

## **Freedom of Information Act 2000 (Section 50) Environmental Information Regulations 2004**

### **Decision Notice**

**Date 19 February 2008**

**Public Authority: Torbay Council**  
**Address: Castle Circus**  
**Torquay**  
**Devon**  
**TQ1 3DR**

### **Summary**

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The complainant made a request to Torbay Council ("the Council") for information about draft documents referred to in council minutes dated 17 March 1939 and their finalisation by a particular firm of solicitors. The documents related to the development of a holiday camp. The Council responded and stated that it had provided everything it held concerning the development to a member of the public known to the complainant but that it could provide further copies to the complainant if necessary. It stated that it did not hold any other information. The Information Commissioner ("the Commissioner") investigated and was satisfied that the Council does not hold the requested information.

### **The Commissioner's Role**

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1. The Environmental Information Regulations ("the EIR") were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Commissioner. In effect, the enforcement provisions of Part IV of the Freedom of Information Act 2000 ("the Act") are imported into the EIR.

### **Background to the request**

2. The Council holds five deeds dated 11 April 1939 which relate to the development of St Mary's Bay into the Dolphin Holiday Camp by the Dolphin Company, namely the Deed of Consent, the Deed of Grant, the Deed of Agreement, the Memorandum of Agreement and the Deed of Conveyance. Amongst other things, these documents imposed conditions concerning the use of the land. Following the demolition of the holiday camp, the Council has granted planning permission for the redevelopment of the majority of the site for housing. For various reasons, the complainant opposes this redevelopment and he has, along with other

members of the public known to him, maintained frequent correspondence with the Council over a number of years and has made numerous requests for information to support the case against the development of the land.

## The Request

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3. On 6 September 2006, the complainant wrote to the Council and requested information in the following terms:

“My research reveals that on 17 February 1939 the Dolphin Holiday Camp sub-committee was informed by the Clerk of the Brixham Urban District Council that the following were received from Messrs Parson and Outfin.

- Deed of Grant of various paths etc at St Mary's Bay
- Conveyance of land for road widening purposes affronting on St Mary's Road
- Agreement for maintenance [sic] and payment towards the cost thereof
- Consent to develop the land as a Holiday Camp under section 10(3) of the Town and Country Planning Act 1932
- Agreement as to the general development of the land aforesaid

I enclose copies of that minute as evidence (Appendix 1).

I now refer to [name of council officer]'s...letter of 15 February 2006. I enclose a copy of that letter (Appendix 2). As you will see, [name of council officer] has only listed four (4) documents, one of which was drawn up by Messrs Parson and Outfin – this fact is in direct conflict with the above mentioned Minute. The three (3) remaining documents are apparently drawn up by Messrs Somerville and Hilton. It would appear that there has been a serious mistake in the safe-keeping of the original documents prepared as required for Brixham Urban District Council by Messrs Parson and Outfin.

Therefore I should be grateful if you could explain to me how important and legally binding documents have apparently been mislaid and at some time been redrawn by Messrs Somerville and Hilton. Could you please inform me when the decision to take this action was made, and in which Council Minute it is referred to?”

4. The Council responded to the request on 5 October 2006. The letter dealt with various concerns and complaints raised by the complainant and another member of the public. It appears that the section which comprised a response to the complainant's request read as follows:

“...I am not aware of any documentation relating to the development of the Dolphin Site (and previously requested by [name of member of the public]) that is in the Council's possession and yet has not been forwarded to [name of same member of the public]. If you would like to receive copies of the documents provided to [name of same member of the public], please let me know.

I have no means of knowing (and I do not propose to speculate as to) why other documents that you allege may have been in the possession of Brixham Urban District Council in 1939 are not amongst the papers presently held by this council”.

5. The complainant responded on 11 October 2006 and expressed dissatisfaction with the response.
6. The Council responded on 9 November 2006 and explained that it maintained its position that all relevant documentation had been disclosed. The Council officer explained:

“As I said in my previous letter to you, I have no means of knowing (and I do not propose to speculate as to) why other documents that you allege may have been in the possession of Brixham UDC in 1939 are not amongst the papers presently held by the Council. All I will say is that it is hardly surprising, given the passage of time and the fact that those documents which are still within the Council’s possessions appear to have only extremely limited relevance to matters still at issue today, notwithstanding your views to the contrary”.

