

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 28 February 2012

Public Authority: Holme Valley Parish Council
Address: Council Chamber
Council Offices
Huddersfield Road
Holmfirth
West Yorkshire
HD9 3JP

Decision (including any steps ordered)

1. The complainant requested information relating to Holme Valley Parish Council ("the council") claiming ownership of various plots of land, the majority of which used to be stone quarries. The council said that it did not hold any relevant information. It said that all relevant records had been transferred to a land charity of which it was the sole trustee and this meant that the information was outside the scope of the Freedom of Information Act 2000 ("the FOIA").
2. The Commissioner's decision is that the request should be considered under the terms of the Environmental Information Regulations 2004 ("the EIR") rather than the FOIA. He considered that the council incorrectly said that it did not hold any relevant information. The Commissioner found that some information was held by the authority itself. On the balance of probabilities, the Commissioner also decided that other information is likely to be held by a third party on behalf of the council. The Commissioner therefore considers that the council breached its obligations under regulation 5(1) and 5(2) of the EIR to make information available within 20 working days.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

- The council has identified that it holds relevant information that was not publicly available in the form of financial records. These appear to concern invoices for the cost of hiring solicitors. The council should either provide the information it holds to the complainant or issue a valid refusal notice under the EIR.
 - In relation to all other information falling within the scope of the request that is held by third parties on behalf of the council (for clarity this will cover all information relating to the council's acquisition of these plots of land) the council should either provide that information to the complainant or issue a valid refusal notice under the EIR.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 7 September 2011, the complainant requested information from the council in the following terms:

"I am therefore now requesting from you the information which the Parish Council submitted to the Land Registry to claim each and ALL of the plots of land involved in the scheme and as listed on the enclosed schedule and published on the internet by the Land Charity...

I also require from you copies of all correspondence, emails, records of telephone calls and all communications of any type and all documentation held by the Parish Council and relating to this matter. I am advised that none of this is privileged information including emails to and from Councillors as neither are communications with solicitors".

6. The council replied on 22 September 2011. The council said that the information is no longer held by it. It said that all information relating to this matter is now held at separate premises by a land charity and it said that it had transferred the request to the charity for further consideration. The council said that the council is sole trustee of the land charity and when acting in its charitable capacity, it is not acting as a statutory public body for the purposes of the Freedom of Information Act 2000 ("the FOIA"). It said that information held by the land charity is not available under the FOIA.

7. The complainant requested an internal review on 25 September 2011. He said that he did not accept that the information was not covered by the FOIA. He said that the information concerned actions taken by the council in 2006, not the land charity, which was only created subsequently.
8. The council replied on 11 November 2011. The council said that it had decided to maintain its position.

Scope of the case

9. The complainant asked the Commissioner to consider whether the council had responded to his request correctly by stating that it did not hold the information requested. The complainant also complained to the Commissioner about the council's failure to undertake an internal review within 20 working days. This has been addressed in the "Other Matters" section of this notice.
10. During the Commissioner's investigation, the council referred to information held in minutes of its meetings available on its website. The Commissioner understands that the complainant has already reviewed this information and found its contents to be unsatisfactory. In view of this and the fact that the information is publicly available, the Commissioner has not considered this issue any further.
11. The council also referred to "acts and plans" which are held in public archive records available for inspection at Huddersfield Library although it was not clear to the Commissioner what the precise nature of this information is or how it may relate to the request. Nonetheless, in view of the fact that this information is already publicly available, the Commissioner has scoped this information out of his investigation.

Reasons for decision

Regulation 2 - Is the information "environmental"?

12. The council considered the request under the terms of the FOIA but the Commissioner has decided that the request should have been dealt with under the terms of the EIR. The Commissioner accepts that information relating to the ownership of land will not necessarily always be environmental. In determining that it is in this case, the Commissioner has had regard to the context. It is clear to the Commissioner that the decision to claim ownership of this land was with a view to considering a range of options for the future of the plots,

one of which would be to dispose of the land. The Commissioner understands that a number of the plots of land have now been sold. The decision to claim ownership is therefore inextricably linked to the issue of what may become of this land in the future and in the Commissioner's view, it is too artificial to claim that the council's actions in this case do not relate to the environment.

