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## Viability – an open book?

Andrew Fraser-Urquhart QC  
Melissa Murphy

afu@ftbchambers.co.uk  
melissa.murphy@ftbchambers.co.uk

Francis Taylor Building  
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



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## Holborn Studios v LB Hackney (No.2) [2020]

- Statutory provisions
- The pre-existing law
- The NPPG
- Holborn Studios 2

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## Statutory provisions

Local Government Act 1972, s 100D(5):

“background papers for a report are those documents relating to the subject matter of the report which—

- (a) disclose any facts or matters on which, in the opinion of the proper officer, the report or an important part of the report is based, and
- (b) have, in his opinion, been relied on to a material extent in preparing the report, but do not include any published works.”

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## Statutory provisions – exempt information

- Background papers do not have to be provided if they contain ‘*exempt information*’ (Local Government Act 1972, Schedule 12A)
- includes information relating to financial or business affairs of a person
  - ‘*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*’ (Schedule 12A, Part 2, para 10).

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## *R(Perry) v LB Hackney* [2014] EWHC 1721 (Admin)

- Viability report to support non-policy compliant AH offer – Submitted in confidence and redacted
- Claimant submitted report ought to have been in the public domain and available to objectors and members of the planning committee
- Patterson J concluded no common law right of access as information clearly confidential – contained information re build and sale costs and residential values “of utmost commercial sensitivity”

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## Perry (2)

- Information exempt under LGA 72
- Disclosure would frustrate clear intention of LGA to allow Councils to negotiate
- No stated decision re balance of public interest – but held that “self-evident” from way documents were treated that Council view was that public interest in maintaining the exemption outweighed the public interest in disclosing it – no formal decision was required by LGA

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## The NPPF – para 57

“Where up-to-date policies have set out the contributions expected from development, planning applications that comply with them should be assumed to be viable. It is up to the applicant to demonstrate whether particular circumstances justify the need for a viability assessment at the application stage.... All viability assessments, including any undertaken at the plan making stage, should reflect the recommended approach and national planning guidance, including standardised inputs, and should be made publicly available”

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## National Planning Policy Guidance

“This National Planning Guidance sets out the government’s recommended approach to viability assessment for planning. The approach supports accountability for communities by enabling them to understand the key inputs to and outcomes of viability assessment.

...

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Improving transparency of data associated with viability assessment will, over time, improve the data available for future assessment as well as provide more accountability regarding how viability informs decision making...

...

How should land value be defined for the purpose of viability assessment?

To define land value for any viability assessment, a benchmark land value should be established on the basis of the existing use value (EUV) of the land, plus a premium for the land owner.

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Should a viability assessment be publicly available?

Any viability assessment should be prepared on the basis that **it will be made publicly available other than in exceptional circumstances**. Even in those circumstances an executive summary should be made publicly available. Information used in viability assessment is not usually specific to that developer and thereby need not contain commercially sensitive data....

Where an exemption from publication is sought, the planning authority must be satisfied that the information to be excluded is commercially sensitive. This might include information relating to negotiations....

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## Holborn Studios No. 2

- Proposal to redevelop premises leased to Holborn Studios, a major photographic studio
- 2016 PP quashed, new application made
- Viability assessment “published” – all heavily redacted
- Further assessment tendered – including unredacted summary
- AH contribution of £757,000 agreed
- Only the developer’s assessment published

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## Difficulties in the published data....

- No justification of EUV benchmark/uncertainty of figure; structure of appraisal suggested a set figure for contributions had been applied
- No indication as to how AH figure arrived at
- Inconsistency of calculations and figures
- Background papers only contained development plan policies
- No evidence of a balancing exercise to justify exempt status

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## Claimant's responses

- Requested full viability information
- Provided letter to Council pointing out difficulties and inconsistencies in Committee Report
- Addendum Report provided to Committee on night of meeting
- Claimant's QC addressed meeting, so did Council's viability expert

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## Findings

- S100d obligations clearly not complied with
- Not all material needed to be produced but "simply inconceivable" that unpublished material was not relied on in Committee report considerations
- NPPG sets out clear principles –

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- Viability assessments should reflect approach in NPPG and made publicly available
- standardised inputs should be used including a benchmark land value based upon EUV plus
- "in a way that aids clear interpretation and interrogation by decision makers"
- publicly available except in exceptional circumstances
- even commercially sensitive data can be aggregated in published viability assessment so as to avoid disclosure of sensitive material

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- NPPG policy a matter of public interest for balancing exercise for exempt material
- anticipation of NPPG is publication except in exceptional circumstances
- support the contention that such assessments are not exempt information unless exceptional circumstances arise
- unclear how, if at all, defendant considered or justified exemption
- Difference from Perry justified by new NPPG policy

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- Counsel for defendant advanced test that only enough material adequate to enable the member of the public to make a sensible response to the consultation on the application (was test approved?)
- Deficiencies and unexplained materials such that that test was failed
- Applied principles in *Joicey* [2014] EWHC 3657 (Admin) that obligation of disclosure for consultation requires enough information to enable members of the public to make well-informed observations on the substance of the decision

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## Some thoughts

- Major step to requirement for disclosure – *Perry* dead
- But not an *unfettered* obligation of disclosure
  - Considered through prism of 100D
  - Test of “material contribution” to Report
  - “Exceptional circumstances”
- Will require clear justification (poss wider impact?)
- Legitimate expectation case not decided

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## Practical pointers

- A big push for disclosure
- But not unfettered
- Importance of the public interest test
- Not all material
- No ex post facto rationalisation



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**An open [REDACTED]\***

**Melissa Murphy**

**\*commercially confidential**



Francis Taylor Building  
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



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## Outline

1. The good old/bad old days & what happened next
2. Holborn Studios (2) and the public interest test
3. Wider implications for the commercial confidentiality exemption in the EIR?



