



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2017/0194

**Heard at Leeds Magistrates Court
On 23rd. January, 2018**

Before

Judge

David Farrer Q.C.

and

Tribunal members

Anne Chafer

and

Malcolm Clarke

Between

Ian Hutchinson

Appellant

and

The Information Commissioner (“The ICO”)

First Respondent

and
Kirklees Metropolitan Council (Kirklees)

Second Respondent

Mr. Hutchinson appeared in person.

Neither Respondent appeared. Both made written submissions.

In this Decision -

“FOIA” is the Freedom of Information Act, 2000

“The EIR” are the Environmental Information Regulations, 2004

“The DN” is the ICO’s Decision Notice.

Decision and Reasons

The Tribunal finds that Kirklees held the requested information at all material times. It orders Kirklees, within 35 days of the publication of this Decision, to respond to Mr. Hutchinson’s request, in so far as the requested information has not been disclosed, on the basis of the finding that it held and holds the requested information

1. Clayton Swimming Bath and Recreation Centre is a facility within Kirklees’ area, which is owned and run by a registered charitable trust (“the Trust”). The sole trustee is Kirklees, which took over the facility when it faced financial problems.
2. Kirklees holds the assets of the Trust as the corporate trustee. They do not form part of any general inventory of council property but are accounted for quite separately.

3. All the administrative work involved in running the Trust is carried out by designated council officers, whose time is charged to the Trust. The board of the Trust consists of cabinet members of Kirklees. Though referred to as “trustees” at certain points in the papers, the officers, like the councillors serving on the board are, of course, agents of the trustee, Kirklees. They hold infrequent meetings.
4. The routine management of the swimming pool is performed by Kirklees Active Leisure Ltd.(“KLA”), which was formed by Kirklees to manage all its leisure facilities. Kirklees, as trustee, granted a lease of the Clayton swimming pool to Kirklees the local authority. The DN records an intention to grant a sub - lease of the facility to KLA.
5. The charity giving rise to the Trust was established by miners about fifty years ago and the swimming pool is evidently open to the public without restriction. The Tribunal has not seen the trust deed.
6. The Trust owns land which a developer wishes to purchase for the purpose of access to land which it intends to develop. Such plots are often referred to as “Ransom strips”, a term implying an enhanced value resulting from a strategic location. A valuation of the land was obtained by Kirklees from a surveyor in the form of a report.
7. There was widespread concern, said Mr. Hutchinson, that the ransom strip would be sold at an undervalue by Kirklees. There had been a similar sale of land owned by the Trust to another developer several years ago, which provoked similar fears.

8. On 9th. December, 2016, Mr. Hutchinson, a Clayton resident, requested from Kirklees a wide range of documents relating to the Clayton Baths contained in exchanges with the Charities Commission (“the Commission”), the regulator of the running of registered charities. Kirklees provided in due course everything that he requested, save the report. The decision to disclose the other material voluntarily was plainly sensible and in no way weakens Kirklees position in relation to the withholding of the report.
9. In its response, and consistently thereafter, Kirklees has stated that it received the disputed report, not as a local authority but as corporate trustee of the Trust. Hence it was not held for the purposes of Kirklees’ functions as a local authority and therefore not held within the meaning of EIR Reg. 3(2)(a). Had FOIA been the governing regime, the information would not have been held by Kirklees as defined in s.3(2)(a)
10. Mr. Hutchinson complained to the ICO following Kirklees’ refusal to disclose.
11. Following the usual investigation, she upheld Kirklees’ contention as to its distinct roles as local authority and trustee. She referred to her guidance to public authorities acting as charitable trustees, which Kirklees had quoted when asked to respond to the complaint.
12. Mr. Hutchinson appealed.

The appeal

13. Kirklees was joined as a respondent and made written submissions supporting and developing the ICO's case.

14. The first issue to resolve is the statutory regime applicable to this appeal. The DN assumed that FOIA governed the request. Both respondents now submit that the EIR 2004 applies. We agree with the revised submission.

15. Extracting the relevant terms from the definition of "environmental information" in Reg. 2(1)(a), the report is a plan affecting "land" and "the landscape", in that it provides advice pursuant to s.119 of the Charities Act, 2011, as to the price at which the plan to sell the strip could be carried out in accordance with the duties of a trustee. There are, doubtless, other combinations of terms within Reg. 2(1) under which the report would qualify as environmental information.

The law

16. EIR 12(4)(a) permits a public authority to refuse to disclose information "to the extent that -
(a) it does not hold that information when the applicant's request is received".

EIR 3(2)(a) provides that "*environmental information is held by a public authority if the information –*

(a) is in the authority's possession and has been produced or received by the authority :"

17. It is accepted that it was in Kirklees' possession. The issue is whether it was "received" by Kirklees. That is probably the same question as arises under FOIA s.3(2)(a) which reads – "*information is held by a public*

authority if it is held by the authority otherwise than on behalf of another person.”

“Received” must mean more than simply accepting physical control since the alternative requirements which follow “and” would otherwise be superfluous. (see also *Holland v ICO and University of Cambridge UKUT 260 (AAC) at §45*).

18. Kirklees’ case is that it did not receive the report in the performance of its functions as a public authority but in a quite distinct role as corporate trustee of a charitable trust. Put in FOIA terms, had that regime applied, Kirklees held the report on behalf of the corporate trustee, namely Kirklees.

19. We were provided with an impressive body of evidence by Mr. Hutchinson designed to show that all the work that the Trust performed was carried out by the staff of the Council and that the two bodies’ involvement with the business of the swimming pool and the recreational facility could not in practice be disentangled.

