

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

Decision Notice

Date: 11 July 2018

Organisation: Richmond Housing Partnership
Address: 8 Waldegrave Road
Teddington
Middlesex
TW11 8GT

Decision (including any steps ordered)

1. The complainant has requested information on the management of fire safety. Richmond Housing Partnership (RHP) refused to comply with the request as it was not a public authority for the purposes of the EIR. RHP also said that the requested information was not environmental information.
2. The Commissioner's decision is that some of the requested information is environmental information within the meaning of regulation 2(1) of the EIR. However the Commissioner also finds that RHP is not a public authority for the purposes of the FOIA or the EIR. Since RHP is not a public authority the Commissioner cannot require it to take any steps.

Request and response

3. On 18 August 2017, the complainant wrote to RHP and requested information in the following terms:

"Specifically, in relation to the management of fire safety, please provide the document/s that relate to your organisation's Fire Risk Management System, in accord with Publicly Available Specification (PAS) 7 compliance and accreditation, in respect of the written elements of:

- Resources and authority
- Training
- Communication

- *Hot works*
 - *Maintenance and testing*
 - *Emergency planning*
 - *Fire risk management audit*
 - *Management review"*
4. On 25 August 2017, RHP responded and explained that as it was not a public authority, it was not obliged to provide the requested information.
 5. On 26 August 2017, the complainant wrote to RHP and disputed its claim that it did not have responsibilities under the EIR. The complainant cited the Commissioner's guidance, regulation 2(2)(d) of the EIR and the Office for National Statistics (ONS).
 6. On 31 August 2017, RHP replied and explained that it had sought legal advice which confirmed that it was not a public authority for the purposes of the EIR as it was not exercising functions of a public authority relating to the environment.
 7. The complainant wrote to RHP again on 1 September 2017 and provided further arguments regarding its status under the EIR. He argued that there had been no alteration to the public sector 'status' of a housing association. He also argued that there was still significant central government control of housing associations and their operations.
 8. On 11 September 2017, RHP provided its final response. It stated that the Housing and Planning Act 2016 was in force and social landlords had been known as private registered providers for some years. It also explained that the ONS classification is related to national debt issues. RHP stated that it is not subject to the FOIA or the EIR, and disputed that the request should be considered as a request for environmental information under the EIR.

Scope of the case

9. The complainant contacted the Commissioner on 12 September 2017 to complain about the way his request for information had been handled. The complainant argued that the request fell to be considered under the EIR because the requested information was environmental. He also maintained that RHP was a public authority under the EIR, although he accepted that it was not a public authority under the FOIA.
10. During the course of the Commissioner's investigation RHP offered to provide some of the requested information (comprising one document) to the complainant in an attempt to resolve the complaint informally. RHP did not however withdraw its claim that it was not a public authority

under the EIR. Subsequently RHP advised that it could only disclose a summary of this document, since it considered that the remainder was commercially sensitive.

11. Having considered the complaint the Commissioner advised the complainant of her view that RHP is not a public authority for the purposes of the EIR. The Commissioner also pointed out that RHP had nonetheless agreed to disclose some of the requested information.
12. However the complainant remained dissatisfied and asked that the Commissioner issue a decision notice.
13. The Commissioner acknowledges that RHP does not believe itself to be a public authority under the EIR. The Commissioner has therefore considered this issue first, since RHP cannot be required to comply with a request for environmental information if it is not a public authority.
14. If the Commissioner finds that none of the information is environmental information, then RHP cannot be required to take any further steps since it is not a public authority under the FOIA. However, if the Commissioner finds that any part of the requested information does constitute environmental information, she will go on to consider whether RHP is a public authority for the purposes of the EIR.

Reasons for decision

Regulation 2(1): is the requested information environmental information?

