

# GREATER LONDON AUTHORITY

[REDACTED]  
[REDACTED]

**Corporate Management**  
**Our ref:** MGLA041215-0631

**Date:** 18 March 2016

Dear [REDACTED]

## **Request for information under the Environmental Information Regulations – Earls Court Redevelopment Scheme**

I write further to your email of 3 December 2015 and our subsequent correspondence regarding your request for information relating to the Earls Court Redevelopment Scheme.

I apologise for inconvenience caused by the time it has taken us to provide you with a response to your request. Your request covers information that required careful consideration and consultation with an external organisation in order for us to be in a position to provide you with a response. It has meant that we have not been able to respond to you as quickly as we would have hoped, or within the 20 working day deadline under regulation 5(2) of the EIR.

Your request asked:

*Please can you supply me with any reports, emails, notes of meetings or other documentation that relate to the consideration of potential changes or modifications to the permitted Earl's Court redevelopment scheme covering the period from the beginning of September 2014 to the present. This would include correspondence involving, or any dealings with, Capco, LB Hammersmith & Fulham and TfL.*

Your request has been considered under the Environmental Information Regulations 2004 (EIR). The information requested is 'environmental information' as it meets the definition set out in regulation 2(1)(c) of the EIR. This covers "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 [2(1)](a) and (b)" including water, soil, land and landscape "as well as measures or activities designed to protect those elements". As such it must be considered for disclosure under the terms of the EIR rather than the Freedom of Information Act 2000.

We have conducted searches with the Mayor's Office, the Planning team, Regeneration team and the Transport team. I can confirm that the GLA holds information falling within the scope of your request.

After careful consideration, we are able to release some of the information falling under your request in the form of emails which accompany this letter. Though these fall under the exception 12 (4) (d) regarding internal communications we have concluded that the public interest falls in favour of disclosure. All personal details including names of junior staff and email addresses have been redacted under the Data Protection Act (see exceptions below). The requested information falls within one of the exceptions to our duty to release information found under regulations 4 and 5. In particular, we consider that the following exceptions apply:

***Under 12 (4) a public authority may refuse to disclose information to the extent that (d)the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data;***  
***(e) the request involves the disclosure of internal communications***

***Under 12 (5) 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;***

***Under 12 (3) a public authority may refuse to disclose environmental information requested to the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.***

When citing the aforementioned EIR exception provisions under regulations 12(4) and (5), the GLA is required to balance the public interest in order to decide whether the information should be withheld. Under regulation 12(1)(b), the public authority can only withhold the information if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. Furthermore, under regulation 12(2), it must apply a presumption in favour of disclosure.

By way of explanation, the 'public interest' is not the same as what might be of interest to the public. In carrying out a Public Interest Test we consider the greater good or benefit to the community as a whole if the information is released or not. The 'right to know' must be balanced against the need to enable effective government, deliver efficient policing and to serve the best interests of the public. The EIR are 'applicant blind'. This means that we cannot, and do not, ask about the motives of anyone who asks for information. In providing a response to one person, we are expressing a willingness to provide the same response to anyone.

After assessing all the considerations pertinent to the circumstances of this request, we consider that the balance of the public interest favours maintaining the disclosure-exception provisions under regulations **12(4)(d), 12(4)(e) and 12(5)(e)** relevant to the remaining information at this time.

I have included the rationale behind our decision to withhold the specific information covered by the above exceptions in the annex to this letter.

I hope that the enclosed information is of interest and I would again thank you for your patience and understanding in this matter.

If you have any further questions relating to this matter, please contact me, quoting the reference at the top of this letter.

Yours sincerely



Information Governance

If you are unhappy with the way the GLA has handled your request, you may complain using the GLA's FOI complaints and internal review procedure, available at:  
<http://www.london.gov.uk/mayor-assembly/gla/governing-organisation/freedom-information>.

