



Scottish Information
Commissioner
www.foi.scot

Decision Notice 257/2024

Whether information should be provided free of charge

Authority: East Lothian Council
Case Ref: 202400749

Summary

The Applicant asked the Authority for information relating to the construction of a sports pitch. The Authority responded under the EIRs and issued a fees notice. The Commissioner investigated and found that the Authority failed to meet the requirements of regulation 8 of the EIRs when responding to the request. He required the Authority to issue a revised review response.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 39(2) (Health, safety and the environment); 47(1) and (2) (Application for decision by Commissioner)

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

Directive 2003/4/EC of the European Parliament and of the Council 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (the Directive) recital 18

Background

1. On 18 May 2024, the Applicant made a request for information to the Authority relating to the construction of a specified sports pitch in Macmerry. Specifically, the Applicant asked:
 - 1) Was the payment of £92,500 received from the developer to the Authority?

- 2) Has this pitch been constructed?
- 3) If not constructed, then where and when is the pitch planned to be constructed?
2. The Authority responded on 23 May 2024. The Authority issued the Applicant with a fees notice for £126.30, under regulation 8 of the EIRs, and stated that it was not obliged to proceed with the request until the fee was received.
3. On the same day, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because he considered the fees notice was “absurd” as he had asked for very specific information.
4. The Authority notified the Applicant of the outcome of its review on 29 May 2024, upholding its original decision without modification.
5. On the same day, 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 did not agree that he requested environmental information and he did not consider the fees notice was reasonable.

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 6 June 2024, 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 requested was environmental information and to the fees notice it had issued.
9. The Authority provided the Commissioner with its submissions.

Commissioner’s analysis and findings

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

FOISA or the EIRs?

11. The Authority handled the Applicant’s request under the EIRs. Environmental information is defined in regulation 2(1) of the EIRs. Where information falls within the scope of this definition, a person has a right to access the information under the EIRs, subject to various restrictions and exceptions contained in the EIRs.
12. The Authority submitted that the information requested fell within paragraph (a) of regulation 2(1) of the EIRs as it related to proposals to alter the use of elements of the landscape within

East Lothian. The Authority also submitted that the information requested fell within paragraph (c) of regulation 2(1) of the EIRs as it related to planning consent and resulting financial and administrative measures that would have a direct impact on land use and landscape at the site in question.

13. The Applicant did not believe that his request should have been responded to under the EIRs as he had requested information about the provision of a sports pitch for the community.
14. Having considered the terms of the request and the withheld information, the Commissioner is satisfied that the information requested is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs, in particular paragraphs (a) and (c) of that definition. In this regard, broadly, it upholds the submissions provided by the Authority.

Section 39(2) of FOISA – Environmental information

15. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1) of the EIRs) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs. In this case, the Commissioner accepts that the Authority was entitled to apply the exemption to the information withheld in this case, given his conclusion that it is properly classified as environmental information.
16. The exemption in section 39(2) is subject to the public interest test in section 2(1)(b) of FOISA. As there is a statutory right of access to environmental information available to the Applicant in this case, the Commissioner accepts, in all the circumstances, that the public interest in maintaining this exemption (and responding to the request under the EIRs) outweighs any public interest in disclosing the information under FOISA.
17. The Commissioner therefore concludes that the Authority was correct to apply section 39(2) of FOISA and to consider the Applicant's information request wholly under the EIRs. In what follows, the Commissioner will consider this case solely in terms of the EIRs.

Regulation 8 of the EIRs – charging

18. The Authority issued a fees notice in terms of regulation 8 of the EIRs. This allows a Scottish public authority to charge a fee for making environmental information available under regulation 5(1) (regulation 8(1)). By virtue of regulations 8(4) and (6), the authority may require the payment of the fee in advance and is not required to make the information available unless the fee is paid.
19. In its fees notice, the Authority stated that it had been its policy since 2019 to recover full staff costs for every information request received that fell under the EIRs.
20. While regulation 8(1) of the EIRs allows a Scottish public authority to charge a fee for making environmental information available under regulation 5(1), the Commissioner does not accept that the EIRs (or, for that matter, the fundamentals of administrative law) justify the blanket application of charging without any consideration of individual circumstances, exceptions or the potential deterrent effect (even if unintended). The Commissioner does not dispute the Authority's right to have a policy, in this or any other aspect of the management of FOISA or the EIRs, but the indiscriminate application of such a policy is a very different matter entirely.