15. The Commissioner has first considered whether the requested information is environmental information. Regulation 2(1) of the EIR defines environmental information as:

“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;*
 - (d) *reports on the implementation of environmental legislation;*
 - (e) *cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and*
 - (f) *the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);"*
16. The Commissioner recognises that it can sometimes be difficult to identify environmental information, and has produced guidance¹ to assist public authorities and applicants. The Commissioner's well-established view is that authorities should adopt a broad interpretation of environmental information, in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC², which the EIR enact.
17. It is generally necessary to inspect the requested information in order to ascertain whether or not it is environmental information. The RHP has provided the Commissioner with 14 documents falling within the description set out in the request, albeit that the RHP does not accept that any of this information is environmental information.
18. In her consideration of this case the Commissioner is assisted by the Court of Appeal's findings in *Department for Business, Energy and Industrial Strategy v Information Commissioner and Henney*.³ The Court

¹ https://ico.org.uk/media/for-organisations/documents/1146/eir_what_is_environmental_information.pdf

² <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32003L0004>

³ [2017] EWCA Civ 844

of Appeal commented that the EIR must be construed purposively, in accordance with the Directive and the Aarhus Convention:⁴

"48. My starting point is the recitals to the Aarhus Convention and the Directive, in particular those set out at [15] above. They refer to the requirement that citizens have access to information to enable them to participate in environmental decision-making more effectively, and the contribution of access to a greater awareness of environmental matters, and eventually, to a better environment. They give an indication of how the very broad language of the text of the provisions may have to be assessed and provide a framework for determining the question of whether in a particular case information can properly be described as "on" a given measure".

19. The disputed information in *Henney* related to a Project Assessment Review (PAR) which concerned the communication and data component (CDC) of the Smart Meter Programme (SMP). The key issue for the Court of Appeal was whether information on a measure which did not in itself affect the state of the elements of the environment, or the factors referred to in regulation 2(1), could be information "on" another measure which did. The Court of Appeal found that information on the PAR was environmental information on this basis, even though it was not in itself a measure likely to affect elements or factors. Rather, information on the PAR was information on the SMP, which was such a measure.
20. The Commissioner understands that interpretation of the phrase "*any information... on*" will usually include information concerning, about, or relating to the measure, activity, factor etc., in question. With specific regard to regulation 2(1)(c), the Court of Appeal in *Henney* commented that:

"It follows that identifying the measure that the disputed information is "on" may require consideration of the wider context, and is not strictly limited to the precise issue with which the information is concerned. It may be relevant to consider the purpose for which the information was produced, how important the information is to that purpose, how it is to

⁴ The 1998 UN/ECE Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental matters

be used, and whether access to it would enable the public to be informed about, or to participate in, decision-making in a better way. None of these matters may be apparent on the face of the information itself."

21. The Commissioner notes that, in this case, the requested information relates to RHP's Fire Risk Management System (FRMS) for the purposes of achieving certification with PAS7.⁵ Following the approach set out in *Henney*, the Commissioner has considered whether the FRMS is a measure that is likely to affect the elements and factors, or a measure designed to protect those elements.
22. According to the British Standards Institute, PAS7 has been developed to provide a fire risk management system that operates at an organisational level. The RHP explained that the requested information includes documents relating to RHP's communication procedure, the way it maintains and tests its fire safety systems and its audit training procedures.
23. Clearly the aim of any FRMS is to manage the risk of fire. In the Commissioner's opinion this can be interpreted as a measure likely to affect the elements of the environment, most obviously air and atmosphere. It can also be interpreted as likely to affect factors such as emissions, discharges and other releases into the environment, likely to affect the elements. It follows that a measure that reduces the risk of fire will have an impact on the effects of fire such as smoke and fumes, which are themselves factors but which affect the elements of air and atmosphere.
24. The Commissioner is also of the opinion that a measure designed to manage the risk of fire is also arguably designed to protect the state of the elements of the environment. The prevention of fire is the prevention of damage to both urban and natural landscapes, the prevention of harmful emissions and the protection of human life and eco-systems.
25. The Commissioner is mindful that she must apply her considerations to the facts of this particular case in order to avoid an unduly broad interpretation. Having inspected the requested information she is of the view that some information is unlikely to constitute environmental information. The Commissioner adopts the approach set out by the

⁵ <https://www.bsigroup.com/en-GB/about-bsi/media-centre/press-releases/2013/September/PAS-7-identifies-what-a-fire-risk-management-system-needs/>

Upper Tribunal⁶ which was subsequently upheld by the Court of Appeal in *Henney*. The Upper Tribunal gave the example of "*a report exclusively focussed on the public relations and advertising strategy to be adopted for the SMP*" as being unlikely to fall within the scope of regulation 2(1)(c).