13. Allowing members of the public rights of access to information that may allow them to understand and challenge decisions taken by public authorities that are likely to have environmental impacts is one of the main purposes of the EIR. Under regulation 2(1)(c) of the EIR, environmental information is defined as any information on (meaning relating to or concerning) an activity that is likely to affect one of the elements listed. In this case, the relevant element would be the land.

Regulation 5(1) - Was the information held?

14. Under the EIR, whether information is "held" is not simply a matter of whether the information is in the physical possession of the public authority concerned. Information may be held on behalf of the public authority by a third party. Whether this is the case or not will depend on the circumstances.
15. The Commissioner understands that in 2006 the council took over 26 plots of land, mainly disused stone quarries, by registering title in its name at the Land Registry. The Commissioner understands that after this registration the plots were transferred to a charity, of which the council is the sole trustee. The charity concerned was established on 6 January 2009. Its purpose, according to the council, is to promote such charitable purposes as the trustees see fit, for the general benefit of the residents of Holme Valley. The task of the charity is to determine the future of the various plots. This involves consideration of whether to sell the land, amongst other options. A website relating to the charity can be accessed, for ease of reference, at the following link:

<http://www.holmevalleylandcharity.org.uk/>

The Commissioner explained to the council that in view of the background details provided, it would be surprising if none of the information requested by the complainant was held by the council or on their behalf by third parties. The Commissioner considered the council's own retention schedule and financial regulations (available via its website), the Local Government Retention Guidelines produced by the Local Government Group of the Records Management Society of Great Britain and the Audit and Accounts Regulations 2003.

16. The Local Government Retention Guidelines have no statutory force in themselves but they do set out whether the retention period suggested results from common practice or statutory requirement. The Commissioner notes that information relevant to property acquisition and disposal is subject to a statutory requirement:

*“Conveyance
(see also Property Acquisition and Disposal)*

4.4 The process of changing ownership of land or property

Destroy 12 years after closure

E.g. Conveyancing files

Statutory

Asset Acquisition and Disposal

7.29 Management of the acquisition (by financial lease or purchase) and disposal (by sale or write off) process for assets

Destroy 6 years, if under £50,000 or 12 years if over £50,000, after all obligations/entitlements are concluded

E.g.

- Legal documents relating to the purchase/sale*
- Particulars of sale documents*
- Board of survey*
- Leases*
- Applications for leases, licences & rental revision*
- Tender documents*
- Conditions of contracts*
- Certificates of approval*

Statutory

*Property Acquisition and Disposal
[see also Conveyance]*

8.2 Management of the acquisition (by financial lease or purchase) process for real property (see also 21.1.0)

E.g Plans Common practice

8.3 Management of the disposal (by sale or write off) process for real property

*Destroy 15 years after all obligations/entitlements are concluded.
Other material re major/significant properties to Archivist for review*

E.g

- Legal documents relating to the sale*
- Particulars of sale documents*
- Board of Survey*
- Tender documents*
- Conditions of contracts"*

In view of the above, the Commissioner believes that it would be a matter of some concern if the authority did not hold this type of information.

17. The Commissioner also explained to the council that he would assume that at some point, in order to acquire the properties, lawyers would have been instructed, either internally or externally. In that scenario, the Commissioner would expect that the lawyers would have kept a file and even if that file is held by external lawyers, most of the information would be the property of the client and at least in part held on behalf of the council.
18. The Commissioner also noted that The Holme Valley Parish Council Financial Regulations provide the following:

"Assets and Liabilities

14.1 The Clerk shall make appropriate arrangements for the custody of all title deeds of properties or other assets owned by the Council. The RFO shall ensure a record is maintained of all such assets owned by the Council recording the location, extent, plan, reference, purchase details, nature of the interest, tenancies granted, rents payable and purpose for which held in accordance with regulation 5(3)(b) of the Accounts and Audit Regulations 2003.

5(3) The accounting records determined by the responsible financial officer on behalf of a relevant body in accordance with paragraph (1)(a) shall in particular contain—

.....

(b)a record of the assets and liabilities of the body;...

