



NCN:

Appeal number: EA/2021/0219

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

**Determined on the papers, the Tribunal sitting in Chambers
on 1 February and 20 April 2022**

Decision given on:

**Before:
JUDGE ALISON MCKENNA
ROSALIND TATAM
EMMA YATES**

Between

DAVID MARKINSON

Appellant

- and -

THE INFORMATION COMMISSIONER

**First
Respondent**

-and-

**DWR CYMRU CYFYNGEDIG
(Trading as Welsh Water)**

**Second
Respondent**

DECISION

1. This appeal is allowed because the Decision Notice contains errors of law.
2. The Tribunal makes a substituted Decision Notice as follows:

SUBSTITUTED DECISION NOTICE

- 2.1 **The Public Authority named in Decision Notice IC-46917-Z1Y4 is incorrectly described. It is here correctly named as “Dwr Cymru Cyfyngedig (trading as “Welsh Water”)”.**
- 2.2 **The Public Authority’s Scheme of Charges for environmental information is not ‘reasonable’ within the meaning of regulation 8 of the Environmental Information Regulations 2004 because it includes charges which are not directly correlated to the act of supplying the environmental information requested.**
- 2.3 **The steps which the Public Authority are required to take are:**
 - (i) **To review its Scheme of Charges to take account of this Tribunal’s Decision;**
 - (ii) **To publish its revised Scheme;**
 - (iii) **To send a copy of its revised Scheme to the Information Commissioner and to the Appellant by no later than 8 weeks after the date on which this Decision is sent to it.**

REASONS

Mode of Hearing

1. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber’s Procedure Rules¹.
3. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 146. It initially sat on 1 February 2022 but adjourned and directed the joinder of the Second Respondent (referred to in this Decision by its trading name of “Welsh Water”). The Tribunal also asked Welsh Water to address particular questions in its Response. The Tribunal reconvened on 20 April 2022 to consider the Second Respondent’s Response and the further submissions thereon from the Appellant and the First Respondent.

¹ <https://www.gov.uk/government/publications/general-regulatory-chamber-tribunal-procedure-rules>

Background to Appeal

3. The Appellant made a request to Welsh Water on 21 November 2019 for an A4 paper copy of the plans of sewers and mains water systems for a specified location. He said he could not travel to Welsh Water's offices, so required a paper copy. This was in fact a clarified request, made after an earlier correspondence, but it is the material request for the purposes of this appeal. Welsh Water responded on 25 November 2019, confirming that the charge for the information, supplied on one sheet of A4 paper, would be £9.
4. The Appellant complained to the Information Commissioner and the Information Commissioner issued a Decision Notice on 23 July 2021, finding that the charge of £9 was 'reasonable' and requiring no steps to be taken.
5. The Decision Notice details the calculation of the charges made by Welsh Water at [15] as follows: £8.42 is the cost of staff time to comply with the request, based on an average response time of 20.2 minutes at £25 per hour. Added to that is £0.42, for advice from the legal team on any exceptions which may apply; £0.10 is the cost of the photocopy. These costs (£8.94) had been rounded up to £9.00.
6. The Decision Notice notes that Welsh Water's policy as to the calculation of costs is appropriately published on its website. The Information Commissioner was satisfied that the cost of £9 in this case was not a significant cost to the requester and that it did not have a deterrent effect on the seeking of environmental information.
7. The Appellant appealed to the Tribunal.

The Law

8. The information requested is agreed to be 'environmental information' so the relevant regime in the Environmental Information Regulations 2004² ("EIRs").
9. Regulation 8 EIRs provides that a public authority may charge for making environmental information available, subject to certain conditions. These are that the charge must be considered 'reasonable' by the public authority and be notified to the requester.
10. The powers of the Tribunal in determining this appeal are set out in regulation 18 EIRs, which imports s.58 of the Freedom of Information Act 2000, as follows:

"If on an appeal under section 57 the Tribunal considers -

² [The Environmental Information Regulations 2004 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

*(a) that the notice against which the appeal is brought is not in accordance with the law, or
(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”

11. The burden of proof in satisfying the Tribunal that the Commissioner’s decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant. The relevant standard of proof is the balance of probabilities.

Submissions and Evidence

12. The Appellant’s Notice of Appeal dated 17 August 2021 relied on grounds that the charge was not reasonable and that both Welsh Water and the Information Commissioner had failed to comply with a High Court judgment (sic) obtained by the Appellant on the question of charges for copies in 2006, so that the Decision Notice was wrong in law.
13. The First Respondent’s Response dated 17 September 2021 maintained the analysis set out in the Decision Notice. It was submitted that the Appellant’s 2006 case was in fact a Decision of the First-tier Tribunal (EA/2005/0014)³, so it set no precedent. Since then, the Information Commissioner had altered its view of EIR Regulation 8 so that charging for staffing costs is now considered to be reasonable and in accordance with revised Guidance⁴. This point was considered in *East Sussex County Council v Information Commissioner, Property Search Group and the Local Government Association* (EA/2013/0037)⁵, in which the First-tier Tribunal accepted that it was reasonable to include staff costs in the charge for providing copies because the original EU Directive (from which the EIRs derive their authority) did not exclude staff time costs. The First Respondent submitted that whilst the First-tier Decision in *East Sussex County Council* also set no precedent, its approach, rather than the Appellant’s 2006 Decision, represented the correct analysis.
14. The Appellant’s Reply dated 28 September 2021 emphasised that he regards his own previous Tribunal Decision as binding on the Information Commissioner. He also submitted (in what appeared to be an entirely new ground of appeal) that no

³ [Microsoft Word - Markinson Decision.DOC \(tribunals.gov.uk\)](https://tribunals.gov.uk/decisions/decision/EA-2005-0014)

⁴ [Charging for information under the Environmental Information Regulations \(EIR\) | ICO](https://ico.org.uk/for-organisations/information-access-to-information/charging-for-information-under-the-environmental-information-regulations-eir-ico)

⁵ This case was later the subject of a preliminary ruling by the European Court of Justice in C-71/14 6 October 2015 - see [CURIA - Documents \(europa.eu\)](https://eur-lex.europa.eu/curia/doclist/curia/doclist.do?method=advancedSearch&query=C-71%2F14)

human input was required in an internet-based process, so the inclusion of staff time was inappropriate in this case, even if permissible in principle.

15. There was a dispute between the parties as to whether the plans were in fact available for inspection by the Appellant for free at Welsh Water's offices. The Decision Notice states at [13] that the information 'may' have been available for inspection in person, but notes that the Appellant had in any event expressed a clear preference for a photocopy.
16. Welsh Water's Response dated 16 March 2022 resisted the appeal on the basis that its charge of £9 was 'reasonable' within regulation 8 of the EIRs. It confirms that it provides access to environmental information free of charge at its offices and also supplies electronic or paper copies of maps on request. It describes a standard 'response process' at paragraph 11 (1) to (6) of the Response, although it is clear from this that step (3) is required only "occasionally" and that steps (5) and (6) are in the alternative, depending upon whether a paper or an electronic response has been requested.
17. Welsh Water explains that it calculates its charges for supplying information with reference to the average time taken to complete the response process plus the cost of printing. This is based on an annual review of the number of requests for copy asset maps. At the time of responding to the Appellant's request, Welsh Water had received over five thousand requests in the previous 12-month period used for assessment. It had decided not to charge for postage.
18. In respect of a copy asset map request (such as in this case) the charge is calculated as follows:
 - (i) 20.2 minutes of employee time, applying an hourly rate of £25 (time recorded on a time sheet) = £8.416;
 - (ii) 1 minute of legal team time (estimated) in supporting staff handling such requests, also applying an hourly rate of £25 = £0.416;
 - (iii) Printing costs of £0.10.
19. Welsh Water then applies a policy of "rounding up or down" to the nearest pound in order to achieve a charge which is simply stated for the requester. It is submitted at paragraph 25 of the Response that "*This policy would never have led to an increase on the actual cost of providing a copy asset map of more than £0.49 and, as it may also have been rounded down, it could have been to the requester's benefit. In the circumstances, as it makes no material difference to the Charge, it would not deter requesters or impact its reasonableness*". Welsh Water relies on the Information Commissioner's Guidance in applying the "rounding up" policy, referring to the overall reasonableness of any charge being more important than the precise activities included in the cost. It did not rely on any basis for "rounding up or down" other than simplicity of presentation.

