

Freedom of Information Act 2000 ('FOIA')
Environmental Information Regulations 2004 ('EIR')
Decision notice

Date: 20 June 2016

Public Authority: Cheshire West and Chester Council

Address: HQ Building
Nicholas Street
Chester
CH1 2NP

Decision (including any steps ordered)

1. The complainant has requested dates relating to a specific building control application which were previously available online. The Commissioner's decision is that Cheshire West and Chester Council has breached regulation 8 of the EIR.
2. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation.
 - Provide the requested dates for Building Control Application 03/01091/MUL free of charge.
3. The public authority must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. On 2 November 2015, the complainant wrote to Cheshire West and Chester Council ('the council') as follows:

"I am trying to view a Building Control Application 03/01091/MUL using the online facility but it is only giving me limited information. It

appears any relevant dates relating to the property have now been removed e.g. approval dates, completion dates etc. is this an error with the system or have these been removed for a reason?"

5. The council responded on 3 November 2015 as follows:

"Please be advised Building control now charge for the search service therefore all dates have now been removed from our on line facility.

Please see the link below for our supplementary fees.

<http://www.cheshirewestandchester.gov.uk/residents/planning%20and%20building%20consulta/building%20regulations/buildingconsultancyforms.aspx> "

6. On the same day, the complainant expressed his dissatisfaction with the response. He referred to Regulation 4 of the EIR, said that the council has deliberately removed the Building control certificate dates, completion dates and decision dates from its website to enable it to charge for the information to the detriment of the public, and requested that the council reinstate access to the information via its website. He also said that the charge of £59 is unreasonable.
7. The council responded on 12 November 2015 stating that the complaint is being considered as per its internal review process for a request for information and provided the reference number of 3554750.
8. Following an email from the complainant on 12 January 2016 chasing a response, the council informed the complainant on 13 January 2016 that the internal review included a wider corporate review of its charging regime for requests for environmental information. It said that the decision is currently in draft and will be sent as soon as possible. It also said that in the meantime, the complainant may refer the matter to the Information Commissioner.
9. The council provided its internal review response on 13 March 2016. The internal review was conducted with a wider remit to consider the council's position overall in charging for environmental information. the In summary, the council made the following points in its review response:
- There is no statutory requirement to publish information/certificates generated under Building Control. Applicants will be issued with original copies and they may apply for further copies but this will ordinarily incur a legal charge.

- The council is being asked to consider ways in which it can save money and reduce spend. One way this can be achieved is to reduce unnecessary or unneeded publications on line as there are infrastructure costs, such as servers and internet access, involved in online publication.
- The council recognises the balance that must be achieved for its residents and the general public to provide relevant information without unduly burdening the public purse, by either spending more money on infrastructure fees or adding to staffing resource time spent and/or providing copy documents without recharge.
- A decision was made to stop publishing building control information for two main reasons:
 - Such information is not required to be published for statutory purposes.
 - Producing copy documents in response to requests could generate income for the council and contribute to the financial savings required on a corporate basis.
- The council is entitled to charge in two situations:
 - Producing copy documents which were produced in pursuance of the council undertaking a statutory function, e.g. building control approval.
 - Responding to a request for information under the EIR.
- In respect of EIR requests, the council is entitled to charge for making environmental information available but any charge must be reasonable.
- Building control information could fall under either/both of the above circumstances.
- In this case, the requester is not the original applicant and his request is not for duplicate copies. Therefore there is no reasonable link to the statutory function and the request must be considered under the EIR.
- As a consequence of the above the council will:
 - Continue with its programme of reviews in relation to its Publication Scheme
 - Reconsider its fees and charges schedule with relevant justifications added/revised

- Review its website and server availability
- Review its EIR request handling
- Once these reviews are complete the council will publish a clear and easily accessible statement on its website confirming how requests for environmental information where charges are likely to apply will be dealt with paying due regard to its statutory obligations under information and other legislation, ICO guidance, the ECJ ruling *East Sussex County Council v Information Commissioner and others* [2015] and LGA guidance.

Scope of the case

10. The complainant initially contacted the Commissioner on 13 November 2015 to complain about the way his request for information had been handled. Following receipt of the council's internal review response, the complainant expressed his opinion that the council is misrepresenting his request, its actions and its entitlement to impose charges. He confirmed that he does not require copies of certificates at this point but simply wants dates. He said that the council already has this information so no work would be involved in providing access. He also said the following:

"As you have some of the data online already and as you have created and provided the information requested, and been paid to do so in order that it becomes a public record, available for the public to view you are creating work by redacting the dates from the information you hold. This is in breach of your statutory duty.

