

Search revenue under threat

Local Authorities could miss out on valuable revenue gained from the Local Land Charge Search system.

East Riding has appealed against a decision made by the Information Commissioner last year which found that information should have been provided free of charge. The same decision was taken in similar circumstances involving Tendring and Liverpool Councils.

In all three cases the request was for information provided by 1.1f,g,h and 3.8 on the local authority standard CON29 form. In each

case the councils said this information was available via regulations relating to the Local Land Charge Search system rather than via the 'access to information' legislation.

In addition, the councils said they were entitled to provide the information in the form they wished, i.e. hard copy, and to charge for it. One council treated the request as a request for information under the Freedom of Information Act 2000. The other two treated theirs as a request under the Environmental Information Regulations 2004.

The Commissioner found that the information

requested, relating to Building Control, Highway Works and Compulsory Purchase Orders, was environmental information. He also said that it should be provided in a manner that would enable the requester to inspect the information without having to pay for it.

These decisions potentially threaten an important revenue stream for local authorities and, as a result, the outcome of East Riding's appeal to the Information Tribunal is awaited with interest. The complainant in the Liverpool case was a professional search agent.

Vexatious requests prove vexing issue

A public authority does not have to comply with a request for information where the request is vexatious according to Section 14 of the Freedom of Information Act 2000. A similar provision in the Environmental Information Regulations 2004 (regulation 12) (4) (a), states that the public body is not required to comply with a request which is "manifestly unreasonable".

A decision notice issued by the Information Commissioner involving Westminster City Council on the 3rd November 2009 has shed some light on what would be classified as a vexatious request.

The case itself (decision reference FS50199130) concerned a series of requests from a leaseholder in a council-owned block of flats about proposed maintenance works. The council sought, unsuccessfully, to use this exemption on the basis there had been 70 previous requests taking up 90 hours of officer time. The Commissioner said it was necessary to apply the following tests as referred to in the Awareness Guidance:

- Could the request (not the requester) fairly be seen as obsessive?
- Is the request harassing the authority or causing distress to staff?
- Would complying with the request impose a



significant burden in terms of distress or distraction?

- Is the request designed to cause disruption or annoyance?
- Does the request lack any serious purpose or value?

The Information Commissioner found, on balance (though he said the case was finely balanced), that the council could not rely on the exemption to provide information contained in Section 14.

The number of separate substantive requests could be more accurately numbered at about 45-50, not 70. The council's main concern with the burden of compliance appeared to be with cost rather than officer time and this in itself was not

enough to classify the requests as vexatious.

The issue of time spent on the request, and whether it was unreasonable, could be argued either way. There was no evidence staff were being deliberately harassed. The requests had purpose and value in that there was no other independent source from which the information could have been obtained other than the council, and it would be difficult for the council to be the arbiter of whether information was, or was not, of further value to the complainant.

This case confirms what was suspected – that it is likely to be quite difficult to persuade the Information Commissioner that information should not be supplied on the basis that the request is vexatious. The overall purpose of the legislation is to supply the public with information and the presumption, in favour of disclosure, will make this a difficult exemption for councils to rely on.

If you have any queries on the Freedom of Information Act or the Environmental Information Regulations please contact David Elliott or Pritpal Singh-Swarn.

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Was fare play a fair test?



DAVID ELLIOTT
considers the case of
**Stratford-on-Avon
District Council v Dyde
[2009] All ER (D) in
which law
enforcement officers
were accused of
being unfair.**

When a taxi firm charged £32 for a £20 journey it was the customers who found themselves under the legal spotlight.

Stratford-on-Avon magistrates agreed that the customers – taxi licensing enforcement officers – had obtained evidence unfairly under Section 78 of PACE 1984. Stratford District Council, who employed the enforcement officers, appealed.

The facts were that an enforcement officer booked a licensed hackney carriage by telephoning the taxi company. She asked for a price to take her and her colleague from A to B. She did not say they were licensing enforcement officers. The company quoted £32 for the journey and the taxi driver was notified of the arrangement. The driver did not turn his meter on when he picked them up.

At the end of the journey the driver asked for the agreed fare. The officers paid it. A receipt was issued. In fact, the correct tariff fare for the journey was just over £20. Therefore the driver was in breach of licensing regulations whereby any hackney carriage has to charge by reference to a publicised tariff of fares and no more.

The officers revealed their identity and cautioned the driver. The driver was charged with knowingly charging passengers a fare more than the metered fare contrary to Section 67(1) of the Local Government (Miscellaneous Provisions) Act



Was evidence that a taxi driver was charging too much obtained fairly?

1976, and failing to turn on his meter contrary to local byelaw.

The defence, without prior notification, made an application that the evidence had been unfairly gathered contrary to Section 78 of PACE. This was on the basis that the driver had not been privy to the discussion between the officers and the booking office fixing the price, that the price had been confirmed by the driver with the officers before the start of the journey, that the driver had not been asked to turn on his meter and that journeys for fixed fares were regularly undertaken. In all the circumstances, said the defence, the evidence had not been fairly gathered and the defendant had been “persuaded” to commit the offence.

The prosecution argued that this was a typical exercise of enforcement powers presenting the defendant with an unremarkable opportunity to commit an offence which was taken.

The defendant should have known of the tariff fare and, indeed, had been sent a warning letter on

this very issue shortly before the incident. The prosecution argued this was not “entrapment” considering the case of *R v Looseley* and the Attorney Generals Reference no .3 of 2000.

The High Court held that the evidence had been fairly gathered and the matter was referred back to the magistrates for trial. Whether or not the driver is guilty has yet to be determined.

The real issue in the case was whether an agreement could lawfully have been made for a fare £12 in excess of the tariff fare. The respondent, being a local taxi driver, would have known that a fixed fare agreed was in excess of the metered fare and was unlawful. In all the circumstances the evidence had been fairly obtained.

The case serves as a reminder to enforcement officers to have regard to legislation that might have the effect of making their evidence inadmissible such as Section 78 of PACE and failure to follow RIPA 2000.

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Talking points

Law Bytes is a series of events organised throughout the year by Wright Hassall with the construction and engineering industry in mind. If you would like to attend any of the following, which all take place at Wright Hassall’s Olympus Avenue offices, please contact caroline.venuto@wrightshassall.co.uk.

Friday 5 March: Speaker: Bill Munn, Best Practice & HR Director, Thomas Vale Construction plc. Thomas Vale is a leading supplier of construction services to the public and private sectors.

Friday 23 April: Speaker: Murray Armes, Probyn Miers Ltd , Architectural Consultants. 'How to present your case to an adjudicator'

Friday 28 May Speaker: Adam Read, AEA Technology Ltd. AEA advises the public and private sectors on energy and environmental matters.

Employment Law Update seminars will take place on the following dates. For more information contact Caroline Venuto.

Thursday 25 March, Thursday 15 April, Thursday 29 April

Permission granted with extension a possibility

The government has offered developers a helping hand by looking at ways of extending the life of a planning permission more easily.

The Planning and Compulsory Purchase Act 2004 section 51 (1) amended section 91 of the Town and Country Planning Act 1990 and reduced the maximum life of a planning permission from five to three years. In the current economic climate many developments have been put on hold.

Furthermore, a new subsection to Section 73 of the 1990 Act was introduced by Section 61(3) of the Planning and Compulsory Purchase Act 2004 which removed the relatively cheap and quick process of extending a planning permission.

The government has recognised that the recession has resulted in a dramatic reduction in schemes coming forward and also a significant reduction in the commencement of those schemes



which already have planning permission.

It also recognised there was a danger that a significant number of schemes would lapse unless the lifetime of the permissions could be extended.

However, some help has been offered by the Town and Country Planning (General Development Procedure) (Amendment No.3) (England) Order 2009. This amended the General Development Procedure Order by allowing the grant of a replacement planning permissions from 1st October 2009.

The new article 10B(b) of the Town and Country Planning (General Permitted Development Procedure Order) 1995 provides for any developer with an existing planning permission as at 1st October 2009 which has not been implemented.

In order to help developers and local planning authorities overcome this problem the



A change in the law may make it easier to gain an extension to planning permission beyond the current three years.
PRITPAL SINGH-SWARN reports.

government has introduced a temporary streamlined procedure. The key features of the new rules, which only apply to existing planning permissions issued before 1 October 2009, are:

- less information is required with applications with no need for front loading e.g. there is no need for a design and access statement or for further plans and drawings;
- the statutory consultation procedures will be less cumbersome with greater discretion given to Local Planning Authorities;
- it is also proposed that there will be a reduced fee for applications. The proposal is for flat fees of £500 for major developments, £50 for householder developments and £170 for other sizes of developments.

Anyone considering extending the lifetime of a permission should probably wait until the fees regulations change unless a permission is due to expire within three months.

The discretion afforded to local planning authorities may perhaps, in some respects, result in a more burdensome section 106. There is always a danger that there may be a change in planning policies or Supplementary Planning Documents since the original permission was granted.

Whilst these new measures are both practical and sensible for recessionary times, it may just leave a sting for when the economy has moved out of recession with increased 106 contributions.

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Drains are the responsibility of highway authorities

The Court of Appeal case, *Department for Transport, Environment and the Regions v Mott MacDonald Ltd, Amey Mouchel Ltd and Cornwall County Council [2006 27th July]* ("Mott Case"), which found for the claimant, has confirmed that highway authorities' statutory duty to maintain highways at the public expense, does extend to repairing and maintaining drains beneath the surface of the road.

In addition, the duty to repair is not limited to fixing defective drains but extends to clearing blockages. Highway authorities not only have to clear blocked drains but also have to deal with the consequences of inadequate drainage – particularly pertinent given the current adverse weather conditions and the frequent flood warnings issued by the Environment Agency.

The implications of this decision is crucial for local authorities and their contractors, making it very clear that the law has not changed since the landmark ruling case of *Burnside v Emerson* in 1968. For a more detailed analysis of this landmark ruling, please see the article on our website, www.wrighthassall.co.uk

WH duo scale the heights for charity

While many may have cursed the snow and ice this winter Ann-Marie Hudson and Glynn Davis, who work at Wright Hassall, saw it as an opportunity to prepare for the journey of their lives.

The pair used the cold weather as an early chance to acclimatise to conditions they will face for a planned 18-day ascent of Mount Everest. They began training on Boxing Day and will undertake the 18,000ft climb to the summit of Kala Patthar in October. They hope to raise more than £5,000 for Cancer Research UK.

Ann-Marie and Glynn have already pledged £1,000 to fund the trip and anyone who wishes to support their journey can make a donation by visiting www.justgiving.com/Excellent-Adventure.

Nick Abell, senior partner at Wright Hassall, said: "The staff and all the partners at Wright Hassall are delighted to be supporting Glynn and Ann-Marie in this exciting venture and wish them every success."

Regulating the regulators

The Regulatory Enforcement and Sanctions Act 2008 came into force on the 1st October 2008 (parts 1, 3 and 4) and the 1st April 2009 (part 2). The Act is a result of the Hampton Review from 2005, the Macrory Review from 2006 and a government paper dealing with regulatory reform from 2007.

The Act forms the Local Better Regulations Office (LBRO). The role of the LBRO is to promote better regulation practices amongst the regulators. It was already established as a government owned company in 2007. There is an expectation that when it has achieved its objectives it will be dissolved. This is the result of part 1 of the Act.

LBROs' objectives are to achieve proportionality, accountability, consistency, transparency and targeting in the field of enforcement. It will work with all regulators in the fields of environmental health, trading standards, licensing and fire safety services. The authorities shall have a duty to have regard to any guidance given to them by LBRO. They also have a duty to comply with guidance when directed to do so by LBRO and a duty to have regard to any list of enforcement priorities published by LBRO.

The LBRO will work closely with national regulators and with LACORS and administer a new "primary authority" scheme which will run alongside the existing "home authority" scheme. This is where a particular local authority might be responsible for a certain company nationally because, for example, its head office is situated in that authority's area. No enforcement action will be able to be taken by another authority against the company without reference to the primary authority. This is the result of part 2 of the Act.

Part 3 of the Act gives the power to the

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DAVID ELLIOTT looks at the Regulatory Enforcement and Sanctions Act 2008 and asks whether it is really necessary.

government to give regulators four new civil sanctions to provide an alternative "toolkit" to issuing criminal proceedings. These are

- Fixed monetary penalties of up to £5000 in respect of low level non-compliance.
- Variable financial penalties the value of which will be determined by the regulator.
- Compliance notices and restoration notices which both require non-compliant practices to be corrected.
- Stop notices requiring a business to stop non-compliant practices.
- Enforcement undertakings - an agreement offered by a business to a regulator to take specific actions in respect of non-compliant practices.

All the above sanctions can be appealable to a tribunal. The sanctions are expressly stated in the Act to be an alternative to prosecution.

Part 4 of the Act requires five specific authorities to reduce unnecessary burdens they impose on businesses, namely the Gas and Electricity Markets Authority, the Office of Fair Trading, the Office of Rail Regulation, the Postal Services Commission and the Water Services Regulation Authority.

We think it questionable to what extent the regulators and the regulated would want to abandon their traditional ways of doing things for this new regime. Would businesses want to register with a primary authority? Why should the "primary authority" scheme run side by side with the "home authority" scheme? Is this unnecessary duplication?

If the regulator does not have to prove the breach to the criminal standard but simply decides to issue a monetary penalty what issues will the appeal tribunal deal with? Is the process Human Rights compliant? Will regulators, including councils, continue to prosecute on the basis that the stigma of conviction forms part of the punishment for breach in all but the most trivial of cases?

We will watch in the coming months the extent to which the regulators and the regulated implement the provisions of this legislation.

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Signed, sealed and delivered

We occasionally receive queries whether a document signed by a parish council has been validly executed in the absence of a formal seal. The definition of parish councils of course includes town councils.

The answer lies in sections 13(5), 14(3) and 33(4) of the Local Government Act 1972. These sections state that, notwithstanding anything else in any other rule of law, a parish or community council need not have a formal seal.

Where it has no formal seal, any of its acts which are required to be signified under seal may be signed and, as a consequence, sealed by two members of the council. The parish councils standing orders should

indicate if they have adopted this procedure.

Model standing orders for parishes published by the National Association of Local Councils provide that a document can be sealed by two members of the council signing it, with their signatures being witnessed by the clerk to the council.

A deed such as a section 106 agreement is therefore quite likely to have been validly executed by a parish council even in the absence of a formal seal.

Please contact David Elliott or Pritpal Singh - Swarn if you have any queries on the above.

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