20. That, however, may not take the case very far because a trust can only function through the agency of human persons and Kirklees’ answer to any such demonstration is “They were operating in their roles as agents of the Trustee, not the Council”.

21. On the other hand, the fact that the trust’s assets and income were held and accounted for quite separately from the assets and income of Kirklees is also of limited relevance. No District Auditor would, we suppose, tolerate any mixing of funds, whatever the relationship between the roles of public authority and trustee.

22. The ICO's FOIA Guidance to public authorities acting as trustees of a charity, quoted at §13 of the DN, is an important factor when determining the question whether Kirklees "received" the report for the purpose of EIR 3(2)(a). Having acknowledged that local authorities can be charitable trustees holding assets for the benefit of local residents, the Guidance continues -

"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 s.3(2)(a) it is held on behalf of the trust)."

It concludes with a further recommendation that the authority make a clear distinction between the two classes of information.

23. With respect, the Guidance contains a non sequitur. The duty of a trustee to act only in the best interests of the trust when dealing with the affairs of the trust does not mean that the local authority as trustee is performing functions distinct from the functions of a local authority. The discharge of its functions by a local authority may require its responsible officer, when dealing with trust business, to act in the interests of the Trust rather than of the authority. Such a switch of priorities does not imply that he is no longer performing a function of the local authority and presents no greater problem than for a human trustee, who must change the focus of interests when switching from his/her personal affairs to those of the trust.

24. The Guidance assumes what Kirklees needs to prove, namely that the requested information is *"information held by an authority only in its*

capacity as a trustee". That ignores the possibility that, in exercising its functions as a trustee, Kirklees is also exercising its functions as a local authority.

25. Treating the Trust as "another person" for the purpose of FOIA s.3(2)(a), as in the quoted guidance is misleading. A trust is not a person in law. The only possible other person is Kirklees acting as trustee.

26. Local authority business involves both the discharge of statutory duties and the exercise of statutory powers. The Local Government Act, 1972 treats both as functions of the local authority. It makes no distinction between them.

27. Section 139 expressly confirms the power of a local authority to receive assets and act as a charitable charity, save in respect of ecclesiastical trusts and those set up for the relief of poverty. It reads –

"139.— Acceptance of gifts of property.

(1) Subject to the provisions of this section a local authority may accept, hold and administer—

(a) for the purpose of discharging any of their functions, gifts of property, whether real or personal, made for that purpose; or

(b) for the benefit of the inhabitants of their area or of some part of it, gifts made for that purpose;

and may execute any work (including works of maintenance or improvement) incidental to or consequential on the exercise of the powers conferred by this section.

(2) Where any such work is executed in connection with a gift made

for the benefit of the inhabitants of the area of a local authority or of some part of that area, the cost of executing the work shall be added to any expenditure under [section 137](#) above in computing the limit imposed on that expenditure by [subsection \(4\)](#) of that section.

(3) This section shall not authorise the acceptance by a local authority of property which, when accepted, would be held in trust for an ecclesiastical charity or for a charity for the relief of poverty.

(4) Nothing in this section shall affect any powers exercisable by a local authority under or by virtue of the [Education Act 1996](#)

28. Subsection(1)(a) refers to the acceptance by a local authority, evidently as trustee, of real or personal property for use in the discharge of its functions. The Clayton Baths trust deed was not exhibited so that we have no direct evidence as to whether the charitable purposes fell within (1)(a), (1)(b) or both. Paragraph 3 of the minutes of the trustee meeting of 17th. August, 2015 apparently refers to expenditure on Scissett Baths funded jointly by Kirklees money and the funds of the Trust, which would suggest that subsection (1)(a) applied. Whether or not this is so, s.139 indicates that there is no clear division between Kirklees' functions as trustee and its other functions. If a local authority chooses to act as trustee of a charitable trust, the performance of its duties as trustee is one of its functions as a local authority.

29. Local authorities are not hybrid authorities, in respect of which there are derogations in Schedule 1 to FOIA from the application of FOIA in respect of certain categories of information. If information is held by Kirklees as a charitable trustee, then it is held for FOIA purposes because functions as a trustee are part of its functions as a local authority. The information here is environmental information but it may be helpful to have regard to FOIA when looking at the broader picture because it will

govern much of the information held by a local authority acting as a charitable trustee.

30. This analysis accords with common sense, at least in the context of this appeal. The provision of recreational facilities is an important part of a local authority's duties. There is a strong public interest in transparency in matters relating to their administration without the need for reference to the Charity Commission. As viewed by a local resident, running of the Trust by the Council is indistinguishable from running by the Board of the charity, as Mr. Hutchinson's evidence indicates. The trust assets, where the local authority is the trustee, will very often be of the same kind as in this appeal. By their nature, charitable trusts are concerned with matters of public rather than private interest.

31. Of course, a decision that trust documents are subject to FOIA is not an end of the matter. There will be cases, no doubt, where issues of commercial sensitivity or other features engage FOIA Part II exemptions or corresponding EIR exceptions..

32. We conclude, however, that a local authority's function as a charitable trustee is one of its many functions arising from the exercise of statutory powers and that such a finding is demonstrated by its inclusion in s.139 of the Local Government Act, 1972. That it operates as a distinct legal person in exercising this function is immaterial.

33. This appeal is therefore allowed. Kirklees must, within 35 days of the publication of this decision, reply to Mr. Hutchinson's request, so far as it applies to the report, in accordance with our finding that it holds this information.

34. Our finding is unanimous.

David Farrer QC,
Tribunal Judge
29th. January, 2018

Date Promulgated: 5th February 2018