

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

Date: 30 November 2017

Public Authority: Bolton Council

Address: Town Hall
Bolton
BL1 1RU

Decision (including any steps ordered)

1. The complainant has requested information relating to decisions made by Bolton Council with regard to Leverhulme Park charitable land.
2. The Commissioner's decision is that Bolton Council is correct to assert that it does not hold the requested information in accordance with the EIR. However, initially the Council relied upon the FOIA and did not respond to the request in accordance with the relevant legislation. The Commissioner finds that Bolton Council breached regulation 14(2) of the EIR because it did not provide a refusal notice within 20 working days.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 17 December 2016 the complainant wrote to Bolton Council ('the Council') and requested information in the following terms:

"On review of the last ten years of annual returns for the charity 'Leverhulme Park' it has come to light that the body corporate Bolton Council is the only trustee. Council Leader Clifford Morris has acted as an official spokesperson for the charity, proclaiming that a vote was put to 'them' the Trustees and they have approved a 2016 application to build planning application 97259/16. Understandably the confusion over who 'them' are needs to be rectified with immediate effect. I require the following release of information.

[1] - *The minutes of the formal meeting of the Trustee - meaning a decision in Council, the minutes of which would form the necessary authority to act and make the change which would allow the construction of planning application 97259/16.*

[2] - *The financial records state zero income for the charity yet multiple organizations frequently make payments to Bolton Council via maintenance fees for use of the charity land protected under the covenant of 'Leverhulme Park'. These payments have not been recorded in any of the annual returns.*

[3] - *Meetings, minutes or Emails of communication in which a proposed land swap was discussed over the long lane section of Leverhulme Park to allow the construction of planning application 97259/16. Any communication from Bolton Council to the Charity Commission in which this matter is discussed.*

On 20th February 2008 the Charity Commission authorized the Council, as trustee of the charity, to dispose of land consisting of approximately 6414 square metres (and the building situated on that land) situated at the east of Leverhulme Park and forming part of the land comprised in a conveyance dated 14th April 1916 made between John Charles Bradshaw of the first part and Alexander Crawford, William Bradshaw and Edmund Sydney Pollock Haynes of the second part (as shown on Plan 1 attached to this email) in exchange for land consisting of approximately 9399 square metres situated at the east of Leverhulme Park, comprised in a conveyance dated 8th September 1932 made between Jessie Scowcroft and Claire Sherwood Scowcroft of the first part and the Mayor Aldermen and Burgesses of the County Borough of Bolton of the second part (as shown on Plan 2 attached to this email) even though this was a disposal to a connected person (as defined in schedule 5 to the Charities Act 1993). The replacement land is to be held on the trusts set out in the conveyance dated 14th April 1916.

[4] - *The minutes of the formal meeting of the Trustee - meaning a decision in Council, the minutes of which would form the necessary authority to act and make the change which would allow the approval of this 2008 land swap.*

[5] - *A detailed map with boundaries clearly defined showing the location of the new land protected under the covenant and the location of the old land that was exchanged in the 2008 land swap.*

[6] - *All minutes, the governing document and any relevant information held by Bolton Council the corporate body as the Trustee in protection of the charity 'Leverhulme Park'.*

Should Bolton Council choose to claim my request is vexatious I will pursue this matter as an intentional act to prevent damaging information from being released to the public."

5. He added a further component to the request on the 18 December 2016:

"As part of this FOI request I also require the following:

[7] - *The minutes of the formal meeting of the Trustee - meaning a decision in Council, the minutes of which would form the necessary authority to act and make the change which allowed the approval of the following construction, PREMIER FIVES FOOTBALL LEVERHULME PARK, LONG LANE, BOLTON, BL2 6EB."*

6. The Council responded on 19 January 2017. It stated that for [1], [3] and [7] the information does not exist; it cited FOIA section 21 for [4] and [6]; it provided information for [5]; and no response was given on [2] as this was considered a statement rather than a request.
7. Following an internal review the Council wrote to the complainant on 30 May 2017 and maintained its original position on [1], [3],[4]and [7]. The Council stated that no information was held at the time of the request in relation to [2], and revised its position on [6] to provide some information but also cited FOIA section 21 for the remainder.

