



Decision Notice 090/2024

Whether information should be provided free of charge

Applicant: The Applicant

Authority: East Lothian Council

Case Ref: 202200550

Summary

The Applicant asked the Authority for information relating to the provision of litter-picking equipment to volunteers, and on the amount of rubbish collected. The Authority responded under the EIRs and issued a Fees Notice.

The Commissioner investigated and found that the information was environmental information, and that the Authority was entitled to issue a Fees Notice to the Applicant and that the fee was reasonable. However, he found that the Authority failed to comply with the EIRs by not informing the Applicant that it did not hold some of the information he had requested.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 39(2) (Health, safety and environment); 47(1) and (2) (Application for decision by Commissioner)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (a), (c) and (f) (definition of “the Act”, “applicant” and “the Commissioner”) (Interpretation); 5(1) (Duty to make environmental information available on request); 8(1), (3), and (8); 10(4)(a) (Exceptions from the duty to make environmental information available); (17(1), (2)(a) and (b) (Enforcement and appeal provisions)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 2 May 2022, the Applicant made a request for information to the Authority. He asked:

- i. Does the Authority run a programme providing volunteers with litter picking equipment to enable them to clean up their local area? If so, please give the name of this programme, when it was launched and what equipment is provided to volunteers.
- ii. If such a programme exists, please tell me how many new members have signed up in EACH of the last five years and the total number of volunteers that have signed up to date.

On 3 May 2022, the Applicant asked to add an additional question to his request, where he asked for:

- iii. Any information on the amount of litter collected EACH YEAR by volunteers taking part in the Authority run litter picking initiatives in the last five years (if applicable) or as many years information as can be provided without exceeding the FOI cost limit.
2. The Authority responded on 9 May 2022 to the Applicant's requests of 2 and 3 May 2022, with a fees notice for £37.20, issued under regulation 8 of the EIRs.
 3. On 9 May 2022, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because he believed the information should be provided free of charge, given that the information was being provided free of charge by other councils in Scotland.
 4. The Authority notified the Applicant of the outcome of its review on 11 May 2022. It upheld its original decision, as it considered all of the information requested fell under the scope of the EIRs. It explained that since 2019 it has been the Authority's policy to recover full staff costs for every information request that falls under the EIRs, and that accordingly a fees notice was issued in response to the Applicant's request.
 5. On 11 May 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. The Applicant stated he was dissatisfied with the outcome of the Authority's review because he does not agree that a fee should be charged for the information he has requested.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 23 June 2022, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These related to why it considered the information to be environmental information and how the fee had been calculated.

Commissioner's analysis and findings

9. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

FOISA or the EIRs

10. "Environmental information" is defined in regulation 2(1) of the EIRs (paragraphs (a), (c) and (f) of the definition are reproduced in full in the Appendix to this decision). Where information falls within the scope of this definition, a person has a right to access the information under the EIRs, subject to the qualifications and exceptions in the EIRs.
11. The Authority considered that the information requested by the Applicant met the definition of environmental information under regulation 2(1)(a), (c) and (f) of the EIRs. It therefore sought to apply section 39(2) (Health, safety and environment) of FOISA.
12. In its submissions to the Commissioner, the Authority went on to consider each part of the definition it considered relevant to the information requested.
13. Firstly it discussed regulation 2(1)(a) of the EIRs which defines such information as 'the state of elements of the environment, such as...land [and] landscape...', and explained that the Commissioner's [published guidance](#)¹ describes 'landscape' as 'an area, as perceived by people, whose character is the result of the action and interaction of natural and/or human factors'
14. The Authority submitted that the Applicant had requested information relating to litter picking activities, which it considered to be action by human factors (volunteers) to alter the character of the landscape by removing elements of the landscape (litter), which had been discarded by separate human factors (humans). Its view was, therefore, that the request met the definition of environmental information under regulation 2(1)(a).
15. The Authority submitted that regulation 2(1)(c) of the EIRs defines environmental information as 'measures (including administrative measures), such as...programmes...and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements.'
16. The Authority highlighted that the Applicant had explicitly requested information regarding a 'programme' for litter in Questions 1 and 2 of his request, which it submitted addressed elements of the environment as noted above regarding the application of regulation 2(1)(a). It considered the information requested, therefore met the definition of environmental information under regulation 2(1)(c).
17. The Authority stated that regulation 2(1)(f) of the EIRs defines environmental information as information on 'the state of human health and safety, including...conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c).'
18. It submitted that the presence of litter within the landscape of East Lothian has a detrimental impact on human health and safety through the presence of contaminants and their potential entry into waste systems and the food chain, detrimental to human mental health and

¹ https://www.itspubliknowledge.info/sites/default/files/2022_03/EIRBriefingsDefinition.pdf

wellbeing, and [potentially encourage crime](#)². Consequently, the removal of litter through litter picking programmes had a positive effect on human health and safety, and thus the information requested met the definition of environmental information under regulation 2(1)(f).

