

35% Campaign
c/o ■ Market Place
Bermondsey SE16 3UQ
35percentelephant@gmail.com

8th January 2017

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

casework@ico.org.uk

Re: Complaint – Information Request to Southwark Council (reference EIR 679428)

Dear Sir/Madam,

I am writing on behalf of the 35% Campaign to complain about Southwark Council's handling of our information request for its regeneration agreement for the Aylesbury estate.

The 35% Campaign is a campaign group set up in response to Southwark Council's repeated failure to ensure that developments provide the minimum 35% affordable housing quota required by its planning policy. We are a group of local residents, traders and others who have an interest in the regeneration of the local area and are associated with the [Elephant Amenity Network](#) and the [Elephant & Walworth Neighbourhood Forum](#). We have been engaging in planning matters ranging from housing to public realm and sustainable development since 2008. Within the course of our campaigning activities, we have gained a thorough understanding of development economics and viability, and have given evidence at examinations in public, public inquiries and Tribunal hearings into viability testing and the disclosure of viability information.

On 26th July 2016, we [made an information request](#) for the regeneration agreement signed between Southwark Council and housing association Notting Hill Housing Trust in April 2014. After numerous reminders and several requests for extensions, the Council finally provided us with the regeneration agreement on 12th October 2016. However much of the agreement and its appendices had been redacted.

This is surprising, given that the Information Commissioner had previously ruled that financial viability information relating to the Aylesbury scheme should be disclosed – see [decision of 25 April 2016](#) (Reference: FS50589692).

This is also surprising, given that page 222 of the document requested entitled "Agreed Commercially Sensitive Information" sets out the information that Southwark Council and development partner Notting Hill Housing consider to be commercially confidential:

Agreed Commercially Sensitive Information

1.1 - Definition of "Developer's Priority Return"

1.2 - Schedule 4 in its entirety

1.3 - Business Plan definitions:

1.3.1 - "Developer's Priority Return"

1.3.2 - "Premium"

1.4 - Business Plan Section 12 in its entirety.

Given the existence of this schedule setting out clearly what information is regarded as confidential, it is very difficult to understand why the redactions made to the regeneration agreement provided go well beyond these four items. We feel that there is no reasoned argument for the Council to continue to withhold information, that both the Council and its development partner did not deem commercially sensitive at the time of signing the agreement.

Reasons in favour of disclosure

For the remainder of the redacted items that are deemed commercially sensitive in the schedule, we continue to hold the view that the arguments in favour of disclosure clearly outweigh the arguments in favour of withholding the information. We have listed the arguments in favour of disclosure as follows:

1. Scale of the redevelopment scheme

In defence of its redactions, the Council has cited a case heard by the First Tier Tribunal in 2013 – that of the nearby Heygate estate (EA/2013/0162). However, there are a number of factors that distinguish the Aylesbury estate scheme from the Heygate scheme. The Aylesbury estate is much larger than the Heygate estate (ca.60 acres vs ca.20); the Council itself describes the Aylesbury regeneration as “one of the largest projects of its kind in Europe.”¹

The Heygate estate redevelopment was essentially a land sale to a private multinational developer, which argued that its 'financial model' was used in projects across the world and was thus a 'trade secret', whereas the Aylesbury redevelopment agreement is with a housing association – a public sector body.

1 See http://www.2.southwark.gov.uk/news/article/844/developer_selected_for_next_phase_of_aylesbury_regeneration_project

We also feel that the Council is wrong to cite the Heygate decision, as this has since been superseded by more recent First Tier Tribunal decisions, namely (EA/2014/0122) and (EA/2016/0012), which both ruled in favour of comprehensive disclosure. We also note that the Council's regeneration agreement for the Heygate scheme has been [made public](#) and therefore see no reason why the Aylesbury regeneration agreement should not also be disclosed.

2. Significant public sector funding

The Heygate regeneration received no grant funding whatsoever. The Aylesbury regeneration in contrast, is a partnership agreement for the redevelopment of the estate by the Council and a non-profit registered social landlord, being developed with a significant amount of public funding. The scheme has been allocated 46m from the government's Estate Regeneration Fund and £27m from GLA funding to date and £13m of HCA funding (which helped build the completed phase 1 of the scheme)². In addition, the Council has [spent](#) a considerable amount of its own funds on the scheme (£28.5m to date), and has committed a further £52m to the scheme over the next three years alone. In addition, the scheme has [received £56m](#) from the government's NDC (New Deal for Communities) programme. This amounts to a total of £222m of public funding allocated of which £97.5m has already been spent. The [appendices](#) to the Council's [draft development plan](#) for the scheme show that overall estimated public sector funding requirement will amount to £300m.

