

# ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.



## THE INFORMATION COMMISSIONER V (1) POPLAR HOUSING ASSOCIATION & (2) PEOPLE'S INFORMATION CENTRE [2020] UKUT 182 (AAC)

Upper Tribunal Administrative Appeals Chamber, Mrs Justice Farbey CP, 8 June 2020

Whether a housing association is a public authority for public access to environmental information.

**Key words: Freedom of Information, United Kingdom, Housing, Public Authority**

1. Poplar Housing Association (Poplar) is a company limited by guarantee and a community benefit society incorporated under the *Co-operative and Community Benefit Societies Act 2014*. It was set up with a transfer of about 13% of the local authority housing stock in 1998. Poplar provides housing and is involved in joint ventures with private developers to redevelop and deliver a proportion of investment in new housing in the area. It owns and manages about 9000 homes, as well as community facilities and commercial property.
2. Poplar is registered with the Regulator of Social Housing (RSH) as a private registered provider of social housing and as a consequence has statutory powers to seek an injunction against anti-social behaviour, parenting orders, and demolition orders terminating assured tenancies.
3. The People's Information Centre made an email request of Poplar seeking a list of addresses of Poplar's empty properties and plots of land earmarked for redevelopment or disposal. The email was overlooked by Poplar, and no response was made. The Information Commissioner decided that the information requested was environmental and that Poplar was a "public authority" for the purposes of the Regulations.
4. Poplar appealed this decision to the First-Tier Tribunal (General Regulatory Chamber), and it found that Poplar was not a public authority and thus was not required to take any action. The applicable law was an *EU Directive 2003/4/EC* of 28 January 2003 on public access to environmental information which in turn reflected article 2(2)(b) of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters (the Convention). A "public authority" is defined in article 2 of the Convention as:
  - a) Government at national, regional and other level;
  - b) Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment;

- c) Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above;
- d) The institutions of any regional economic integration organization referred to in article 17 which is a Party to this Convention.

5. The Upper Tribunal noted that the case law set out that the necessary criteria for determining whether an entity is a public authority, being the entrustment of the performance of services of public interest (on the one hand) and the vesting of special powers (on the other hand). The Upper Tribunal agreed with the First Tier Tribunal that the evidence showed that Poplar had not been empowered to perform public administrative functions by virtue of a legal basis specifically defined in national legislation (at [87]). The mere existence of statutory regulation cannot convert a service provider into a public authority (at [83]). The appeal was dismissed.

## IMPLICATIONS



The engagement of nonprofit organisations in the delivery of what once was almost solely the province of the state is evident across many jurisdictions, not only in the United Kingdom. The blurring of the boundaries creates legal issues as to what aspects of state accountability such as Freedom of Information, the scope of Auditor General investigations and Ombudsman, or Crown immunity from civil and criminal liability should apply. On the other side of the coin when should the concessions of nonprofit or charity status such as taxation benefits, ability to receive public donations and foundation grants, and exemption from commercial statutes that apply to for-profit enterprise be removed?

Can this shift to hybridity be characterised as the natural economic forces at play to find the most financially fit-for-purpose structure for the common good, governments seeking to escape accountability, outsource risk and capture new sources of private funds at lower costs, or nonprofits merely achieving their purpose by harnessing government resources as best they can from an inferior bargaining position?

## VIEW THE CASE



This case may be viewed at <http://www.bailii.org/uk/cases/UKUT/AAC/2020/182.html>

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