Scope of the case

8. The complainant contacted the Commissioner on 30 May 2017 to complain about the way his request for information had been handled and specifically that the Council refused to provide the requested documents.
9. After communication with the Commissioner, the Council agreed that the request related to matters which would or could alter the state of the land. It therefore reconsidered request under the EIR.
10. The Council stated that *"the focus of the questions asked by the requester is very firmly on the decisions made by the Council as a trustee of the charity rather than in its role as a local authority"* and therefore the information is not held for the purposes of the EIR.
11. As such the Council's revised position is that it does not hold the information and therefore regulation 12(4)(a) applies.

12. The scope of the case is to consider whether the Council holds the information relating to the requests annotated [1], [2], [3], [4], [6] and [7] above.

Reasons for decision

Background

13. In response to a separate request the Council advised that it disclosed a report of the Director of Place, titled "*Leverhulme Park and land at Long Lane, Darcy Lever*" ('the Report') dated 10 July 2017. The Report explains the charitable status and management of Leverhulme Park ('the Park') and seeks to clarify how income and expenditure are treated for the Park.
14. The Report confirms that the Park was registered as a charity by the Council in 1963 and remains a registered charity with the Charity Commission.
15. The Report provides detail of the boundary of charitable land within the Park including a change made in retrospect of the Council building a community and leisure centre on the land. Regarding this change the Council states "*Whilst Lord Leverhulme's consent was obtained, the Charity Commission was overlooked. However, once this mistake came to light the Charity Commission was contacted and an agreement reached on a way forward.*" This agreement was to exchange an equivalent amount of non-charitable land at the Park with the charitable land affected. The land upon which the community leisure building is located is therefore no longer charitable land.
16. The Report confirms that the Council has completed zero annual returns to the Charity Commission for a number of years. It states that expenditure exceeds income received for the Park and that the Council funds the difference. The Report provides a yearly figure of expenditure paid by the Council in this respect from 2012/13 to 2016/17.

Regulation 3(2)(a) / 12(4)(a)

17. The EIR gives members of the public the right to access environmental information. Regulation 3(2)(a) says that information is held by a public authority if the information is in the authority's possession and has been produced or received by the authority. Regulation 12(4)(a) of the EIR clarifies that a public authority is not required to disclose information to the extent that it did not hold the information when an applicant's request was received.

18. The Council considers that there are two principal factors in support of its position that the requested information is not held. Firstly, it proposes that information relating to the charitable land at the Park is held in its capacity as charity trustee and secondly that no related information is held for Council purposes. Additionally the Council provides reasoning as to why information for a number of the requests does not exist.
19. The Commissioner's role in this particular case is to decide whether the Council would in principle under the EIR hold any or all of the requested information at the time the request was made. In her guidance "*Information held by a public authority for the purposes of the EIR*"¹ the Commissioner describes circumstances when information is not held for its own purpose under the EIR:

"There are circumstances when a public authority 'holds' information relating to its role in another capacity, which means that it is not held to any extent for its own purposes under the EIR. For example, this will apply when a public authority acts as a charity trustee, as in the case of a local authority that holds assets such as playing fields and community halls in trust for the benefit of local residents. Information held in such a capacity is not held, to any extent, by the local authority for its own purposes as a public authority under the EIR, because, under charities' law, trustees must act only on behalf of the charity and not in their own interests."

20. The guidance further clarifies:

"this does not mean that no information about the charity or the authority's role as trustee can be held for the purposes of the EIR. For example, the authority may hold some of this information for its own purposes, and this will be determined on a case by case basis. Authorities are therefore advised to make a clear distinction between information held on behalf of a charity and information held for their own purposes"

21. Considering that the Park is a registered charity and therefore governed by charities law, and the engagement of Charity Commission relating to changes to the charitable land and the submission of annual returns, the

¹ https://ico.org.uk/media/for-organisations/documents/1640/information_held_for_the_purposes_of_eir.pdf

Commissioner is satisfied that the Council will hold some information in relation to its capacity as trustee of the charity and not for its own purposes under the EIR.