Freedom of Information Act 2000 (FOIA) and Environmental Information Regulations 2004 (EIR):  
Certificate of Exemption for Requested Information

## EIR Exception provision

**12(4)(d)** – A public authority may refuse to disclose information to the extent that the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data

**12(4)(e)** – A public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications

**12(5)(e)** – 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.

**13 (1)** – To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data.

## How the exemption applies to this information

### **12(4)(d) – material in the course of completion:**

Regulation 12(4)(d) is engaged when a request relates to material still in the course of completion, unfinished documents or incomplete data. If the information in question falls into one of these categories, then the exception is engaged.

Guidance published by the Information Commissioner defines material which is still in the course of completion as including information created as part of the process of formulating and developing policy, where the process is not complete. The guidance goes on to state:

*“The fact that the exception refers to both **material** in the course of completion and unfinished **documents** implies that these terms are not necessarily synonymous. While a particular document may itself be finished, it may be part of material which is still in the course of completion. An example of this could be where a public authority is formulating and developing policy.”*

The information must be considered in the context of the ongoing scheme which is very much live. The Royal Borough of Kensington & Chelsea (RBKC) and the London Borough of Hammersmith & Fulham (LBHF) have granted formal outline planning consent for the Earls Court Masterplan; and detailed planning consent has been granted for two sites and further detailed planning applications for other areas are to be submitted.

The information includes discussion of ideas, a GLA agenda for a cancelled meeting and a draft discussion document. The information does not comprise approved or agreed measures, may/may not form part of any final agreement and are part of a wider planning process yet to be finalised. The exception for unfinished documents and material in the course of completion is therefore engaged. In order to engage this exception it is not necessary to demonstrate where disclosure might have any particular adverse effect, but any adverse effects may be relevant to the public interest test considerations.

### **EIR 12(4)(e) – internal communications**

Regulation 12(4)(e) is engaged in relation to information intended to be communicated or saved in a file where it may be consulted by others within, and was not transferred outside, a public authority. This is therefore a class based exception whereby if the information in question falls into either of these categories, the exception is engaged.

Part of the information was not shared outside of the GLA and the exception is engaged. Again, this is a class based exception, limited by the public interest test, but to which any adverse effects of disclosure may be relevant.

### **EIR 12(5)(e) – the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.**

Regulation 12(5)(e) is engaged when information (excluding emissions) is commercial or industrial in nature; and is confidential under either the common law of confidence, contract, or a statutory bar; and protects a legitimate economic interest; and the confidentiality will be adversely affected

by disclosure.

Is the information commercial or industrial in nature?

Your request covers information forming part of ongoing discussion relating to the Earls Court development scheme. This includes information which is commercial in nature including issues of size, density, cost, purchase and timing. The condition of the exception is therefore satisfied.

Is the information confidential under either the common law of confidence, contract, or a statutory bar?

The information is held by the GLA under a duty of confidence and consequently under the expectation that they would not be widely accessed, circulated or distributed.

We would also argue that some of the information is also covered by common-law of confidence – it is not trivial in nature, has the necessary qualities of confidence, and was provided as part of process whereby it was expected by both parties that certain information would be held in confidence.

The sensitive nature of the information in the present case means it is clearly confidential. Wherever, because of the sensitive nature of the information, the law recognises the confidentiality of the information as deserving of legal protection, the confidentiality is provided by law.

The confidentiality is provided by law to protect legitimate economic interests within the meaning of exception 12(5)(e). Disclosure would adversely affect that confidentiality and damage the economic interests which we have identified. Our conclusion is that the confidentiality exception is therefore engaged.

We are however mindful of the views of the Information Commissioner (ICO) in regards to how this exception provision is engaged and applied, and we have also taken note of the recent decision by the Information Tribunal (EA/2013/0162)<sup>1</sup>, in particular paragraph 42 which states:

*‘The legislature must be taken to intend that it is not always in the public interest for a public authority to choose to keep information confidential. There is no breach of trust when a public authority fulfils its statutory obligation under FoIA or EIR... They recognise in contracts that in an individual case, depending on the circumstances, the public authority may have a duty disclose.’*

In this case, we have decided parts of the information are protected by a legitimate obligation of confidence.

Is the confidentiality protecting a legitimate economic interest?

We are strongly of the view that disclosure would cause harm to the commercial interests of the GLA and CapCo; and that these can be considered to be legitimate economic interests. In relation to the legitimate economic interests, we would make reference to the Information Commissioner’s guidance, which states:

*‘Legitimate economic interests could relate to retaining or improving market position, ensuring that competitors do not gain access to commercially valuable information, protecting a commercial bargaining position in the context of existing or future negotiations, avoiding commercially significant reputational damage, or avoiding disclosures which would otherwise result in a loss of revenue or income’.*<sup>2</sup>

The information covered by this exception provision falls within the following categories:

- cost
- scale
- phasing and associated timing

<sup>1</sup><http://www.informationtribunal.gov.uk/DBFiles/Decision/i1279/London%20Borough%20of%20Southwark%20EA.2013.0162%20%2809.05.14%29.pdf>

<sup>2</sup>[https://ico.org.uk/media/for-organisations/documents/1624/eir\\_confidentiality\\_of\\_commercial\\_or\\_industrial\\_information.pdf](https://ico.org.uk/media/for-organisations/documents/1624/eir_confidentiality_of_commercial_or_industrial_information.pdf)



The release of the information falling within these categories would:

- cause misconception about housing stock price
- affect commercial negotiating position
- affect ability to engage with funders and third parties
- create confusion as to affect commercial reputation
- delay implementation of the development

The information falls within the GLA's exercise of its statutory planning function and thereby its own legitimate economic interests and those of CAPCO in this matter which mirror the description provided in the Commissioner's guidance, and that those could be harmed or prejudiced by the release of specific pieces of information covered by this request.

Will the confidentiality be adversely affected by disclosure?

By extension, this element is satisfied as disclosure would harm both the confidential nature of the information held under confidence and the legitimate economic interests already identified.

**13(1) – personal data**

The names, contact details and information about individuals have been redacted / withheld as disclosure would contravene the first principle of the Data Protection Act 1998, which requires all processing of personal data to be fair and lawful.

In this case disclosure would be unfair as the individuals concerned have a legitimate expectation that their names and contact details will not be made public.

**Public interest test**

**Considerations favouring disclosure:**

We acknowledge that there is a general public interest in fostering accountability and transparency in respect of planning and development matters and particularly the GLA's decision making behind, and progress of, developments of this size and impact.

In considering the public interest in this case, the GLA is mindful of regulation 12(2) of the EIR instructing authorities to apply a presumption in favour of disclosure. There is an underlying rationale supporting the disclosure of environmental information, as outlined in Directive (2003/4/EC)<sup>3</sup> which gave rise to the Environmental Information Regulations:

*"Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision making and, eventually, to a better environment".*

There is a public interest in informing public understanding of how the planning process operates in this particular case and the basis upon which decisions are made by the GLA. There is also a general public interest in increased understanding of the GLA's general approach to handling planning issues to enable communities affected by developments to better engage and improve participation in the decision making processes.

Given the number of people affected, there is a strong public interest in release of information that informs and engages public debate on issues pertinent to the development programme to reassure the public that the GLA has considered the most appropriate options. Disclosure would inform scrutiny of the approach adopted by the GLA to negotiate maximise benefit from this development.

**Considerations favouring non-disclosure:**

Whilst guidance published by the Information Commissioner acknowledges there is no automatic or inherent public interest in withholding internal communications it also states that 'Public

interest arguments should be focussed on protecting the public authority's private thinking space.<sup>3</sup>

The GLA should be allowed the necessary room to think in private and have a "safe space" in which to have discussions to develop and explore a full range of options, enabling us to make effective decisions whilst formulating policies.

Disclosure would be likely to prejudice this "thinking space" impacting the integrity of the decision making process, and the free and frank exchange of ideas, options and suggestions that form part of that process by inviting external comments and criticism prior to approval or development of a final approach or policy.

We acknowledge that effective policy and decision making should be informed by engaging with the public and key stakeholders; however this engagement needs to be structured to be effective.