Having the dates online originally means that it is in suitable format for display or easy extraction."

He said that the council is flouting the letter of the regulations and certainly the spirit of the regulations in order to thwart his businesses legitimate competition and requested that the council inform him of a place provided by it where he can view this information, free of charge under EIR.

11. In this decision notice, the Commissioner has considered whether the council has breached Regulation 8 of the EIR.
12. The Commissioner has considered whether the council has breached Regulation 4 of the EIR in a separate enforcement notice (case reference ENF0629097). This is because section 50(4) of FOIA, which imports the enforcement and appeal provisions for regulation 18 of the EIR, doesn't

allow a decision notice to order steps in relation to regulation 4 of the EIR. However, section 52(1) of the FOIA allows for an enforcement notice to order steps in relation to regulation 4 of the EIR.

13. The Commissioner contacted the council on 29 March 2016 to enquire whether it has responded to the complainant's request to view the information free of charge. On 31 March 2016, the council confirmed that it would contact the complainant and invite him to view the requested information at the council's offices at Wyvern House. Any issues arising from this will be dealt with separately from this decision notice.

Reasons for decision

Regulation 8 Charging

14. Regulation 8(1) permits a public authority to charge for making environmental information available. However, Regulation 8(3) states any charge cannot "exceed an amount which the public authority is satisfied is a reasonable amount". Regulation 8(3) does not provide any definition of the word "reasonable".
15. The EIR implements the provisions of the Directive 2003/4/EC on public access to environmental information ('the Directive') into UK law. Article 5(2) of the Directive provides that:

"Public authorities may make a charge for supplying any environmental information but such charge shall not exceed a reasonable amount."
16. As stated in the Commissioner's guidance 'Charging for environmental information'¹, the intention behind the EIR is to increase public access to environmental information. This can be seen in recitals 1 and 9 of the Directive from which the EIR are derived. The Commissioner therefore considers that any charge should be compatible with encouraging transparency and should not be an obstacle to such access. Recital 18 of the Directive states "as a general rule, charges may not exceed the actual costs of producing the material in question".

¹ <https://ico.org.uk/media/for-organisations/documents/1627/charging-for-environmental-information-reg8.pdf>

17. In light of the leading decision of the Court of Justice of the European Union ('CJEU') regarding charging for environmental information, the East Sussex case², the Commissioner would have to answer 2 questions:-
- a. Has the council included only the costs of supplying information including overheads attributable to staff time spent answering the request but excluding any part of the cost of maintaining the relevant database?
 - b. Does the charge exceed a reasonable amount, taking into account (i) whether in the light of the economic situation of the requester and the public interest in protection of the environment it would have a deterrent effect for that requester and (ii) whether in any event it is objectively reasonable?
18. As stated in the aforementioned guidance, the Commissioner considers the overall reasonableness of any charge to be the most important consideration, rather than a focus on the precise activities – for example staff time spent locating and retrieving information - which can be included in the cost. In particular, the charge must not have a deterrent effect on the right to obtain environmental information.
19. A public authority should be able to demonstrate why it believes a charge in each particular case is reasonable. This may mean providing a breakdown of the charges so the requester can understand the basis for the fees. In line with the Directive and Article 5(2) the Commissioner will carry out an objective assessment of whether the PA's charge was reasonable (as opposed to a public law test, that public authority's assessment must be so unreasonable as to be perverse).
20. In this case the Commissioner asked the council to confirm what he charge of £59 covers, and to provide a breakdown of how the £59 has been arrived at in this case, and on what basis the council believes the charge is reasonable. He also enquired as to how the council's building control records are maintained and how many files would need to be searched in order to locate the information requested in this case.
21. The Commissioner also asked what measures the council has taken in order to make environmental information (including building control information) available to the public, including by electronic means, and what environmental information is available on the council's website.

