

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 3 June 2019

Public Authority: Folkestone and Hythe District Council

Address: Civic Centre
Castle Hill Avenue
Folkestone
Kent
CT20 2QY

Decision (including any steps ordered)

1. The complainant has requested information about meetings held by the 'Kent Planning Officers Group'. Folkestone and Hythe District Council ("the Council") informed the complainant that it could make the information available subject to a charge of £375.00, in accordance with regulation 8 of the EIR. The Council subsequently amended the charge to £325.00 during the course of the Commissioner's investigation.
2. The Commissioner's decision is that the Council has breached regulation 8(3) by seeking to levy an unreasonable charge for the provision of environmental information. The Council also breached regulation 8(4) by failing to notify the complainant of the sought advance payment of the charge within the required time.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response to the complainant that does not seek to apply a charge under regulation 8.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 15 April 2018, the complainant wrote to Council and made request 1 in the following terms (Council reference LS-006840-RN):

Background

Folkestone & Hythe District Council (FHDC) have planning officers who attend the Kent Planning Officers Group meetings.

The Request

Please could you provide me with any information on:

- The Agendas for all the meetings FHDC's representative/s has received or supplied between Jan 1st 2015 - Present*
- All reports which formed part of the agenda*
- All minutes of the meetings.*

6. On 15 April 2018, the complainant wrote to the Council and made request 2 in the following terms (Council reference LS-006841-RN):

Background

In the Kent Developers Group Members Directory 2017, it states their members have:

Regular access to senior officers and Members at Kent County Council and Kent Planning Officers Group, to promote working together more closely and influence how Kent's planning system works.

The Request

Please could you provide me with any information on:

- The names of the Kent Developer Group members - eg Quinn Estates, Pentland Homes who have received access to Folkestone & Hythe Officers Kent Planning Officer Group members.*
- The dates the KDG members received access*
- Minutes of the meeting*
- The name of the project discussed*
- A record of all decisions made.*

For the period 1st Jan 2017 through to the present.

7. The Council responded on 15 May 2018. It stated that:

- Part of the information sought by request 2 would be contained within the information sought by request 1, and that it could make*

the information available subject to a charge of £375.00 under regulation 8; and,

- The remaining part of the information sought by request 2 (which the Council interpreted to be all pre-application consultations sought by 'Kent Developer Group' members) was withheld under regulation 12(4)(b) on the basis that to supply it would be manifestly unreasonable on the grounds of cost.
8. On 15 May 2018, the complainant asked the Council to undertake an internal review in respect of the charge.
 9. Following an internal review the Council wrote to the complainant. It maintained that the charge was correct.

Scope of the case

10. The complainant contacted the Commissioner on 5 July 2018 to complain about the way his request for information had been handled, and specifically that the charge was not reasonable.
11. During the course of the Commissioner's investigation, the Council amended the charge to £325.00.
12. The Commissioner considers the scope of the case to be the determination of whether the charge of £325.00 complies with regulation 8.

Reasons for decision

Regulation 8 – Charging

13. Regulation 8(1) allows a public authority to charge for making environmental information available, subject to the following conditions:
 - Regulation 8(2) provides that no charge can be made to allow access to a public register or list of environmental information, or to examine the information at the place which the public authority makes available;
 - Regulation 8(3) requires that any charge must not exceed an amount which the public authority is satisfied is reasonable;

- Regulation 8(8) requires the public authority to publish and make available to applicants a schedule of its charges and information on the circumstances in which a charge may be made or waived.
14. The Commissioner accepts that a charge can include the staff costs of locating, retrieving and extracting the requested information, as well as any disbursement costs. This follows the findings of the First-tier Tribunal (Information Rights) in *East Sussex County Council v Information Commissioner and Property Search Group (EA/2013/0037)* which found that the drafters of the original EU Directive 2003/4/EC (from which the EIR are derived) made a clear decision not to exclude the cost of staff time in searching for the environmental information when considering a reasonable amount for a charge. However any charge should be reasonable, and a requester should not be disadvantaged by a public authority's poor records management.

What information has been requested?

