

LEGAL ALERT

The Freedom of Information Act 2000 - Developers beware your information may become public

The Freedom of Information Act 2000 (the Act) came fully into force on 1 January 2005. In short the Act provides a general right of access for anyone, on request, to information held by public authorities (including publicly owned companies) in the UK (save for Scotland), in order to enhance transparency and accountability within the public sector. Therefore the Act has potentially significant implications for the privacy of any communications and information provided by third parties to public authorities.

Clearly there is a considerable range of information that property companies may pass to public bodies for all sorts of reasons, including detailed tenders in respect of PPP/PFI and other property development projects, appraisals, financial projections and financing proposals. The thought that such often confidential and commercially sensitive information could find its way into the wrong hands and effectively become public is understandably concerning.

Fortunately, the general right of access is subject to a number of exemptions, in particular confidentiality and commercial interest. Pursuant to section 41 of the Act, if the information has been disclosed to the public authority in confidence then the authority has an "absolute" exemption from disclosing it to any applicant. Pursuant to section 43, information can also be withheld if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the authority itself. This is designed to protect information which may have an intrinsic commercial value, such as trade secrets and market-sensitive information the disclosure of which might disadvantage any person. However this exemption is conditional and the authority can only refuse disclosure if, in all the circumstances, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. It is far from clear how this test will be applied by public authorities, the Information Commissioner/Tribunal and the High Court in practice.

Any person (the complainant) may apply to the Information Commissioner for a decision whether or not an authority has dealt with an information request appropriately. The Commissioner may then serve an enforcement notice on the authority specifying the steps required to comply with the request. Either the complainant or the authority may appeal from the decision of the Commissioner to the Information Tribunal. Ultimately, if the Commissioner considers that an authority is in breach of an enforcement notice he may notify the High Court and the Court may deal with the authority as if it had committed a contempt of Court. The Act does not create any civil right of action against an authority.

In practical terms property companies will need to consider how best to protect the confidentiality of the information they disclose to public bodies. Generally a prominent confidentiality provision stating that the information has been provided to the authority in confidence and must not be disclosed to any third party is likely to be the most effective method as the authority then has an "absolute" exemption from disclosing it to any applicant. Equally there may be an opportunity for property companies to seek to obtain information about projects or transactions being carried out by competitors with public authorities.

For further information please contact our property litigation partner David Stevens on 020 7421 6453