

Disclosure of viability assessments in planning cases: position under the EIR and under the law generally (see Holborn Studios)



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Outline

The law generally

EIRs



The general law

S. 100D Local Government Act 1972:

- (1) background papers for meetings of principle council to be listed and open to inspection by the public.
- (4) Nothing requires disclosure of document which discloses “exempt information”
- (5) Background papers are those which disclose facts on which report based and have been relied on to a material extent in preparing report

S. 100L, Part 1 Sched 12A LGA 1972:

Exempt info is information relating to the financial or business affairs of any particular person “*if and so long, as in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information*”



The general law

R (Joicey) v Northumberland CC [2014] EWHC 3657

- Windfarm noise assessment published 36 hours before committee meeting
- Right to know provisions require information to be published “in good time for members of the public to be able to digest it and make intelligent representations” [47].
- “timely” turns on factors such as character (easily digested/technical), audience (sophisticated / ordinary) and bearing on decision (tangential/central)



The general law

R (Perry) v Hackney LBC [2014] EWHC 3499 (Admin)

- Two applications for mixed use development.
- VA submitted confidentially. Never made public.
- Claim brought on (1) common law right for committee to see report (2) breach of LGA 1972. Dismissed:
 - No common law right for Committee to see report: [70].
 - Information was exempt information - the exemption was inserted to allow negotiation. Disclosure would frustrate statutory purpose. No breach of LGA 1972 for either Committee or Claimant not to see VA [78], [89].



The general law

2019: NPPF

- For developers to explain why they cannot make contributions; viability appraisals should (1) reflect PPG (2) include standardized inputs and (3) be made publicly available.

2019 PPG

- Outlines how viability exercise should be undertaken incl defining cost of land



The general law

R (Holborn Studios) v LB Hackney [2020] EWHC 1509 (Admin)

- Leaseholder of site challenging IP's plans to redevelop.
- Two viability reports prepared, one with numbers blanked out, the other only summarized in public domain.
- JR on the basis of *inter alia* (1) non-compliance with LGA (2) material in public domain incomprehensible.



The general law

R (Holborn Studios) v LB Hackney [2020] EWHC 1509 (Admin)

- JR allowed [71].
- Non-compliance with s.100D LGA 1972. Significant quantities of information obviously important for Committee Report's section on viability [61].
- D argued “substantial compliance” as what was in public domain sufficient and large quantities of the material “exempt”. Rejected:
 - Need to show public interest in maintaining exemption, NPPF/PPG indicate expectation in public domain (*Perry* distinguished) [65];
 - info in public domain opaque, unexplained, irreconcilable, and prevented objectors engaging in viability discussions [66]-[69].



The general law

R (Worcestershire Acute Hospitals NHS Trust) v Malvern Hills DC [2023] EWHC 1995 (Admin)

- Challenge to grant of PP for South Worcester Urban Extension
- Hospital had sought s. 106 contributions of £millions.
- OR advised viability indicated s. 106 contris come at expense of highways or AH.
- Decisions taken in 2018
- Ground 2: breach of s. 100D LGA 1972 by vailing to make viability appraisal public



The general law

R (Worcestershire Acute Hospitals NHS Trust) v Malvern Hills DC [2023] EWHC 1995 (Admin)

- Ground 2: breach of s. 100D LGA 1972 by vailing to make viability appraisal public
- Accepted materials were background papers unless they included exempt info [119]
- No real dispute it contained confidential information so issue was para 10 balance [122]
- Decisions taken pre NPPF (2019). Perry followed, not disclosed.



The general law

R (Worcestershire Acute Hospitals NHS Trust) v Malvern Hills DC [2023] EWHC 1995 (Admin)

- Where the balancing exercise should be struck – i.e. whether public interest in confidentiality more important than public having access – a judgment for officers on rationality basis [127].
- S100D (4) does not provide for redaction of confidential info or part disclosure [128].
- Proper officer to review disclosure if circumstances change [130]
- Consequences of breach:
 - decision not automatically unlawful [142]
 - quashing depends on (1) substantial compliance and (2) material prejudice [140]



The general law

In summary:

- Highly likely that, if developer using VA to avoid s. 106 obligations, VAs will be “background documents”
- They cannot be “part disclosed”
- Pre-2019: likely to contain exempt information and balance to be struck a matter for officers.
- Post-2019: they should be containing standardized inputs and highly likely public interest will favour disclosure.
- As non-compliance does not automatically mean quashing, engage early and ask for the VA before the decision is made.