15. The requests seek the agendas, circulated documents, and minutes relating to meetings held by the 'Kent Planning Officer's Group' ("KPOG"). The Council has explained that this is an informal forum for senior and head planning officers of the various local authorities based in Kent, including Kent County Council and Medway Unitary Council. KPOG is not a decision making body, and functions only as a platform for sharing best practice and working initiatives between planning officers.

Regulation 8(2)

16. In respect of regulation 8(2), the Council has confirmed that the requested information is not contained within a public register or list. The Council has also confirmed that, on receipt of the requests, the requested information was not already collated and available for examination.
17. There is no evidence that suggests the Council's position is incorrect, so the Commissioner accepts that this part of regulation 8 has been met.

Regulation 8(3)

How has the Council calculated the charge?

18. The Council has informed the Commissioner that it has a charging policy for the EIR. This policy contains the provision to charge a rate of £25.00 per hour for officer time spent complying with a request (not including time required for redaction under exceptions), in addition to the material cost of disbursements.

19. In this particular case, the charge is based on the time required for an officer to locate, retrieve and extract the information.
20. The Council has clarified that, in response to the Commissioner's investigation, an officer has already searched for the information. This action took the officer 13 hours; and it is on this basis that the Council amended the charge to £325.00. The Council anticipates that any disclosed information could be communicated electronically, and so no disbursement costs are included.

How has the Council determined that the charge is reasonable?

21. The Council has informed the Commissioner that it has applied the charge in accordance with its charging policy, which is based on ICO guidance and decision notices, including FER0585074¹, in which the Commissioner indicated that it is reasonable for public authorities to use the rate of £25.00 per hour (which is the rate used for the purposes of the FOIA) as a starting point for calculating the cost of staff time under the EIR.
22. On receipt of the requests, the Council was already aware that all relevant held information (namely meeting agendas, circulated documents, and minutes) would be contained within the email archive of a planning officer who was a member of KPOG. That planning officer (who has since left the Council), had first-hand knowledge of the information, and noted that any search for the information would not be simple, due to it being contained within a considerable amount of background correspondence between senior planning officers across the county (as such officers communicate with one another on a range of matters). On this basis, the planning officer calculated that to search for the information would take 15 hours, and therefore require a charge of £375.00.
23. Upon the Commissioner's investigation, an officer searched for the held information. The Council monitored this activity and found that it took 13 hours (leading to the Council amending the charge to £325.00). The search used the keyword 'KPOG', and was undertaken within all inbound and outbound emails in the archive. The search initially retrieved in excess of 200 emails, which the officer then needed to individually

¹ https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1560278/fer_0585074.pdf

review to identify only those containing agendas, circulated documents, and minutes relating to KPOG meetings. The Council has explained that it has undertaken this search only to ensure that all known recorded information is retrieved, as it will shortly implement a new retention policy (which is currently on hold pending the Commissioner's decision).

24. The Council has explained that there is no statutory or business requirement for the Council to retain and hold this information in a centralised manner. Any decision by the planning officer to retain information about KPOG meetings would have been at their discretion. Consequently, compliance with a request for such information would, as a matter of necessity, require the Council to undertake a search in order to collate the information.
25. The Council has emphasised that it routinely publishes environmental information through its publication scheme, which is progressively expanded as additional datasets are identified and prepared for released. In respect of planning, development and building control, the Council already publishes a range of information including:
 - Section 106 agreements
 - Planning statistics
 - Building control applications
 - Competent person declarations
 - The Council asset register
 - Social housing details
 - Brown field register
 - Major documents relating to the Council's own strategic projects, such as Otterpool Park and Princes Parade

The Council's information governance team is also careful to interpret the charging exclusion for environmental 'registers or lists' as broadly as possible. However, the Council believes that it is reasonable for it to charge for information that is not already published, or otherwise available in the form of a register or list.

26. The Council has also asked the Commissioner to note that, prior to applying the charge, officers met to discuss estimates of the time required to search and collate the held information, and whether the information was already proactively published elsewhere; thereby allowing the complainant to be redirected to that information without incurring any costs.
27. When informing the complainant of the applied charge, the Council also advised that if he was able to modify the request or limit its scope, this may minimise the cost, and as such, invited the complainant to contact the information governance team to discuss his options in doing this.

The Council has explained that it relies upon requesters engaging with it to provide a steer in such cases, and that in this particular case, it would be challenging for the Council to proffer suggestions about refining the request without knowing the complainant's intentions behind it. However, the complainant declined to engage with the Council, and instead proceeded to request an internal review about the charge.

28. The Council has emphasised that its procedure on paid EIR charges is to monitor the time expended on the request. If the search time is smaller than the paid-for estimate, the Council will refund the difference to the requester (calculated in 15 minute increments). If the search time is larger than the estimate, the Council will absorb the difference. This process was explained to the complainant when advising him of the charge. The Council believes that this procedure ensures that the final balance paid by any requester is proportionate and reasonable; this contrasts with many other public authorities which advertise on their websites that the applied charge is final.

The Commissioner's analysis

29. The Council has provided the Commissioner with a cogent explanation of how the information is held, and it is noted in particular that the charge is based on the actual time taken for the location, retrieval and extraction of the held information (13 hours).
30. The EIR do not specify the rate at which staff time should be calculated. Although *The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004*² ("the FOIA Fees Regulations") do not apply to the EIR, the Commissioner's view is that it is reasonable for public authorities to use the given rate of £25.00 per hour as a starting point. In the circumstances of this case, this is the exact rate charged by the Council.
31. However, the Commissioner recognises that the charge of £325.00 is likely to represent a significant cost to a requester under the EIR, and in particular, notes that the request seeks information about planning across the county; which suggests that the information may have a wider public value beyond the complainant's own immediate interest.
32. The Commissioner's guidance on regulation 8 emphasises that public authorities should avoid routinely charging for environmental information, and additionally, should take account of the wider aims of

² <http://www.legislation.gov.uk/uksi/2004/3244/contents/made>

the EIR. The guidance also notes the findings of the Court of Justice of the European Union ("CJEU") in the case of *C-71/14 East Sussex County Council v Information Commissioner*, in which the CJEU found that an applied charge must not have a deterrent effect on the right to obtain environmental information.

33. The Commissioner recognises that, if an applied charge does have a deterrent effect, this undermines the intended purpose of the EIR and the fundamental objectives that it is seeking to achieve in line with the Convention of Access to Information, Public Participation in the Decision-Making and Access to Justice in Environmental Matters (commonly known as the 'Aarhus Convention'), and the subsequent EU Directive 2003/4/EC.
34. The Commissioner's guidance also explains that the context of a request may affect the reasonableness of any charge. A reasonable charge in one context (e.g. for property search information requested as part of a commercial transaction), may differ from a reasonable charge in other (e.g. a public group seeking information about pollution in relation to environment concerns).
35. In the context of this case, the Commissioner must consider whether the charge is reasonable. In addressing this, the Commissioner perceives that it useful to refer again to the FOIA Fees Regulations, as part of which Parliament set an 'appropriate limit' for the consideration of costs under the FOIA. That appropriate limit, which is £450 for local public authorities, can be seen as an indication of what Parliament intended would be a reasonable cost to expect such authorities to incur when responding to an information request under the FOIA. In this case, the charge of £325 is significantly within the appropriate limit that would apply to an information request under the FOIA, and it is reasonable for the Commissioner to consider that such a charge, applied to environmental information that may have a wider public value beyond the complainant's own immediate interest, would represent a clear deterrent effect.
36. Having considered these factors, the Commissioner is not satisfied that the charge is reasonable, and therefore does not comply with regulation 8(3).
37. Having concluded that the charge is not reasonable, the Commissioner does not need to proceed to consider regulation 8(8).

Regulation 8(4)

38. Regulation 8(4) requires that the public authority must notify the requester of any required advance payment of a charge within 20 working days after the date of receipt of the request.
39. The Commissioner has reviewed the dates of the requests and response, and finds that the Council did not notify the complainant within 20 working days.
40. The Commissioner therefore finds that the Council breached regulation 8(4).

Other matters

41. The complainant has raised concerns that the charge represents unlawful discrimination against him under the terms of the Equality Act 2010.
42. The Commissioner emphasises that the decision in this case relates only to the Council's compliance with the EIR. The Commissioner is not able to make a determination under any legislation that she does not regulate.

Right of appeal

43. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

44. 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.
45. 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

Andrew White
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