

Freedom of Information Act 2000 (Section 50) Environmental Information Regulations 2004

Decision Notice

Date: 21 March 2011

Public Authority: Nottingham City Council
Address: The Guildhall
Burton Street
Nottingham
NG1 4BT

Summary

The complainant made a request to Nottingham City Council (the 'Council') for information about the amount of heat sold in a particular period by Enviroenergy, an energy company owned by the Council. The Council charged the complainant a fee of £900 for the information under regulation 8 of the EIR. The Commissioner's decision is that the Council did not charge a reasonable fee and therefore breached regulation 8(3). He has also found that the Council breached regulation 8(4) by failing to issue the fees notice within 20 working days and regulation 11(4) by failing to provide an internal review response within 40 working days.

The Commissioner's Role

1. The Environmental Information Regulations (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

The Request

2. The complainant made requests for information to the Council on 14 August 2009. The requests related to the amount of heat sold by Enviroenergy, an energy company owned by the Council:
 - (1) "I would therefore like to request that you let me know how much heat was sold in the annual period that includes most of 2007."
 - (2) "I would also like to request that for the last annual period reported to the CHPQA you let me know (a) how much heat (in MWh) was distributed through the district heating system, and (b) how much of this heat (in MWh) was actually sold."
3. On 23 October 2009 the Council responded to the request. In relation to request 1, it explained that it would be required to calculate a response and was permitted to charge a fee for providing the information under regulation 8 of the EIR. It therefore issued a fees notice inviting the complainant to pay a fee of £900 to cover an estimated five days of work necessary to calculate the requested information. In relation to request 2, the Council applied regulation 12(5)(e) to withhold the requested information.
4. On 30 October 2009 the complainant requested an internal review of the Council's response to his request. In relation to request 1, the complainant indicated that he would consider paying the fee of £900 but queried the Council's interpretation of his request.
5. On 5 January 2010 the Council provided an internal review response and upheld its initial response to the request. The Council also confirmed its interpretation of request 1.
6. On 8 January 2010 the complainant wrote to the Council and explained that he would pay the fee of £900 in order to obtain the information relating to request 1. However, he also requested that the Council should provide data demonstrating that five days of work had been carried out by the Council when providing the information. On 13 January 2010 the complainant provided the Council with a cheque as payment.
7. Following the payment of the fee of £900, on 29 January 2010 the Council provided the complainant with a response to request 1. On 23 February 2010 the Council also provided the complainant with a timesheet detailing the work undertaken to calculate the requested information.

The Investigation

Scope of the case

8. On 1 March 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - Request 1 – the Council charged a fee of £900 for providing the information but had not demonstrated that this was a reasonable fee; and
 - Request 2 – the Council refused to provide the requested information.
9. During the course of the Commissioner's investigation the following matters were resolved informally and therefore these are not addressed in this Notice:
 - The Council disclosed the information relevant to request 2.
10. The Commissioner has therefore considered whether the fee of £900 charged by the Council for providing information in response to request 1 was a reasonable amount under regulation 8 of the EIR.

Chronology

11. On 7 September 2010 the Commissioner wrote to the Council and explained that, on the basis of the available evidence, he believed the Council had not charged a reasonable amount when requesting the fee of £900. The Commissioner therefore invited the Council consider refunding the fee to the complainant.
12. On 2 November 2010 the Council responded to the Commissioner and said that it believed the fee was not unreasonable, and was based on the actual hourly rate of pay of the staff who were required to undertake the work to calculate a response to the request. Therefore the Council said it believed the fee reflected the cost of producing the information and that it did not intend to refund the fee to the complainant. However, the Council noted that with the benefit of hindsight it believed it should have refused to comply with the request under regulation 12(4)(b) because the amount of work required meant the request was manifestly unreasonable.

Analysis

Substantive Procedural Matters

Regulation 2 – environmental information

13. The Commissioner has considered whether the information requested by the complainant is environmental information as defined by the EIR.
14. The Commissioner considers that the information requested falls within regulation 2(1)(b): information on “factors, such as substances, energy, noise, radiation or waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment”. Information about the amount of heat sold in a particular period is information on the factor of energy which is likely to affect the state of the elements of the environment, and therefore the Commissioner considers the request is for environmental information.