EIRs SI 2004/3391

Implement Dir 2003/4/EC which in turn implements Aarhus Convention information pillars.

Broad outline

- Public authority must proactively make environmental information that it holds available to the public (unless covered by reg. 12) (reg. 4); and
- Make environmental information available “on request” (reg. 5)
- Public authority may refuse to disclose if (1) exception applies and (2) public interest in maintaining exception outweighs duty to disclose (reg. 12(1))
 - Public interest in all exceptions must outweigh public interest in disclosure:
Ofcom v IC (C-71/10) [2011] PTSR 1676 [21]
- Presumption in favour of disclosure (reg. 12(2))



EIRs SI 2004/3391

Exceptions include

- Reg 12(5)(c): to the extent disclosure would adversely affect IP rights
- reg. 12(5)(e): to the extent disclosure would adversely affect confidentiality of commercial or industrial information where confidentiality is provided by law
- Reg 12(5)(f): to extent disclosure would adversely affect the interests of a person who (i) was not (and could not be put) under a legal obligation to supply the information (ii) did not supply in circumstances that any person would be entitled to disclose it and (iii) that person does not consent.



EIRs SI 2004/3391

Environmental information: reg 2(1)

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on—

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) 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 (a) and (b) as well as measures or activities designed to protect those elements;



EIRs SI 2004/3391

Environmental information: reg 2(1)

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on—

...(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);

ICO: includes information informing the public about matters affecting the environment or enable them to participate in decision-making.



EIRs SI 2004/3391

- Is it environmental information?
- LB Southwark v Information Commissioner (EA/2013/0162) ("*Lend Lease*")
 - Request for viability assessment in connection with planning application by Lend Lease to redevelop large area of Elephant and Castle.
 - VA submitted to LPA on private and confidential basis
 - Was environmental information:
 - regeneration programme was "enormous", and so likely to affect the state of the landscape as an element of the environment: reg 2(1)(c)
 - VA was an economic analysis within the framework of that measure and activity: reg 2(1)(e)



EIRs SI 2004/3391

- Is it environmental information?
- See too:
 - Shepway DC v IC EA/2017/0240 (viability assessment)
 - Darlington BC v IC EA/2018/0005 (Subscription and shareholder agreement between LPAs and Peel Group for ownership of Durham Tees Valley Airport)
 - South Gloucestershire Council v IC EA/2009/0032 (developer sought internal appraisal produced by Council to inform s. 106 negotiations)
 - Greenwich v IC EA/2014/0122 (viability assessment)



EIRs SI 2004/3391

- If it is Environmental Information, what exceptions are engaged?
- Normally 12(5)(e) and possibly (f). See e.g. *Lend Lease*;
- Occasionally 12(5)(c) (IP rights): see e.g. *Lend Lease* (appendix to the VA was a financial model developed by LL as a tool to assess large projects, allowing scenarios to be run and tested).



EIRs SI 2004/3391

- Public interest test. Always v fact specific. Common examples/themes
 - In disclosing:
 - Transparency and accountability, especially if unclear bargain
 - Public participation
 - Local importance of issues
 - In maintaining exception
 - Harm to economic interests
 - It would undercut viability of scheme or “social” elements
 - It contains trade secrets or similar
 - Key info or summary already in public domain
 - Maintaining commercial confidences



EIRs SI 2004/3391





- Public interest test: can impact differently on different parts of VA:
- *Lend Lease*
 - Appendix 22 a commercial secret. Harm outweighs disclosure [55]
 - LL projections of commercial sales and rentals of great sensitivity, if disclosed would be used by future commercial customers damaging delivery of project or its social content. Not disclosed [56].
 - Reasoning does not apply to private purchasers (influenced by market) and social housing providers [57]
 - Rest less sensitive [58]
- Can lead to disclosure of parts: *Lend Lease* [59]



Thank you

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