21. Charging for making environmental information available needs to be consistent with the fundamental purposes of the legislation, particularly allowing general access to environmental information and participation in environmental decision-making.
22. In this spirit, the Commissioner notes recital 18 in [Directive 2003/4/EC](#)¹ (the Directive), from which the EIRs are derived, states, in relation to charging for supplying environmental information, that instances where advance payment will be required “should be limited”.
23. Recital 18 in the Directive also states that a schedule of charges should include information on the circumstances in which a charge may be “waived”, which regulation 8(8)(b) of the EIRs also requires.
24. Further to this, the [Aarhus Implementation Guide](#)², which offers guidance on the interpretation of convention from which the EIRs are derived, states that if information is to be truly accessible it must also be affordable and notes that many countries with access to information regulations try to keep information available – and free whenever possible.
25. More specifically, the Aarhus Implementation Guide notes that, to ensure financial barriers are not an impediment to access to information, and every person can afford information, public authorities often waive fee requirements. The Commissioner does not believe these reflections on practice are included simply as passing comment: they are clearly intended to have a purpose, in the context of guidance.
26. The Commissioner has also had regard to the decision of the European Court of Justice in Case 217/97 Commission v Federal Republic of Germany (specifically paragraph 47) which is reproduced (on page 94) in the Aarhus Implementation Guide:

“Any interpretation of what constitutes “a reasonable cost” for the purposes of Article 5 of the [EC] directive [on information, 1990] which may have the result that persons are dissuaded from seeking to obtain information or which may restrict their right of access to information must be rejected.”
27. In addition, the Commissioner has considered [guidance from the UK Information Commissioner \(UK ICO\) on charging for environmental information](#)³. This guidance states that:
 - When thinking about a charge, public authorities should begin by considering whether it is reasonable to apply a charge and whether it would deter the requester from accessing the information.
 - The UK ICO’s position is that routinely charging for supplying environmental information is not reasonable, as it does not align with the purpose of the Environmental Information Regulations 2004 (the EIR) and may act as a deterrent to requesters.
 - The UK ICO’s view is that public authorities should accept the costs associated with the routine administration of complying with requests as part of their obligations under the EIR (which most authorities follow by not routinely charging for complying with requests). As such, his view is that there are limited circumstances in which charging for making environmental information available is reasonable.

¹ https://www.legislation.gov.uk/eudr/2003/4/pdfs/eudr_20030004_adopted_en.pdf

² https://unece.org/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

³ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/charging-for-information-under-the-eir/#can-we-charge>

- The UK ICO considers the overall reasonableness of any charge to be the most important consideration, rather than a focus on the precise activities which public authorities can include in the cost.

28. The UK ICO guidance is very firmly of the view that charging must not deter individuals from their right to obtain environmental information:

Access to environmental information is an important right and the financial cost of making a request should not prevent the ability to exercise that right.

You should ensure that any charge you apply does not mean that only those who can afford it can access the environmental information you hold. It is vital that everyone has access to environmental information and has the same opportunities to contribute to public debate. If an applied charge does deter requesters, this undermines the intended purpose of the EIR and the fundamental objectives that it is seeking to achieve.

29. Overall, the Commissioner endorses the approach taken by the UK ICO. While his own guidance on the matter could perhaps be stronger on overriding principles (and it will be reviewed shortly, with this in mind), he does not believe his guidance to be inconsistent with anything rehearsed above. Bearing in mind the fundamental purposes of the legislation, the reasonableness of the decision to charge has to be as important as the reasonableness of the charge itself.
30. In this case, in view of all the factors detailed above, the Commissioner cannot accept the Authority's approach to charging in this case.
31. As rehearsed earlier, the Authority issued the Applicant with a fees notice of £126.30. This was on the basis of 3 hours' work by grade 11 employees (£42.10 per hour). During the investigation, the Authority provided a detailed breakdown of how it arrived at this fee (including such steps as 10 minutes to read an email and 15 minutes to draft a response to the information request and to send it to the FOI team).
32. The Commissioner notes the terms of the request, which asked three questions that would seem to require relatively straightforward responses or, at least, responses that should not be unduly burdensome to compile. Certainly, he considers that the hypothetical reasonable person would deem it unreasonable to have to pay £126.30 to receive a response to these questions (and might well be deterred from proceeding with the request, particularly if required to pay in advance).
33. As a counterfactual exercise, the Commissioner has considered what charge would have been permitted if the information requested was not environmental information (thereby falling to be responded to under FOISA).
34. If the Commissioner accepted that the cost calculation provided by the Authority was reasonable, then the first £100 of costs under FOISA would have to be provided free of charge with the Authority only entitled to charge 10% of the remaining costs (i.e. 10% of £26.30). Under FOISA, then, the Authority would be permitted to charge the Applicant £2.63 – rather than £126.30 under the EIRs.
35. The Commissioner must acknowledge that there are two separate charging regimes in FOISA and the EIRs, and that it is perfectly conceivable that charging calculations under the two regimes, for similar information, will differ. It is also, notable, however, that charging under FOISA, while permitted, is very rare indeed – and he is not aware of this particular Authority making a general rule of charging under FOISA, or indeed of charging at all under

that regime. This may be because the FOISA charging regime is more complex than that under the EIRs and is only capable of yielding relatively small sums (although the Commissioner is aware of the Authority charging extremely small sums, in other cases, under the EIRs). In any case, the Authority cannot be unaware of this disparity, or of its likely impact on applicants: its application of the EIRs regime is hardly likely to encourage individuals to seek environmental information.