² C-71/14 East Sussex County Council v Information Commissioner

22. The council explained that £59 is the hourly rate for the building control service. It said that the rate is arrived at by following the financial guidance on establishing an hourly rate for building control services in the CIPFA guide on building control accounting. It said that the £59 covers the cost of searching for the information, reviewing the case file to ensure the certificate is valid (which may involve the assistance of a surveyor), producing the document in the requested format and sending it to the applicant.
23. The council also said that it considers that a standard charge for this type of information request is appropriate as it is consistent and easy for its customers to understand. It said that it is reasonable to charge for this information as it is an enhanced search and not just a request to provide access. In addition, the council said that it does not make a profit from these charges and considers that, overall, the calculation accurately reflects the actual cost of providing the information.
24. The Commissioner was provided with a copy of how the charge of £59 is arrived but was asked to keep that information confidential as the council believes it could damage its commercial interests.
25. In relation to how its building control records are maintained, the council said that they are maintained in electronic format in a variety of systems and types of media. It explained that often the person requesting the certificate will not recall the building control application number and will only be able to provide the address which can increase the time taken to effectively track down the specific application especially if the work related to a new build property or conversion where considerable time can be spent tracking down the correct application file and then determining which plot number is relevant to the address. It also said that normally there is only one file per building regulation application but that file could contain hundreds of individual documents which are generically named.
26. In relation to what measures the council has taken in order to make environmental information (including building control information) available to the public, including by electronic means, the council said that following guidance from the LGA it has recognised the need to state its clear position on access to environmental information. It said that whilst it is already reviewing its Publication Scheme and identifying areas for pro-active publication it recognises that a wider review needs to be undertaken to:
 - Review its approach to requests under EIR both for information available through its Publication Scheme and for information that is not available through its Publication Scheme

- Review its website and server availability
- Reconsider its Fees and Charges schedule with relevant justifications added/revised
- Review its EIR request handling

It added that once these reviews are complete it will publish a clear and easily accessible statement on its website confirming how requests for all types of environmental information will be dealt with. It said that this will include guidance on how requests for information where charges are likely to apply will be dealt with, paying due regard to its statutory obligations under information and other legislation, ICO guidance, the ECJ ruling *East Sussex County Council v Information Commissioner and others* [2015] and LGA guidance.

27. The council did not specifically respond to the Commissioner's enquiry as to what environmental information is available on the council's website.
28. The Commissioner notes that the council's arguments as to why the £59 charge is reasonable focus on what it considers to be an enhanced search. The explanation as to reasonableness centres on the cost of searching for the information, reviewing the case file to ensure the certificate is valid, producing a document in the requested format and sending it to the applicant. This is not what was requested in this case. The request was simply for dates in relation to a specific building control application.
29. In addition, the council has said that often the person requesting the certificate will only be able to provide the address which increases the time taken to locate the information. This was not the case in this instance as the complainant provided the specific building control application number.
30. Although the Commissioner considers that the overall reasonableness of any charge is the most important consideration, rather than a focus on the precise activities which can be included in the cost, the council has failed to take the specific circumstances of the request into account. The Commissioner considers that an objective assessment in this case is that the charge is not reasonable as it covers activities that are not necessary in order to provide the requested information.
31. The Commissioner has taken into account the finding in the related enforcement notice (case reference ENF0629097) that the council has breached regulation 4 of the EIR which requires a public authority to implement measures that will improve access to environmental information. If a public authority has failed to take reasonable steps to progressively make environmental information available to the public,

including by electronic means, then it is unlikely that a significant charge for staff time will be reasonable.

32. The Commissioner has also considered the context of the request as this can affect the reasonableness of any charge. In the recent East Sussex case³, the charge was for providing property search information that is a necessary part of a commercial property transaction. The CJEU noted that the charge for information was a very small part of the wider costs involved in the transaction. The Commissioner acknowledges that a reasonable charge in a commercial context, which is the case here, may differ from a reasonable charge when, for example, a local residents' group is seeking information about pollution. However, consideration of the commercial context has not altered the Commissioner's view that the charge of £59 in this case is not objectively reasonable because such a charge covers more than simply providing the requested dates.
33. In the particular circumstances of this specific case, the Commissioner considers that no charge would be reasonable.

Other matters

34. In its internal review response, the council stated that it is not obliged to offer an internal review of its handling of the request for information but that the Code of Practice issued under section 45 of the FOIA and the Information Commissioner both recommend it is good practice to have one.
35. The Commissioner would like to point out that the council is mistaken in its belief that it is not obliged to offer an internal review. Internal reviews are mandatory in relation to requests for environmental information. The council should consider the Commissioner's guidance on this issue:

https://ico.org.uk/media/for-organisations/documents/1613/internal_reviews_under_the_eir.pdf

³ C-71/14 East Sussex County Council v Information Commissioner

Right of appeal

36. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

37. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
38. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Andrew White
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