

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 August 2017

Public Authority: Kirklees Metropolitan Council
Address: PO Box B24
Civic Centre 3
Market Street
Huddersfield
HD1 1WG

Decision (including any steps ordered)

1. The complainant has requested correspondence between Kirklees Metropolitan Council and the Charities Commission regarding Clayton Swimming Bath and Recreation Centre. The Commissioner's decision is that the requested information is not held by Kirklees Metropolitan Council under section 1(1)(a) of the FOIA as under section 3(2)(a) the information is only held on behalf of another person. The Commissioner does not require the public authority to take any steps.

Request and response

2. On 9 December 2016, the complainant wrote to Kirklees Metropolitan Council ('the council') and requested information in the following terms:

"Copies of all correspondence, e-mails and documents exchanged between the Council and the Charities Commission, regarding the workings, operations, complaints etc. in connection with Clayton Swimming Bath and Recreation Centre - Charity No. 523548 (a charity whose trustees are Kirklees Council, with responsibility for day to day management passed to Kirklees Council cabinet members), over the last six months."
3. The council responded on 12 January 2017. It said that in so far as it holds information as a result of it being a corporate trustee of a charitable organisation, it does not hold this information for the purposes of section 3(2)(a) of the Freedom of Information Act 2000.

However, it disclosed the majority of the requested information, except an independent surveyors report, outside of the FOIA.

4. On 13 January 2017, the complainant expressed dissatisfaction at the response and requested a copy of the report. He then requested an internal review on 16 January 2017.
5. The council provided an internal review on 10 February 2017 in which it maintained its original position.

Scope of the case

6. The complainant contacted the Commissioner on 11 February 2017 to complain about the way his request for information had been handled.
7. The Commissioner has considered whether the information within the scope of the request is held by the council as a public authority for the purposes of the FOIA.

Reasons for decision

Section 3(2) – information held by a public authority

8. Section 1 of FOIA states that any person making a request for information is entitled to be told whether the public authority holds the information requested and, if held, to be provided with it.
9. Section 3(2) sets out the criteria for establishing if information is held for the purposes of FOIA:

“For the purposes of this Act, information is held by a public authority if

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(a) it is held by the authority, otherwise than on behalf of another person, or

(b) it is held by another person on behalf of the authority”

10. The Commissioner’s guidance on “Information held by a public authority for the purposes of the FOIA”¹ states that when a public authority holds
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¹ https://ico.org.uk/media/for-organisations/documents/1148/information_held_by_a_public_authority_for_purposes_of_foia.pdf

information solely on behalf of another person it is not held for the purposes of the FOIA and that each case needs to be considered according to the specific circumstances.

11. The Commissioner asked the council to provide a detailed explanation as to on what basis it has concluded that, although it physically holds the information of the nature requested, it does not hold this information for the purposes of the FOIA – i.e. on what basis has the council concluded that although it physically holds the information it is not needed for any of the council's own functions.
12. The council explained that it is the trustee of the Clayton Swimming Baths and Recreation Centre – a Charity No. 523548, and that the information sought by the request is information held by the council in its capacity of a trustee.
13. It referred to the aforementioned guidance which gives an illustrative example of the situation of a local authority acting as a trustee of a charitable trust and holding information for that purpose:

“Charity trustees – public authorities, usually local authorities, can be trustees of charitable trusts. For example, assets such as playing fields and community halls may be held by a local authority on trust for the benefit of local residents. As trustees must act only in the best interests of the charity, and not in their own interests, this means that any information held by an authority only in its capacity as a trustee is not held by it for the purposes of FOIA (in accordance with section 3(2)(a) it is held on behalf of the trust). Nevertheless, an authority may hold information about the charitable trust for its own purposes. For example, the charity may make a report to the authority, or the authority may provide administrative support to the charity and hold information about this. It is therefore important to consider requests for information about such a charity on a case by case basis, and it is recommended that authorities should make a clear distinction between information held solely on behalf of a charity and their own information.”

14. The council said that it is satisfied that the information sought falls squarely within the example contained in the guidance as information that is not held by the council for the purposes of FOIA as it is held solely in its capacity as trustee. It said that the information consists of correspondence between the council and the Charity Commission which is clearly created and held in the council's capacity as trustee and not for any other purpose. It explained that the report which was withheld from the information provided to the complainant outside of the FOIA regime, and as a matter of its discretion, was obtained by the council in its capacity as trustee and not for any other purpose.

15. The Commissioner has considered whether, in this case, the council has any reason to hold the requested information for its own purposes. She asked the council questions relating to the nature of the relationship between the council and the charity, whether the council has any responsibility/function regarding the charity or any interest in the land that was subject to the valuation, the support provided to the charity, access to and ownership of the requested information, how enquiries about the information are dealt with, and whether costs arising from holding the information are included in the council's budget.
16. The council said that it has, in its local authority capacity, taken a lease from the council as corporate trustee of the Charity as it is the local authority which is responsible for leisure provision in the borough. It explained that the council, as local authority, intends to grant an underlease to Kirklees Active Leisure, a charitable organisation that operates all of the council's leisure facilities. It said that these proposals are following the charity having taken independent valuation advice and are also in consultation and with the approval of the Charity Commission. It said that there is no relationship between the council and the charity, as they are separate legal entities, other than one of landlord and tenant. Regarding having any interest in the land that was the subject of the valuation, the council said that it does not have any interest in its capacity as local authority, but does in its capacity of corporate trustee.
17. In relation to clerical and administrative support provided to the charity, the council confirmed that it does provide support, but not pursuant to any legal requirement.
18. The council said that access to the information requested is controlled by officers acting exclusively in the interests of the council as corporate trustee of the charity. It also said that deciding what information is created, retained, altered or deleted are decisions of the corporate trustee and officers who advise it.
19. In relation to whether the council itself deals with enquiries about the information, the council explained that only insofar as this information request is concerned as the request was made to the council's FOI Team which meant council officers had to approach the officers representing the corporate trustee to find the information that the applicant and the Commissioner are seeking. It said that other than in such circumstances, the council does not deal with enquiries about the information requested.
20. With regards to whether costs arising from holding the information are included in the council's budget, the council said that officer time is charged to the charity itself but the council does not make a specific charge to the charity for storing the records.

21. The Commissioner also asked the council to comment on the following:
- The complainant has asserted that the independent surveyors report was paid for by the council. He has said that he attended a meeting with the Chair of the Trustees and a second trustee (both Kirklees Councillors) and the Legal Officer for Kirklees and that when asked the direct question of 'who paid for the report?' a very clear indication was given that it was the council who had both instructed and paid for the report, not the charity. The complainant therefore believes that the report is the property of the council and subject to the FOIA. He also informed that Commissioner that he has examined the charity's accounts and can find no clear entry for them having paid for the report.
 - The complainant has also asserted that the council's Legal Officer indicated that the council would be prepared to release information from the report (including the valuation of the land), provided that the land-agent for the developer wishing to buy the land agreed to it, which the land-agent apparently did not agree to and therefore the council's willingness to release information is determined by a developer (who could have a vested interest in keeping the price of the land a secret, especially if the developer is getting it for a very low price). He has asserted that there would be no advantage to the council in keeping the valuation of the land a secret and certainly it would not be in the 'interests of the charity' to do so.
22. In relation to who paid for the independent surveyors report, the council explained that a Senior Legal Officer at the council, who also acts independently for the charity when required, was present at the meeting the complainant referred to but he cannot recollect for certain whether or not the statement that the council had both instructed and paid for the report was made. However, the council accepts that it may be possible that officers may have been under the misapprehension that the council had commissioned the report and that the charity would pay for it, but subsequent enquiries have determined that the council did not commission the report. The council referred the Commissioner to the content of the report to demonstrate that the independent surveyor was instructed by the trustee. It explained that the cost of the report will be paid for by the developer, not the council or the charity and that this is perhaps the reason that the complainant is unable to find a clear entry in the charity's accounts in this regard.
23. In relation to there being no advantage to the council, and it not being in the interests of the charity, to keep the price of the land a secret, the council said that when a transaction is being negotiated it is extremely common that the details of it are kept between the parties so as to protect commercial sensitivity and keep the terms of the deal secure. It said that its Legal Officer did indicate that the council, in its capacity as trustee of the charity, would be willing to release a copy of the report if

the other parties were agreeable to do so. The council explained that the Legal Officer emailed a colleague of the complainant on 25 August 2016 and said 'I also managed to speak to Portman Land who affirmed that Redrow do not want the price releasing as to make any sense they would have to release the data behind this which is commercially sensitive and may give an unfair commercial advantage, not only to their competitors but to those members of the public looking to buy a house from them'. The council explained that this is the reason that the developer has a vested interest, not that they are getting the land for a very low price. The council agreed that there is no advantage to the council in keeping the valuation of the land secret. However, it explained that the advantage is with the corporate trustee, and it is in the best interests of the charity, because if the information was released and the public gained an unfair advantage, as outlined above, the scheme may no longer be viable from the developer's point of view and they may withdraw, meaning the charity gets nothing.

24. The Commissioner has considered the factors in the aforementioned guidance that would indicate that the requested information is held by the council solely on behalf of another person (the charity) and concludes that:

- the council, as the local authority, has no access to, use for, or interest in the information;
- access to the information is controlled by the charity;
- the council, as the local authority, does not provide any direct assistance at its own discretion in creating, recording, filing or removing the information;
- the council, as the local authority, is merely providing storage facilities, whether physical or electronic.
- the council, as the local authority, does not deal with enquiries about the information; and
- costs arising from holding the information are not included in the council's overall budget.

25. Given that the council, as local authority, is responsible for leisure provision in the borough, the Commissioner can understand why the complainant believes that the requested information should be subject to the FOIA. However, the Commissioner understands that the role of the council officers as corporate trustees of the charity is separate from the role of local authority officers. Having considered the above factors, and the arguments presented by the complainant and the council

relating to who paid for the independent surveyors report and whether there is any advantage to the council, or it being in the interests of the charity, to keep the price of the land a secret, the Commissioner is satisfied that in this case the requested information is not held under section 1(1)(a) of the FOIA as under section 3(2)(a) the information is only held on behalf of another person, that being the charity.

Right of appeal

26. 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

27. 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.
28. 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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