

# Decision Notice 157/2020

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## Road defect repairs and claims

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**Applicant: The Applicant**

**Public authority: East Lothian Council**

**Case Ref: 202000095**



Scottish Information  
Commissioner

## Summary

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The Council was asked for information regarding pothole and road defect repairs and the settlement of claims relating to these.

The Council issued a Fees Notice to the Applicant, explaining that it considered the payment of a fee reasonable in order to comply with the request. The Council advised that, if the fee was not paid, it was not under any obligation to provide the information.

The Commissioner investigated and found that, while the Council was entitled to issue a Fees Notice to the Applicant, the fee charged was not reasonable. The Commissioner required the Council to issue a revised Fees Notice to the Applicant.

## Relevant statutory provisions

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The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (paragraphs (a) and (c) of definition of “environmental information”); 5(1), (2)(b) and (4) (Duty to make available environmental information on request); 8(1), (3), (4), (6) and (8) (Charging); 9(1) and (3) (Duty to provide advice and assistance)

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

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1. On 4 December 2019, the Applicant made a request for information to East Lothian Council (the Council). The information requested was:
  - a) How much has the Council spent in 2018-2019 repairing pot holes and other road defects?
  - b) How many potholes were repaired in that time (both temporary and permanent)?
  - c) How many claims were rejected and how many were honoured and settled?
  - d) How much did the Council pay out on settled claims in that time?
2. The Council responded on 17 December 2019, in line with the EIRs, informing the Applicant that it considered payment of a fee was reasonable in order for it to comply with the request.
3. The Council provided the Applicant with a Fees Notice, which explained that, with effect from 2019, it had a policy to recover full staff costs for every information request received which fell under the EIRs. In this case, the Council was seeking to charge the Applicant £52.70 for the location, retrieval and production of the requested information. A breakdown of the calculation made by the Council to arrive at that cost was provided
4. On 18 December 2019, the Applicant wrote to the Council, requesting a review of its decision. The Applicant set out the following reasons for his dissatisfaction with the Council’s response:
  - He did not agree with the rate of charge per hour and the number of hours quoted to fulfil his request.
  - There was insufficient detail in the Fees Notice to allow the Applicant to understand the nature of the tasks involved and how each task was being charged. The Applicant noted

that he could not see from the Notice how and why it would take a Grade 8 member of staff up to 1.5 hours to do certain work.

- He asked, if it took a Grade 8 member of staff to do a particular task, could the Council explain why and what tasks were involved. He commented that the Fees Notice lacked that detail to allow him to understand the rationale and calculations.
  - He asked that a specific breakdown be provided of what exactly the tasks were and how long each one took.
  - He sought an explanation as to why such senior grade staff were involved in what he considered to be a routine administrative request.
  - The Applicant explained that, as the Council was only entitled to charge him for the actual retrieval and production costs to complete his request, this was why he was asking for more detail from the Council to justify its charges.
  - The Applicant also submitted that the Council had not given him enough advice and assistance for the reasons set out above.
5. The Council notified the Applicant of the outcome of its review on 14 January 2020, upholding its original response. Further explanations were provided in response to the points raised by the Applicant.
6. On 22 January 2020, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (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 stated he was dissatisfied with the outcome of the Council's review for the following reasons:
- Public authorities are supposed to have resilience and contingency for staff absences when handling FOI requests. He felt aggrieved that the Council believed it fair that he should be charged a Grade 8 rate due to the absence of a Grade 4 on authorised leave (as the Council had claimed in the review outcome).
  - If a Grade 4 member of staff could easily do the work of a Grade 8 staff member, why should he be charged what would be a disproportionate amount if his request had been submitted when the Grade 4 staff member was available.
  - He had asked the Council to explain why it considered this acceptable and to justify the difference in costs they expected him to pay.
  - He objected to the estimated costs being rounded up and preferred to pay the exact cost as stated in the Council's policy.
  - The Council had the option to round down, yet they chose to round the cost up, based on a Grade 8 staff member doing work a Grade 4 staff member could easily do. The Applicant was seeking an explanation as to why it considered this to be acceptable.
  - He did not understand what checking and validation processes were involved in what should be a fairly elementary task. He commented that the Council had even admitted as much, given that a Grade 4 member of staff could do most of the work involved.
  - He questioned why he should be asked to pay for the Council staff's work to be checked and validated, when he should be charged for retrieval and production costs only. He commented that he only wanted the data and was not asking for it to be checked and validated.

- The Council had not made it clear what proportion of the task was spent on collating the data and how much was merely an administrative task. He did not understand why a Grade 11 member of staff is required to complete what is an elementary task and why he should be charged accordingly.
- He submitted that it was in the public interest for the requested information to be disclosed and this should be easily and readily available.
- The request was about pothole repairs and claims, which was within the Council's remit and responsibility.

## **Investigation**

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7. 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.
8. On 24 January 2020, the Council was notified in writing that the Applicant had made a valid application. The case was allocated to an investigating officer.
9. 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 the Council's decision to process and respond to the request under the EIRs, and its decision to charge for the provision of the information (including the basis of the charge), together with any action taken by the Council to provide advice and assistance to the Applicant.
10. During the investigation, the Council produced a revised Fees Notice in an effort to reach a settlement with the Applicant. This revised Fees Notice reflected the fact that the Grade 4 member of staff who had been on authorised absence at the time of the request and requirement for review had since returned to work and so was able to undertake the tasks previously allocated to the Grade 8 member of staff.
11. The Applicant commented every other council across Scotland responded to his request without any concerns or queries with the requested information, at no charge. The Applicant questioned why other councils could do this but this Council could not and noted that he objected to being charged at all and considered it unacceptable under the circumstances.

## **Commissioner's analysis and findings**

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12. In coming to a decision on this matter, the Commissioner considered all of the withheld information and 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.

### **Application of the EIRs**

13. The Commissioner is satisfied that the information covered by this request is environmental information, as defined in regulation 2(1) of the EIRs (paragraphs (a) and (c) of the definition of "environmental information"). The Applicant asked for information about the number of potholes repaired by the Council, together with the cost of these repairs and how it dealt with claims relating to these defects. This is information which relates to built structures (roads) and activities undertaken by the Council in relation to making repairs to these, and also

administrative and financial activities affecting, or likely to affect, the elements of the environment, in particular land and landscape.

14. The Applicant has not disputed the Council's decision to handle the request under the EIRs and so the Commissioner will consider the information solely in terms of the EIRs in what follows.

### **Matters to be investigated**

15. The Applicant challenged several points relating to the Fees Notice issued by the Council. Having considered these matters, the Commissioner has identified the following key points of dissatisfaction which he will consider below:
  - The seniority of staff required to undertake work to locate, retrieve and provide information covered by the request.
  - The actual tasks needing to be completed by staff to locate, retrieve and provide information covered by the request.
  - The actual time needed to complete each of the tasks necessary to locate, retrieve and provide information covered by the request.
  - The Council's decision to round up the time required to the nearest half hour.

### **Regulation 8 of the EIRs – Charging**

16. The Council issued a Fees Notice in terms of regulation 8 of the EIRs. This allows a Scottish public authority to charge a fee for making environmental information available under regulation 5(1) (regulation 8(1)). By virtue of regulations 8(4) and (6), the authority may require the payment of a fee in advance and (if it does so) is not required to make the information available unless a fee is paid.
17. As the Commissioner has concluded that the Council was correct to consider the Applicant's request under the EIRs, it follows that it is permissible for the Council to charge a fee for making the information requested available, as provided for in regulation 8.
18. The Commissioner must now consider whether the Council's Fees Notice complied with the requirements in the EIRs.