TABLE 7A.2 TOTAL FUNDING SHORTFALL

Public sector funding requirement	Total funding shortfall £m
Land value deficit	76.185
Infrastructure costs (shortfall after developer contributions)	20.737
Leaseholder acquisitions	130.422
CPO enquiry costs	1.500
Re-housing tenants	21.853
Demolition	39.075
Land disposal and programme management	9.893
Total	299.665

These costs are the estimated cost over time including inflation

²[This Council report](#) confirms that the scheme has been allocated £46m from the government's Estate Regeneration Fund and that Notting Hill has been allocated £27m in GLA funding for phase 1b/c, while [this report](#) confirms that the completed phase 1 of the scheme received £13m in HCA funding.

3. The financial model

We dispute that the DPA contains a 'financial model' as is claimed by the Council. As an interested party in the Heygate Tribunal case (EA/2013/0162), we know that the developer's financial model was a spreadsheet containing macros and formulas spanning several thousand pages and formed the supporting background information to a viability assessment, - the information requested is not a viability assessment, it contains no such spreadsheet. There is no evidence to support the claim that the redacted information in schedule 4 of the DPA contains a financial model or even information relating to a financial model. Moreover, the development partner in this case is not a private developer; it is a housing association, classified by the ONS as a public sector body. We see no reason why an agreement between two public sector bodies should be kept confidential.

4. Re-negotiation of the DPA

The DPA was the result of an extensive public procurement process and extensive negotiations by our Council administration to secure the best possible deal for the regeneration of the estate. We were surprised and concerned when it was announced early in 2016, that terms of the agreement had been re-negotiated at the request of NHHT, and that the Council had been requested by NHHT to fund £22m of works that NHHT was originally required to fund under the agreement.

5. Human rights breaches - Secretary of State CPO decision

The recent ruling by the Secretary of State to refuse compulsory purchase orders for the regeneration scheme, as a result of the Council breaching residents' human and equalities rights, prompts the need for greater transparency and has increased public concern about the scheme in general. Disclosure of the partnership agreement will show that the Council has secured a good deal for its residents, that the agreement does make adequate provision for residents (especially leaseholders) and that the significant public investment in the scheme to date will pay off in the long run.

The following press articles demonstrate the level of concern and public interest in the scheme:

<https://www.architectsjournal.co.uk/news/aylesbury-estate-southwark-councils-judicial-review-application-over-cpos-refused/10016008.article>

<https://www.theguardian.com/cities/2016/sep/20/aylesbury-estate-ruling-future-regeneration-sajid-javid>

<https://widerimage.reuters.com/story/residents-resist-demolition>

<https://www.architectsjournal.co.uk/news/assessing-aylesbury-whats-the-true-cost-of-demolishing-council-estates/8692267.article>

<https://www.theguardian.com/society/2016/jul/13/aylesbury-estate-south-london-social-housing>

6. Relevant considerations

In considering our complaint we request that the [Local Government Transparency Code 2015](#) be taken into consideration. This says that local authorities should “*publish all contracts in their entirety where the value of the contract exceeds £5,000*”.

We also request that the following First Tier Tribunal decisions be taken into consideration:

[ICO vs London Borough of Greenwich 2015](#) (EA/2014/0122)

[ICO vs London Borough of Lambeth 2015](#) (EA/2016/0012)

We also request that the [ICO decision of 3rd Nov 2016, ref: FS50627364](#) and decision of [25th October 2016, ref: FER0626901](#) be taken into consideration in investigating our complaint.

For your information, we applied to the Council on 24th October 2016, for it to undertake an internal review of its decision. The Council has not responded to our request. We are therefore referring the matter to you for determination before expiry of the three month statutory period.

For your convenience we have below appended a column to the [schedule of redactions](#) provided by the Council, containing our full responses to each of the grounds for redaction.