## The Investigation

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### Scope of the case

7. On 17 November 2006, the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant asked the Commissioner to consider whether the Council held the information he had requested on 6 September 2006.
8. The complainant also raised other issues that are not addressed in this Notice because they do not fall within the scope of the EIR.

### Chronology

9. The Commissioner corresponded with the complainant from 11 July 2007 to 27 September 2007 to clarify the terms of the complaint and to ensure that the complainant had provided relevant documentation. On 27 September 2007, the Commissioner wrote to the complainant to set out his understanding of the complaint and advised that he would proceed on that basis. This was limited to the request on 6 September 2006.
10. In the meantime, the Commissioner telephoned the Council on 29 August 2007 and wrote a letter asking it for information about how it had handled the request. The Commissioner asked the Council to state in clear terms whether it holds information of the description specified in the request and to respond to a number of questions designed to establish whether the information is held by the Council.

11. The Council responded on 27 September 2007. It accepted that its original response to the complainant's request had not been particularly precise as to leave the complainant in no doubt as to whether the Council held the actual information requested. The Council also enclosed copies of relevant correspondence.
12. The Commissioner telephoned the Council on 3 October 2007 and directed it to write to the complainant to set out in clear terms whether it held information falling within the scope of his request which the Council did on the same day. It stated that the information requested was not held.
13. On 3 October 2007, the complainant wrote to the Commissioner and provided a newspaper article relating to the Council's failure to provide information to a government department. This information was not directly relevant to the complaint being considered by the Commissioner but it appears that it was supplied by the complainant to demonstrate general failures by the Council to provide information and to support his position that the Council may have also failed to provide him with information.
14. The Commissioner telephoned the complainant on 10 October 2007 to enquire about his response to the Council's letter on 3 October 2007. The complainant confirmed that he continued to be dissatisfied with the Council's response that the information was not held and that he wished the Commissioner to pursue his complaint in this regard. The complainant also wrote to the Commissioner on 13 October 2007 to confirm this and enclosed copies of correspondence that he considered relevant.
15. The Commissioner wrote to the Council on 12 October 2007 to ask for more information to help with the investigation, particularly concerning the background to the complaint.
16. The Council responded to the Commissioner on 1 November 2007 and provided the information requested by the Commissioner.
17. On 7 November 2007, the Commissioner telephoned the Council to discuss the background to the complaint. The Commissioner also raised the issue of whether the information was environmental and whether it should have been handled under the EIR.
18. The Council sent a fax to the Commissioner on 7 November 2007 and provided copies of relevant background correspondence.
19. On 19 November 2007, the Council returned a telephone call from the Commissioner. The Commissioner and the Council discussed the case and in particular, the contents of the Council's letters on 27 September 2007 and 1 November 2007.
20. The Commissioner wrote to the Council on 29 November 2007 to make some final enquiries and the Council responded on 17 December 2007.

## Analysis

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### Procedural matters

21. The Council responded to the complainant's request under the Act. The Commissioner reviewed whether the information requested is environmental and should have been considered under the EIR.
22. The Council explained to the Commissioner that it holds five sets of deeds dated 11 April 1939 relating to the development of St Mary's Bay by the Dolphin Company. The Deeds relate to Brixham Urban District Council ("BUDC") which was dissolved in 1968. These deeds are:
  - The Deed of Consent
  - The Deed of Agreement
  - The Deed of Grant
  - The Memorandum of Agreement
  - The Deed of Conveyance
23. The Council explained that the Deed of Consent was consent under the Town and Country Planning Act for the development of St Mary's Bay which the Council described as equivalent to a modern form of planning permission. The Agreement confirmed that the buildings were to be removed after the expiration of 21 years from 29 September 1939 and that no compensation would be payable by the Council upon removal of the buildings. The Agreement also stated that some land would remain as open space. The Deed of Grant represented the dedication by  
  
the landowner of a public right of way on land adjacent to St Mary's Bay and the Memorandum of Agreement referred to the Deed of Grant and stated that BUDC agreed to maintain the footpath dedicated by the Deed of Grant.
24. Having considered the description of the information provided by the Council, the Commissioner is satisfied that it is reasonable to argue that the information falls within the scope of 2(1)(c) of the EIR as set out at the end of this Notice. The documents concern a significant development on an area of land where it is likely that some residual traces of the development remain. Further, the documents also concern the dedication of public footpaths and other conditions upon the land. The Commissioner takes the view that information concerning how land is to be used is environmental in nature and would fall within the scope of the EIR.
25. The Commissioner went on to consider the details of the complainant's request on 6 September 2006. In the request, the complainant referred to a letter from a council officer of 15 February 2006. The Commissioner inspected the letter and noted that it was not in fact a letter addressed to the complainant but was addressed to another member of the public who it appears is known to the complainant. The letter provides details of four deeds held by the Council and

