

GREATER **LONDON** AUTHORITY

Tom Francis
(By email)

Our Ref: MGLA160916-6318

2 March 2017

Dear Mr Francis

Thank you for your request for information which the GLA received on 16 September 2016. Your request has been dealt with under the Environmental Information Regulations 2004. Please accept my apologies for the delay in responding.

You asked for:

...all correspondence (written and by email) from 5th May 2016 to date between the GLA/Mayor's office and the Garden Bridge Trust, and between the GLA/Mayor's office and TfL concerning the Garden Bridge. Please also make public full details of all financial information about the Garden Bridge project that may have been provided together with this correspondence.

Please find the relevant information attached. Some of the information you requested is being withheld as it falls under the exception in Regulations 12 (4)(d), (4)(e), (5)(b) and (5)(e) of the Environment Information Regulations. In applying this exception we have had to balance the public interest in withholding the information against the public interest in disclosing the information. The attached annex to this letter sets out the exception in full, as well as the factors the GLA considered when deciding where the public interest lay.

Please note for clarity, a figure on P59 of attachment '6318-B' is quoted at £633m. This is a typo and should be 633k.

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

Yours sincerely

Paul Robinson
Information Governance Officer

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:
<https://www.london.gov.uk/about-us/governance-and-spending/sharing-our-information/freedom-information>

Annex A – EIR Exception provisions

Exception provisions
<ul style="list-style-type: none"> • Regulation 12(4)(d) – Material which is still in the course of completion • Regulation 12(4)(e) – Internal communications • Regulation 12(5)(b) – The course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature; • Regulation 12(5)(e) – Confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest
How the exemption applies to this information
<p>Regulation 12(4)(d) is engaged when the request relates to material that is 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.</p> <p>This provision has been applied to withhold unfinished documents and information that relates to, or discuss the content of, those documents. Guidance published by the Information Commissioner clarifies:</p> <p><i>“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.”</i></p> <p>This same guidance also clarifies that material which is still in the course of completion can include information created as part of the process of formulating and developing a policy, decision or recommendation. In this regard, this regulation of the EIR acknowledges that public authorities should have the necessary space to think in private, to develop and explore the full range of options relevant to a particular policy or process in a “safe space”; protecting the integrity of the decision making process, and the free and frank exchange of ideas, options and suggestions that form part of that process.</p> <p>It is not necessary to demonstrate where disclosure might have any particular adverse effect in order to engage the exception, but any adverse effects of disclosure may be relevant to the public interest test considerations.</p> <p>Regulation 12(4)(e) applies to communications explicitly between TfL and the GLA whereby officials have engaged in free and frank discussions on matters pertaining to the Garden Bridge project. The exception is engaged in order to protect the necessary space to explore ideas in private against the backdrop of a project which is under great public, media and political scrutiny.</p> <p>The EIR does not provide a definition of what constitutes as an internal communication, however the relationship between the GLA and TfL is unusual in that TfL is a statutory body created by the Greater London Authority (GLA) Act 1999. This Act gives the Mayor of London a general duty to develop and apply policies to promote and encourage safe, integrated, efficient and economic transport facilities and services to, from and within London. In this instance the form and substance of the relationship between TfL and the GLA and the nature of the information concerned justify that communications are internal.</p> <p>Regulation 12(5)(b) provides an exception from the disclosure of environmental information which would adversely affect the course of justice. The definition of the course of justice is wide reaching and in relation to this request relates to material covered by legal professional privilege.</p> <p>In order for the exception to apply there must be evidence of identifiable harm or negative impact. In the case of privileged information there would need to be significant factors at play for there not to be an adverse effect. Public access to privileged information when negotiations are still ‘live’ would provide an indication of the arguments, strengths or weaknesses which the GLA and TfL might have, unbalancing the level playing field under which adversarial proceedings are meant to be carried out.</p> <p>Regulation 12(5)(e) is engaged when the purpose of the exception is to protect any legitimate economic interests underlying commercial confidentiality. The exception can be broken down into a four-stage test whereby all four element are required in order for the exception to be engaged:</p> <ul style="list-style-type: none"> - The information is commercial or industrial in nature.

- Confidentiality is required by law.
- The confidentiality is protecting a legitimate economic interest.
- The confidentiality will be adversely affected by disclosure

Is the information commercial or industrial in nature?

Some of the requested communications between GBT and TfL / GLA contain discussions regarding the development of the Heads of Terms and commercial offer between GBT and CSCB. This process has not yet concluded. The information is therefore commercial in nature.

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

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

In applying this exception, we have taken note of a decision by the Information Tribunal (EA/2013/0162)¹, 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 that some information is protected by a legitimate obligation of confidence.

Is the confidentiality protecting a legitimate economic interest?

Disclosure would be likely to cause harm to the commercial interests of GBT. 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'.²

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

- Summary of discussions between GBT and CSCB on finalising the agreement;
- Information relating to the value of the commercial offer;
- Escalating negotiations between both parties including lines to take;
- Proposed heads of terms.

The release of information falling within these categories could (adversely affect):

- Jeopardise and prejudice negotiations and the commercial positioning of parties;
- Potentially delay the implementation of the proposed development.

We therefore consider that the legitimate economic interests of GBT in this matter 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.

Public interest test (where applicable)

In relying on these EIR exception provisions under regulations, the GLA is required to balance the public

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

² https://ico.org.uk/media/for-organisations/documents/1624/eir_confidentiality_of_commercial_or_industrial_information.pdf

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.

There is a strong public interest in the release of information that would inform and engage public debate on issues pertinent to the Garden Bridge. The release of the information covered by this exception would also therefore help reassure the public that we are considering the most appropriate options and advice regarding the project.

There is a general public interest in transparency in relation to planning and development matters, particularly in the decision making behind, and progress of, developments of this size and impact. Disclosure of this information would enable the community affected by the development to understand more fully the decision making process.

Furthermore, the public interest is served by the GLA being transparent and open to scrutiny to increase diligence.

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. 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.

There is a strong public interest in favour of maintain the exception under 12(5)(b) for information which is legally privileged. The timing of the request in relation to the stage of negotiations surrounding the project and in addition to a review³ into the Garden Bridge project is a significant factor in deciding to maintain the exception.

The best interests of the public – i.e. the public interest – is best served by ensuring that public authorities continue to deliberate robustly and comprehensively, considering all options and their potential impacts, in order for the best possible decisions to be taken.

There is of course an inbuilt public interest in maintaining commercial confidences. As discussed in the aforementioned Information Tribunal decision (EA/2013/0162), the courts have recognised the enduring strength of the public interest in maintain the confidentiality of negotiations and bidding that take place in relation to public/private sector partnerships.

The best interests of the public are met by the GLA being able to foster relationships of trust with its partners, through which the sharing of confidential, sensitive commercial information can be shared to support the development of projects such as the Garden Bridge.

Publishing sensitive financial information shared with the GLA under an expectation of confidentiality would deter these partners from sharing similar information with GLA in the future, particularly if they felt that the GLA would not treat information that could harm their economic interests with due care. This would ultimately hinder the ability of the GLA to deliver its stated objectives for London.

³ <https://www.london.gov.uk/press-releases/mayoral/review-to-be-conducted-into-garden-bridge-project>