

Decision Notice



Decision 018/2013 Mr Alex Simpson and South Lanarkshire Council

Fees notice

Reference No: 201201600

Decision Date: 18 February 2013

www.itspublicknowledge.info

Rosemary Agnew

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

Mr Simpson asked South Lanarkshire Council (the Council) for information about repairs to specific roads over a specified period. The Council issued a fees notice in terms of the EIRs. Following an investigation, the Commissioner found that the Council was entitled to issue a fees notice before providing the information requested and that the fee charged by the Council was reasonable.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 39(2) (Health, Safety and the Environment)

Environmental Information (Scotland) Regulations 2004: regulations 2(1) (definitions (a) to (c) of “environmental information”) (Interpretation); 5 (Duty to make available environmental information on request); 8(1), (3), (4), (5), (6) and (8) (Charging)

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

Background

1. On 19 June 2012, Mr Simpson wrote to the Council requesting information which had been the subject of previous correspondence with the Council (a particular service request).
2. The Council sought clarification and, on 20 June 2012, Mr Simpson wrote to the Council clarifying that his request was for the following information:
(Roads Dept) Details (date, location and work carried out) of repairs carried out to Kirkfield Rd, Leelaw Rd, Greenrig Rd, Hawksland Rd and Bog Rd since 01/01/11. If more than one repair was carried out in an area that would normally be counted as one repair, I would like the total number of repairs indicated.
Additionally, I would like to request a copy of the last 2 inspections carried out pertaining to the Kirkfield Rd area.



3. The Council responded on 29 June 2012, informing Mr Simpson that since he was requesting environmental information the Council had considered his request in terms of the EIRs. It applied section 39(2) of FOISA. The Council informed Mr Simpson that the EIRs allowed it to charge a fee and provided him with a fees notice for £81.84 outlining the work and time it would take to process his request and the hourly rate.
4. On 4 July 2012, Mr Simpson wrote to the Council requesting a review of its decision. In particular, he questioned the Council's decision to deal with the request in terms of the EIRs, the time it would take and the hourly cost involved.
5. The Council notified Mr Simpson of the outcome of its review on 1 August 2012. It explained why the request fell to be dealt with under the EIRs and upheld the decision to issue the fees notice for the above amount. The Council further explained that the fees notice was in line with its Schedule of Charges¹ for environmental information, as published on the Council's website with its Publication Scheme.
6. On 21 August 2012, Mr Simpson wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Council's review and applying to the Commissioner 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 certain specified modifications.
7. The application was validated by establishing that Mr Simpson made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

Investigation

8. On 15 October 2012, the investigating officer notified the Council in writing that an application had been received from Mr Simpson, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the Council was asked to justify the fees notice issued to Mr Simpson.
9. The Council responded on 13 November 2012, providing an explanation of the cost involved in producing the information requested by Mr Simpson. The Council further stated that during the investigation it had provided Mr Simpson with some information free of charge and informed him that this reduced the fees notice to £76.84.
10. Mr Simpson confirmed receipt of the further information (which he stated had been provided earlier). He maintained his dissatisfaction regarding the fees notice issued.

¹ http://www.southlanarkshire.gov.uk/downloads/file/918/foi_publication_scheme



11. The relevant submissions received from both the Council and Mr Simpson will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to her by both Mr Simpson and the Council and is satisfied that no matter of relevance has been overlooked.

FOISA or EIRs?

13. The Commissioner's thinking on the relationship between FOISA and the EIRs is set out in detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland*² and need not be repeated in full here.
14. It is clear from the Council's correspondence with Mr Simpson that any information falling within the scope of the request would be environmental information, as defined in regulation 2(1) of the EIRs. The information in question relates to road conditions and the repair thereof and the Commissioner is satisfied that it would fall within the definition of environmental information in regulation 2(1) of the EIRs – see in particular paragraphs (a) to (c) of that definition, set out in the Appendix below.

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)) 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 Council was correct to apply the exemption to the withheld information, given her conclusion that it is properly classified as environmental information.
16. As there is a separate statutory right of access to environmental information available to the applicant in this case, the Commissioner accepts that the public interest in maintaining this exemption and dealing with the request in line with the requirements of the EIRs outweighs any public interest in disclosure of the information under FOISA. She has consequently proceeded to consider this case in what follows solely in terms of the EIRs.

Regulation 5(1) of the EIRs

17. Regulation 5(1) of the EIRs (subject to the various qualifications contained in regulations 6 to 12) requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant.

² <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200600654.asp>



Regulation 8 of the EIRs (Charging)

18. In this case, the Council issued a fees notice in terms of regulation 8 of the EIRs, which states that 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. By virtue of regulation 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 (see Appendix for full details).
19. The issue to be considered in this investigation is whether the Council's fees notice was calculated in line with regulation 8 of the EIRs, in particular regulation 8(3), which states that the fees to be charged shall not exceed a reasonable amount and shall not exceed the costs to the authority of producing the information requested.
20. Mr Simpson submitted to the Commissioner that in his experience the information he requested should take no longer than ten minutes to locate and provide to him.

Were the fees charged reasonable?

