



**FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
Information Rights**

**Tribunal Reference:** EA/2013/0162  
**Appellant:** London Borough of Southwark  
**Respondent:** The Information Commissioner  
**Second Respondent:** Lend Lease (Elephant and Castle) Ltd  
**Third Respondent** Adrian Glasspool  
**Judge:** NJ Warren  
**Member:** Dr H Fitzhugh  
**Member:** P de Waal  
**Hearing Date:** 21 January 2015  
**Decision Date:** 10 March 2015

**DECISION NOTICE**

**A. Background**

1. These proceedings arise under the Environmental Information Regulations (EIR) following a request for information made by Mr Glasspool to the London Borough of Southwark (Southwark). He asked for

“a copy of the financial viability assessment submitted with the planning application which was made on 28 March 2012 – reference number 12/AP/1092.”

This planning application had been made by Lend Lease (Elephant and Castle) Ltd (“Lend Lease”) and concerned the redevelopment of the Heygate Estate at the

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Elephant and Castle. The Information Commissioner (ICO) decided that Southwark should disclose the information. Southwark appealed to the Tribunal and Lend Lease were joined as a party.

2. On 9 May 2014 we allowed the appeal in part by deciding that two categories of information were exempt from disclosure. Unless indicated otherwise, paragraph numbers referred to in this decision relate to our earlier decision.
3. The first category was Lend Lease's development model which we accepted as a trade secret. Appendix 22 of the viability assessment consisted of the application of Lend Lease's development model to the Heygate Estate Project. It was included so as to enable Southwark's experts to interrogate the model as part of their scrutiny of the viability assessment. We concluded that the whole of Appendix 22 was exempt from disclosure and indicated that there might be other material elsewhere in the report which might be exempt for the same reason (see para 55).
4. The second category was information about sales and rentals which would be subject to commercial negotiation between Lend Lease and other businesses. See para 56.
5. The total amount of material within the scope of the request was enormous. We therefore asked Southwark, Lend Lease and the ICO to try to agree which parts of the requested information fell into these two categories; and they have done so. Accordingly a large amount of information has been disclosed. They have agreed 21 redactions which are set out in a disclosure schedule. Mr Glasspool has asked us to reconvene and to take our own decision in respect of these redactions. There is

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nothing frivolous about his request for us to do so and we consider that he is entitled to a decision from us. We therefore reconvened on 21 January 2015 for a resumed hearing.

6. Southwark were represented by Mr Beglin. Lend Lease were represented by Mr Pitt-Payne QC and Mr Hopkins. Mr Glasspool was represented by Ms Morrison. The ICO did not trouble to attend but sent a short written submission which did not descend to detail.

## **B. Procedure**

7. We started the hearing in open session.
8. In respect of the development model, Mr Pitt-Payne QC conceded, rightly in our view, that it would be wrong to proceed on the basis that any material, wherever it occurred, must be redacted if it also appeared in Appendix 22. He stated that he intended in closed session to support the redactions agreed by three of the parties on the basis that they were either :-
  - (a) Material appearing outside Appendix 22 where redaction was required to protect the development model;
  - (b) Detailed figures underpinning figures in Appendix 22 which fell to be redacted; or
  - (c) Textual explanation underpinning some of the assumptions in the model and thus also requiring redaction.

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9. Ms Morrison made some preliminary submissions focussing on the nature of our task. She submitted that the fact that the ICO had reached agreement on these redactions should not carry great force. She highlighted in particular information about the internal rate of return, profit on costs and some elements within the executive summary. She submitted that if prejudice to future commercial negotiations were relied on for a redaction then it was necessary to demonstrate the real prospect of such negotiations, not merely their possibility.
10. We accepted this last submission. We also accepted that information falling within the three categories identified by Mr Pitt-Payne QC would be capable, depending on the facts, of being material requiring redaction in the application of our decision.
11. It was inevitable that we would have to examine the information remaining in dispute in closed session. Ms Morrison agreed that a gist of the closed hearing should be sent to her in writing. She would then be content to make written submissions in response.
12. During the closed part of the hearing, Mr Pitt-Payne QC produced for us the disputed information and a closed schedule of the agreed redactions. In respect of each redaction, the closed schedule contained two extra columns. The first new column identified the redaction and remains closed. The second new column indicated the arguments for supporting the redaction.
13. It became plain by the end of the hearing that, with some minor adjustments to protect the disputed information, it would be possible for the second of the new columns to be added to the open schedule to serve as an accurate gist of the

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arguments advanced in the closed session. This was then supplied to Mr Glasspool and to Ms Morrison and we have received further written submissions from Ms Morrison and a reply from Lend Lease.

### **C. The nature of our task**

14. It is convenient here to deal with Ms Morrison's submission on the nature of our task.
15. We are not reopening issues already decided. We are not reassessing the balance of the public interest in respect of individual pieces of information. We have confined ourselves to asking whether the redactions in the schedule agreed between Southwark, Lend Lease and the ICO properly fall within para 55 or para 56 of our earlier decision. Ms Morrison is correct to submit (para 2g of her submissions) that a decision in respect of any material not falling within those two paragraphs has already been taken (see para 58).
16. Ms Morrison also raises concerns (see for example para 5 and para 12 of her submissions) about "selectivity" on the part of Lend Lease to protect information seen as commercially sensitive. She also submits that the other parties have entered into a negotiation which extended the scope of information that may permissibly be withheld in accordance with the Tribunal's decision.
17. It is true that it is possible to point to a number of apparent inconsistencies in what has and has not been disclosed. We put these inconsistencies to Mr Pitt-Payne QC.

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He told us, and we accept, that they represent material which Lend Lease originally, and still in principle, considered should not be disclosed according to the terms of our decision. Lend Lease had, however, taken a flexible stance in agreeing to disclosure of some of this material in attempting to reach agreement with the ICO and Southwark in compliance with our decision.

18. Our approach has been to make up our own mind in respect of each disputed redaction.
19. Ms Morrison also submits that paragraph 55 does not justify the withholding of specific figures within the development model; nor, she submits can Mr Pitt-Payne's third category, textual explanations, fall within either paragraph 55 or paragraph 56 (see especially paras 9 and 19 of her submissions).
20. In our judgement, these submissions go too far. A "textual explanation" may or may not come within paras 55 or 56, depending on its content.
21. Appendix 22 contains hundreds, if not thousands of specific figures applying the Lend Lease model to the Heygate Estate development. In these circumstances it is unrealistic and artificial to consider each number separately. On its own, one figure looks innocent enough; but such individual assessments would amount cumulatively to the disclosure of most, if not all, of the model. That is why we stated that the whole of Appendix 22 should be withheld and left the door open to the possibility of the same rationale also applying to other parts of the mountain of material before us. In respect of paragraph 55, this exercise, as Mr Pitt-Payne

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points out, should not be done slavishly; and as Ms Morrison points out, the key is to protect the model.

22. Para 16 of Ms Morrison’s submissions proposes that we test the redactions under paragraph 55 by asking whether they constitute “an exact replica of a sufficient part of the model”. It may be that this is intended to refer to a replica of a sufficient part of Appendix 22. Either way, such an approach, in our view, would be too restrictive and would not serve as an accurate guide to what should be exempt from disclosure under para 55.

23. We also consider that discussion of the development model on the one hand as intellectual property under the exception in Regulation 12(5)(c) and, on the other hand, as an economic interest protected by commercial confidentiality, under Regulation 12(5)(e), is of limited assistance. It seems to us that protection of a trade secret may itself be a legitimate economic interest also protected by commercial confidentiality. These interests are not necessarily mutually exclusive. Compare para 53.

24. We have followed the approach set out in the above paragraphs in deciding whether the redactions agreed between Lend Lease, Southwark and the ICO are correct.

#### **D. Redactions which Mr Glasspool accepts**

25. Mr Glasspool accepts that redactions 28, 29, 43, 44 and 50 on the schedule have been made correctly and we say no more about them.

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**E. Redactions with which we do not agree**

26. Redactions 20, 21, 22 and 33 conceal the profit on cost and internal rate of return (“IRR”) figures proposed by Lend Lease and its professional advisors as benchmarks against which the viability of the Heygate Estate project should be assessed. After consultation with specialists in loan security valuation and capital markets, the advisors concluded that in order to secure development funding in the current market on a large multiphase scheme it would be necessary to demonstrate a developer’s return within certain brackets. The rates within those brackets, explaining the subsequent benchmark proposal, have also been redacted.

27. It is true, as Lend Lease points out, that Lend Lease regards these figures as commercially sensitive. It is also true that one of them appears in Appendix 22.

28. Nevertheless, in our judgement these figures do not come within para 55. They do not betray the development model. As we have indicated, it is important with the figures contained in Appendix 22 not to take any one figure in isolation but to view the development model as a whole. This we have done but in our judgement these figures have a stand alone quality outside the development model which makes them different from the material protected by paragraph 55. They are the figures to which it is proposed that the analysis produced by the model should be compared.

**F. Redactions with which the Tribunal agrees**

29. It is convenient to start with redactions 1 and 32. These contain results for profit on cost and IRR obtained from the model on assumptions then current. Unlike the



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external benchmarks, we consider these figures to be embedded within the model and to come within para 55.

30. Redaction 45 is the supporting evidence gathered for material entered in parts of appendix 22. Redaction 47 is a print out of two extracts from Appendix 22. In our judgement both these fall within para 55.

31. Applying the principles which we have outlined, the same goes for redactions 23, 31, 34, 42, 48 and 49. To these must be added redaction 30 except for the references to profit on cost and internal rate of return in the second paragraph.

32. Redaction 41 is a report from Lend Lease's advisors on residential property values. At first sight, it might appear that this report would fall to be disclosed in accordance with the remarks in paras 56 and 57. This, however, would be to overlook Lend Lease's strategy, as part of the financing of the project, to sell a proportion of the residential property "off plan". We accept that these transactions would be the subject of commercial negotiation with businesses. The appendix falls within para 56.

## **G. Further disclosure**

33. We therefore allow the appeal as confirmed in our earlier decision, and in addition to the disclosure already made, we specify that Southwark should disclose the figures contained on page 28 of the viability assessment. They should do so, at the latest, within 35 days of this decision being published.

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34. We wish to express our thanks to all parties and to their legal teams for the high quality of the preparation and argument in this case. The complexity of the information requested inevitably imposed a huge burden on them all. Without their efforts the case would have taken even longer.

**NJ Warren**

**Chamber President**

**Dated 10 March 2015**