26. To the extent that the requested information relates to activities which are likely to affect the elements and factors, and where the predominant purpose of the documents is the prevention of fire, the Commissioner finds that it does constitute environmental information. In contrast, the Commissioner is satisfied that other information, such as that relating to communications and training, does not fall within the scope of the definition.

Regulation 2(2): is RHP a public authority under the EIR?

1. Since the Commissioner is satisfied that some of the information is environmental information within the meaning of regulation 2(1)(c) of the EIR, she must now consider whether the RHP is a public authority. If the RHP is not a public authority it cannot be required to respond to a request for environmental information under the EIR.
2. The definition of a public authority is given at regulation 2(2) of the EIR (references to the Act are references to the FOIA):
 - (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 the 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.*

⁶ [2015] UKUT 671, para 91

3. The Commissioner is satisfied that RHP is not a public authority under regulation 2(2)(a) or 2(2)(b) of the EIR. This is because RHP is not a government department and is not listed under Schedule 1 to the FOIA. Nor is it owned by either the Crown or any other public authority.
4. Accordingly, the Commissioner has gone on to consider regulation 2(2)(c). The test for considering whether a person is a public authority within the meaning of regulation 2(2)(c) was set out by the Upper Tribunal in the case of *Fish Legal*⁷ following a preliminary ruling from the Court of Justice of the European Union (CJEU).⁸ Persons 'performing public administrative functions' are defined as:

"...entities, be they legal persons governed by public law or 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 result from the normal rules applicable in relations between persons governed by private law."

5. The Commissioner is satisfied that the first test is met by RHP because in her opinion the provision of affordable housing is a service provided in the public interest. RHP is registered as a non-profit private provider of social housing with its regulator, the HCA. It has the power to buy and sell property and land in connection with its function of providing social housing, although it does not have power of compulsory purchase.
6. The Commissioner has next considered whether RHP is entrusted to perform these services by law, and whether it has any special powers. The Commissioner has taken account of the Court of Appeal's findings in *Weaver v London Quadrant Housing Trust*,⁹ which considered whether a housing association was exercising a public function for the purposes of the Human Rights Act 1998 in relation to the granting and termination of a tenancy.
7. RHP argued that *Weaver* is of limited relevance in this case because the scope of the judgement was restricted to a very small part of a housing association's day to day work. RHP considered that its activities were

⁷ *Fish Legal v The Information Commissioner and Others* GIA/0979/2011 & GIA/0980/2011

⁸ <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62012CJ0279:EN:HTML>

⁹ *Weaver v London and Quadrant Housing Trust* [2009] EWCA Civ 587

much broader. RHP also pointed out that the Court of Appeal confirmed that *Weaver* does not necessarily have a wider application and that each provider of social housing would need to be considered on the facts of its own particular case. RHP therefore considered that the Court of Appeal's findings in *Weaver* did not extend to designating public authorities under the EIR.

