

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 26 April 2021

Public Authority: Eden District Council
Address: Town Hall
Penrith
Cumbria
CA11 7QF

Decision (including any steps ordered)

1. The complainant requested from Eden District Council ("the Council") the monthly counts of fly-tipping data. The Council stated that it would require a fee of £100.00 in order to provide the requested information, in accordance with regulation 8 of the EIR.
2. The Commissioner's decision is that the Council breached regulation 8(3) by seeking to levy an unreasonable charge for the provision of environmental information.
3. The Commissioner requires the Council 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 Council 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 28 September 2020, the complainant wrote to the Council and requested information in the following terms:

"FOI request. Please provide the following fly-tipping data in csv format): Monthly counts of fly-tips.

Monthly counts of fly-tipping by primary waste type.

Monthly counts of fly-tipping by land type.

Monthly counts of fly-tipping by waste/incident size.

Please provide data from 01 January 2017 to 31 July 2020."

6. The Council responded on 30 September 2020. It stated that it would require a charge of £100.00. It explained that the charge had been calculated based on an estimated four hours of staff time for locating, retrieving and extracting the requested information.
7. On 5 October 2020 the complainant wrote to the Council and requested that his request be reconsidered under the Freedom of Information Act. He stated *"being able to submit under EIR does not preclude my right to information under the freedom of information act and so I would like my request to be dealt with as a freedom of information request"*.
8. On 8 October 2020 the complainant wrote to the Council again. He stated, *"my real concern was using the EIR to charge for information that if it were under the FOI act would have been free"*. He cited an ICO decision notice regarding regulation 8 which found another public authority's charge to be unreasonable under regulation 8 of the EIR.¹ He also stated that the requested information, *"should be close to hand as the statistics are collated for DEFRA on a routine basis, however they are only published quarterly and I require monthly."*
9. Following an internal review the Council wrote to the complainant on 13 November 2020. In relation to the information access regime, it explained that:
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¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2615045/fer0763266.pdf>

"the Council applies an exemption provided for under section 39 of the Freedom of Information Act, to all environmental information requests received. This encompasses all waste related requests (including fly tipping). We refer to the definition of environmental information in the Environmental Information Regulations, which is also contained in section 4.5 of our Access to Information Policy."

10. In relation to the decision notice cited by the complainant, the Council said that the ICO considered the charge levied in that case to be unreasonable. It explained that in developing its own EIR charging regime, it had sought to apply a reasonable charge. It provided to the complainant a link to its charging regime. Ultimately, the Council maintained its original position that four hours was a reasonable timescale because this request would involve investigating each year and each specific fly tipped incident in that year. The Council also stated that it had confirmed this timeframe with the officer who initially provided the time estimate.

Scope of the case

11. The complainant contacted the Commissioner on 16 November 2020 to complain about the way his request for information had been handled. In relation to his request he asked that the Council release the information without charge and that the Council review the way it charges for information. He explained that he would like the Commissioner to, *"make a definitive ruling on the ability to charge for information under the EIR in particular reference to how that works alongside FOI rules."* He requested that the Commissioner also, *"write to all councils updating guidance on charging for information under EIR"*.
12. The scope of this notice is to determine whether the Council's charge of £100.00 complies with regulation 8 of the EIR.

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 request seeks the monthly counts of fly-tipping by different types: by primary waste type, by land type and by waste/incident size. The information requested covers the timeframe 1 January 2017 to 31 July 2020. The complainant asked that the information be provided in a CSV format. The Council confirmed that the format the information is held in is spreadsheets.

Is the requested information environmental?

16. The Commissioner has first considered whether the information requested is environmental in accordance with the definition given in regulation 2(1) of the EIR. This provision defines environmental information as:

"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 (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes...and activities affecting or likely to affect the elements and factors referred to in (a) and (b)...”.

17. In response to the Commissioner’s investigation, the Council explained that for all waste requests (including fly tipping) it applies the exemption provided for under section 39 of the FOIA, relating to environmental information. The Council stated that it refers to the definition of environmental information contained with regulation 2(1) of the EIR, and also in its Access to Information Policy.²
18. In this case, the information requested consists of fly tipping data. The Commissioner is of the view that the information in question here is on waste. The Commissioner therefore considers that the information requested in this case falls under the definition of environmental information set out in regulation 2(1)(b) of the EIR.

Regulation 8(2)

19. In respect of regulation 8(2), the Council has confirmed that the specific requested information is not contained within a public register or list. The Council also confirmed that the specific information requested was not collated and available for examination on receipt of the request.
20. However, the Council did confirm that some of the quarterly data, for the date range requested, is held and contained within a public register and provided a link to the Commissioner³. This webpage requires an individual or organisation to register an email address for public access to the published quarterly information.
21. The Commissioner notes that although some of the information is published quarterly, the request sought monthly counts of fly-tipping data. There is no evidence that suggests that the Council’s position is incorrect regarding the monthly data, so the Commissioner accepts that this part of regulation 8 has been met.