#### *Did the Council have a published schedule of fees?*

19. Regulation 8(8) of the EIRs requires a Scottish public authority to publish and make available to applicants a schedule of its fees, and information on the circumstances in which a fee may be charged, waived or required to be paid in advance.
20. Within the Fees Notice issued to the Applicant, the Council provided a link to a Schedule of Fees available on its website. This facilitates access to the "East Lothian Council Schedule of Fees for the purpose of the Environmental Information (Scotland) Regulations 2004 (v2 – July 2019)", available via this link  
[https://www.eastlothian.gov.uk/downloads/file/28484/schedule\\_of\\_fees\\_2019](https://www.eastlothian.gov.uk/downloads/file/28484/schedule_of_fees_2019).
21. The Council's Schedule of Fees states that it charges a fee for responses to requests for environmental information under the EIRs. In summary, it makes clear what the proposed fee will incorporate in relation to the actual cost of staff time taken to locate, retrieve, redact (where relevant) and provide the information, together with any additional costs (such as postage or photocopying). The schedule of fees also makes it clear all costs must be paid in

advance and, where the Council finds that it costs less to provide the information than quoted, it will refund the overpayment.

22. The Commissioner is satisfied that the Council was entitled to charge a fee for the request under consideration in this decision, under regulation 8(1) of the EIRs, and that it has published a schedule of its fees, as required by regulation 8(8) of the EIRs.

*Was the fee reasonable?*

23. Regulation 8(3) of the EIRs states that fees charged shall not exceed a reasonable amount and shall not exceed the costs to the authority of producing the information requested.
24. In considering what is reasonable, the Commissioner has taken account of the considerations set out in his guidance on “Charging for Environmental Information”<sup>1</sup> under the heading “Is the charge reasonable or excessive?” (paragraph 12). These include:
- Any costs charged must not be such that applicants are dissuaded from seeking to obtain environmental information or that the right to access is restricted.
  - Public authorities should be able to demonstrate to the Commissioner that, in setting charges, they have undertaken a proper study of all of the relevant factors which should be taken into account, that they have given those factors proper consideration and that they have not taken into account any other, irrelevant, factors.
  - Account should be taken of the actual costs to the authority of providing the information. For example, it is likely to be cheaper to provide a document on the website or by email than to send it out in hard copy, and this should be reflected in the charge.
25. In seeking to establish whether the Council’s fee was reasonable, the Commissioner investigated the amount of work required to locate, retrieve and provide the information covered by the Applicant’s request.
26. The Council was asked to explain why Grade 11 and Grade 8 members of staff were required to carry out relevant tasks, what these tasks were and how long they would take. The Council was also asked to explain why it had rounded up the cost of the work necessary to locate, retrieve and provide the information to the nearest half hour.

*Grade of staff involved*

27. The Council explained that it was necessary for the Grade 11 staff member to carry out the actions to locate, retrieve and provide information which would fulfil parts (a) and (b) of the request, as they were the only staff member who can access, collate and validate all of the information for these parts of the request.
28. As it is only this member of staff who can carry out the work to fulfil parts (a) and (b) of the request, the Commissioner is satisfied that the Council was entitled to charge for a Grade 11 member of staff in those respects.
29. At the time of responding to the Applicant’s request, the Council explained that a Grade 8 member of staff would be responsible for locating, retrieving and providing the information necessary to fulfil parts (c) and (d) of the request. The Council submitted that only two members of staff employed in its Insurance and Risk Service had the necessary knowledge to locate and respond to these parts of the Applicant’s request and, as the Grade 4 member

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<sup>1</sup> <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.aspx?IID=9903&sID=10173>

of staff was on authorised leave at time of the request and requirement for review being received, it was only the Grade 8 member of staff who was available to undertake this work.

30. The Council confirmed in its submissions that the Grade 4 member of staff had since returned to work and, as a consequence, it had been able to revise the cost associated with fulfilling parts (c) and (d) of the Applicant's request.
31. The Commissioner notes that in the Council's Schedule of Fees it states that "the Council will use the lowest graded member of staff available to carry out the task who has the required skills and knowledge to provide the information requested."
32. The Commissioner confirmed that, at the time it received the Applicant's request and requirement for review, the only member of staff available with the required skills and knowledge was the Grade 8 staff member. Bearing in mind that this grade reflected the cost to the Council at the material time, the Commissioner accepts that the Council was then entitled to charge for a Grade 8 staff member.
33. On the basis of the evidence provided, therefore, the Commissioner is satisfied that the Council was entitled to charge for the grades of staff identified.
34. However, the Commissioner acknowledges that the Council is now able and prepared to revise the cost due to the availability of the Grade 4 staff member and he considers this to be reasonable in the circumstances.

#### *Nature of tasks to be carried out*

35. In its submissions, the Council provided a breakdown of the tasks required to be carried out and the time associated with these.
36. Based on the explanation provided by the Council, the Commissioner accepts that the tasks identified as necessary to locate, retrieve and provide information for all parts of the Applicant's request were reasonable in the circumstances.
37. Under regulation 5(4) of the EIRs, where information covered by the request is compiled by or on behalf of the authority, it should be up to date, accurate and comparable as far as the authority believes it to be. The Commissioner is satisfied, based on the submissions received from the Council, that the steps to be taken by the Grade 11 member of staff in respect of the validation of the financial data would be necessary for the Council to meet its obligations under this regulation. The Commissioner is also satisfied, based on the submissions received from the Council, that the steps to be taken by the Grade 8 member of staff in respect of the process of checking claims would be necessary for the Council to meet its obligations under this regulation. Therefore, the Commissioner accepts that, as part of the process of producing the information, this could be charged for.

#### *Time taken to undertake tasks*

38. The Council has detailed in its submissions the amount of time it expects it would take the Grade 11 member of staff to carry out the tasks to fulfil parts (a) and (b) of the request. Having considered the nature of the tasks concerned the Commissioner accepts that the time quoted is reasonable.
39. In relation to the work that would have to be carried out by the Grade 8 member of staff to fulfil parts (c) and (d) of the request, the Council explained that, as the work had not yet been carried out, the timescales given in the Fees Notice represented an estimate of the time required. The Council then provided what it considered to be a reasonable approximation of the time required to do each task.



40. Having considered the relevant submissions, the Commissioner is satisfied that the time allocated to the tasks set out by the Council to fulfil parts (c) and (d) of the request appears reasonable in the circumstances.

*Rounding up of staff time*

41. In his application, the Applicant expressed dissatisfaction with the Council's decision to round up the cost of staff time to the nearest half an hour.
42. In its response to the Applicant's requirement for review, the Council explained that the amount of time to locate, retrieve and validate the information requested had been rounded up to the nearest half hour, in accordance with its Guide to Information: Schedule of Fees (para 5) "Staff costs will be rounded up/down to the nearest half hour".
43. In its submissions, the Council referred to its Schedule of Fees and commented that all charges are payable in advance, which means that fees are calculated on the basis of reasonable estimates regarding the time required to locate and provide the relevant information. The Council noted that, in the event that costs are lower than anticipated, it is Council policy to refund the overpayment.
44. In considering the fairness of the Council's policy to round up or down staff time, the Commissioner has had regard to;
- The terms of regulation 8(3) of the EIRs, which states that fees charged shall not exceed a reasonable amount and shall not exceed the costs to the authority of producing the information requested.
  - The Scottish Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the EIRs<sup>2</sup> (the Code of Practice). This states (at paragraph 5.6.2 in Part 2) "Authorities must ensure that the projected costs should be a reasonable estimate of the costs likely to be incurred and based only on the estimated actual costs to the authority."
  - Paragraph 12 of his own briefing, where he comments that "Any costs charged must not be such that requesters are dissuaded from seeking to obtain environmental information or that the right to access is restricted".
  - The fact that provision for rounding up/down is to be found in the Council's Guide to Information and not (as might be expected) in the Schedule of Fees.
45. While the Commissioner acknowledges that it is the Council's practice to refund any overpayment should it take less time to fulfil the request, he cannot find any reasonable justification for the Council following the practice of rounding up staff time. The effect of this could be considerable, in aggregate, and it can only take the estimate further from a reasonable reflection of the time actually required. The Guide to Information simply refers to fees being rounded up or down and it is not apparent on what basis a decision would be taken to round in a particular direction, in this or any other case.
46. The Commissioner therefore finds the Council's decision to follow this practice unreasonable in the circumstances, and so in breach of regulation 8 of the EIRs.