Commissioner's conclusions

19. Given the nature of the information that has been requested by the Applicant, the Commissioner agrees with the Authority's reasoning and explanation as to why the information would meet the definition of environmental information.
20. The Commissioner is satisfied that the information falling within scope of the Applicant's request is environmental information as defined by regulation 2(1) of the EIRs, and falls within paragraphs (a), (c), and (f) of the definition of environmental information.
21. The Commissioner therefore finds that the Authority was correct to respond to the request solely in terms of the EIRs.

Regulation 8 of the EIRs – charging

22. The Authority issued a fees notice in terms of regulation 8 of the EIRs. Under regulation 8(1) of the EIRs, a Scottish public authority may charge a fee for making environmental information available under regulation 5(1). Regulation 8(3) makes it clear that a fee charged under the EIRs shall not exceed a reasonable amount and in any event shall not exceed the costs to the authority of producing the information requested.
23. The Authority, in its fees notice stated that it had been its policy since 2019 to recover full staff costs for every information request received that falls under the EIRs.
24. The Applicant submitted that he found it unusual that one local authority charged for information that was otherwise provided by other local authorities free of charge. He believed that the Authority should provide the information without charging a fee.
25. As the Commissioner has found that the Authority was correct to consider the Applicant's request under the EIRs, it follows that it is permissible for it to charge a fee for making the requested information available, as provided for in regulation 8.
26. The Commissioner must now consider whether the Authority's Fees Notice complied with the requirements of the EIRs.

Did the Authority have a published schedule of fees?

27. Regulation 8(8) of the EIRs requires a Scottish public authority to publish and make available to applicants a schedule of its fees, and information on the circumstances in which a fee may be charged, waived or required to be paid in advance.
28. Within the Fees Notice issued to the Applicant, the Authority provided a link to a [Schedule of Fees](#)³ available on its website.
29. The Schedule of Fees stated that the Authority charged a fee for responses to requests for environmental information under the EIRs. In summary, it set out what the fee would incorporate in relation to the actual cost of staff time taken to locate, retrieve, redact (where

² [National Litter and Flytipping strategy: island communities impact assessment - gov.scot \(www.gov.scot\)](#)

³

https://www.eastlothian.gov.uk/downloads/download/13194/environmental_information_scotland_regulations_2004

relevant) and provide the information, together with any additional costs (such as postage or photocopying). The schedule of fees also made it clear all costs must be paid in advance and, where the Authority found it cost less to provide the information than quoted, it would refund the overpayment.

30. The Commissioner is satisfied that the Council was entitled to charge a fee for the request under consideration in this decision, under regulation 8(1) of the EIRs, and that it published a schedule of its fees, as required by regulation 8(8) of the EIRs.

Was the fee reasonable?

31. Regulation 8(3) of the EIRs states that fees charged shall not exceed a reasonable amount and shall not exceed the costs to the authority of producing the information requested.
32. In considering what is reasonable, the Commissioner has taken account of the considerations set out in his guidance on "[Charging for Environmental Information](#)"⁴ under the heading "Is the charge reasonable or excessive?" (paragraph 12). These include:
- Any costs charged must not be such that applicants are dissuaded from seeking to obtain environmental information or that the right to public access is restricted;
 - Public authorities should be able to demonstrate to the Commissioner that, in setting charges, they have undertaken a proper study of all of the relevant factors which should be taken into account, that they have given those factors proper consideration and that they have not taken into account any other, irrelevant, factors;
 - Account should be taken of the actual costs to the authority of providing the information. For example, it is likely to be cheaper to provide a document on a website or by email than to send it out in hard copy, and this should be reflected in the charge.
33. In seeking to establish whether the Authority's fee was reasonable, the Commissioner investigated the amount of work required to locate, retrieve and provide the information covered by the Applicant's request.

Staff involved, nature of tasks to be carried out and time taken

34. The Authority submitted that in order to retrieve the information it held, falling within the scope of the applicant's request, it would require a search of the Authority's server, extraction of the information from spreadsheets, filtering for what had been requested, collating, checking and sending. It explained that a staff member at Grade 11 was needed as this was the minimum grade holding the necessary knowledge and access to produce the information requested.
35. In its submissions to the Commissioner, the Authority stated that it did not hold all of the information the Applicant had requested, but that the determination that some information was not held was not included in the calculation of the fee.