8. Finally, RHP pointed out that the decision in *Weaver* was reached in the context of the previous regulator of providers of social housing, the Housing Corporation. RHP clarified that the Housing Corporation no longer exists and has been replaced by the Housing and Communities Agency (the HCA). It also set out that there had been considerable deregulation of housing associations such as RHP.
9. The Commissioner acknowledges the Court of Appeal's approach in *Weaver*, but is mindful that the Upper Tribunal clarified in *Fish Legal* that the key test is not the nature of the functions carried out by a person, but how they are carried out. The Upper Tribunal found that bodies will be public authorities if they have been given special legal powers to enable them to carry out their functions.
10. The Commissioner's guidance¹⁰ further explains that special legal powers are created in law and can only be used by the relevant body. They go beyond the normal rules of private law that apply to any company or person in conducting its business, such as buying and selling property and managing contracts.
11. Special legal powers can include, but are not limited to;
 - Compulsory purchase;
 - Requiring access to and use of private property;
 - Creating new laws and criminal sanctions;
 - Special levels of influence or advisory roles; and
 - Susceptibility to judicial review.
12. An organisation is more likely to be a public authority under this test if it holds a range of powers that collectively amount to a special legal status. In *Fish Legal* the water companies' powers included compulsory purchase, the right to enter property to maintain services, and the power to ask the government directly to create byelaws and criminal offences related to their functions. These powers were considered

¹⁰ <https://ico.org.uk/media/for-organisations/documents/1623665/public-authorities-under-eir.pdf>

sufficient to mean that the water companies were public authorities within the meaning of regulation 2(2)(c) of the EIR.

13. The Commissioner requested clarification of any special powers held by RHP. RHP confirmed that it has the following powers:
 - Ability to apply for an Anti-Social Behaviour Order under section 5(1)(b) of the Anti-Social Behaviour Act 2003
 - Ability to apply for Anti-Social Parenting Orders under section 26B of the Anti-Social Behaviour Act 2003
 - Ability to seek an order demoting a tenant from assured status under section 6A of the Housing Act 1988
 - Ability to grant a Family Intervention Tenancy under paragraph 12ZA of Schedule 1 of the Housing Act 1988 for the purposes of provision of behaviour support services.
14. RHP confirmed that it has no other powers over and above those normally held by private individuals and companies.
15. The Commissioner notes that RHP does not have any of the special powers held by the water companies in *Fish Legal*. Nor is she persuaded that the powers described at paragraph 13 above constitute special powers in the context of the EIR. In the Commissioner's opinion these powers granted to RHP are unlikely to amount to a significant advantage or responsibility for overseeing a given public service.
16. Having carefully considered the specific circumstances of this case, the Commissioner is not satisfied that RHP is undertaking functions of public administration. Accordingly, the Commissioner finds that RHP is not a public authority under regulation 2(2)(c) of the EIR.

Regulation 2(2)(d): Under the control of another public authority

17. Finally the Commissioner has considered whether RHP is under the control of another public authority and has public responsibilities, exercises functions of a public nature, or provides a public service, relating to the environment. The first test is therefore whether RHP is under the control of another public authority.
18. The Commissioner's guidance defines control as meaning something more than mere influence or regulation. Control must be such that the body in question has no genuine autonomy in deciding how it performs its functions in practice. The controlling public authority can exercise its control in various ways, including;
 - the power to issue directions to the body in question, including by exercising the rights of a shareholder;

- the power to appoint or remove a majority of the management board; and
 - the power to deny the body financing to the extent that it jeopardises its existence.
19. As set out above the Commissioner notes that RHP is a provider of social housing, including affordable rental properties and low cost home ownership. It has charitable status as a community benefit society¹¹ registered with the FCA.
20. RHP confirmed that it is managed by a board made up of non-executive board members and its chief executive. RHP's rules provide that procedures for the election of the board shall make provision for its board to have two residents on it. Otherwise, RHP explained, its board members are chosen for their skills and expertise as well as support for the charitable objectives of RHP. RHP confirmed that no public authority has any right to appoint any of the board.
21. RHP explained that, like all community benefit societies, RHP has shareholders. It explained that shareholders in a community benefit society derive no financial benefit from their shares but do have voting rights at general meetings and have a role in the election of board members. RHP confirmed that the majority of RHP's shareholders are private individuals with the London Borough of Richmond also having a share. RHP confirmed that the London Borough of Richmond does not have a majority control of the running of RHP or a majority say in the election of new board members. It also confirmed that the London Borough of Richmond will cease to hold its share in the near future due to deregulation of private registered providers.
22. RHP also provided the Commissioner with an explanation of how it is regulated by the HCA. The HCA has two fundamental objectives (under section 92K of the Housing and Regeneration Act 2008). The economic regulation objective ensures that registered providers of social housing are financially viable, properly managed and provide value for money. The consumer regulation objective is to support the provision of well managed housing and ensure that actual and potential tenants have choice and can be involved in housing management and to encourage registered providers to contribute to the environmental, social and economic well-being of the areas where housing is situated.

