

Convention goes head to head with confidentiality

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The profitability of development is more critical than ever to starting, lending or foreclosing on schemes that shape the country. Viability issues are central to the credibility of proposals for historic assets, arguments for competing forms of development and deciding acceptable planning contributions. The evidence submitted, usually to justify a discount against affordable housing requirements, varies in complexity and reliability. It will include information that applicants wish to keep private. Disclosure to competitors of land payments, management fees, build costs, contractor profits and revenue assumptions may cause real harm. Recent tribunal and court decisions confirm the need for caution in making the case for relaxation of policies.

The Environmental Information Regulations 2004 give rights of public access to information held by public authorities. They implement European Directive 2003/4/EC on public access to environmental information, which follows and expands upon the 1998 Aarhus Convention. The convention's primary goal is to increase the quality and extent of public involvement in and scrutiny of decisions on the environment. One exception is where disclosure would adversely affect commercial confidentiality protecting a "legitimate economic interest". There is still a presumption of disclosure, however, and the balance of the public interest in maintaining confidentiality must be weighed. The information commissioner is the first port of call once the council complaints procedure has been exhausted.

Disclosure damage at issue

In May, the commissioner accepted that an applicant's viability evidence on a development at Hampton Court was commercial and confidential. Disclosure was ordered, however, because the commissioner refused to accept that it would clearly harm the applicant's ability to enter into contracts or negotiate rental levels. A week later, the First Tier Tribunal, which hears appeals on commissioner decisions, took a different view on viability information associated with listed building works. A developer had applied for conservation area consent to demolish the Lakota Building in the St Paul's area of Bristol. PPG15 required clear evidence of a lack of alternatives to demolition. Public requests for the viability data were refused on the basis of the confidentiality exception. The tribunal found that disclosure would affect confidentiality protecting a legitimate economic interest and the developer's concerns were reasonable. Nonetheless, it decided that the public interest in maintaining confidentiality did not outweigh the public interest in disclosure.

The authority was making a "*specific environmental decision about the demolition of a protected building which was imminent and controversial*", it held. The viability work was directly relevant to and a major factor in that decision. The fact that the council owned part of the development site gave rise to a need for "particular scrupulousness" and increased the desirability of disclosing everything relevant to the case.

Appraisal argument ruled out

The High Court adopted a different approach in *R (English) v East Staffordshire Borough Council* [2010]. The judge considered whether the council acted unfairly in withholding financial appraisals that justified the applicant's case that a housing project was required to enable the national football centre proposed in a separate application. He concluded that there had been no procedural unfairness and that the Lakota decision was irrelevant. The public had the gist of the appraisals, he ruled.

Cases such as *Uniplex* and *Garner* have been interpreted as signalling a different approach to Aarhus requirements. A purposive approach to disclosure in *East Staffordshire* may have emphasised the value of scrutiny and involvement rather than the acceptability of getting the gist of things. This case was not argued on the basis that refusal to disclose was a breach of a statutory duty under the 2004 regulations and their scope in light of the convention. It is also unlikely that an inspector would accept withholding of evidence at an inquiry. Decisions about disclosure must still be informed by consideration of the nature of the evidence from applicants, the risk of appeal, harm from disclosure both to developers and those wishing to make an informed comment and the scope for methods of processing and assessing it.

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