Please do not hesitate to contact me should there be any further information you may require.

I look forward to hearing from you.

Yours sincerely,

Jerry Flynn

35% Campaign

www.35percent.org

PS. A full history of my information request and all correspondence is available on the internet at this address:

https://www.whatdotheyknow.com/request/aylesbury_estate_development_par

<u>Item</u>	<u>Page No</u>	<u>Description of redaction</u>	<u>Grounds for redaction</u>	<u>35% Campaign response</u>
2	P 10	Limited selections of text within the	Those elements of the definition that set out the amount of the developer’s priority return have been	It was ruled that the “Developer’s Priority Return” does not have the characteristics of

		definition of "Developer's Priority Return"	<p>redacted to protect the commercial interests of the parties.</p> <p>Disclosure of this confidential and sensitive information would be detrimental to Notting Hill Housing Trust's 2 (NHHT) legitimate economic interests. It would prejudice NHHT's ability to compete in the commercial market for other projects of a similar nature to this one. This would, or would be likely to, cause NHHT significant commercial disadvantage and material financial loss.</p> <p>The council considers, therefore, that this information should be redacted as its disclosure would, or would be likely to prejudice the interests of the NHHT. In the circumstances, the public interest in maintaining the exception outweighs the public interest in disclosing the information.</p>	<p>a "trade secret" as identified in the Tribunal Case of London Borough of Southwark and The Information Commissioner and others (EA/2013/0162). In this case and in subsequent ones the Developer's Priority Return had to be disclosed. We submit that in any event, being a non-profit housing association, NHHT cannot claim commercial confidentiality. Notwithstanding this, the figure was in any case disclosed as the result of a previous FOI request we made</p>
3	P.11	Definition of Development Longstop Date	<p>This date (and other dates) have been redacted to protect the commercial interests of the parties.</p> <p>The dates and contractual time periods within the DPA are withheld to ensure that the council is able to continue to incentivise the timely redevelopment of its land in negotiating and procuring the redevelopment of its land in future; disclosure would prejudice this negotiating position.</p> <p>In addition, while the time frames for completion of the project are known, specific time periods under the DPA relating to individual events have been redacted to avoid these becoming bargaining positions for third parties, prejudicing the council's negotiating position (and NHHT's economic interests) and ability to seek to acquire all third party interests by private treaty.</p> <p>It is considered that the public interest in maintaining the exception outweighs the public</p>	<p>This does not fall within the information identified as 'commercially sensitive' on page 222 of the Development Partnership Agreement and should therefore be disclosed forthwith.</p>

			interest in disclosing the information.	
4	P. 32-33	Definition of “Rights of Light Report”	<p>Part of the definition has been redacted to avoid prejudicing negotiations that may need to be entered into in order to compensate affected parties in the event they have rights to light and these rights are affected.</p> <p>The council considers, therefore, that this information should be redacted as its disclosure would, or would be likely to prejudice the commercial interests of the council and those of NHHT and the public interest in maintaining the exception outweighs the public interest in disclosing the information.</p>	This does not fall within the information identified as 'commercially sensitive' on page 222 of the Development Partnership Agreement and should therefore be disclosed forthwith.
6	P. 35	Definition of “start date”	See point 3 above	This does not fall within the information identified as 'commercially sensitive' on page 222 of the Development Partnership Agreement and should therefore be disclosed forthwith.
7	P. 80	Schedule 2	See point 3 above	This does not fall within the information identified as 'commercially sensitive' on page 222 of the Development Partnership Agreement and should therefore be disclosed forthwith.
8	P. 85 & seq	Schedule 4	<p>The financial provisions’ schedule has been selectively redacted to remove sensitive and confidential pricing information to protect the commercial interests of the parties. The schedule contains detailed provisions relating to NHHT’s financial model which underpins the DPA.</p> <p>The model is bespoke to this transaction and as such has the characteristics of a “trade secret” as identified in the Tribunal Case of London Borough of Southwark and The Information Commissioner and others (EA/2013/0162).</p>	Your description of this information as 'a schedule of financial provisions' containing 'pricing information', reveals that it is not a financial model as referred to in the Tribunal Case (EA/2013/0162). As parties to this case we know that the financial model was a spreadsheet running into several thousand tabs with formulas and macros. This is very different from pricing information. Indeed the Tribunal in the above case specifically ruled that pricing information should be