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<sup>2</sup> <https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2016/12/foi-eir-section-60-code-of-practice/documents/foi-section-60-code-practice-pdf/foi-section-60-code-practice-pdf/govscot%3Adocument/FOI%2B-%2Bsection%2B60%2Bcode%2Bof%2Bpractice.pdf>



47. For the reasons given above, the Commissioner does not agree that the Fees Notice issued by the Council to the Applicant in response to his request and requirement for review was entirely reasonable. In particular, there would appear to have been no justification, in this case, for rounding up staff time. The Fees Notice did not, therefore, comply with the requirements in regulation 8 of the EIRs in all respects.

### **Regulation 9 of the EIRs – Duty to provide advice and assistance**

48. Regulation 9(1) of the EIRs provides that a Scottish public authority must, so far as it would be reasonable to expect it to do so, provide advice and assistance to applicants and potential applicants. Regulation 9(3) provides that a Scottish public authority which conforms to the relevant Code of Practice (in relation to the provision of advice or assistance) is to be taken to have complied with this duty.

49. The Code of Practice” states (at paragraph 5.1 in Part 2):

***Authorities should offer advice and assistance at all stages of a request***

*Authorities have a duty to provide advice and assistance at all stages of a request. It can be given either before a request is made, or to clarify what information an applicant wants after a request has been made, whilst the authority is handling the request, or after it has responded.*

(The full text of Section 5 gives more detailed guidance on good practice in offering advice and assistance in relation to various stages and aspects of a request.)

50. In its submissions, the Council explained that, when the Applicant’s request was received on 4 December 2019, in line with its standard procedures, it notified him on 17 December 2019 that the Council considered the payment of a fee to be reasonable and issued an EIR Fees Notice detailing the charges. The Council commented that this response included notice of the procedure provided by it for dealing with complaints and the Applicant’s right of appeal to the authority and the Commissioner.

51. In the circumstances, the Commissioner is satisfied that the Council fulfilled its obligation to provide relevant advice and assistance to the Applicant, in line with regulation 9 of the EIRs.

## **Decision**

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The Commissioner finds that East Lothian Council (the Council) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant.

The Commissioner finds that, in providing appropriate advice and assistance to the Applicant, the Council complied with the EIRs.

However, while the Commissioner acknowledges that the Council was entitled to issue a Fees Notice to the Applicant, he is not satisfied that the fee charged was reasonable, in line with regulation 8 of the EIRs.

The Commissioner therefore requires the Council to issue a revised Fees Notice to the Applicant, rectifying any failure to comply with regulation 8 identified in this decision, by 21 January 2021.

## **Appeal**

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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**

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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**

**7 December 2020**

### 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

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(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.

...

(4) A Scottish public authority shall, in making environmental information complied by it available in accordance with paragraph (1), ensure so far as practicable that that information is up to date, accurate and comparable.

...

#### 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.
- (4) A Scottish public authority may require that payment of the whole or part of a fee under paragraph (1) be made in advance of making information available.

...

- (6) Where a Scottish public authority has notified an applicant that advance payment is required under paragraph (5) then that authority is not obliged to-
  - (a) make the information requested available under regulation 5(1); or
  - (b) comply with regulations 6, 7 or 13,unless the fee is paid; and any such fee must be paid within a period of 60 working days beginning with the day on which the authority gave such notification.

...

- (8) A Scottish public authority shall publish and make available to applicants-
  - (a) a schedule of its fees; and
  - (b) information on the circumstances in which a fee may be charged, waived or required to be paid in advance.

## **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.

...

- (3) To the extent that a Scottish public authority conforms to a code of practice under regulation 18 in relation to the provision of advice and assistance in a particular case, it shall be taken to have complied with the duty imposed by paragraph (1) in relation to that case.

...

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