4.4 The RFO shall be responsible for maintaining an adequate and effective system of internal audit of the Council's accounting, financial and other operations in accordance with regulation 6 of the Accounts and Audit Regulations 2003.

6. A relevant body shall maintain an adequate and effective system of internal audit of its accounting records and of its system of internal control in accordance with the proper internal audit practices, and any officer or member of that body shall, if the body requires—

(a) make available such documents of the body which relate to its accounting and other records as appear to that body to be necessary for the purpose of the audit; and

(b) supply the body with such information and explanation as that body considers necessary for that purpose.)

Any officer or Member of the Council shall, if the RFO or Internal Auditor requires, make available such documents of the Council which appear to the RFO or Internal Auditor to be necessary for the purpose of the audit and shall supply the RFO or Internal Auditor with such information and explanation as the RFO or Internal Auditor considers necessary for that purpose”.

19. Therefore, if the acquired properties are still owned by the authority its own financial rules provide that information relating to, for example, title, purchase details and nature of interest must be maintained and there would need to be access to documentation for audit purposes. Furthermore, the council's own retention schedule provides that:

“Title deeds, leases, Agreements, contracts” are to be held indefinitely for the reasons of “Audit, Management” and “General correspondence... is to be kept for a minimum of 2 years. If related to audit matters, correspondence should be kept for the appropriate period specified in the schedule.”

20. In response to the Commissioner's concerns, the council told the Commissioner that all files relating to this matter are now held by the land charity at its own separate premises and it provided some limited background information. The council said that legal advice was provided by a particular law firm prior to the establishment of the land charity however this firm no longer holds any files relating to the matter. The council said that once the scheme was established, a local solicitor was appointed. The council was not specific about whether the relevant information would have been transferred to the new appointed solicitor, however, in the absence of any specific reference to the information having been destroyed, the Commissioner would assume that this was the case.

21. The council said that to comply with charities legislation, the land charity's accounts are independently examined (not audited) on an

annual basis. The council also referred to its auditors and said that no concerns had been raised regarding possible non-compliance with the council's own regulations.

22. The Commissioner considered the council's response and overall, he found that it did not adequately address the concerns raised by the Commissioner. It is clear that the council's response is based on what is, in the Commissioner's view, an erroneous belief that despite the fact that it took ownership of this land in the name of the council, the setting up of the land charity effectively means that the council is somehow largely "divorced" from the matter and therefore none of the information about the council's land acquisition falls to be considered under the terms of the EIR or the FOIA. This point of view has impeded the Commissioner's attempts to gain a full understanding of the extent of the relevant information that may be held by solicitors or the land charity on behalf of the council.
23. The council has repeatedly referred to the Commissioner's generally established line on public authorities acting as charitable trustees. For ease of reference, this line is explained here:

<http://www.ico.gov.uk/foikb/PolicyLines/FOIPolicyCostsforretrievinginformationfromdeepstorage.htm>

The Commissioner would like to highlight that the line above is intended to give a general overview of the Commissioner's position in relation to public authorities acting in their roles as charitable trustees. Any formal decision by the Commissioner will include a fuller consideration of the specific circumstances of the case and general guidance may not be particularly relevant. The Commissioner considered this was the case in this matter and that the authority had not given adequate consideration to the circumstances. The line above refers to actions taken by the council whilst acting in its role as charitable trustee. It is clear from this case that when the council took ownership of the land, it was acting in its own right. The fact that the charity was created at a later date only adds weight to this argument. In the Commissioner's view, information relating to the acquisition of this land by the council is, on the balance of probabilities, held by the council on behalf of other parties, such as the land charity and possibly a firm of solicitors.

Other matters

24. The Commissioner notes that in this case the council did not act in accordance with the Commissioner's advice on undertaking internal

reviews which states that an internal review should be undertaken prompted and in any event, should not take longer than 20 working days unless exceptional circumstances are involved. The Commissioner trusts that the council will consider the guidance below and make appropriate improvements in the future:

http://www.ico.gov.uk/for_organisations/freedom_of_information/guide/refusing_a_request.aspx

Right of appeal

25. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

26. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
27. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Andrew White
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