

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 12 August 2019

Public Authority: Folkestone and Hythe District Council

Address: Civic Centre
Castle Hill Avenue
Folkestone
Kent
CT20 2QY

Decision (including any steps ordered)

1. The complainant has requested information about meetings and communications between Folkestone and Hythe District Council ("the Council") and third party organisations. The Council informed the complainant that it could make the information available subject to a charge of £75.00, in accordance with regulation 8 of the EIR.
2. The Commissioner's decision is that the Council has breached regulation 8(3) by seeking to levy an unreasonable charge for the provision of environmental information.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response to the complainant that does not seek to apply a charge under regulation 8.
4. The Council must take these steps 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

5. On 20 March 2019, the complainant wrote to the Council and requested information in the following terms:

Background

The Otterpool Park Planning application has been submitted and validated. Part of the 27 documents supplied is the Outline Water Cycle study. It makes clear at Page 22 of this document that Arcadis and FHDC have been closely engaging with Affinity Water (AW).

The Request

Please would you provide me with any information on

- Dates and places of any meeting between Arcadis, FHDC and AW*
- Emails between the parties relating to water.*

6. The Council responded on 17 April 2019. It stated that it could make the information available subject to a charge of £75.00 under regulation 8.
7. On 18 April 2019, the complainant asked the Council to undertake an internal review in respect of the charge.
8. Following an internal review the Council wrote to the complainant on 24 April 2019. It maintained that the charge was correct.

Scope of the case

9. The complainant contacted the Commissioner on 24 April 2019 to complain about the way his request for information had been handled, and specifically that the charge was not reasonable.
10. The Commissioner considers the scope of the case to be the determination of whether the charge of £75.00 complies with regulation 8.

Reasons for decision

Regulation 8 – Charging

11. Regulation 8(1) allows a public authority to charge for making environmental information available, subject to the following conditions:

- Regulation 8(2) provides that no charge can be made to allow access to a public register or list of environmental information, or to examine the information at the place which the public authority makes available;
 - Regulation 8(3) requires that any charge must not exceed an amount which the public authority is satisfied is reasonable;
 - Regulation 8(8) requires the public authority to publish and make available to applicants a schedule of its charges and information on the circumstances in which a charge may be made or waived.
12. The Commissioner accepts that a charge can include the staff costs of locating, retrieving and extracting the requested information, as well as any disbursement costs. This follows the findings of the First-tier Tribunal (Information Rights) in *East Sussex County Council v Information Commissioner and Property Search Group (EA/2013/0037)* which found that the drafters of the original EU Directive 2003/4/EC (from which the EIR are derived) made a clear decision not to exclude the cost of staff time in searching for the environmental information when considering a reasonable amount for a charge. However any charge should be reasonable, and a requester should not be disadvantaged by a public authority's poor records management.

What information has been requested?

13. The request seeks:

- The dates and places of any meeting between the Council and two third party organisations ('Arcadis' and 'Affinity Water') in respect of the planning application for 'Otterpool Park', a proposed Garden Town located in Kent.
- Any emails between the Council and the two third party organisations relating to water.

Regulation 8(2)

14. In respect of regulation 8(2), the Council has confirmed that the requested information is not contained within a public register or list.
15. There is no evidence that suggests the Council's position is incorrect, so the Commissioner accepts that this part of regulation 8 has been met.

Regulation 8(3)

How has the Council calculated the charge?

16. The Council has informed the Commissioner that, at the time of the request, it had a charging policy for the EIR. This policy contained the provision to charge a rate of £25.00 per hour for officer time spent complying with a request (not including time required for redaction under exceptions), in addition to the material cost of disbursements.
17. In this particular case, the charge is based on the time required for an officer to locate, retrieve and extract the information.
18. The Council has clarified that the cited time of three hours is an estimate provided by an officer familiar with the information and its context.

How has the Council determined that the charge is reasonable?

19. The Council has informed the Commissioner that, whilst the charging policy is currently suspended (following decision notice FER0843262¹, issued by the Commissioner on 3 June 2019), it considers that the determination of reasonableness should be holistic and take into account all factors in a case.
20. In this case, the complainant advised the Council (when seeking an internal review) that he had submitted the same request to Affinity Water, which has since disclosed held information. Whilst the Council has not been able to verify this with Affinity Water, it considers it reasonable it accept the complainant's statement as true. On this basis, and in the expectation of the Council and Affinity Water holding mirror copies of the information (due to being opposing parties in email correspondence), the Council considers it reasonable to conclude that the complainant already holds a full and complete record of any relevant information that the Council may possess. In such a scenario, the Council does not consider that the duplicate disclosure of the same correspondence would serve a purpose.
21. The Council also considers it relevant that the correspondence was undertaken prior to the publication of various reports (including the Outline Water Cycle Study, Sustainability Statement and Utilities Delivery Strategy), which were made available on the Council's website one month prior to the request being made. Through the publication of this information, the Council considers that it has already recognised and addressed the public interest in additional information being made

¹ <https://ico.org.uk/media/2615045/fer0763266.pdf>

available on the subject. In this context, the Council considers that there is extremely marginal remaining public interest in further copies of the correspondence between the Council and Affinity Water being disclosed.

22. The Council also considers it relevant to note that the requester has historically placed an extensive and far-reaching burden on the Council's resources. An example of this is that between 17 July 2018 and 17 July 2019 the complainant has submitted 83 information requests to the Council.
23. In light of these, the Council believes that it is reasonable to impose a charge. The act of doing so allows the Council to offset the resource burden of compliance when handling requests of negligible wider value and minimal public interest.

The Commissioner's analysis

24. The EIR do not specify the rate at which staff time should be calculated. Although *The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004*² ("the FOIA Fees Regulations") do not apply to the EIR, the Commissioner's view is that it is reasonable for public authorities to use the given rate of £25.00 per hour as a starting point. In the circumstances of this case, this is the exact rate charged by the Council.
25. However, the Commissioner recognises that the charge of £75.00 is likely to represent a significant cost to a requester under the EIR, and in particular, notes that the request seeks information about the Council's interaction with two third party organisations in respect of a substantial development project, including that about the water cycle for the impacted area. The subject matter of the information suggests that it may have wider public value beyond the complainant's own immediate interest.
26. The Commissioner's guidance on regulation 8 emphasises that public authorities should avoid routinely charging for environmental information, and additionally, should take account of the wider aims of the EIR. The guidance also notes the findings of the Court of Justice of the European Union ("CJEU") in the case of *C-71/14 East Sussex County Council v Information Commissioner*, in which the CJEU found that an applied charge must not have a deterrent effect on the right to obtain environmental information.

² <http://www.legislation.gov.uk/uksi/2004/3244/contents/made>

27. The Commissioner recognises that, if an applied charge does have a deterrent effect, this undermines the intended purpose of the EIR and the fundamental objectives that it is seeking to achieve in line with the Convention of Access to Information, Public Participation in the Decision-Making and Access to Justice in Environmental Matters (commonly known as the 'Aarhus Convention'), and the subsequent EU Directive 2003/4/EC.
28. The Commissioner's guidance also explains that the context of a request may affect the reasonableness of any charge. A reasonable charge in one context (e.g. for property search information requested as part of a commercial transaction), may differ from a reasonable charge in another context (e.g. a public group seeking information about pollution in relation to environment concerns).
29. In the context of this case, the Commissioner must consider whether the charge is reasonable. In addressing this, the Commissioner perceives that it is useful to refer again to the FOIA Fees Regulations, as part of which Parliament set an 'appropriate limit' for the consideration of costs under the FOIA. That appropriate limit, which is £450.00 for local public authorities, can be seen as an indication of what Parliament intended would be a reasonable cost to expect such authorities to incur when responding to an information request under the FOIA. In this case, the charge of £75.00 is significantly within the appropriate limit that would apply to an information request under the FOIA.
30. Whilst the Commissioner has considered the specific arguments provided by the Council for why the context of the request makes the charge reasonable, she perceives that these are based on an assumption that the exact information has already been disclosed to the complainant by a third party, and additionally, the extent of the complainant's prior interactions with the Council. Whilst the Commissioner's guidance acknowledges that a difference in broad context may make a charge reasonable (as explained in paragraph 28), the Commissioner considers that in the circumstances of this case, the Council is seeking to apply significantly more restrictive factors based on the identity of the complainant. The Commissioner considers that the application of such restrictive factors would, in effect, result in situations where one requester may receive a charge for information that another requester would not; such a scenario cannot be deemed as fair.
31. Having considered these factors, the Commissioner is not satisfied that the charge is reasonable, and therefore finds that it does not comply with regulation 8(3).
32. Having concluded that the charge is not reasonable, the Commissioner does not need to proceed to consider regulation 8(8).

Other matters

33. The Council appears to have focussed its arguments under regulation 8 only to email correspondence between the Council and Affinity Water.
34. In complying with the step ordered by this decision notice, the Council should ensure that it carefully refers to the request, which also seeks information about meetings and correspondence with Arcadis.

Right of appeal

35. 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@justice.gov.uk

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

36. 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.
37. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF