

Decision Notice 132/2020

Did a fees notice comply with the EIRs?

Applicant:

Public authority: East Lothian Council

Case Ref: 202000670



Scottish Information
Commissioner

Summary

The Council was asked for a range of information about its interaction with third parties about particular properties. It issued a fees notice under the EIRs, which the Applicant challenged

The Commissioner concluded that the Council had wrongly processed non-environmental information under the EIRs and that it had incorrectly issued a fees notice for this information. He required the Council to carry out a new review.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement), 21(4) and (5) (Review by Scottish public authority)

Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations) regulation 4(1), (2) and (3)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (paragraphs (a) and (c) of definition of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request); 8(1) and (3) (Charging); 9(1)(Duty to provide advice and assistance); 16(3) and (5) (Enforcement and appeal provisions)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 6 May 2020, the Applicant made a request for information to East Lothian Council (the Council). The request was as follows:

This communication is a formal request for provision of copies of all relevant papers, including planning and licensing matters covering the intromissions between East Lothian Council and the parties named below in the period 1 January 2016 to the present – May 2020. The request includes all correspondence including email, planning and licensing applications, copies of licences and notices, legal documents and court proceedings together with any press releases issued to the media and any other relevant matter.

The Applicant listed the parties and the specific properties covered by the request.

2. The Council wrote to the Applicant on 7 May 2020, and asked him to clarify what he meant by use of the term "intromissions".
3. The Applicant responded on the same day and explained that "intromissions" meant "interactions".
4. The Council responded to this clarified request on 21 May 2020. It notified the Applicant that, under regulation 8 of the EIRs, it was charging a fee of £367.92.
5. On 27 May 2020, the Applicant wrote to the Council, requesting a review of its decision. He did not accept that the information covered by his request was environmental information and

argued that the fee charged did not comply with the Commissioner's guidance on charging for information.

6. The Council notified the Applicant of the outcome of its review on 18 June 2020. The Council maintained that the information was environmental, that the charges were appropriate and permitted under the legislation and that they were in accord with the Commissioner's guidance.
7. On 27 June 2020, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. The Applicant expressed dissatisfaction that the Council considered the information to be environmental and making the information available would incur costs of £367.92.

Investigation

8. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
9. On 5 August 2020, the Council was notified in writing that the Applicant had made a valid application and the case was allocated to an investigating officer.
10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and to answer specific questions. These related to its view that all of the requested information was environmental, and its decision to charge £367.92 for the provision of the information.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner considered the relevant submissions, or parts of submissions, made to him by both the Applicant and the Council. He is satisfied that no matter of relevance has been overlooked.

The different charging regimes under the EIRs and FOISA

12. Under regulation 8(1) of the EIRs, a Scottish public authority may charge a fee for making environmental information available. Regulation 8(3) makes it clear that a fee charged under the EIRs shall not exceed a reasonable amount and shall not exceed the costs to the authority of producing the environmental information.
13. If information is not environmental information, the information request must be dealt with under FOISA and any charges must be in line with the (FOISA) Fees Regulations.
14. The two charging regimes are very different. For example, while the EIRs allow an authority to charge a reasonable fee in any case where information is being made available, under FOISA, an authority is not allowed to charge where the projected costs of complying with the request is £100 or less. Where the projected costs are more than £100, the authority may only charge up to 10% of the difference between the projected costs and the £100. (Regulation 4 of the Fees Regulations.) It is therefore very important, when an authority wishes to charge a fee, that the correct charging regime is used.

Matters to be investigated

15. The Applicant challenged several points relating to the fees notice issued by the Council. These can be summarised as follows:
- (i) is the information environmental?
 - (ii) is the fees notice reasonable?

Is the information environmental?

16. The Council handled the request solely under the EIRs. The investigating officer asked the Council to comment on whether all of the information requested was in fact environmental information, as defined in regulation 2(1) of the EIRs.

Documents relating to the use of land and the built environment

17. The Council submitted that six documents falling within the scope of the Applicant's request, held by the Council's Environmental Health and Trading Standards service, relate to the use of land and the built environment at a named caravan site and its impact on the elements of the environment at the site, as well as interventions required to protect those elements. The Council therefore argued that the information accords with the definition of "elements" in regulation 2(1)(a) of the EIRs in terms of land and landscape, and that it also addresses "factors" (regulation 2(1)(b)) in terms of waste and "measures" (regulation 2(1)(c)) in terms of 'activities affecting or likely to affect' those same elements and factors.
18. The Council provided the Commissioner with copies of these six documents. Having reviewed the information contained in these six documents, the Commissioner is satisfied that it relates to the state of the elements (the land) and the measures (health and safety policies) affecting the land, and as such it falls within the definition of environmental information in regulation 2(1), particularly paragraphs (a) and (c) of that definition (see Appendix 1).

Planning documentation

19. The Council also advised the investigating officer that planning information had also been identified as falling within the scope of the request but that, as the Planning department was unable to provide a fees notice in time, the information was excluded from the fees notice issued to the Applicant. The Council noted that there are 34 documents relating to planning applications falling within the scope of the Applicant's request, 21 of which are already published online. The Commissioner is satisfied that the planning information is environmental information for the purposes of the EIRs. The Council has advised the investigating officer that it would now make the planning information available to the Applicant free of charge.
20. It is clear from the Council's submissions that it did not charge the Applicant a fee for the provision of the planning information, nor did it provide him with the information or withhold it under any of the exceptions provided for in the EIRs. This is a breach of regulation 5(1) of the EIRs.
21. Given that 21 of the 34 planning documents held by the Council were already published online, the Commissioner considers that the Council was obliged, in line with its duty to provide advice and assistance in regulation 9(1) of the EIRs, to notify the Applicant that these documents were already published online and to let him know where they could be located. As the Council failed to do this, he finds that it breached regulation 9(1) of the EIRs.

Non-environmental information

22. The Council advised the investigating officer that it now recognised that some of the information it had charged for in the fees notice was not in fact environmental information and that this information should have been dealt with under FOISA and not under the EIRs. In particular, the Council noted that its licensing records, such as applications and associated correspondence, had been generated as part of a distinct process and did not meet the definitions of environmental information regarding elements, factors or measures under the EIRs. The Council disclosed this information to the Applicant, subject to the redaction of personal data, during the investigation.
23. In light of this, the Commissioner must find that, in charging a fee for non-environmental information under regulation 8(1) of the EIRs, the Council breached both regulation 8(1) of the EIRs and section 1(1) of FOISA.

Was the fees notice reasonable?

24. As noted above, regulation 8(1) of the EIRs allows Scottish public authorities to charge a fee for making environmental information available. Regulation 8(3) makes it clear that the fees charged shall not exceed a reasonable amount and shall not exceed the costs to the authority of producing the information requested.
25. As the Council's fees notice of £367.92 included charges for information that was not environmental, the Commissioner cannot accept that the fees notice was reasonable. He requires the Council to carry out a new review in terms of regulation 16 of the EIRs in relation to the environmental information falling within the scope of the Applicant's request.
26. In the event that the Council issues a new fees notice to the Applicant, the fees notice should, in line with the Council's duty to advise and assist, provide the Applicant with a breakdown of the calculations that led to the arrival of the new fee.

Commissioner's comments on the handling of the request

27. It is clear that the Council made a number of failings when responding to this request, many of which arise from its early decision to treat all of the information covered by the request as environmental information.
28. The Commissioner notes that it is the Council's policy always to make a charge when making information available in response to requests made under the EIRs.¹ While the Council is entitled to follow such a policy, provided any fees charge comply with regulation 8 of the EIRs, it must ensure that the fees notices it issues under the EIRs are only for environmental information and that non-environmental information is quickly identified and dealt with under FOISA. In this case, it is fortuitous that the Applicant queried the fees notice issued by the Council or he may have paid for information the Council was not entitled to charge for.

¹ https://www.eastlothian.gov.uk/download/downloads/id/27015/publication_scheme.pdf

Decision

The Commissioner finds that East Lothian Council (the Council) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) and with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant.

In particular, the Council failed to comply with section 1(1) of FOISA by incorrectly categorising information as environmental and in not responding to the non-environmental part of the request under FOISA.

The Council also failed to comply with the following provisions of the EIRs:

- regulation 5(1) (by failing to provide the planning information falling within the scope of the request)
- regulation 8(3) (by issuing a fees notice for information which, by virtue of it including non-environmental information, was not reasonable)
- regulation 9(1) (by not advising the Applicant that some information was published online)

The Commissioner therefore requires the Council to provide the Applicant with:

- a compliant review outcome under regulation 16 of the EIRs regarding the environmental information which falls within the scope of the request
- a compliant review outcome under section 21(4) FOISA regarding the non-environmental information falling within the scope of the request
- the planning information it identified as falling within the scope of its request free of charge

by 7 December 2020.

Appeal

Should either the Applicant or the Council wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Enforcement

If the Council fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Council has failed to comply. The Court has the right to inquire into the matter and may deal with the Council as if it had committed a contempt of court.

Margaret Keyse
Head of Enforcement
22 October 2020

Appendix 1: Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

21 Review by Scottish public authority

...

- (4) The authority may, as respects the request for information to which the requirement relates-
 - (a) confirm a decision complained of, with or without such modifications as it considers appropriate;
 - (b) substitute for any such decision a different decision; or
 - (c) reach a decision, where the complaint is that no decision had been reached.
- (5) Within the time allowed by subsection (1) for complying with the requirement for review, the authority must give the applicant notice in writing of what it has done under subsection (4) and a statement of its reasons for so doing.

...

Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004

4 Fee payable

- (1) For the purpose of section 9(1) of the Act (fees), the fee which a Scottish public authority may charge is to be determined in accordance with paragraphs (2) to (4).
- (2) Where the projected costs do not exceed £100, no fee shall be payable.
- (3) Where the projected costs exceed £100 but do not exceed the prescribed amount, the fee shall not exceed 10% of the difference between the projected costs and £100.

...

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

- (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;

...

(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 paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

...

5 Duty to make available environmental information on request

(1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

(2) The duty under paragraph (1)-

...

(b) is subject to regulations 6 to 12.

...

8 Charging

(1) Subject to paragraphs (2) to (8), where a Scottish public authority is under a duty to make environmental information available under regulation 5(1), it may charge a fee for so doing.

...

(3) Fees charged under paragraph (1) shall not exceed a reasonable amount and in any event shall not exceed the costs to the authority of producing the information requested.

...

9 Duty to provide advice and assistance

(1) A Scottish public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

...

16 Review by Scottish public authority

...

(3) The Scottish public authority shall on receipt of such representations-

- (a) consider them and any supporting evidence produced by the applicant; and
- (b) review the matter and decide whether it has complied with these Regulations.

...

- (5) Where the Scottish public authority decides that it has not complied with its duty under these Regulations, it shall immediately take steps to remedy the breach of duty.

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info