			<p>This information is considered to be confidential in its entirety and its publication would enable other developers to benefit from its contents. Disclosure of this part of the DPA would cause sufficient harm to NHHT's interest that would outweigh any public interest in its disclosure. The council's own economic interests are also a factor, as they are intimately connected with the success of this project as a whole. The economic interests of both parties are a factor in the success of the project which is a consideration in the public interest balance. The public interest in disclosing this information is outweighed by the public interest in maintaining the exception.</p>	<p>disclosed. We reiterate our argument that NHHT is a non-profit and public funded housing association. Therefore the case in favour of disclosure is greater and the exceptions for 'trade secrets' do not apply. Furthermore, the Aylesbury regeneration scheme is more than twice as large as the Heygate and therefore the need for transparency is greater. Furthermore, much of the financial provisions information has already been disclosed as the result of a previous FOI request</p>
h10	P.122 Para 5.1.4	Management Fee	<p>The amount of the management fee has been redacted to protect the commercial interests of the parties.</p> <p>Disclosure of this information would prejudice NHHT's ability to compete in the commercial market for projects of a similar size and nature. This would, or would be likely to, cause NHHT significant commercial disadvantage or material financial loss.</p> <p>It is considered that the public interest in maintaining the exception outweighs the public interest in disclosing this information.</p>	<p>This does not fall within the information identified as 'commercially sensitive' on page 222 of the Development Partnership Agreement and should therefore be disclosed forthwith.</p>
11	P123 para 7.1.2	Sales and Lettings costs	<p>The amount of the maximum cap on sales incentives and PX costs has been redacted as this is commercially sensitive and could affect the ability of NHHT to compete in the market. Disclosure of this information would prejudice NHHT's ability to compete in the commercial market for projects of a similar size and nature. This would, or would be likely to, cause NHHT significant commercial</p>	<p>This does not fall within the information identified as 'commercially sensitive' on page 222 of the Development Partnership Agreement and should therefore be disclosed forthwith.</p>

			disadvantage or material financial loss. The council considers, therefore, that this information should redacted as its disclosure would, or would be likely to, prejudice the commercial interests of NHHT. The public interest in disclosing this information is outweighed by the public interest in maintaining the exception.	
12	P123 para7 .1.5	Agency Fees	The amount of the agency fees has been redacted to protect the commercial interests of the parties. Disclosure of this information would prejudice NHHT's ability to compete in the commercial market for projects of a similar size and nature. This would, or would be likely to cause NHHT significant commercial disadvantage or material financial loss. The council considers, therefore, that this information should redacted as its disclosure would, or would be likely to, prejudice the commercial interests of NHHT. The public interest in disclosing this information is outweighed by the public interest in maintaining the exception.	This does not fall within the information identified as 'commercially sensitive' on page 222 of the Development Partnership Agreement and should therefore be disclosed forthwith.
13	P124 para 9.2.1	Other development costs	The rate of the finance charges where the development cash flow is 100% debt funded has been redacted for reasons of commercial confidentiality. Disclosure of this information would prejudice NHHT's ability to compete in the commercial market for projects of a similar size and nature. This would, or would be likely to, cause NHHT significant commercial 4 disadvantage or material financial loss. The council considers, therefore, that this information should be redacted, as its disclosure would, or would	This does not fall within the information identified as 'commercially sensitive' on page 222 of the Development Partnership Agreement and should therefore be disclosed forthwith.

			be likely to prejudice the commercial interests of NHHT. The public interest in disclosing this information is outweighed by the public interest in maintaining the exception.	
14	P.129 -130	Definition of 'Residual Land Value'	<p>The method for calculating residual land value has been redacted to protect the commercial interests of the parties.</p> <p>The viability calculations in general link to the financial model which as described above is considered to be confidential as being a “trade secret”. Disclosure of this information would prejudice NHHT’s ability to compete in the commercial market for projects of a similar size and nature. This would, or would be likely to, cause NHHT significant commercial disadvantage or material financial loss.</p> <p>The council considers, therefore, that this information should be redacted as its disclosure would, or would be likely to, prejudice the commercial interests of the council and those of NHHT.</p> <p>The public interest in disclosing this information is outweighed by the public interest in maintaining the exception.</p>	This does not fall within the information identified as 'commercially sensitive' on page 222 of the Development Partnership Agreement and should therefore be disclosed forthwith.
15	P135 para 4.8.6 and 4.8.7	Time periods relating to viability calculations	See 3 above	This does not fall within the information identified as 'commercially sensitive' on page 222 of the Development Partnership Agreement and should therefore be disclosed forthwith.
20	P162 para 3.11	Amount of CPO indemnity	Disclosure of this information would prejudice the council’s ability to negotiate with third parties, undermining its negotiating position in seeking to	This does not fall within the information identified as 'commercially sensitive' on page 222 of the Development Partnership