¹¹ Within the meaning of the Co-operative and Community Benefit Societies Act 2014

23. RHP explained that section 92K(5) states that the HCA must exercise its function in a way that minimises interference and is proportionate, consistent, transparent and accountable. The HCA regulates through the issue of standards which may relate to consumer or economic matters, however, economic standards relate only to private registered providers.
24. The HCA has the power to inspect the activities of a registered provider and to undertake enquiries into the affairs of a registered provider if they suspect that they may have been mismanaged. It has limited powers to intervene where a private registered provider fails to meet the specific standards. It can issue enforcement notices, financial penalties and force a transfer of the management of a registered provider's property.
25. However, the HCA as regulator has no power to direct how private registered providers run their organisation. It has no power over decisions of private registered providers as they borrow money, buy land, enter into contracts, dispose of land, grant tenancies, merge with or acquire other registered providers or other kinds of business.
26. HCA's powers are similar to those of other regulators, with private registered providers operating as independent entities with the regulator only having powers where there is a material failure to comply with a standard to such a severity that it cannot simply be rectified when the HCA or registered provider become aware of the issue.
27. The Commissioner considers that the existence of a regulatory framework, such as that set out above, does not indicate control by a public authority. In the Commissioner's opinion a body is only under the control of a public authority if that control is exercised at all times in respect of its public functions, not just when that body is failing to perform them in accordance with legislation. The Commissioner also notes that RHP's autonomy is not restricted by its arrangements with local councils or how it is funded.
28. In addition RHP provided further detail regarding the complainant's argument (see paragraph 8 above) about the temporary classification of private registered providers as public bodies by the ONS. RHP clarified that sections 92 and 93 and schedule 4 of the Housing and Planning Act 2016, as well as two associated statutory instruments,¹² were

¹² Housing and Planning Act 2016 (Commencement No. 4 and Transitional Provisions) Regulations 2017/75; and

subsequently passed by Parliament to ensure that private registered providers of social housing would be classified as private bodies by the ONS for the purposes of public accounting.

29. RHP explained that this legislation removed powers for the HCA to consent to certain disposals of social housing dwellings, to consent to constitutional changes and mergers between private registered providers, removed local authority rights (where held) to nominate board members save for a small percentage and removed the right for local authorities (where held) to hold shares and/or voting rights in private registered providers of social housing.
30. The ONS has since concluded that private registered providers of social housing in England are private, market producers and have been reclassified to the private non-financial corporations sub-sector. The Commissioner notes that this conclusion was reached after the complainant's correspondence with RHP.
31. The Commissioner requested information on any agreements and funding from public authorities which may limit RHP's autonomy. RHP confirmed that it does have agreements in place with the London Borough of Richmond and the London Borough of Kingston upon Thames, however, RHP has the power of veto where requests within the agreement fall outside of RHP's charitable objectives. RHP confirmed that it is not publicly funded and does not receive grant funding.
32. In light of the above, the Commissioner is satisfied that RHP is not under the control of any other public authority. The Commissioner therefore finds that RHP is not a public authority within the meaning of regulation 2(2)(d).

Conclusion

33. The Commissioner has examined whether RHP falls within any of the definitions of public authority as set out at regulation 2(2) of the EIR. The Commissioner concludes that RHP does not fall within any of the definitions, therefore she finds that RHP is not a public authority for the purposes of the EIR.
 34. In light of the above the Commissioner cannot require RHP to take any further action in response to the complainant's request. Although the
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Commissioner has found that some of the information is likely to be environmental, she has also found that RHP is not a public authority and is therefore not obliged to comply with the EIR.

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

Sarah O’Cathain
Senior Case Officer
Information Commissioner’s Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF