

RIBBLE VALLEY BOROUGH COUNCIL REPORT TO POLICY & FINANCE COMMITTEE

Agenda Item No.

meeting date: TUESDAY 16 NOVEMBER 2010
title: CHARGING FOR ENVIRONMENTAL INFORMATION AND LOCAL LAND -
CHARGES
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1 PURPOSE

- 1.1 To inform committee about the current situation with regard to local land charge fees and environmental information.
- 1.2 To seek committee's approval for:
 - 1.2.1 a new charging schedule for environmental information; and
 - 1.2.2 an interim approach for dealing with requests for such information from personal search companies and others seeking local land charges data.
- 1.3 Relevance to the Council's ambitions and priorities:
 - Council Ambitions – The Environmental Information Regulations 2004 give people rights to certain information that is held by the Council.
 - Community Objectives – Please see above.
 - Corporate Priorities – Please see above.
 - Other Considerations – The Council is obliged to comply with legislation. It also has fiduciary duties with regards to its use of resources as a custodian of public money.

2 LOCAL LAND CHARGES, THE REGISTER AND SEARCHES

- 2.1 The Council is obliged to keep a register of local land charges.
- 2.2 As local land charges on land are enforceable against subsequent purchasers of that land, prospective purchasers (usually via their solicitors or agents) can carry out an "official search" of the local land charges register to see whether there are any outstanding charges registered against the property that they are considering buying.
- 2.3 Local authorities also hold other information about properties which prospective purchasers may be interested in. Form CON29(R) is a standard form of enquiry. Its questions reveal information about the property/land itself, such as information on previous planning applications and building control, environmental health and housing notices. Form CON29 is in two parts. Part 1 (CON29(R)) contains a list of standard enquiries about a property. Optional enquiries are contained in Part 2 (CON29O).
- 2.4 There was, and still is, a fee for provision of this information by the Council. The fee is set by the Council itself. Fees as from 1 April 2010 are currently as follows:
 - Full Search £107.00.

- LLC1 £17.00.
- CON29(R) £90.00.
- CON29(O) £12.00 per question (except question 22 which is £20).

No change is proposed to this fee as a result of legislative changes.

Personal searches

- 2.5 Legislation also provided that any person may search in any local land charges register on paying the prescribed fee. The “fee” was “prescribed” as £22 (increased from £11 last year). This fee has recently been “removed” from the legislation.
- 2.6 Individuals and companies who offer an alternative to the “official search” (“personal searchers”) therefore undertake the local land charges search themselves (a so-called “personal search”).
- 2.7 The Council’s register is held in both paper and electronic format. Work is progressing with a view to the register being fully electronic in the future. In respect of computerised registers the Council can make the pertinent part of it available for inspection in visible and legible form. In practical terms, the local land charges officers do more than merely provide a copy of the data. They also, for example, verify that the plans are accurate, liaise with the personal searcher if they are not etc. and check that the electronic version is complete.
- 2.8 In order to fairly allocate the limited resources of the local land charges officer, the Council operates an appointments-only system for carrying out personal searches.

3 THE 2008 AND 2009 GUIDANCE AND THE 2008 REGULATIONS

- 3.1 During 2005, the Office of Fair Trading (“**the OFT**”) carried out a study of the property search industry and identified some concerns with limits on the availability of property information. It distinguished between the local authorities’ function as “information holder” and its function as “report compiler”. The OFT recommended that local authorities should make “their unrefined property information available to third parties on terms that do not advantage their own compiling activities over competing compilers”. In January 2008 the Department for Communities and Local Government subsequently produced eleven pages of “good practice guidance” on how this should be achieved (“**the 2008 Guidance**”).
- 3.2 In January 2009 the Department for Communities and Local Government produced a further 31 page guidance note (“**the 2009 Guidance**”) in conjunction with the introduction of new statutory requirements (“**the 2008 Regulations**”).
- 3.3 The 2008 Regulations set out a detailed “charging model” for access to “unrefined data”.
- 3.4 The 2009 Guidance divided the information held by local authorities into three types or “data sets”: “pre-unrefined”; “unrefined” or “refined”. The 2008 Regulations do not refer to these “data sets”, but the Guidance made it clear that these should be used as the starting point. Understanding these “data sets” is helpful in understanding the difficulties that councils, are likely to experience in terms of the recent developments described below.
- 3.4.1 “**Pre-unrefined data**” is data which cannot be made publicly available as access would not comply with the Data Protection Act or pass a Freedom of Information test. An example might be a document which is not part of a

public register, and which contains someone's personal details (names, addresses, contact numbers etc).

3.4.2 "**Unrefined data**" is data which has already been "cleaned up" for public consumption, i.e. any sensitive/personal data has been removed from it, or the property information has been extracted from the larger source.

3.4.3 "**Refined data**" is data where "value has been added to the unrefined data", e.g. whether by a local authority or by a personal searcher. An example of this would be a tailored search.

3.5 The charging model in the 2008 Regulations focused on "unrefined" data and made it clear that this "data set" should be made available to all parties (i.e. the local authority local land charges officers, and the personal searchers) at the same cost by a local authority, thus creating "a level playing field".

3.6 The 2009 Guidance deftly avoided addressing who should bear the cost of "cleaning up" pre-unrefined" data to make it into "unrefined data." Instead it recognised that a local authority might be unable to make unrefined information available "where it operated an electronic system holding pre-unrefined data." It provided that "in such circumstances, the local authority should make the refined data available to third parties on a "cost recovery basis."

4 THE CHARGING SCHEME

4.1 The 2008 Regulations do not deal with fees for a full local land charges search, nor with fees for a personal search of the local land charges register. They do not apply: "in respect of access to free statutory information, except to the extent that a local authority is providing a service which is supplementary or incidental to that described in the enactment in question." As "free statutory information" is defined in a way which includes information caught by the Environmental Information Regulations 2004, this exception has taken on greater significance, as explained below.

4.2 The Council produced a charging scheme, using the costing and charging guidance in the 2009 Guidance and the 2008 Regulations.

4.3 The focus of the 2008 Regulations is ensuring fair "access to property records." They provide a detailed methodology for working out the charge (or recharge) for "access to property records". "Access to property records" is defined to include: allowing someone to inspect or search property records at the Council's offices; allowing the making of, or providing copies of property records; or electronically transmitting property records or copies of such records.

4.4 This committee approved a scale of charges for use when supplying such information at its meeting on 24 March 2009.

4.5 Until recent developments, this scale of charges had been used when responding to requests for property records from personal searchers. It will still be used where requests are received for refined data on specific CON29(R) questions.

5 THE ENVIRONMENTAL INFORMATION REGULATIONS 2004

The EIR and the 2008 Regulations

5.1 The Environmental Information Regulations 2004 ("**the EIR**") came into force on 1 January 2005 - the same date as the right to access provisions of the Freedom of

Information Act 2000 (“**the FOIA**”) came into force. There are numerous areas of overlap (but also some key differences) between these two regimes.

- 5.2 The EIR deal with “environmental information” (broadly defined), held (again broadly defined) by public authorities.
- 5.3 “Environmental information” is an exemption (section 39) to, and is therefore carved-out from, the FOIA regime: thus information is either “environmental” and dealt with under the EIR, “personal data” and dealt with by reference to the Data Protection Act 1998, or neither, in which case it is dealt with under the FOIA.
- 5.4 As noted above, the 2008 Regulations carve out “free statutory information” (which would appear to include “environmental information”) from their scope.
- 5.5 Appendix A to the 2009 Guidance contained a note on the Environmental Information Regulations 2004. It commented (emphasis added) that it was: “possible that some of the information required to complete a property search may be “environmental information” as defined by the EIR, in which case the EIR regime would apply.” However, as the 2008 Regulations had been created specifically to deal with personal searchers who wanted access to property information held by local authorities, and as the 2008 Guidance paid scant regard to the EIR (other than this “caveat” as to their “possible” application) local authorities understandably assumed that EIR were likely to be of minimal impact.
- 5.6 Local authorities therefore used the scale of charges that they had created (in compliance with the 2008 Regulations) when dealing with requests for unrefined property data from personal searchers.

The EIR’s requirements

- 5.7 The EIR place numerous duties on public authorities with regard to “environmental information”.
- 5.8 They oblige the Council to make such information available to the public by electronic means that are easily accessible and to take reasonable steps to organise it with a view to the active and systematic dissemination of it. Crucially for current purposes they also place a duty on the Council to make environmental information available on request as soon as possible and no later than 20 working days after receipt of the request.
- 5.9 An EIR “request” can be made in writing, by email or (unlike under the FOIA) orally. Anyone from anywhere can request environmental information. No interest needs to be shown or proved, no reasons need to be given for the request and no reference to the EIR needs to be made.
- 5.10 Information supplied by the Council has to be up-to-date, accurate and comparable. Any enactment which would prevent disclosure of information in accordance with the EIR shall not apply. If the applicant wants information in a certain format, the Council should try to make it so available.
- 5.11 The Council may charge a “reasonable” amount for making information available (and what will be deemed to be “reasonable” has been assessed by the Information Commissioner’s Office), but it cannot charge for access to registers, or examination in situ.
- 5.12 The Council has to:

- 5.12.1 publish and make available to applicants, a schedule of charges; and
- 5.12.2 provide advice and assistance to applicants.
- 5.13 The EIR are “championed” by the Department for Environment, Food and Rural Affairs (“**DEFRA**”).
- 5.14 There are exceptions to the duty to disclose which are set out in Regulations. If the Council refuses to provide information, it has to do so in writing and has to include certain things in its refusal. Dissatisfied applicants can make representations to the Council, if they think the Council has failed to comply with the Regulations and certain steps then have to be followed. The EIR are enforced by a Tribunal established under the Freedom of Information Act 2000 and led by the Information Commissioner’s Office (“**the ICO**” and “**the Information Tribunal**”). The ICO has various powers (derived from the FOIA but applicable also to the EIR) to require authorities to provide information, when their refusal to do so has been successfully challenged by an applicant.
- 5.15 Although the ICO and the Information Tribunal are not “courts” as such: each decision they make is published and there is an expectation that such decisions will be followed by local authorities. Applicants cite these decisions when requesting information from local authorities. If a local authority chooses to ignore a precedent set in an ICO decision and (in an analogous situation) the case proceeds to the ICO, it is probable that the local authority will lose. The net effect is that it is prudent for authorities to follow the ICO precedents. The Council therefore generally does so.
- 5.15.1 The ICO has made it clear that it considers the majority of information provided by authorities in response to property search enquiries to be environmental information. In its view, such requests should have been dealt with pursuant to the EIR, rather than being subject to the statutory charges set under the 2008 Regulations. This view has been stated in ICO “guidance” and in numerous of its rulings.
- 6 THE “REMOVAL” OF THE PERSONAL SEARCH FEE
- 6.1 In July 2010 DEFRA updated its guidance on charging for environmental information under the EIR. The guidance covers some 14 pages. Key points include:
- 6.1.1 It is possible to charge for making environmental information available in many cases (but such charging is discretionary);
- 6.1.2 The charge must be reasonable; (Presumably an authority must consider the impact of the *Markinson* case, where the ICO held that 10p per A4 sheet was “reasonable”);
- 6.1.3 It is not possible to charge for inspecting information *in situ*, or for access to public registers or lists of environmental information. The guidance listed “the Local Land Charges Register” as being such a public register.
- 6.2 Local authorities were advised this Summer (via a letter from central Government) to cease to charge the £22 fee for personal searches of the register. The statutory fee was subsequently “removed” from the legislation. This Council therefore no longer charges this fee to personal searchers.
- 6.3 The latest DEFRA guidance on charging under the EIR explains that there is no clear definition of what is a “reasonable amount” but that “it should be understood to mean that any charges should not exceed the cost of making the information available” and that “a charge must not exceed the cost of producing the information.” The guidance

explains that where information should be supplied free of charge (i.e. where the applicant is inspecting documents or viewing a public register), then the “charge” should be limited to covering additional costs such as photocopying.

- 6.4 However, where an applicant wants to have documents sent to him, “it will be up to the public authority to determine what a reasonable amount should be. This may...include the cost of locating, retrieving, and extracting the information; the cost of communicating that information to the applicant and staff time spent on carrying out the activities related to supplying the information.”

7 FEES SCHEDULE

- 7.1 The Council already has a fees policy in relation to requests under the Freedom of Information Act 2000 and the Data Protection Act 1998 (approved by this committee on 25 September 2007).

- 7.2 The Council does not yet have a “schedule of fees for environmental information”.

- 7.3 The Council’s solicitor has appended a draft schedule to this report at Appendix A. This has not yet been completed. However, it explains the basis upon which the Council will charge, and, if approved by members, the fees can then be calculated by the Council’s finance department.

- 7.4 As it is probable that property records are environmental information, and in the absence of any further guidance from government, it would be prudent for this authority to treat requests for such information as requests for environmental information, at least in the short term.

8 RISK ASSESSMENT

- 8.1 The approval of this report may have the following implications:

- Resources – as the pre-unrefined data would have to be “cleaned up” to make the property record “unrefined”, and as records could be inspected in the office free of charge, there would necessarily be a cost to the Council, in treating property information as “environmental”.
- Technical, Environmental and Legal – The issues are necessarily technical. This Council, like others, has been placed in a difficult position. Government policy is towards greater openness and transparency, particularly with regard to environmental issues and information. As the EIR are EU driven, it is highly unlikely they will be revoked.
- Political – not applicable.
- Reputation – Continuing to charge, when it is becoming apparent that the charge should arguably not be levied anymore on the statutory footing that it is, could impact on the Council’s reputation. Should new legislation be introduced, or should central government attempt to solve the “problem” that they have created, the Council may wish to revisit any decision it makes today.

9. **RECOMMENDED THAT COMMITTEE**

- 9.1 continue not to charge personal searchers who wish to inspect the local land charges register;

- 9.2 continue to charge, as previously approved by committee, for official searches, or for refined data supplied upon request by the Council;
- 9.3 decide that the Council should treat requests for unrefined property records as requests made under the EIR; and
- 9.4 authorise the Council's Solicitor to finalise the schedule for the EIR along the lines attached at Appendix A.

DEBBIE NUTTALL - SOLICITOR

BACKGROUND PAPERS

1. The Local Land Charges Act 1975 and the Local Land Charges Rules 1977.
2. *Personal searches of the local land charges register and other records held by local authorities, good practice guidance for local authorities and personal searchers*, Department of Communities and Local Government, January 2008.
3. *Local Authority Property Search Services- Costing and Charging Guidance*, Department of Communities and Local Government, January 2009.
4. The Local Authorities (England)(Charges for Property Searches) Regulations 2008.
5. http://www.ico.gov.uk/upload/documents/library/environmental_info_reg/practical_application/fep116_property_searches_and_eir_v1.pdf.

For further information please ask for Debbie Nuttall, extension 4403.