

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 29 January 2013

Public Authority: East Sussex County Council
Address: County Hall
St Anne's Crescent
Lewes
East Sussex
BN7 1UE

Decision (including any steps ordered)

1. The complainant submitted a request to East Sussex County Council ("the council") for various pieces of environmental information relating to a named property. The council provided this information, but made a charge to the complainant of seventeen pounds. The Commissioner's decision is that the council has breached regulation 8(3) by levying an unreasonable charge for the provision of the information requested. In addition, he finds that the council has breached regulation 11(4) by failing to provide a substantive response to the complainant's request for an internal review within 40 days.
2. The Commissioner requires no steps to be taken.

Request and response

3. On 3 June 2011, the complainant wrote to the council requesting answers to questions "3.2, 3.4 a,e,f, 3.4 b,c,d, 3.5, 3.6 a-l" (sic) on the standard CON29 local search enquiry form in respect of [a named property]. These questions are as follows:

3.2 Land to be acquired for Road Works

Is the property included in land to be acquired for road works?

3.4 Nearby Road schemes

Is the property (or will it be) within 200 meters of any of the following:-

- (a) The centre line of a new trunk road or special road specified in any order, draft order or scheme.*
- (b) The centre line of a proposed alteration or improvement to an existing road involving construction of a subway, underpass, flyover, footbridge, elevated road or dual carriageway.*
- (c) The outer limits of construction works for a proposed alteration or improvements to an existing road, involving:
 - (i) Construction of a roundabout (other than a mini roundabout); or*
 - (ii) Widening by construction of one or more additional traffic lanes.**
- (d) The outer limits of:
 - (i) Construction of a new road to be built by a local authority;*
 - (ii) An approved alteration or improvement to an existing road involving construction of a subway, underpass, flyover, footbridge, elevated road or dual carriageway; or*
 - (iii) Construction of a roundabout (other than a mini roundabout) or widening by construction of one or more additional traffic lanes.**
- (e) The centre line of the proposed route of a new road under proposals published for public consultation.*
- (f) The outer limits of:
 - (i) Construction of a proposed alteration or improvement to an existing road involving construction of a subway, underpass, flyover, footbridge, elevated road or dual carriageway;*
 - (ii) Construction of a roundabout (other than a mini roundabout); or*
 - (iii) Widening by construction of one or more additional traffic lanes, under proposals published for public consultation?**

3.5 Nearby Railway Schemes

Is the property (or will it be) within 200 metres of the centre line of a proposed railway, light railway or monorail?

3.6 Traffic Schemes

Has a local authority approved but not yet implemented any of the following for the roads, footways and footpaths (named in box B) which about the boundaries of the property:-

- (a) Permanent stopping up or diversion*
- (b) Waiting or loading restrictions;*
- (c) One way driving;*
- (d) Prohibition of driving;*
- (e) Pedestrianisation;*

- (f) *Vehicle width or weight restriction;*
- (g) *Traffic calming works including road humps;*
- (h) *Residents parking restrictions;*
- (i) *Minor road widening or improvement;*
- (j) *Pedestrian crossings;*
- (k) *Cycle tracks; or*
- (l) *Bridge building.*

4. The council promptly provided the information requested but charged the complainant seventeen pounds. On 29 July 2011, the complainant sought an internal review of the council's decision to charge for the information. The council provided a formal response to this request on 30 November 2011 outlining its position that "*Regulation 8 of the EIRs provides a general right for public authorities to charge for making [environmental] information available*"; and that it would continue to do so pending the outcome of various appeals currently before the Information Tribunal.

Scope of the case

5. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He specifically asked the Commissioner to consider the council's entitlement to charge for the information it provided.
6. The issue for the Commissioner's consideration in this notice is whether the council has charged a "reasonable amount", under regulation 8(3), for the information it has provided to the complainant.

Reasons for decision

Regulation 2

7. Whilst the council has not provided a substantive argument that the information sought does not fall within the scope of the EIRs, it has noted that the complainant made "*no reference to the Environmental Information Regulations 2004*" in his request. The Commissioner began by considering whether the request made by the complainant is a request for environmental information as defined by regulation 2(1) of the EIRs.
8. The Commissioner considers that the information which is necessary to answer the relevant questions on the CON29 form, outlined in paragraph 5 above, falls within regulation 2(1)(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 (a) and (b) as well as measures or activities designed to protect those elements". As each piece of information pertains to a human development on the land, essentially road, traffic or railway schemes, the Commissioner considers all of the information to be on measures likely to affect one or more of the elements referred to in regulation 2(1)(a).

Regulation 8(3)

9. Public authorities often levy a charge for providing information of the type sought in this case under the [Local Authorities \(England\) \(Charge for Property Searches\) Regulations 2008](#) ("the CPSR"). The Commissioner's position is that regulation 5(6) specifically disapplies the charging provisions under the CPSR. In [Kirklees v Information Commissioner](#), the Tribunal accepted that regulation 5(6) has this effect. Therefore, where information is environmental in nature, public authorities should levy charges in accordance with the EIRs. This position also acknowledges the primacy of EU legislation whereby European law, such as the EIRs, takes precedence over domestic law.
10. Having established that the information requested is environmental information within the meaning of regulation 2(1), the charging regime which the council must comply with is that contained in the EIRs. Regulation 8 provides a general right for public authorities to charge for the provision of environmental information.
11. Regulation 8(3) of the EIRs states that, "a charge under paragraph (1) shall not exceed an amount which the public authority is satisfied is a reasonable amount." The Commissioner's position is that a "reasonable charge" under regulation 8(3) can only cover the costs of disbursements incurred in providing the information, such as postage and photocopying. He does not accept that factors such as the costs of staff time spent on complying with a request can be taken into account. If a public authority believes that it would take an excessive amount of time to comply with a request, it has the option of citing the exception at regulation 12(4)(b).
12. The council disagrees with this interpretation; feeling that the Commissioner's view is too restrictive. Instead, it argues that the provision in regulation 8(3) for a public authority to charge a "reasonable amount" allows it to make charges on a "*cost recovery basis*".
13. The Commissioner considers that his interpretation of regulation 8(3) is supported by the Information Tribunal decision in [Markinson v Information Commissioner](#). The Tribunal commented:

"30. ... the Council has taken into account "the officer time in locating and retrieval of the documentation", a factor which we believe the Council and the Commissioner should have regarded as irrelevant. Regulation 8(2)(b) provides that the information in question should be made available for inspection free of charge and we believe that, if the costs of locating and retrieving a piece of information should be disregarded for that purpose, it is not open to a public authority to regard it is reasonable to include them in the cost of copying the same material".

14. The Commissioner's starting point is that he considers it unlikely that the regulations intended for a public authority to be able to charge for the same work necessary to respond to a request in some instances, but not others. With this in mind, the Commissioner considers that it would be illogical, and contrary to the general scheme of regulation 8, for a public authority to be prohibited from charging for locating and retrieving information in some scenarios; but allowed to do so in others. Whether the information is being provided on paper or to be inspected, the degree of work for the public authority involved in locating and retrieving the relevant information will be the same. As regulation 8(2)(b) clearly prohibits work being charged for time locating and retrieving information where that information is to be inspected by the applicant, it must follow that this activity cannot be charged for where the copies of the information are provided to the applicant.
15. The Commissioner notes that regulation 8(2) explicitly addresses the scenarios in which the drafters of the EIRs considered public authorities to be prohibited from charging for environmental information. Regulation 8(2)(b) prohibits charging where an applicant inspects environmental information. Similarly, regulation 8(2)(a) prohibits charging where environmental information is available on a "public register or list". What regulations 8(2)(a) and 8(2)(b) have in common is that they prohibit charging based upon the form in which the information is to be provided to the applicant. Once the information has been collated, where information is inspected or publically available the form in which the applicant views the information does not cause any additional cost to the public authority. From regulation 8(2), which outlines where charging is prohibited, the Commissioner's view is that it follows that regulation 8(3), which outlines where charging is permitted, must be interpreted as applying to scenarios where the form in which the information is provided causes public authorities additional cost. Most commonly, this will be where paper copies of the information are requested. It is on this basis that the Commissioner views a "reasonable amount" as extending to disbursements, necessitated by the form in which the information is provided, such as postage and photocopying costs.

16. The council has argued that an entitlement to charge on a cost recovery basis is implied by regulation 8(8). Regulation 8(8) provides that a council must publish in advance any charges that are to be made for the provision of environmental information. The Council therefore contends that Regulation 8(8) cannot have been intended to require the council to publish potential costs of postage only. The implication being, presumably, that the obligation to publish charges implies that there will be some diversity in the charges levied on particular types of environmental information.
17. The Commissioner is not persuaded by this argument. The disbursement costs associated with obtaining information will be relevant to complainants and the Commissioner considers the publication of these costs would generally be of assistance to the public in considering whether to make a request under the EIRs. This is particularly likely to be the case for voluminous requests where the costs of postage and photocopying may be high. In these instances, the publication of these charges would assist an applicant in considering whether to avail themselves of their right under regulation 6(1) to request the information in a "particular form or format" which may not attract disbursement costs, such as inspection.
18. The Commissioner's decision is that the public authority did not process the information request in accordance with the EIRs. Specifically it breached regulation 8(3) because it calculated the charge made on a cost recovery basis. As explained above, the Commissioner's view is that a "reasonable amount" in these circumstances is restricted to the disbursement costs associated with making the information available in the specified form i.e. postage and photocopying costs.

Regulation 11

19. Regulation 11 provides applicants with a right to "make representations" to a public authority if it appears to them that the authority has failed to comply with the EIRs in respect of a request for environmental information.
20. On 29 July 2011, the complainant wrote to the council questioning the council's basis for charging for environmental information. The Commissioner acknowledges that the complainant did not specifically refer to his request of 3 June 2011 in this correspondence. However, the Commissioner is also mindful of the ['Code of Practice - Environmental Information Regulations 2004'](#) which states:

"60. Any written reply from the applicant (including one transmitted electronically) expressing dissatisfaction with an authority's response to a valid request for information should be treated as a complaint... These communications should be

handled in accordance with the authority's review procedure pursuant to Regulation 11, even if the applicant does not state his or her desire for the authority to review their decision of the handling of their application."

This guidance makes clear that a request for an internal review does not specifically have to ask a public authority to review the decision. As the applicant clearly expressed, in his communication of 29 July 2011, dissatisfaction with the authority's charging policy, which it had applied in respect of his request of 3 June 2011, the Commissioner is of the view that the applicant has made representation within 40 working days of making his request as per regulation 11(2).

21. Regulation 11(4) requires a public authority in receipt of representations from an applicant should consider the grounds of the review and notify the applicant of its decision as soon as possible and no later than 40 working days after the date of receipt. As the council did not provide a substantive response to the complainant's request of 3 June 2011 until 30 November 2011, the Commissioner finds that the council has failed to comply with regulation 11(4).

Right of appeal

22. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

23. 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.
24. 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

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