Commissioner's conclusions

36. Having considered the relevant submissions, the Commissioner is satisfied that the Authority was entitled to charge for the grade of staff identified and that it correctly identified the relevant tasks required to fulfil the request. He accepts that the final Fees Notice issued to the Applicant was reasonable in all the circumstances.

⁴ <https://www.itspublicknowledge.info/sites/default/files/2022-03/Chargingforenvironmentalinformation.pdf>

Other matters

Regulation 5(1) - Duty to make environmental information available

37. Regulation 5(1) of the EIRs requires a Scottish public authority which holds the information to make it available when requested to do so by any applicant. This obligation relates to information that is held by the authority when it receives a request.
38. On receipt of a request for environmental information, the authority must ascertain what information it holds falling within the scope of the request. Having done so, regulation 5(1) requires the authority to make the information available, unless a qualification in regulation 6 to 12 applies (regulation 5(2)(b)).
39. Under the EIRs, a Scottish public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 applies.

Regulation 10(4)(a) – Information not held

40. Regulation 10(4)(a) of the EIRs states that a Scottish public authority may refuse to make information available to the extent that it does not hold the information when it received the request.
41. As stated above, the Authority advised in its submissions to the Commissioner that it did not hold all of the information the Applicant had requested, and that this had not been shared with the Applicant at the time of the request, request for review or when the Authority provided its submissions.
42. The EIRs permit a Scottish public authority to charge for providing environmental information that it holds. In order to determine whether a fees notice is appropriate and how much it should be for, the authority has to determine whether it holds the information that is being sought. If it does not hold environmental information that has been requested, this should be communicated to the Applicant in response to his request, within the statutory timescale.
43. The Commissioner finds that the Authority should have notified the Applicant, in line with regulation 10(4)(a) of the EIRs, that it did not hold any information to satisfy part of his request, at the time that this was established.
44. The Commissioner therefore finds that the Authority failed to comply with regulation 5(1) of the EIRs, and requires it to provide the Applicant with a new review response in relation to part 3 of his request.

Decision

The Commissioner finds that, in respect of the matters specified in the application, the Authority complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by the Applicant. However, the Authority failed to comply with the EIRs by failing to inform the Applicant, in its response or review response, that it did not hold information in relation to part 3 of his request, as required by regulation 10(4)(a).

The Commissioner therefore requires the Authority to provide a new review response to the Applicant for part 3 of his request, by **24 June 2024**.

Appeal

Should either the Applicant or the Authority wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Enforcement

If the Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

David Hamilton
Scottish Information Commissioner

10th May 2024

Appendix 1: Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

...

39 Health, safety and the environment

...

- (2) Information is exempt information if a Scottish public authority-
- (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
 - (b) would be so obliged but for any exemption contained in the regulations.

47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -
- (a) a notice under section 21(5) or (9); or
 - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

- (2) An application under subsection (1) must -
- (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
 - (b) state the name of the applicant and an address for correspondence; and
 - (c) specify –
 - (i) the request for information to which the requirement for review relates;
 - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c);
and
 - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).

...

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

“the Act” means the Freedom of Information (Scotland) Act 2002;

“applicant” means any person who requests that environmental information be made available;

“the Commissioner” means the Scottish Information Commissioner constituted by section 42 of the Act;

...

“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;

...

(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 paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

...

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

...

5 Duty to make available environmental information on request

(1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

...

8 Charging

(1) Subject to paragraphs (2) to (8), where a Scottish public authority is under a duty to make environmental information available under regulation 5(1), it may charge a fee for so doing.

...

- (3) Fees charged under paragraph (1) shall not exceed a reasonable amount and in any event shall not exceed the costs to the authority of producing the information requested.

...

- (8) A Scottish public authority shall publish and make available to applicants-
- (a) a schedule of its fees; and
 - (b) information on the circumstances in which a fee may be charged, waived or required to be paid in advance.

...

10 Exceptions from duty to make environmental information available

...

- (4) A Scottish public authority may refuse to make environmental information available to the extent that
- (a) it does not hold that information when an applicant's request is received;

...

17 Enforcement and appeal provisions

- (1) The provisions of Part 4 of the Act (Enforcement) including schedule 3 (powers of entry and inspection), shall apply for the purposes of these Regulations as they apply for the purposes of the Act but with the modifications specified in paragraph (2).
- (2) In the application of any provision of the Act by paragraph (1) any reference to -
- (a) the Act is deemed to be a reference to these Regulations;
 - (b) the requirements of Part 1 of the Act is deemed to be a reference to the requirements of these Regulations;
- ...
- (f) a notice under section 21(5) or (9) (review by a Scottish public authority) of the Act is deemed to be a reference to a notice under regulation 16(4); and

...