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T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



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T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



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## Example from a bygone era...

“...it is quite clear from the witness statement of Miss [E] that the DTZ report was shot through with the confidential information of third parties, and fell within Schedule 12A, Part I, paragraph 7. It is **perfectly obvious that it was assessed as confidential on a reasonable basis**. Accordingly, section 100D(4)(a) operated so as to preclude the non-inclusion of that document in the list of background documents constituting a breach of duty.”

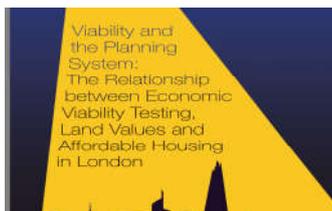
***Bedford v. LBI*** [2003] Env. L.R. 22, per Ouseley J, at [81].

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T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



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## The winds of change blew



R. (on the application of McCarthy and Steve Retirement Lifestyle Ltd) v Greater London Authority

Case Number: 2016/00100

Case No. 16/00100

IN THE HIGH COURT OF JUSTICE  
QUEEN'S BENCH DIVISION  
PLANNING COURT

Case No. CO/1524/2017

Before:  
**MR JUSTICE BODGATE**

Between:  
McCarthy and Steve Retirement Lifestyle Ltd  
-and-  
Greater London Authority

Filed: 15/03/2017

Case No. CO/1524/2017

15/03/2017

Francis Taylor Building  
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



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## Planning application/appeal context

- Per AFU Q.C.'s presentation:
  - NPPF/57
  - PPG Reference ID: 10-021-20190509 (any viability assessment should be prepared on the basis that it will be publicly available other than in exceptional circumstances)



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T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



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## Holborn Studios & the public interest test

“...the existence of the policy contained in the Framework and the guidance contained in the PPG have an important bearing on the consideration of whether or not there is a public interest in disclosing the information contained in a viability assessment (even if it is properly to be characterised as commercially sensitive, bearing in mind the observations in the PPG about the extent to which information in such an assessment would be specific to a particular developer).”

Per Dove J at [64]



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T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



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## Environmental Information Regulations 2004

- Environmental information – broadly defined.
- Starting point for public authority: release information, unless there is a good reason not to.
- May refuse only if an exception applies and the public interest test is satisfied.
- Wider implications of Holborn Studios 2 re the public interest test?

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T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



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## The public interest test

“Under the Regulations, most exceptions are subject to the public interest test. This is an extra stage in the process of deciding what information to provide, which requires you to balance the public interest arguments for disclosing the information against those for upholding the exception. This means that even if disclosing information would harm, for example, international relations, you must still release the information if the public interest arguments for disclosing it are stronger. The public interest is not necessarily the same as what the public finds interesting.”

Information Commissioner Guide to the Environmental Information Regulations

Francis Taylor Building  
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



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## Recent Information Commissioner Decisions

- Complaints (where EIR 12(5)(e) – confidentiality of commercial information engaged):
  - In last 12 months – of 29 complaints to the IC, 23 failed because the IC agreed that the public interest entitled the authority to withhold the requested information.

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T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



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## Factors relevant to the public interest test (where the commercial confidentiality exemption engaged)

- (1) Greenwich (Woolwich Estates):
  - General public interest in transparency and accountability
  - Availability of information would inform discussions about financial decisions taken by the Council, including re provision of affordable & social housing for residents: informed oversight & scrutiny

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T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



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## Greenwich (Woolwich Estates) ctd

- Other factors weighed in the public interest test:
  - “Strong” public interest in not prejudicing the commercial interests of the parties to the agreement and consequently increasing costs to tax payers
  - “Strong” public interest in protecting the commercially sensitive information of Lovell and its partners from competitors

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T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



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## **Factors relevant to the public interest test (where the commercial confidentiality exemption engaged)**

- (2) Mendip DC – Saxonvale site, Frome
  - Some acknowledgment of public benefit of transparency & scrutiny.
  - Decision focuses on adverse effects of disclosure on Council & Property Group’s economic interests & harm to prospect of bringing the site forward for development.

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T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



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## Discussion points

- EIR commercial confidentiality exemption: balance to be struck.
- Therefore weight to afford to factors within the balance is important.
- Notions of “transparency”, “scrutiny” – abstract concepts but crucial for public confidence in public decision making.
- Put against that – arguments re providing insight into, say business model & ability to compete.
- Q: should developers and others expect to have to operate without the benefit of any commercial confidentiality protection when contracting with public authorities? NB components of exemption 12(5)(f):
  - Legitimate economic interests underlying commercial confidentiality
  - Demonstrable adverse effect caused by disclosure (“would cause harm”)

Francis Taylor Building  
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



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## ANY QUESTIONS?

Email:

[melissa.murphy@ftbchambers.co.uk](mailto:melissa.murphy@ftbchambers.co.uk)

For occasional tweeting:

[@MelissaRGMurphy](https://twitter.com/MelissaRGMurphy)

Francis Taylor Building  
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



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