disclosure of the disputed information.

46. The Commissioner made two distinct legal errors of direct relevance to the public interest balance in this case.

47. The first is that the Commissioner failed to take into account that the disputed information engages Lend Lease's rights under Article 1 of Protocol 1 to and/or Article 8 of the European Convention on Human Rights ("ECHR"): see for example the Court of Appeal's judgment in *Veolia v Nottinghamshire CC* [2010] EWCA 1214 per Rix LJ at paragraph 121, as applied by the First-Tier Tribunal in *Staffordshire CC v IC & Silbelco* (EA/2010/0015). Article 1 of Protocol 1 provides that:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

48. The disputed information in this case constitutes Lend Lease's "possessions". Disclosure to the public would interfere with Lend Lease's entitlement to its possessions. Disclosure should therefore only be ordered if it is justified according to ECHR principles. Moreover, the presumption in favour of disclosure under regulation 12(2) EIR does not apply in these circumstances.

49. The Commissioner's second distinct error is that he expressly excluded the Council's commercial and economic interests from his assessment of the public interest balance: see paragraphs 61 and 95 of his decision notice. That is an error of law. Whether under FOIA or the EIRs, the public interest balance must be based on "all the circumstances of the case". The circumstances of this case include a real likelihood of serious prejudice to the commercial interests of a public authority. That is plainly contrary to the public interest. It should be taken into account and given due weight.

50. Further, the Commissioner gave insufficient weight to the following factors in favour of maintaining the relevant exemptions or exceptions:

- (i) Disclosure would have been likely to cause very substantial harm to Lend Lease's commercial interests, not only in the short term, but over the 15-year life of this project. Lend Lease's competitors, prospective customers and suppliers would

have received a detailed insight into Lend Lease's financial models, methodology and plans. This would have enabled them to adjust their own approaches, business practices, negotiating positions, offers and plans, to the detriment of Lend Lease. Those parties would, for example, tend to reduce what they seek to pay (in the case of prospective customers) and increase the prices they charge (in the case of prospective suppliers) because they would know what Lend Lease ultimately expects to charge or pay.

- (ii) Those other parties – in particular, Lend Lease's competitors – would have obtained for free valuable information for which Lend Lease had paid considerable sums.
- (iii) Likewise, those other parties would have benefitted from the time and expertise that Lend Lease itself had expended in generating the disputed information.
- (iv) Disclosure to the public, including Lend Lease's competitors, would have undermined the value of its trade secrets/intellectual property. Those assets are important to the value of the business overall.
- (v) Lend Lease is, through its parent company, listed on the Australian Stock Exchange and bound by the attendant disclosure rules. Given the contents of, the significance and commercial sensitivity of the disputed information, disclosure may well trigger a requirement to make disclosure on the Australian Stock exchange which is likely to harm Lend Lease's share price and reputation.
- (vi) The outcomes summarised at (i) to (v) above would be contrary to the public interest in maintaining the fairness of prices and practices in competitive markets.
- (vii) Disclosure of the disputed information would also have been likely to prejudice the Council's negotiating position as regards outstanding compulsory purchases, prices and rents.

- (viii) Any material prejudice to the prices, terms or rents which Lend Lease proposed to secure would have further undermined the commercial attractiveness of a project which was already at the limit of commercial viability (as more fully explained in the disclosed version of the Viability Assessment and summarised above). Disclosure of this information would have created a real risk of such prejudice, thereby imperilling Lend Lease's proposal as a whole.
- (ix) If Lend Lease were forced to withdraw from the project, both Lend Lease and the Council would lose very substantial sums of money, in terms of both wasted investment and potential foregone profits (which would have been shared equally between the Council and Lend Lease). The Council would have to pay to Lend Lease significant sums by way of reimbursement. The Council's costs as at January 2013 amounted to about £47.5 million in capital expenditure and just under £18million in review costs managing the estate. Lend Lease's investment amounted to about £12 million as at January 2013, and Lend Lease has subsequently incurred about a further £2 million in costs.
- (x) If Lend Lease were forced to withdraw from the project, the detrimental consequences for the wider public would be very serious, in terms of increased uncertainty, cost and delay in the delivery of housing and business facilities, job-creation, the regeneration of the Elephant and Castle area (including related transport infrastructure to be developed in conjunction with Transport for London), regeneration of neighbouring and dependent areas, such as the Aylesbury Estate where the Council is part way through a procurement exercise to select a developer, and the financial return to the public purse. As regards housing, the public interest in successful delivery is not confined to social housing, but extends to all types of housing.
- (xi) Disclosure of the disputed information would have undermined the working relationship between Lend Lease and the Council. A close and positive working relationship will be important to the successful delivery of this project.
- (xii) Disclosure of the disputed information would make Lend Lease and other developers and commercial partners substantially more reluctant voluntarily to

share such detailed commercial information with public authorities such as the Council. Instead, they would be more likely than not to disclose only that information which is required by law. Further or alternatively, to the extent that they did continue to make more detailed information available to public authorities, this would be under more restrictive conditions. As a result, those public authorities would make important decisions on a less informed basis and/or their analysis of such information would be less efficient and more costly. That is contrary to the public interest in rigorous scrutiny and robust decision-making.

- (xiii) There is an inherent public interest in the maintenance of confidences, especially those relating to the most secret types of confidential information, such as trade secrets, protecting financial and business models.

51. Lend Lease submits that the public interest in maintaining any of the applicable exemptions or exceptions, taken in isolation, suffices to outweigh the public interest in the disclosure of the disputed information. The public interests in maintaining all applicable exemptions or exceptions should, however, be considered in aggregate, in accordance with the decision of the Court of Justice of the European Union in *Ofcom v IC* (Case C-71/10) [2011] 2 Info LR 1.

52. The Commissioner also gave too much weight to the public interest in the disclosure of the disputed information:

- (i) The Commissioner overstated the extent of widespread public concerns about or objections to the redevelopment of the Heygate Estate site. He failed properly to take into account the widespread support for the redevelopment, evidenced by the Council's consultation exercises.
- (ii) The Commissioner should have assessed the *incremental* public interest in disclosure, i.e. the extent to which the disclosure of the disputed information furthered the public interest over and above the information from the parts of the Viability Assessment that were disclosed in the course of the Commissioner's investigation. The disclosed information explains the proposed redevelopment, the methodology used for assessing its commercial viability, the conclusions of

that assessment and the recommended options for improving the financial outlook. The disclosed information allowed the public to understand and challenge the conclusions of the Viability Assessment, scrutinise the proposal and to participate in an informed way in the Council's decisions about Lend Lease's applications for planning permission.

- (iii) Furthermore, additional information would continue to be provided to the public following the request as the project unfolded, e.g. through the then outstanding compulsory purchase process, inquiry and procedures and through the planning process. The Commissioner failed to give sufficient weight to those other sources of information and to those forums for informed public participation in the Council's decision-making. The Commissioner failed properly to consider the considerable consultation exercise undertaken by the Council and Lend Lease and resultant adjustments made to the proposal to accommodate feedback from those consultations. The Commissioner further failed to give sufficient weight to the additional, independent checks on the proposed decision added by the independent expert analysis by the DVS, the analysis by the Greater London Authority and their appointed experts and by the Planning Inspectorate which conducted the compulsory purchase order inquiry.
- (iv) The Commissioner failed properly to consider the extent to which *this particular information* would illuminate public debate on important issues. For example, the Commissioner noted alleged public concern as to whether the Council had secured best value in its disposal of the land: see paragraphs 71 and 103 of the decision notice. Lend Lease contends that any such concerns are misplaced, but in any event the particular information in dispute in this case sheds little if any light on that matter.
- (v) The Commissioner also noted the proposed departure from the Council's usual requirement of 35% affordable housing: see paragraphs 77-78 and 100 of the decision notice. It is important to note that such flexibility on the Council's part was not only lawful, but commonplace among local authorities as regards large-scale developments. In any event, the disputed information illuminates that issue only insofar as it sets out why even a ratio of 25% would be extremely challenging

in commercial terms. The disclosed information and publicly available information already explain the reasoning behind that conclusion.

- (vi) Also as regards the delivery of affordable housing, the Commissioner failed to appreciate that this is one among a range of policy objectives to be weighed up by the Council when considering applications for planning permission. The objective of economic regeneration is likely to carry more weight. The Commissioner thus overestimated the relative importance of the affordable housing issue on the outcome of Lend Lease's application for planning permission.
- (vii) The Commissioner failed properly to grapple with the complexity of the withheld data and of Appendix 22 in particular. The Council was not required to disclose that information in spreadsheet form: *Innes v IC and Buckinghamshire County Council* (GIA 3436/2011). In any other form, Appendix 22 – which runs to many thousands of pages not designed for printing or for single-screen shots – would essentially be unreadable. Even in spreadsheet form, Appendix 22 is an exceptionally technical and complex model. By way of illustration, Lend Lease provided DVS officers with bespoke training in order to help them understand Appendix 22. In these circumstances, the public would not benefit in any meaningful way from this information being made publicly available. The only parties who would be in a position to understand and benefit from this information would be Lend Lease's competitors and, in respect of relevant items of information such as available budgets for the purchase of specific goods and services to be procured, or proposed sales prices, ground rents and, if available discounts, prospective suppliers and customers.

53. In summary, Lend Lease contends that the Commissioner misjudged the application of the public interest test in respect of those EIR exceptions that he considered were engaged in this case. The public interest in maintaining those exceptions outweighed any public interest in disclosure.

54. Likewise, the public interest in maintaining the exception in regulation 12(5)(c) EIR (to the extent that this is applicable) and regulation 12(5)(d) EIR outweighed any public interest in disclosure.

55. For similar reasons:

- (i) to the extent that FOIA section 43(1) and/or (2) apply, the public interest in maintaining these exemptions outweighs any public interest in disclosure; and
- (ii) to the extent that FOIA section 41(1) applies, there would be no defence to any action for breach of confidence in respect of the disclosure of the disputed information.

56. Lend Lease contends that the public interest in maintaining any applicable EIR exceptions or FOIA exemptions outweighs any public interest in disclosure, whether such exceptions or exemptions are considered separately or in aggregate; but, if necessary, Lend Lease will contend that the public interest test should be applied by considering any applicable EIR exceptions or FOIA exemptions in aggregate.

Conclusion

57. The Tribunal will be invited to allow the appeal and/or to substitute a decision notice stipulating that the disputed information was exempt from disclosure.

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17th September 2013