21. The Scottish Ministers published a Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the EIRs dated December 2010³ (the Code of Practice). The question of charging for responding to requests for environmental information is dealt with at page 5 of the Code. This states that:
A fee may be payable for receipt of the information requested. Regulations set out the basis on which fees may be charged for FOI requests, which are subject to an upper cost limit. There are no comparable fees regulations for EIRs; when responding to EIRs authorities may charge "a reasonable amount". Authorities should publish their scheme of charges for all requests for information.
22. Regulation 8(8) of the EIRs also states that a Scottish public authority shall 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. The Council has published such a schedule on its website and provided a link as explained at paragraph 5 above. Basically, this states that a charge will be made for responses to requests for information under the EIRs, that the proposed fee will represent the actual cost to the Council in providing the information and that staff time will be calculated at actual cost per staff member(s) hourly rate (with no maximum rate and no limit to the sum chargeable).
23. There is no definition of what is considered to be "reasonable" in the EIRs or the Code of Practice, or of what charges can be taken into account, although, in line with regulation 8(3) of the EIRs, the charge must not exceed the cost of providing the information.
24. In considering what is reasonable, the Commissioner has taken account of the considerations set out in her guidance on "Fees and Excessive Cost of Compliance"⁴, under the heading "Is the charge reasonable or excessive?" These include:

³ <http://www.scotland.gov.uk/Resource/Doc/933/0109425.pdf>

⁴ <http://www.itspubliknowledge.info/Law/FOISA-EIRsGuidance/Fees/FeesOverview.asp>



- Any costs charged must not be such that applicants are dissuaded from seeking to obtain environmental information or that the right to 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.
 - Authorities must be careful when agreeing a set charge for a particular type of document, e.g. a planning file, to ensure that the charge is reasonable for all documents which fall within the description. While a charge may be reasonable for a larger file, the same charge may not be reasonable for a smaller file.
 - Similarly, 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 the website or by email than to send it out in hard copy, and this should be reflected in the charge.
25. The Council explained that the information requested by Mr Simpson was contained within a bespoke maintenance management system for Roads Services, known as EXOR, and that the system contained a large amount of data/information. It explained that the EXOR system is highly complex and required a Roads Engineer (at a cost of £20.46 per hour) to understand the terminology and the interaction of information held within the system. In relation to Mr Simpson's request, the Council explained that there were no employees of a lower level (and therefore at a lower pay grade) who would be able to locate and retrieve the requested information.
26. The Council further explained that it had undertaken the task of locating and retrieving the information for Mr Simpson's request and the actual time taken had been four hours at a total cost of £81.84. In this case, therefore, the costs were not simply estimated.
27. In his application to the Commissioner, Mr Simpson also stated that his request should have been treated as two separate requests.
28. The Council submitted that it did not necessarily agree that the two parts of the request should be treated separately, in that the second part contained the terms "additionally" and "Kirkfield Rd area" (being a reference to the same roads as in the first part the request), which linked the two parts of the request.
29. The Council accepted, however, that the request could be interpreted in a different way and during the investigation provided copies of information for Kirkfield Road to Mr Simpson free of charge. The Council submitted that the provision of this information correlated to a cost of £5.00 in total (15 minutes) and would have an effect on the overall charge sought from Mr Simpson. Consequently the Council submitted that it was willing to reduce its fee to £76.84: Mr Simpson was informed of this.



30. In this particular case, having considered the submissions presented to her, the Commissioner is satisfied that the fees notice issued by the Council was reasonable in terms of regulation 8(3) of the EIRs. Whether the request is interpreted as one request or two, the Council was entitled under regulation 8 to charge for producing the information.
31. Having considered the Council's explanations against all relevant considerations, the Commissioner accepts that the time charged for and hourly rate were reasonable in the circumstances, with the result that a reasonable fee was charged. Consequently, in terms of regulation 8(6) of the EIRs, the Council is not required to make the information requested available under regulation 5(1) unless the outstanding fee of £76.84 is paid.

DECISION

The Commissioner finds that South Lanarkshire Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002, and with the Environmental Information (Scotland) Regulations 2004, in responding to the information request made by Mr Simpson. It is not, therefore, required to make the information requested available under regulation 5(1) unless the fee is paid.

Appeal

Should either Mr Simpson or South Lanarkshire Council wish to appeal against this decision, there is an 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 notice.

Margaret Keyse
Head of Enforcement
18 February 2013



Appendix

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

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.

...



The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

...

"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 paragraph (a);
- (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;

...

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.

(2) The duty under paragraph (1)-

...

(b) is subject to regulations 6 to 12.

...



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.

(4) A Scottish public authority may require that payment of the whole or part of a fee under paragraph (1) be made in advance of making information available.

(5) Where a Scottish public authority imposes a requirement under paragraph (4) it shall notify the applicant in writing.

(6) Where a Scottish public authority has notified an applicant that advance payment is required under paragraph (5) then that authority is not obliged to-

- (a) make the information requested available under regulation 5(1); or
- (b) comply with regulations 6, 7 or 13,

unless the fee is paid; and any such fee must be paid within a period of 60 working days beginning with the day on which the authority gave such notification.

...

(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.