A significant challenge for Public Authorities in assessing major planning proposals is the disparity between the skills, expertise and resources available to the Authority and to the developers. Authorities must seek to ensure a development meets the needs of the local community, the strategic needs of London as a whole, are viable and are cost effective. Statutory planning duties require Authorities to seek to maximise developers' commitment, contained within a section 106 agreement, to mitigate the impact of schemes, thereby reducing the burden of mitigation falling upon the public purse, without prejudicing the overall viability of the scheme and acknowledging that developers operate within a commercial and competitive market environment involving financial risk.

Release of this information at this time would divert attention and resources away from the task at hand and towards responding to external thoughts whilst discussions are still ongoing. This in turn would also be likely to have an adverse effect on the GLA's ability to engage in free-flowing and honest exchanges of views in the future as it is likely that officials would become reluctant to explore all options - including unpopular or unlikely ideas - for fear of disclosure and negative publicity.

The scheme is a major regeneration project for London of great benefit to the public. This is illustrated by the nature of the S106 obligations agreed with CapCo. These include 1,500 affordable homes, improvements to streets and public realm, creation of green space, transport improvements, new local amenities including a school, community centre, leisure centre, health centre, cultural space and money towards a cultural fund for the area, as well as up to 10,000 permanent jobs and £8 million worth of employment and skills training.

Whilst it is only right that a scheme of this size, scale and impact, receives a high level of public scrutiny, it is vital that stakeholders can engage and discuss ideas, strategies and progress candidly. The scheme is expected to take 15 to 20 years to reach conclusion and it is important to protect the space to carry out such discussions for them to be effective.

In Information Tribunal decision (EA/2013/0162), the courts recognised the enduring strength of the public interest in maintain the confidentiality of negotiations that take place in relation to public/private sector partnerships:

*Once you use private sector profit making organisations in order to help fund regeneration and to deliver infrastructure, social housing and other public goods, then inevitably considerations of commercial confidentiality and the need to avoid harm to commercial interests must be given full weight when assessing the public interests for and against disclosure*

In that case, the Tribunal balanced the public interest with particular consideration to the public interest in ensuring projects are not allowed to fail or be put into jeopardy, in public participation in decision making, and in avoidance of harm to commercial interests. It is important to note the reliance of local communities on public / private sector partnerships to deliver affordable housing. There is a strong public interest in these developments succeeding and not being undermined.

The best interests of the public – i.e. the public interest – are served by ensuring that public

<sup>3</sup> [https://ico.org.uk/media/for-organisations/documents/1634/eir\\_internal\\_communications.pdf](https://ico.org.uk/media/for-organisations/documents/1634/eir_internal_communications.pdf)

authorities can deliberate robustly and comprehensively, consider all options and potential impacts, to reach the best possible decision. It is therefore in the public interest that the space to assess proposals fully is protected.

Whilst developers have a clear interest in sharing appropriate information in support of their applications, publishing sensitive information shared with the GLA under an expectation of confidentiality would deter partners from sharing similar information in the future. This is particularly if they felt that the GLA would not treat information that could harm their economic interests with due care. This would ultimately lessen the information available to the GLA, thereby impacting our effective scrutiny of bids, and our ability to meet our stated objectives for London.

There is also the consideration that releasing incomplete or unfinished material into the public domain would distract public debate away from the substantive environmental and health issues that the information relates to. Debate could focus instead on secondary issues such as any deficiencies in the information or differences between a draft and other drafts or a prior or final policy position. While this argument does not carry significant weight, it is nonetheless relevant.

A large amount of information about the scheme is already in the public domain including on the GLA, borough and developer websites. However we are concerned not to release information which can be withheld under the EIRs where such release would damage the interest of the GLA or third parties. The best interests of the public are met by the GLA being able to foster relationships of trust with its partners, through which confidential, sensitive and financial information can be shared to support the development of sites such as Earls Court. It is not in the public interest to cause economic harm to organisation operating in a competitive environment.

The incomplete nature of the information held and small number of documents involved mean that disclosure at this point in time would not greatly inform the public debate or present a full picture of how a decision was made or a policy position arrived at, thereby shedding little light on the planning decision making process. We therefore conclude that on the balance of the public interest our consideration falls in favour of maintaining the exceptions, and towards non-disclosure, of the information at this time.