	and 3.11. 4		<p>acquire all interests within the development area through private treaty negotiation and avoiding the need to rely on compulsory purchase powers. Furthermore, disclosure of this information could prejudice the council's case at any Upper Tribunal (Lands Chamber) hearing in the event of unresolved compensation claims. This would, or would be likely to, cause the council significant commercial disadvantage or material financial loss.</p> <p>Disclosure of this information would prejudice NHHT's ability to compete in the commercial market for projects of a similar size and nature. This would, or would be likely to, cause NHHT significant commercial disadvantage or material financial loss.</p> <p>The public interest in disclosing this information is outweighed by the public interest in maintaining the exception.</p>	Agreement and should therefore be disclosed forthwith.
21	P166 para 6.4	Amount of management fee to be released on completion of warranty	<p>This item is considered to be commercially confidential. Disclosure of this information would prejudice NHHT's ability to compete in the commercial market for projects of a similar size and nature. This would, or would be likely to, cause NHHT significant commercial disadvantage or material financial loss.</p> <p>The council considers, therefore, that this information should be redacted as its disclosure would, or would be likely to, prejudice the commercial interests of NHHT.</p> <p>The public interest in disclosing this information is outweighed by the public interest in maintaining the exception.</p>	This does not fall within the information identified as 'commercially sensitive' on page 222 of the Development Partnership Agreement and should therefore be disclosed forthwith.
22	P173 para	Amount of payment	The redaction is of the payment to be made for subplot leases and is commercially confidential.	This does not fall within the information identified as 'commercially sensitive' on

	1.5.6.4		<p>Disclosure of this information would prejudice the council's ability to meet its statutory duty to ensure best consideration for its land, setting a precedent which undermines its negotiating position in procuring development partners for future redevelopment of its land. This would, or would be likely to, cause the council significant commercial disadvantage or material financial loss.</p> <p>Disclosure of this information would prejudice NHHT's ability to compete in the commercial market for projects of a similar size and nature. This would, or would be likely to, cause NHHT significant commercial disadvantage or material financial loss.</p> <p>The council considers, therefore, that this information should be redacted as its disclosure would, or would be likely to, prejudice the commercial interests of the council and those of NHHT. The public interest in disclosing this information is outweighed by the public interest in maintaining the exception.</p>	page 222 of the Development Partnership Agreement and should therefore be disclosed forthwith.
24	BP1, BP12	Definition of developers priority return	See point 2 above	See our response to point 2
25	BP1, BP22	Definition of Premium	See point 8 above	See our response to point 8
26	BP4, P15 para 4.2.3.17	Developer financial assumption of leaseholder values	See point 20 above	This does not fall within the information identified as 'commercially sensitive' on page 222 of the Development Partnership Agreement and should therefore be disclosed forthwith.

27	BP4, P25 para 4.5.3.5	Management fee percentage	See point 10 above	This does not fall within the information identified as 'commercially sensitive' on page 222 of the Development Partnership Agreement and should therefore be disclosed forthwith.
29	BP9, P. 20	Annual salary details of staff posts	Publication of annual salaries relating to such a small number of positions would or could be identifiable and would result in disclosure of information relating to the financial affairs of those individuals.	This does not fall within the information identified as 'commercially sensitive' on page 222 of the Development Partnership Agreement and should therefore be disclosed forthwith.
30	BP14, P7-10 section 14.4	Details of developer incentive financial mechanisms	See point 8 above	This does not fall within the information identified as 'commercially sensitive' on page 222 of the Development Partnership Agreement and should therefore be disclosed forthwith.