- states which firm of solicitors “prepared” each deed. It states that the Deed of Consent, the Deed of Agreement, and the Memorandum of Agreement were prepared by Messrs Somerville and Hilton, and that the Deed of Grant was prepared by Messrs Parsons and Outfin.
26. The complainant also referred to council minutes on 17 March 1939 that relate to the meeting of The Dolphin Holiday Camp Sub-Committee. The minutes record the receipt of draft documents relating to the Dolphin Holiday Camp from Messrs Parsons and Outfin of the description set out by the complainant in his request. The minutes also record that following the suggestion of slight amendments, it was unanimously resolved by the Sub-Committee that the Housing and Town Improvement Committee be recommended to approve the documents for engrossment, that the Common Seal of the Council be affixed when the documents were ready for completion and that plans be left for the surveyor to approve and attach to the various documents.
  27. Having carefully considered the terms of the request, the Commissioner understood that the information sought by the complainant was copies of the draft documents referred to in the council minutes on 17 March 1939 or, failing that, information that would explain what had happened to the draft documents and the circumstances of their finalisation by Messrs Somerville and Hilton.
  28. Firstly, dealing with the disparity between the record of five drafts and the Council stating in the letter of 15 February 2006 that it only holds four deeds, the Council explained to the Commissioner that at the time when the letter of 15 February 2006 was written referring to four deeds, the Council was not aware that it also held the Deed of Conveyance. This has since been made available to a member of the public known to the complainant. The complainant confirmed to the Commissioner that he does not now require a further copy of this.
  29. On the subject of whether the Council holds copies of any draft material relating to the Dolphin Holiday Camp as referred to in the minutes on 17 March 1939, the Council maintained that it does not hold this information. The Council confirmed that it has checked deed records held in the deeds store and also that of local land charges. The Council’s senior solicitor explained that sometimes drafts of deeds are kept in “correspondence files” associated with the deeds in question but that the Council does not hold any correspondence files for BUDC relating to the Dolphin Holiday Camp. Even if correspondence files from BUDC relating to the Dolphin Holiday Camp were transferred to the Council when BUDC was dissolved, there would be no legal obligation on the Council to keep such files and it would be in line with legal protocol to destroy them after 6 years or at the very most 12 years.
  30. The Council explained that it is unable to state whether it ever held draft copies of the Dolphin Holiday Camp deeds. The Council explained that the age of the information, together with the changes there have been to the Council’s organisation over time, have meant that the Council is now unable to account for what happened to the drafts. The Council’s records show that no correspondence files were transferred from BUDC when it was dissolved. The Council also



suggested that it may have been the case that once the deeds had been completed, the drafts were returned to the solicitors and destroyed in due course.