² https://www.eden.gov.uk/media/5302/accesstoinfopolicy_v30.pdf

³ <https://www.wastedataflow.org/Register.aspx>

Regulation 8(3)

How has the Council calculated the charge?

22. The Council explained that the charge was calculated at a rate of £25.00 per hour for staff time for locating, retrieving and extracting information, in accordance with its Access to Information Policy. It explained that officers provided an estimate of the amount of time they believe it would take to complete the task, which in the case of this request, was four hours.

How has the Council determined that the charge is reasonable?

23. The Council informed the Commissioner that it had applied the charge in accordance with its charging policy. It explained that its rationale for determining that the rate of £25.00 per hour (which is the rate set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the fees regulations)) is reasonable as set out in its Access to Information Policy. The policy states that the Council may charge a "reasonable amount" for information requested under the EIR. It states that this can include the reasonable costs of production and delivery of the information, and the staff costs incurred to extract and provide the information. The policy states that the costs of providing environmental information are included in its current Fees and Charges guidance and are charged at the following rates:

- £25 per hour for staff time for locating, retrieving and extracting information;
- 10p per A4 sheet for any photocopying and printing; and
- The costs of any postage.

24. It stated that the process for determining its EIR charging regime was extensive and included having regard to relevant ICO guidance and decision notices. It added that its EIR charges are published on its website⁴. In its response to the complainant, the Council stated that in developing its EIR charging regime, it had sought to apply a reasonable charge.

⁴ <https://www.eden.gov.uk/your-council/council-business/council-finances/fees-and-charges/>

25. The Council confirmed that having revisited its response, it did not wish to reverse or amend its position or apply an exception to withhold the information.

The Commissioner's analysis

26. The Council has not provided the Commissioner with a cogent explanation of how the information is held. The Commissioner requires this explanation in order to determine whether the charge the Council has estimated is reasonable in the circumstances. In its initial response to the request and its submissions to the Commissioner, the Council has not clearly explained how the requested information is held. The Council only confirmed that the information is held in spreadsheets. However, it is not clear how many of these spreadsheets are held, and what type of data they hold, for example yearly or monthly counts of fly-tipping. In its internal review, the Council stated that complying with the request would, *"involve investigating each year and each specific fly tipped incident in that year"*. The Commissioner notes that the charge is based on the time taken to locate, retrieve and extract the held information and that this, by the Council's own estimation, would only take four hours.
27. The EIR do not specify the rate at which staff time should be calculated. Although the 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. This is the rate used by the Council in this case.
28. The Commissioner considers that the charge of £100.00 is likely to represent a significant cost to a requester under the EIR. She notes that the requested information constitutes fly-tipping data across a three and a half year timeframe. She notes that this issue was reported about in local media⁵. This suggests that there may be a wider public interest in the requested information. The Commissioner also notes that the information has already been collated and published on a quarterly basis. She therefore considers it would not be unreasonable for a requester to assume that the Council would have the monthly data to hand.
29. 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

⁵ <https://www.cwherald.com/news/rubbish-fly-tipped-more-than-300-times-in-eden/>

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.⁶

30. 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 on 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.
31. 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).
32. In the context of this case, the Commissioner must consider whether the charge is reasonable. In addressing this, the Commissioner finds it useful to refer again to the 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 £100 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.
33. Having considered these factors, the Commissioner is not satisfied that the charge is reasonable, and therefore does not comply with regulation 8(3).

⁶ <https://ico.org.uk/media/for-organisations/documents/1627/charging-for-environmental-information-reg8.pdf>

34. Having concluded that the charge is not reasonable, the Commissioner does not need to proceed to consider regulation 8(8).

Other Matters

35. In bringing this matter to the ICO, the complainant asked the Commissioner to *"make a definitive ruling on the ability to charge for information under the EIR in particular reference to how that works alongside FOI rules."* He also requested that the Commissioner, *"write to all councils updating guidance on charging for information under EIR"*.
36. The Commissioner considers each complaint on an individual basis. She emphasises that the decision in this case relates only to the Council's compliance with the EIR in relation to this specific information request. It does not constitute a definitive ruling on a public authority's ability to charge for information under the EIR. Public authorities should consider each information request individually and in line with the Commissioner's guidance on regulation 8⁷.

⁷ <https://ico.org.uk/media/for-organisations/documents/1627/charging-for-environmental-information-reg8.pdf>

Right of appeal

37. 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@justice.gov.uk

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

38. 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.
39. 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

**Ben Tomes
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