22. The Commissioner must therefore go on to determine whether the Council holds any information for its own purposes that falls within the scope of this request. Where there is some dispute between the amount of information identified by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions, applies the civil standard of the balance of probabilities.
23. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request at the time of the request.

Items 1, 2, and 3 of the request

24. Item [1] relates to the submission of a planning application for a cycle track at Leverhulme Park. The Council has advised the Commissioner that *"if any minutes which met the description in the request did exist, they would detail a decision of the charity not the Council"*. The Council goes on to explain that in any case the information would not exist because *"the submission of a planning application is only the first part of any construction process for which no authority is required from the party responsible for the land."*
25. Regarding item [2] the Council states that *"The annual returns of the Leverhulme Park charity would contain information relating to the financial activities of that body not the Council, and therefore if created would not be held by the Council for its own purposes."* In the Report the Council subsequently provides further information regarding income and expenditure. The Council states that the information in the Report, dated 10 July 2017, was subsequently compiled and not available at the time of the request.
26. The Report provides the reason for the land swap referred to in item [3] as being made in retrospect of the Council building a community and leisure centre on the charitable land. It explains that planning application 97259/16 did not require a land swap, the Council therefore advises that the requested information does not exist.
27. The Commissioner is satisfied that the on the balance of probabilities the Council is unlikely to hold any relevant information for items 1, 2, and 3 of the request. Additionally the requested information is in relation to its capacity as a trustee and not its own purposes under the EIR.

Items 4, 6, and 7 of the request

28. The Council considers that these items relate to information held in its role as charity trustee and therefore are not held for the purpose of the EIR. However it also explains that historically decisions have been taken by the relevant member during the course of meetings considering other Council business and that *"any decisions taken in the capacity of trustee were recorded in the general minutes, rather than any separate trustee minutes"*. Following discussions with the Charity Commission the Council confirms that its future practice will be to record information relating to the Council as trustee in separate minutes.
29. The Council explains that its minutes are available either online or in the paper archives for later than 2005/6. Historical information is therefore publically available and search terms can be used to look for electronic minutes. These may contain information relating to the Park due to the previous practice of combining minutes. However, as is the case with item 4, some supporting documents will not be available and the Council refers back to its position that this information is not held for the purposes of the EIR.
30. The Commissioner is satisfied that any documented decisions in relation to items 4,6 and 7 relate to information held in the Council's role as charity trustee and not for the purposes of the EIR. Although the historical minutes are combined with general Council minutes the Commissioner finds that there is no onus on the Council, under the EIR, to locate and provide these minutes.
31. Regulation 12(4)(a) of the EIR is technically subject to a public interest test but the Commissioner considers conducting a test to be a futile exercise where, as here, she is satisfied that the public authority did not hold the requested information at the time of the request. Therefore the Commissioner has not gone on to consider the public interest balancing test.

Commissioner's decision

32. The Council's submissions confirmed that that the focus of the request is in relation to the decisions made by the Council as a trustee of the charity rather than in its role as a local authority. Additionally for items [1], [2] and [3] it provides plausible arguments as to why the information does not exist. Therefore the Commissioner is satisfied that on the balance of probabilities the Council does not hold information relevant to the complainants request for the purposes of the EIR. No steps are required.

Regulation 14(2)

24. The Council provided an FOIA response to the request and maintained its reliance on the FOIA in the review. After prompting by the Commissioner the Council revised its position to rely upon the EIR.
33. A refusal to provide information must comply with the obligations under regulation 14(2) of the EIR. Regulation 14(2) provides that, "*The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request*". In this case, the authority did not respond to the request in accordance with the relevant legislation and therefore failed to provide a refusal notice within 20 working days.
34. The Commissioner therefore finds that the Council breached regulation 14(2).

Right of appeal

35. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

36. 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.
37. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF