

ACCESS TO LOCAL AUTHORITY RECORDS

ADVICE

1. This advice is concerned with arrangements made by local authorities for providing access to information required by independent personal search agents ('IPSA' for short) for the purposes of compiling the information required by regulation 8(k) or authorised by regulation 9(m) of the Home Information Pack (No.2) Regulations 2007 (SI 2007/1777) ('HIPR' for short). It concerns the practice whereby local authorities refuse to allow IPSAs to inspect records held by them, maintaining that they comply with the relevant legal duty by providing copies, often by post. Where this is done, I am informed, the local authority levies a charge for providing the information, relying on the Local Authorities (Charges for Land Searches) Regulations 1994 (SI 1994/1885) ('the 1994 regulations').
2. In my opinion this is unlawful in any of the following circumstances:
 - (1) Where it concerns information that the local authority is required to keep under a statute that provides a public right of inspection at reasonable hours [see paragraph 4 below].
 - (2) Where it concerns a request for Environmental Information [see paragraph 8 below].
 - (3) In any other case where the charge exceeds the modest charge permissible where the request is made under the Freedom of Information Act 2000 ('FoIA' for short) [see paragraph 10 below].
3. In what follows I also address a related issue, namely the circumstances in which an IPSA is excused from providing information under transitional provisions contained at schedule 6 to the HIPR that apply when local authorities maintain a policy of not allowing others to inspect records from which relevant information can be deduced.

Information required to kept by statute with public right of inspection at reasonable hours

4. Examples of legislation providing a public right of access at reasonable hours can be found in section 3(1) and (2) of the Commons Registration Act 1965 and section 28 of the Planning (Hazardous Substances Act 1990).
5. The right of inspection is typically couched in terms such as these: '(2) Any register maintained under this Act shall be open to inspection by the public at all reasonable times.'¹. The statute requires that the register itself be open to inspection by the public. The requirement that the register be open to inspection entails that any member of the public has an unfettered right at all reasonable times to look at the register in person. Any local authority refusing to permit inspection of such a register is failing to comply with the obligation to make the register open to inspection by the public; offering to supply only copies of only parts of the register is non compliance with the requirement to keep the register open for public inspection.
6. The case is *a fortiori* when the authority seeks to charge for supplying the information in the absence of an express statutory power (or one that arises by necessary implication). In my opinion of 5th July 2007 I explained why I agreed with James Goudie Q.C. that where there is a right to inspect a public register not coupled to an express power to charge, a local authority is not entitled to make a charge as a condition of allowing inspection (whether under the 1994 regulations or s 93 of the Local Government Act 2003).
7. It follows that where the local authority refuses to allow access by public inspection, insisting instead on providing copies at a charge, the authority is acting unlawfully in one, possibly two respects: by denying the public inspection that the statute requires and by subjecting access to the information to a charge that it is has no right to levy.

¹ These are the words of s 3(2) of the Commons Registration Act 1965.

Environmental Information

8. In my advice of 5th July 2007 I drew attention to the breadth of the information to which the Environmental Information Regulations 2004 (SI 2004/3391) apply². This information is to be provided free of charge, on request and as soon as possible³. An arrangement under which the information is provided only by providing copies for which a charge is made is incompatible with the regulations and is therefore unlawful.
9. There is no particular form with which a request for environmental information must comply before these regulations are engaged (sign language may suffice⁴).

Freedom of Information Act

10. Information sought under this act for the purposes of personal searches is to be provided promptly, at modest cost⁵. Again there is no particular form with which these requests must comply, although there is limited prescribed information that the request should contain⁶.

The Transitional Provisions

11. HIPR prescribe what information must go into a search report. Recognising that, exceptionally, there will be cases where it is impossible to obtain the prescribed information, they provide a derogation in the case of any information where 'a record from which the answer or result could be deduced is not held by or obtainable under any circumstance [from the relevant body]'. I refer to this as the 'narrow derogation'⁷. The narrow derogation essentially recognises that there are situations in which the information cannot be obtained by documentary search; where this is the case, there is no breach of the requirements in HIPR.
12. There is a further derogation under paragraph 4 of schedule 6, which I will call the 'broad derogation'. The narrow derogation is expressly subject to the broad. The broad

² See paragraphs 27 and 28.

³ Ibid paragraphs 28 and 29.

⁴ Ibid paragraph 29.

⁵ Ibid paragraphs 30 and 31.

⁶ Section 8.

⁷ HIPR Schedule 6, paragraph 3.

derogation comes into play when an answer or result that would otherwise be required to comply with HIPR can be deduced from a record held by a local authority but:

- (1) 'that local authority has a policy of not allowing others to inspect such records';
and
- (2) a local authority has not been requested to provide the search report.

Where the broad derogation is engaged the report may omit the relevant answer or result, provided certain conditions are complied with.

13. Because the narrow derogation is subject to the broad, where the circumstances that engage the broad derogation are present, there is no strict requirement to include the answer or result that might have been deduced from the local authority's records. There are thus two justifications for not including the information:

- (1) What one might loosely term 'impossibility' (which means that a documentary search could not provide the answer or result in any circumstances).
- (2) What one might term 'reluctance' (which means that the local authority for whatever reason will not permit an IPSA or any other person to inspect the record from which the answer or result could be deduced).

'Impossibility' represents the narrow derogation and 'reluctance' the broad.

14. The draft guidance for HIPR and the memo of 30th October 2007 prepared by Carol Sweetenham of the Conveyancing & Property Searches Working Group both suggest that in a case where the information is held by the local authority on a register (or for that matter any other record that it holds) that it refuses as a matter of policy to allow others to inspect, the broad derogation is not engaged if the authority is prepared to provide copies of the register against payment of a fee and by that means the information can be obtained⁸. As I understand what happens in such cases, the search agent asks to be able to inspect the register or other record for the purposes of a particular question, is (pursuant to a policy the local authority has in place) denied the opportunity to inspect the register him or herself but offered in its place a service whereby an agent of the local authority inspects the register or other record and provides such information as he or she believes is necessary to deduce the answer or result that the IPSA requires.

15. If I have correctly understood what is taking place, the local authority clearly ‘has a policy of not allowing others to inspect such records’. Ms Sweetenham’s analysis seems to be that in these circumstances an inspection takes place so that the broad derogation is not engaged⁸. With respect, I strongly disagree. The derogation is engaged where ‘that local authority has a policy of not allowing *other persons* to inspect *such records*’. ‘Other persons’ means persons other than the local authority and ‘such records’ refers to records of the type described at 4(b), i.e. records held by a local authority. In the case that I have postulated, the local authority is unequivocally refusing to allow any person except its own agents to inspect records that it holds. It is not allowing ‘*other persons*’ to do so. Providing copies of parts of the records extracted by the local authority itself does not amount to permitting inspection of the records themselves.
16. If the copy offered by the authority is the entirety of the record the agent has asked to search, then it is arguable that the authority is allowing other persons to inspect such records notwithstanding that it will not permit inspection of the primary record. If, on the other hand, what is offered is an extract based on the judgment of the local authority staff member dealing with the request, the local authority is unquestionably not allowing others to inspect the relevant records within the meaning of paragraph 4(c).
17. Before leaving this subject I draw attention to the fact that the two questions of fees for access to information and the transitional provisions that I have addressed in this advice are legally independent, but appear to have become inter-twined in practice. That is to say that nothing in HIPR affects the rights of a local authority to charge for providing access to information and the fact that the local authority might be doing so unlawfully does not engage the broad derogation. It does, however, appear that some IPSAs may be resorting to the broad derogation whenever the local authority refuses to allow access to its records except on payment of a fee. From the point of view of the customer that is not a satisfactory result, because the customer has to rely on insurance when the relevant

⁸ See the second and third paragraphs of the memo of 30 October 2007 and p 67, paragraph 3 and page 68 paragraph 4 2nd bullet point of the draft guidance.

⁹ ‘Our view is that this does not comply with the HIPs Regulations as they do not specify where the inspection is to take place or state that insurance may be used if a LA charges for inspection, wherever it takes place.’

information is readily available. The solution being proposed in the HIPR guidance is that IPSAs should pay the charges being demanded by local authorities; as I have explained, that appears to rest on an incorrect premise that the extracting of copies amounts to permitting inspection.

18. The obvious solution is for local authorities to afford access to information on proper terms. Information that is part of a public register open to public inspection should be made freely available, information that is Environmental Information should be freely accessible, as should information that the authority is required to provide under the FoIA. Mere charging for copies at a modest rate does not amount to refusal to allow others to inspect and therefore does not engage the broad derogation. If there is a class of information in respect of which there is a statutory power to charge that survives the Environmental Information Regulations, the right course in my opinion would be to require the charge to be paid and the information to be included in the report.

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