31. Regarding the circumstances surrounding the finalisation of the documents, the Council explained that it is usual legal protocol for a working draft document to be circulated between the solicitors of two parties to an agreement, with amendments being made as appropriate as part of the negotiation process. Once the parties had agreed, the documents could be written up into their final form upon special paper (known as engrossing) and then completed as deeds. They would then be stored in the Council's deeds store.
32. In an attempt to understand what happened in this particular case, the Council examined the minutes in Torquay Library. The first reference to the Dolphin Holiday Camp documents is within council minutes on 6 February 1939. The minutes record that it was resolved that Messrs Parsons and Outfin were to be appointed by the council to prepare the documents. The second reference is in the minutes referred to by the complainant on 17 March 1939 which states that BUDC received the draft documents from Messrs Parsons and Outfin and, following suggestions of slight alterations, BUDC recommended the draft documents for engrossment and sealing. The third and final reference is contained within minutes dated 4 April 1939. The latter minutes record that when Messrs Parsons and Outfin had submitted the documents for sealing, they had recommended two slight amendments (presumably a reference to the events recorded in the minutes of 17 March 1939). The minutes record a resolution that the Council be recommended to accept both amendments. It is understood that sometime between 4 April 1939 and 11 April 1939, the documents were engrossed (by the firms stated on the documents) and completed as deeds dated 11 April 1939.
33. The Council explained that it had understood from the minutes that Messrs Parsons and Outfin were appointed by BUDC to prepare the documents and it interpreted this as meaning that Messrs Parsons and Outfin would act on the Council's behalf in negotiating with Messrs Somerville and Hilton (the firm which the Council assumes was acting on behalf of the Dolphin Company) and would make appropriate amendments to the drafts in order to prepare them for final engrossment. The Council explained that simply because Messrs Parsons and Outfin had been involved in the preparation of the drafts does not exclude another solicitor from also being involved in the preparation of the same drafts and then becoming the engrossing firm.
34. The terms of the complainant's original request make plain that there appeared to him to be a contradiction between the council minutes which suggest that Messrs Parsons and Outfin "prepared" the documents and the Council's letter on 15 February 2006 which states that some of the deeds had been "prepared by" Messrs Somerville and Hilton. The Commissioner asked the Council about this and it clarified that when it wrote "prepared by", it had meant "engrossed by". It explained that it had simply wanted to avoid using a technical term that may not be readily understood.

35. The Council stated that it does not know, because there are no records held, why Messrs Somerville and Hilton engrossed the Deed of Consent, the Deed of Agreement, and the Memorandum of Agreement but Messrs Parsons and Outfin engrossed the Deed of Grant and the Deed of Conveyance. It confirmed that it has checked the records of the 1939 minutes for BUDC and has not found any further references to the Dolphin Holiday Camp documents which would shed any more light on the circumstances surrounding the engrossment of the documents.
36. The Commissioner recognises that there are some record management deficiencies at the Council (which has been addressed in the "Other matters" section of this Notice) but despite this, he accepts that it is not surprising that the Council no longer holds details of an event which took place over sixty years ago at a different Council which has since been dissolved. In view of the considerations set out in this Notice, the Commissioner is satisfied that the Council no longer holds copies of the draft documents referred to in the minutes on 17 March 1939, or any information which would explain what happened to them or what the circumstances were surrounding the finalisation of the documents.

## The Decision

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37. The Commissioner's decision is that the Council acted in accordance with the exception under 12(4)(a) of the EIR because it does not hold the information requested.
38. The Commissioner also considers that the Council failed to comply with the EIR in the following respect:
  - It failed to specify the reasons not to disclose the information requested as it was not clear until the Commissioner's intervention whether the Council actually held the information requested. It therefore breached regulation 14(3)(a)

## Steps Required

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39. The Commissioner requires no steps to be taken.

## Other matters

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40. Although it does not form part of this Decision Notice the Commissioner wishes to highlight the following matter of concern:

During the course of the investigation, the Council stated that it does not have either a records management policy or a formal retention schedule. However, the Council has explained that it is taking steps to address this by recently agreeing a new records management strategy and programme to be implemented over two



years. The Commissioner believes that the Council may benefit from further advice and guidance from the National Archives in relation to this initiative. The relevant contact details are as follows:

<http://www.nationalarchives.gov.uk/recordsmanagement/>

[rmadvisory@nationalarchives.gov.uk](mailto:rmadvisory@nationalarchives.gov.uk)

Records Management Advisory Service (RMAS)  
National Advisory Service  
The National Archives  
Kew  
Richmond  
Surrey  
TW9 4DU

## Right of Appeal

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41. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@dca.gsi.gov.uk](mailto:informationtribunal@dca.gsi.gov.uk)

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 19<sup>th</sup> day of February 2008**

**Signed .....**

**Gerrard Tracey  
Assistant Commissioner**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

### Regulation 2 - Interpretation

#### Regulation 2(1) In these Regulations –

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form 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) and (b) as well as measures or activities designed to protect those elements;

**Regulation 12(4)** For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

- (a) it does not hold that information when an applicant’s request is received;

**Regulation 14(1)** If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.

**Regulation 14(3)** The refusal shall specify the reasons not to disclose the information requested, including –

- (a) any exception relied on under regulations 12(4), 12(5) or 13;