

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

Decision notice

Date: 14 August 2018

Public Authority: Poplar Housing & Regeneration Community Association

Address: 167a East India Dock Road
London
E14 0EA

Decision (including any steps ordered)

1. The complainant requested information regarding properties which the organisation has earmarked for regeneration and/or disposal. He has also requested copies of contracts relating to a specific redevelopment project.
2. The Commissioner's decision is that Poplar Housing & Regeneration Community Association ("Poplar HARCA") is a public authority for the purposes of the Environmental Information Regulations ("the EIR"). As it has failed to respond to either request within 20 working days, it has therefore breached Regulation 5(2) of the EIR.
3. The Commissioner requires Poplar HARCA to take the following steps to ensure compliance with the legislation.
 - Issue a substantive response, under the EIR, to both requests.
4. Poplar HARCA 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 pursuant to section 54 of the Freedom of Information Act and may be dealt with as a contempt of court.

Request and response

5. On 26 February 2018, the complainant wrote to Poplar HARCA via the whatdotheyknow.com website and requested two sets of information in the following terms:

"Please provide a list of addresses including postcodes of empty properties owned by you which are earmarked for redevelopment or disposal. This includes empty plots of land."

and:

"Please provide, in relation to the redevelopment of Balfron Tower, and Chrisp St:

- 1. Detailed breakdown of redevelopment costs showing the value of each major contract and its nature.*
- 2. Total cost for each site.*
- 3. Copies of major contract(s) relating to redevelopment."*

6. Poplar HARCA did not acknowledge either request and had not provided a response at the date this notice was issued.

Scope of the case

7. The complainant contacted the Commissioner on 28 March 2018 to complain about the way his request for information had been handled.
8. The Complainant contacted the Commissioner on 17 April 2018 to request a decision notice considering Poplar HARCA's compliance with the EIR.
9. As it was unclear from the publically available information whether Poplar HARCA was, in fact, a public authority for the purposes of the EIR, the Commissioner sought submissions from the organisation on this point.
10. The scope of the following analysis is to determine:
- a. whether the requested information is environmental and, if so;
 - b. whether Poplar HARCA is a public authority for the purposes of the EIR and was thus obliged to respond to requests made under the Regulations and, if so;

- c. whether Poplar HARCA has complied with Regulation 5(2) of the EIR.

Reasons for decision

Is the requested information environmental?

11. Regulation 2(1) of the EIR defines environmental information as being information on:
 - (a) *the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*
 - (b) *factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*
 - (c) *measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a)...as well as measures or activities designed to protect those elements;*
12. The Commissioner has not seen the requested information but she is able to form a view on whether information relating to redevelopment or disposal of land would fall within the definition in Regulation 2(1), specifically Regulation 2(1)(c).
13. The leading authority on the approach to the definition of Regulation 2(1)(c) is the judgment of the Court of Appeal in *BEIS v IC and Henney* [2017] EWCA Civ 844. In *Henney*, the Court of Appeal made the following key points:
 - a. The definition must be construed broadly (though of course not boundlessly).
 - b. It is wrong to ask whether the information is about anything to do with the environment. The question is whether the information is about a measure that fits within regulation 2(1)(c).
 - c. "Information is 'on' a measure if it is about, relates to or concerns the measure in question."

- d. Information can be on/about more than one measure. It is wrong to ask whether it is “primarily” on the relevant measure. It is also wrong to impose “a requirement that the information in question is directly or immediately concerned with a measure which is likely to affect the environment.”
 - e. The Court of Appeal disapproved the term “bigger picture”, but held that, “identifying the measure that the disputed information is “on” may require consideration of the wider context”.
 - f. The boundaries of regulation 2(1)(c) EIR should be drawn by taking a purposive approach, by reference to Directive 2003/4/EC and the Aarhus Convention.
14. The Commissioner considers that the proposed “redevelopment or disposal” of land would be a measure “likely to affect the elements and factors referred to in (a) and (b)”. The information requested is clearly “on” that measure and therefore it falls within Regulation 2(1)(c) as environmental information.

Is Poplar HARCA a public authority for the purposes of EIR?

15. Regulation 2(2) of the EIR defines “public authorities” as:

- (a) *government departments;*
- (b) *any other public authority as defined in section 3(1) of the Act, disregarding for this purpose the exceptions in paragraph 6 of Schedule 1 to the Act, but excluding—*
 - (i) *any body or office-holder listed in Schedule 1 to the Act only in relation to information of a specified description; or*
 - (ii) *any person designated by Order under section 5 of the Act;*
- (c) *any other body or other person, that carries out functions of public administration; or*
- (d) *any other body or other person, that is under the control of a person falling within sub-paragraphs (a), (b) or (c) and—*
 - (i) *has public responsibilities relating to the environment;*
 - (ii) *exercises functions of a public nature relating to the environment; or*
 - (iii) *provides public services relating to the environment.*

16. Poplar HARCA owns and manages about 9,000 homes as well as community facilities and commercial property in east London. Poplar HARCA Ltd was originally set up with a stock transfer of local authority housing, but is constituted as a private company limited by guarantee, with 12 members (five of whom lived locally) and therefore is not 'wholly owned by the public sector'. It is a Community Benefits Society and registered with the Homes and Communities Agency (HCA) as a Registered Provider of social housing.
17. Clearly, Poplar HARCA is not a government department. Neither is it listed in Schedule 1 of the Freedom of Information Act and no order has been made under Section 5 of that Act designating Poplar HARCA as a public authority.
18. Whilst Poplar HARCA is regulated by the HCA, it does not receive funding from that body – or from Homes England. The Commissioner is satisfied that neither the HCA nor any other public authority exerts "decisive influence" on the actions of Poplar HARCA. As Poplar HARCA can therefore operate in a "generally autonomous manner" it does not qualify as a public authority under Regulation 2(2)(d).¹
19. Regulation 2(2)(c) of the EIR transposes, into UK law, Article 2(2)(b) of Directive 2003/4/EC which expands the definition of public authorities to include:

"Any natural or legal person performing public administrative functions under national law, including specific duties or services in relation to the environment."
20. In *Fish Legal v Information Commissioner & Others*, the Grand Chamber of the Court of Justice of the European Union further defined that Article:

"The second category of public authorities, defined in Article 2(2)(b) of Directive 2003/4, concerns administrative authorities defined in functional terms, namely entities, be they legal persons governed by public law or by private law, which are entrusted, under the legal regime which is applicable to them, with the performance of services of public interest, inter alia in the environmental field, and which are, for this purpose, vested with special powers beyond those which

¹ Grand Chamber of the Court of Justice of the European Union, Case C-279/12, *Fish Legal v Information Commissioner & Others*; para 68

result from the normal rules applicable in relations between persons governed by private law.”

21. The questions before the Commissioner are therefore whether Poplar HARCA is carrying out functions of public administration in relation to the environment and, if so, whether it has special powers which enable it to do so.

Functions of Public Administration

22. The Commissioner’s view is that the provision of social housing is a function of public administration. This is an approach confirmed in *R (Weaver) v London & Quadrant Housing Trust* where it was held that the provision of subsidised housing was “a function which can properly be described as governmental. Almost by definition it is the antithesis of a private commercial activity.”²
23. The Commissioner further considers that the provision of social housing is, at least in part, environmental in nature. As Poplar HARCA is a registered provider of social housing, it therefore performs functions of public administration.

Special Powers

24. *Fish Legal* sets a test for “special powers” in this regard as being those which give a body a practical advantage relative to the rules of private law.
25. Poplar HARCA has helpfully set out four powers that it has been granted by statute:
- a. Ability to apply to the County Council for land acquisition.
 - b. Ability to apply for injunctions.
 - c. Ability to receive grants and / or financial assistance
 - d. Seeking possession of short term assurance accommodation
26. The Commissioner considers that c) and d) do not qualify as special powers as they do not confer any practical advantage to Poplar HARCA over and above the ordinary rules of private law.
27. Section 34 of the Housing Associations Act 1985 gives housing associations the right, where a local authority is unwilling to acquire the

² *R (Weaver) v London & Quadrant Housing Trust* [2009] EWCA Civ 587; Para 70

land necessary for the association to build needed homes, to apply to the relevant County Council to acquire the land for that purpose.

28. Poplar HARCA has argued that this does not amount to a “special” power as it is a power to *apply* and not to *acquire*. However the Commissioner considers the substance (if not the form) of that power to be an advantage not available under private law.
29. In addition, the Commissioner considers that the power to appeal to a superior authority would create considerable leverage on behalf of a housing association asking a local housing authority to acquire land on its behalf – an advantage which would not be conferred under private law.
30. The Commissioner notes that, by virtue of being a registered provider of social housing, Poplar HARCA can apply for certain injunctions which private landlords cannot:
 - a) They can apply for an anti-social behaviour order under section 5(1)(b) of the Anti-Social Behaviour, Crime & Policing Act 2014;
 - b) They can apply for anti-social parenting orders under section 26B of the Anti-Social Behaviour Act 2003;
 - c) They can seek an order demoting a tenant from assured status under section 6A of the Housing Act 1988;
 - d) They can grant a Family Intervention Tenancy under paragraph 12ZA of Schedule 1 to the Housing Act 1988, for the purposes of provision of behaviour support services.
31. Poplar HARCA argues that these powers do not qualify as special powers because they are powers in connection with *individuals* and not *the environment*.
32. The Commissioner is not persuaded by this argument. She believes that the powers described above confer a practical advantage on Poplar HARCA relative to private law. Whilst the judgment in *Cross v Information Commissioner & Cabinet Office*³ requires that the *functions* of public administration must include environmental functions, there is no existing precedent that states that the substance of the powers themselves must be environment-related.

³ *Cross v Information Commissioner & Cabinet Office* [2016] UKUT 0153 (AAC)

33. Whilst the judgement as to whether Poplar HARCA is a public authority for the purposes of the EIR is a finely balanced one, the Commissioner notes that the principle of the EIR – and the Aarhus Convention which preceded them – was improving public access to environmental information. She is therefore keen to promote an interpretation of the EIR which gives the broadest and deepest possible access to environmental information to the general public.
34. The Commissioner therefore concludes that Poplar HARCA *is* a body which falls within the definition of a public authority under Regulation 2(2)(c) of the EIR and it is thus responsible for complying with requests made under the Regulations.

Time for compliance

35. Regulation 5(1) states that: "*a public authority that holds environmental information shall make it available on request.*"
36. Regulation 5(2) states that such information shall be made available "*as soon as possible and no later than 20 working days after the date of receipt of the request.*"
37. The Commissioner considers that the request in question constituted a valid request for information under the EIR.
38. From the evidence presented to the Commissioner in this case, it is clear that, in failing to issue a response to the request within 20 working days, Poplar HARCA has breached Regulation 5(2) of the EIR.

Other Matters

39. On 11 July 2018, the Commissioner issued decision notice FER0700353 which considered whether or not another housing association was a public authority for the purposes of the EIR and concluded that it was not.⁴ The Commissioner has reached her conclusion in the present case (as she does in all cases) on the basis of all of the evidence available to her. On that evidence she considers that the circumstances of this case are materially different to FER0700353.

⁴ <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2259424/fer0700353.pdf>

Right of appeal

40. 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

41. 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.
42. 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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