36. In all the circumstances, looking simply at the charge imposed, the Commissioner does not consider that the fees notice issued by the Authority in this case was reasonable.
37. During the investigation, the Commissioner asked the Authority to what extent it had factored the following points into its decision-making on charging under the EIRs at the level of policy-making, framing its schedule of charges (and related information) and to charging in this particular case:
 - fundamentally, the EIRs are designed to promote access to environmental information and participation in environmental decision-making – by everyone
 - to be accessible, information must be affordable
 - anything (in the realms of charging) that – by design or otherwise – has the effect of deterring people from seeking access to environmental information will not be consistent with the underlying purposes of the Aarhus Convention, the Directive or the EIRs.
38. The Authority provided submissions on the above points, which affirmed its position of recovering full staff costs (on the basis of the actual cost of employing the staff in question) for every information request received which falls under the EIRs.
39. The Authority also referred to previous decisions of the Commissioner (of which it was the subject), which it considered supported its conclusion that both the design and application of its fee charging policies involved sufficient consideration of the letter and spirit of the Aarhus Convention, the Directive and the Commissioner's guidance.
40. The Commissioner has carefully considered the Authority's submissions. Having done so, he concludes, in all the circumstances of the case, that the Authority failed to meet the requirements of regulation 8 of the EIRs in responding to the information request made by the Applicant. While his decisions have upheld individual charges under the EIRs, he is not aware of any of them having endorsed the blanket approach to charging which the Authority is clearly pursuing, and which on no stretch of the imagination could be said to be compatible with the spirit of any the relevant legislation, as discussed above.
41. Consequently, the Commissioner requires the Authority to issue the Applicant with a revised review outcome under regulation 16 of the EIRs (which must not impose a fresh charge under regulation 8(1)).
42. As part of this investigation, the Commissioner has considered the Authority's [Schedule of Fees](#)⁴ and its [associated policy on charging under the EIRs](#)⁵. In terms of regulation 8(8), a Scottish public authority must publish such a schedule (which it does – paragraph(a)), **and** information on the circumstances in which a fee may be charged, waived or required to be paid in advance (paragraph (b)). In the Commissioner's view, the requirement to detail these circumstances carries with it the expectation that fees will not be charged invariably, they will

⁴ https://www.eastlothian.gov.uk/downloads/file/33175/schedule_of_fees_2023_to_2024

⁵ <https://www.eastlothian.gov.uk/chargesbook>

be waived on occasion and they will not always require to be paid in advance (in any case, it is also apparent from recital 18 in the Directive that charging in advance should not be a regular occurrence). That does not appear to be the Authority's approach, however – and, in any case, he can identify no place (and none has been identified to him) where any of these circumstances are set out.

43. The requirement to detail certain circumstances in regulation 8(8)(b) is clear enough: they require to be stated explicitly, not simply inferred from policy or practice. The Commissioner is not satisfied that the Authority has done this and, therefore, finds that it has failed to comply with this part of the regulation. In line with this, bearing in mind all of the considerations discussed above, the Commissioner must also question the Authority's unvarying policy of charging for every single item of environmental information it is asked for, and requiring payment before anything is made available. While there will, undoubtedly, be individual circumstances in which charging is appropriate, the current approach is not consistent with the general right to environmental information and the purposes for which that right was created. With a view to ensuring that people are not deterred from seeking environmental information they are entitled to, that approach needs to change.
44. The Commissioner would, therefore, ask the Authority to review its approach to charging for environmental information, along with all relevant material it publishes or provides to applicants on the matter, with a view to addressing all of the concerns identified in this decision. Further guidance on this matter can be provided, if required, but the Commissioner will need to take further action under his [Enforcement Policy](#)⁶ if this point is not actioned promptly.

Decision

The Commissioner finds that the Authority failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant.

The Commissioner finds that the Authority, in responding to the Applicant's information request, failed to meet the requirements of regulation 8 of the EIRs.

The Commissioner therefore requires the Authority to provide the Applicant with a revised review outcome under regulation 16 of the EIRs (which must not impose a fresh charge under regulation 8(1)), by **6 January 2025**.

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.

⁶ <https://www.foi.scot/sites/default/files/2022-06/EnforcementPolicy.pdf>

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

12 November 2024