20. Welsh Water's Response records at paragraph 21 that its legal team's estimated time input is included on the basis that this may be required to ensure legally compliant responses to requests. However, in the Appellant's case, it is stated that substantive legal input was required to support staff in clarifying the Appellant's request and dealing with his correspondence about the charging policy.
21. Welsh Water's Response explains that the Appellant is mistaken in describing a fully automated process and confirms that human intervention is always required in supplying copy information.
22. The First Respondent made further submissions dated 8 April 2022, as follows. It is submitted that, in view of Welsh Water's Response, it would not appear that there is an element of automation which affects the reasonableness of the Charging Scheme.
23. On the question of legal costs, it is submitted that whilst it is reasonable in principle to include this element, the information supplied to the Information Commissioner during enquiries suggested that this was for legal advice in considering any exemptions to disclosure, whereas Welsh Water's Response stated that the legal advice had been obtained in response to the Appellant's correspondence. It was submitted that passing on the cost of legal advice in respect of clarifying the request was permissible, but that legal advice taken about the charging policy could not be considered as relating to the process of providing the requested information. Nevertheless, the advantages of having a policy which eliminates the need to calculate the requirement for legal advice in 6,000 cases a year would be of benefit to requesters and so, on balance, the First Respondent regarded it as reasonable.
24. In relation to the policy of "rounding up", the First Respondent noted that Recital 18 of the Aarhus Directive 2003/4/EC from which the EIRs are derived states that "*as a general rule, charges may not exceed the actual costs of producing the material in question...*". It notes that, if the rounding up charge were not permitted but postage costs were applied, requesters who requested a copy by post would pay more. It is noted that other water companies impose higher charges than Welsh Water and it is submitted that, in all the circumstances, the charge of £9 was reasonable.
25. The Appellant made further submissions dated 10 April 2022. He submitted that there is no legal authority for Welsh Water's application of "rounding up" charges or its inclusion of costs for legal advice. It is submitted that neither Welsh Water nor the Information Commissioner have properly answered the Tribunal's questions.
26. The Appellant submits that a charge of £9 for a single sheet of A4 paper is excessive and flies in the face of the founding principles of freedom of information legislation.

Conclusion

27. We conclude that the Appellant has in his Notice of Appeal misunderstood the legal status of his 2006 case. It is not a High Court judgment - it is a First-tier Tribunal Decision. Decisions of the First-tier Tribunal have no precedential value – see *O’Hanlon v Information Commissioner* [2019] UKUT 34 (AAC)⁶. It follows that neither Welsh Water, the Information Commissioner nor this Tribunal is bound to follow the Decision in Mr Markinson’s earlier case.
28. We note that none of the parties has made submissions to us in respect of the European Court’s preliminary ruling in the *East Sussex County Council* case, although it is referred to in the Information Commissioner’s current Guidance. Whilst not establishing a domestic precedent, it seems to us that the ECJ’s analysis lends considerable weight to the argument that we should approach this case, in accordance with the Information Commissioner’s current Guidance, on the basis that a charging policy which includes staff costs is in principle reasonable.
29. However, it is also clear from the ECJ’s Ruling at [36] that only costs attributable to the supplying of environmental information may be charged. We note the Advocate General’s Opinion⁷ at paragraph 60 point (iv) refers to the requirement for a “*direct correlation*” between the charges made and the “*act of supplying*”, as follows:

“In my opinion, a charge which does not exceed a reasonable amount within the meaning of Article 5(2) is a charge which: (i) is set on the basis of objective factors that are known and capable of review by a third party; (ii) is calculated regardless of who is asking for the information and for what purpose; (iii) is set at a level that guarantees the objectives of the right of access to environmental 38 – See, for example, Article 3(2) of Directive 2003/4. 39 – See also, for example, Opinion of Advocate General Fennelly in Commission v Germany, C-217/97, EU:C:1999:34, point 26. 40 – See Article 4 of Directive 2003/4. 41 – See Article 1 of, and recitals 9 and 20 in the preamble to, Directive 2003/4. EAST SUSSEX COUNTY COUNCIL I - 19 information upon request and thus does not dissuade people from seeking access or restrict their right of access; and (iv) is no greater than an amount that is appropriate to the reason why Member States are allowed to make this charge (that is, that a member of the public has made a request for the supply of environmental information) and directly correlated to the act of supplying that information”.

30. In this case, Welsh Water describes its ‘response process’ as based on the average amount of staff time taken to supply information in response to requests for copy asset maps. Although we note that the six steps described will in most

⁶ [GIA_1680_2018-00.pdf \(publishing.service.gov.uk\)](#)

⁷ [Document Canevas \(landmarkchambers.co.uk\)](#)

cases consist only of four steps, Welsh Water relies on having an evidence-based system of time-recording (which we have not seen). It is impossible for us to evaluate the reasonableness of the calculation of average time without seeing the data showing how staff spent that time. Nevertheless, we appreciate the desirability of having a set charge in each case and that inconvenience would be caused to all requesters if Welsh Water had to calculate costs on a case-by-case basis. On that basis, we regard the policy of applying an average amount of staff time to each request as in principle reasonable.

31. However, we also see some dangers in an approach based on average times, given the likelihood that commercial operators would ask for bulk information and domestic/community requesters (such as the Appellant) would ask for minimal information. It seems to us that a policy based on average times for these reasons risks having a disproportionate impact on the domestic/community requester of environmental information. It would be possible, for example, to mitigate this risk by applying a capped charge to *de minimis* requests made by an individual or community group in order to ensure that the application of a charge based on average times did not represent a deterrent cost to some but not others. Both Respondents submitted that the charging policy could not be seen to be deterrent because Welsh Water continues to receive many requests, but we have some doubts about the force of this argument in the context of a monopoly holder of information.
32. Whilst we accept that the adoption of a Charging Scheme based on the allocation of staff costs plus disbursements is in principle reasonable and within the scope of regulation 8 of the EIRs, we also conclude that Welsh Water's policy of "rounding up" its charges departs significantly from the required correlation between the act of supplying the information and the charges made in relation to that act. We accept that the Information Commissioner's Guidance refers to the overall reasonableness of charges, but in our view, this does not extend to including charges which bear no relationship to the act of supplying the information requested and are imposed merely for administrative convenience. We conclude that Welsh Water's Charging Scheme is not "reasonable" within the meaning of Regulation 8 EIRs so long as it includes the ability to "round up" charges to the nearest pound, as described. We conclude that the Decision Notice was erroneous in finding that the Scheme was reasonable in this respect.
33. We also conclude that Welsh Water's Charging Scheme was either wrong in principle, or that Welsh Water departed from its own Scheme, in apparently seeking to pass on to the Appellant the legal costs involved in dealing with his correspondence about its charges. As the Information Commissioner submitted, it seems unlikely that the cost of taking legal advice about possible exceptions to the duty of disclosure could reasonably be passed on to each requester in any event, given the likely frequency of similar requests for standard documents (such as copy maps of pipes and sewers). We conclude that the Decision Notice was erroneous in finding that the Scheme was reasonable in this respect.

34. Having had the opportunity to consider Welsh Water's submissions, we do not accept the Appellant's contention that the process of supplying information is fully automated so that no staff time is in fact necessary. We accept that there is always human input required in supplying requested information, even if the request is made and the information supplied electronically.
35. We note that the Decision Notice did not attempt to resolve the factual dispute as to whether the Appellant could have attended Welsh Water's Office to view the information in person. We find ourselves in similar difficulty. Nevertheless, we conclude that the point is immaterial to our Decision as, even if the Appellant had attended one of Welsh Water's offices, he could only have viewed the information there and would have had to pay the same amount for a copy to be supplied to him in any event (see paragraph 14 of Welsh Water's Response).
36. For all these reasons, we now allow the appeal and make the substituted Decision Notice above, requiring the steps to be taken within 8 weeks.

(Signed)

JUDGE ALISON MCKENNA

DATE: 28 April 2022

DATE PROMULGATED: 03 May 2022