Regulation 8 - charging

15. Regulation 8(1) provides that a public authority may charge for making environmental information available. Regulation 8(3) provides that any charge “shall not exceed an amount on which the public authority is satisfied is a reasonable amount”.
16. However, a public authority can only take certain costs into account in calculating this amount. These are disbursements such as the cost of photocopying or postage. The cost of staff time in identifying, locating or retrieving information cannot be taken into account. This view was confirmed in the Tribunal decision in the case of [David Markinson v Information Commissioner](#) (EA/2005/0014).
17. The Council’s fees notice of 30 October 2009 explained that if the complainant wished to receive the requested information, he should pay a fee of £900. The Council explained that this charge applied because the nature of Enviroenergy’s domestic heat meters meant it would be necessary to make detailed calculations in order to provide a response to the request. It said that it estimated the task would take five days of work and that the fee of £900 applied.
18. The Commissioner has advised the Council of his view that the fee of £900 was unreasonable because it took into account costs of identifying, locating and retrieving the information rather than only the costs of producing the information, such as photocopying or postage.

19. However, the Council has maintained its view that the fee was reasonable in accordance with regulation 8 of the EIR and comments made by the Tribunal in the case of *Markinson v Information Commissioner*. It has argued that the actual hourly rates of the individual members of staff involved in calculating the data amounted to £972.86. Therefore, it considers that the fee of £900 was reasonable because it is lower than the actual cost to the Council of producing the information. It also argues that the calculations were 'actions necessary to produce the figure, not actions used to locate, identify or retrieve this information'.
20. The Commissioner does not accept the Council's view that work undertaken to calculate data in order to respond to a request can be considered as a cost of providing information under regulation 8. Indeed, the Commissioner considers that these actions would clearly constitute locating, identifying and retrieving information.
21. The Commissioner concludes that the charges detailed by the Council cannot be taken into account in a fees notice, and finds that the Council breached regulation 8(3) by charging an unreasonable fee for providing information.
22. Regulation 8(4) provides that where a public authority levies a charge for providing environmental information, it should notify the applicant of this and the amount to be paid within 20 working days after it receives the request for information. The complainant's request was made on 14 August 2009. The Council did not write to the complainant to levy a charge of £900 until 23 October 2009, and consequently the Commissioner finds a breach of regulation 8(4).

Procedural requirements

Regulation 11 – representations and reconsideration

23. Regulation 11(3) provides that upon receiving representations from an applicant unhappy with a response to a request for information, the public authority should review its response. Regulation 11(4) provides that the outcome of this internal review should be communicated to the applicant within 40 working days.
24. On 30 October 2009 the complainant wrote to the Council to explain that he was dissatisfied with its response to his request. The Council did not provide the outcome of its internal review until 8 January 2010 and so the Commissioner finds that it has breached regulation 11(4).

The Decision

25. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act because:
- it breached regulation 8(3) by issuing a fees notice that took into account factors that the Fees Regulations do not allow it to consider;
 - it breached regulation 8(4) by failing to issue its fees notice within the statutory time for compliance; and
 - it breached regulation 11(4) by failing to provide its internal review response within the statutory period.

Steps Required

26. The Commissioner requires no steps to be taken

Right of Appeal

27. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 21st day of March 2011

Signed

**Lisa Adshead
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Regulation 2 - Interpretation

Regulation 2(1)

“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;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

Regulation 8 - Charging

Regulation 8(1)

Subject to paragraphs (2) to (8), where the public authority makes environmental information available in accordance with regulation 5(1) the authority may charge the applicant for making the information available.

Regulation 8(2)

A public authority shall not make any charge for allowing an applicant –

- (c) to access any public registers or lists of environmental information held by the public authority; or
- (d) to examine the information requested at the place which the public authority makes available for the examination.

Regulation 8(3)

A charge under paragraph (1) shall not exceed an amount on which the public authority is satisfied is a reasonable amount.

Regulation 8(4)

A public authority may require advance payment of a charge for making environmental information available and if it does it shall, no later than 20 working days after the date of receipt of the request for the information, notify the applicant of this requirement and of the amount of the advance payment.

Regulation 11 - Representation and reconsideration

Regulation 11(1)

Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request.

Regulation 11(2)

Representations under paragraph (1) shall be made in writing to the public authority no later than 40 working days after the date on which the applicant believes that the public authority has failed to comply with the requirement.

Regulation 11(3)

The public authority shall on receipt of the representations and free of charge –

- (e) consider them and any supporting evidence produced by the applicant; and
- (f) decide if it has complied with the requirement.

Regulation 11(4)

A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the receipt of the representations.