

Decision Notice

Decision 201/2018: Mrs N and Glasgow City Council

Fees charged: planning information

Reference No: 201801462

Decision Date: 11 December 2018



Scottish Information
Commissioner

Summary

The Council was asked for a range of information about a planning application. It issued a fees notice, which was challenged.

The Commissioner investigated and found that the Council was entitled to issue a fees notice and that the notice was reasonable in terms of regulation 8 of the EIRs.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (paragraphs (a) and (c) of definition of “environmental information”); 5(1) and (2)(b) (Duty to make available environmental information on request); 8(1), (3), (4), (6) and (8) (Charging); 9(1) and (3) (Duty to provide advice and assistance)

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

Background

1. On 19 July 2018, Mrs N asked Glasgow City Council (the Council) for a wide range of information (her request comprised nine separate parts) in relation to planning application 17/02993/DC Ref: 36 Quadrant Rd Glasgow G43 2QR from September 2017 to the present day. In her request, Mrs N named the Council officers whose correspondence was relevant to her request, and described the information she wanted, with reference to her neighbours. Her request included the internal communications that led to the Council telling one of her family members that no further comment would be made on any further questions. The full request is set out in Appendix 2 to this decision, but will be redacted from the published version of this decision.
2. The Council responded on 3 August 2018. It informed Mrs N that the requested information fell under the ambit of the EIRs. It provided a breakdown of the time required to respond to her request and issued a fees notice of £234.24.
3. On 6 August 2018, Mrs N emailed the Council requesting a review of its decision. She considered the fees notice was excessive. She questioned the Council’s response in detail, including the requirement for senior staff to undertake the work. She stated that there was no detailed schedule of fees showing “the true and up to date charging scale tariff” on the Council’s website. She noted that a previous request had not incurred a charge, and she complained that the response did not include any details of the number of emails or data that would be provided on payment of the fee.
4. The Council notified Mrs N of the outcome of its review on 3 September 2018. It responded to the points raised in her request for review. It noted that some of the information was accessible on its planning portal and provided a weblink. The Council confirmed that it was satisfied that it could issue a fees notice, and provided Mrs N with its published charging schedule. It commented that, as Mrs N had named Council employees in her request, these individuals would need to undertake the work involved in answering it. The Council provided details of a sample exercise it had carried out, to support the calculation of its fees notice.

5. The Council also suggested ways in which the cost of providing information could be reduced through a narrowed request. It provided Mrs N with a list of the types of correspondence which were covered by her request: these included emails to and from Mrs N; emails between other members of her family and the Council; emails between officers of the Council relating to the application.
6. On 3 September 2018, Mrs N applied to the Commissioner for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (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. Mrs N was dissatisfied with the outcome of the Council's review and expanded upon the comments submitted in her request for review.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Mrs N made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
8. On 25 September 2018, the Council was notified in writing that Mrs N had made a valid application.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and answer specific questions about its fees notice, including justification for the time and costs that were likely to be incurred in responding to the request.
10. The Council responded on 16 October 2018.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to him by both Mrs N and the Council. He is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

12. The Commissioner is satisfied that the information covered by this request is environmental information, as defined in regulation 2(1) of the EIRs (paragraphs (a) and (c) of the definition of "environmental information"). Mrs N asked for information about a planning application, which is information on measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting, or likely to affect, the elements of the environment, in particular land and landscape.
13. Mrs N has not disputed the Council's decision to handle the request under the EIRs and so the Commissioner will consider the information solely in terms of the EIRs in what follows.

Matters to be investigated

14. Mrs N challenged several points relating to the fees notice issued by the Council. Having considered Mrs N's application, the Commissioner has identified the following key points of dissatisfaction, which he will consider below:
 - whether the Council was entitled to charge a fee for the provision of information;
 - whether senior staff were required to complete the work;
 - no charge had been issued for previous requests;
 - some of the information described in the Council's review response was information of which she was already aware and would be of no assistance to her;
 - the information included correspondence from other members of her family, who had their own data protection rights.

Regulation 8 of the EIRs – Charging

15. The Council 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.
16. As the Commissioner has concluded that the Council was correct to consider Mrs N's request under the EIRs, it follows that it is permissible for the Council to charge a fee for making available the information requested, as provided for in regulation 8.
17. The Commissioner then considered whether the Council's fees notice complied with the requirements in the EIRs.

Did the Council have a published schedule of fees?

18. 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.
19. The Council provided Mrs N with a copy of a document entitled "Charging for Environmental Information" and explained that this document was accessible from the following webpage: <https://www.glasgow.gov.uk/index.aspx?articleid=17480>.
20. The Commissioner is satisfied that the Council publishes, and makes available to applicants, a schedule of its fees as required by regulation 8(8) of the EIRs.
21. The Council's schedule of fees states it may charge a fee for responses to requests for environmental information under the EIRs. In summary, it makes clear that the proposed fee will not exceed the actual cost to the Council in providing the information, and describes the chargeable elements of locating, retrieving and assembling the information. The schedule of fees also describes situations where the fee may be waived.
22. The Council was asked to explain why it had decided to charge Mrs N for the provision of information, given that information had previously been provided without charge.
23. The Council explained that it had disclosed substantial volumes of information about the requested development and planning applications to the N family, including to Mrs N. It had

opted to waive the fee when it responded to Mrs N's previous request, considering it would be uneconomical to issue a fees notice and process payment. However, the work involved in amassing and redacting the information had been considerable. With hindsight, the Council considered it should have charged a fee for the information provided previously.

24. The Council submitted that, when it received the current request, it decided that issuing a fees notice would be appropriate as no other ground for waiving the fee note applied.
25. 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 has published a schedule of charges, as required by regulation 8(8) of the EIRs.

Was the fee reasonable?

26. 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.
27. In considering what is reasonable, the Commissioner has taken account of the considerations set out in his guidance on "Charging for environmental information¹" 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 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 the website or by email than to send it out in hard copy, and this should be reflected in the charge.
28. In seeking to establish whether the Council's fee was reasonable, the Commissioner investigated the amount of work required to locate, retrieve and provide the information covered by Mrs N's request.
29. The Council was asked to explain what types of information are **not** published on its planning portal. The Council explained that pre-application requests, being non-statutory, are not published on the planning portal. In addition, internal correspondence between officers and correspondence between officers and third parties is not published on the portal within a planning application file unless directly relevant to the application: e.g. a formal objection or an amended plan.
30. The Council stated that, unless email correspondence is directly relevant to the application and uploaded to the document management system, it tends to remain on an officer's email store (unless deleted). Some teams also download emails to a central document management system.
31. The Commissioner is satisfied that the Council would have to search its records as identified above to locate some information covered by Mrs N's request, given that it is not published on the Council's planning portal.

¹ <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.aspx?IID=9903&SID=10173>

32. In relation to information published online, the Commissioner notes that the Council provided Mrs N with a weblink to the online planning application in its review response.
33. Most of the relevant emails are likely to be held in individual officers' email accounts. The Council explained that only the officers themselves can search their emails, unless they are a member of senior management and have a secretary, which does not apply in this situation. Mrs N named the officers she expected to hold the information, so these are the officers who would be required to conduct the searches.
34. The Commissioner is satisfied with the Council's explanation that the staff named in Mrs N's request (of whatever seniority) would have to search their own records for the requested information.

Number of documents falling in scope of request

35. The Council was asked to estimate the number of documents held by each individual officer. It submitted (with supporting information) that one of the named officers had located 34 documents and had taken 45 minutes to complete this task.
36. The Council submitted that the other three named members of staff would have a similar number of documents. In addition, another two members of staff would also be required to search their records for the requested information; these members of staff would be likely to hold fewer documents.
37. The Commissioner is satisfied that the estimates of the number of documents likely to fall within scope of the request appear to be reasonable, in light of the search already undertaken by one officer.

Hourly rate of identified staff

38. In its "Charging for Environmental Information" paper, the Council states that the fees charged meet the criteria set out in regulation 8(3) of the EIRs, which requires that a fee shall not exceed a reasonable amount. Staff costs are charged on the basis of the actual hourly cost to the Council of employing the staff in question for the time spent (which includes the employer's national insurance and pension contributions).
39. The Council provided details of the hourly rate for each of the members of staff, with a supporting document which specified the hourly rate for each grade of staff when charging for information provided under the EIRs.
40. On the basis of the evidence provided, the Commissioner is satisfied that the Council is entitled to charge on the basis of the identified hourly rates for the staff in question.

Other charges and costs

41. In estimating the total cost that would be likely to be incurred in providing the requested information, the Council submitted that, in addition to the time taken to locate the requested information, it would also require two hours to physically redact information which was exempt from disclosure. This estimate was based on the time taken to redact correspondence held by one member of staff.
42. The Council noted that some of the information held by staff may be duplicated, for example a member of staff may have been copied into an email between two other officers so this email would be located three times. The Council recalculated the fees notice for searching one member of staff's records and reduced its estimate to £70.22 for this work (this included two hours of redaction time for a Grade 4 member of staff).

43. The Commissioner is satisfied with the Council's estimate of the number of documents it is likely to hold, in relation to Mrs N's request, and satisfied that the Council has correctly stated the hourly rate that can be charged for the relevant staff to search their own records.
44. The Commissioner notes that the Council has provided a revised estimate for the cost of a member of staff searching their own records and has offered to issue a revised fee note of £70.22. This takes into account the fact that some of the information held by staff members may be duplicated. However, the charge of £70.22 is based on the search of just one person's emails. Mrs N's request named several staff, and the Council has found that other staff not named in her request would also be likely to hold relevant information. The Commissioner does not accept that the Council's revised fee would cover all searches required to retrieve and provide the information covered by Mrs N's request.
45. The Commissioner is satisfied that the costs that are likely to be incurred in complying with Mrs N's request (as stated on the fees notice provided to her on 3 August 2018) are reasonable, given the work involved and the requirement for individual staff members to search their own emails.
46. The Commissioner is satisfied that the Council was entitled to issue a fees notice to Mrs N in relation to her information request, and that, in all respects, the fees notice complied with the requirements in regulation 8 of the EIRs.

Regulation 9 of the EIRs – Duty to provide advice and assistance

47. Regulation 9(1) of the EIRs provides that a Scottish public authority must, so far as it would be reasonable to expect it to do so, provide advice and assistance to applicants and potential applicants. Regulation 9(3) provides that a Scottish public authority which conforms with the relevant Code of Practice (in relation to the provision of advice or assistance) is to be taken to have complied with this duty.
48. The "relevant Code of Practice" is the Scottish Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the EIRs. This states (at paragraph 5.1 in Part 2):

Authorities should offer advice and assistance at all stages of a request

Authorities have a duty to provide advice and assistance at all stages of a request. It can be given either before a request is made, or to clarify what information an applicant wants after a request has been made, whilst the authority is handling the request, or after it has responded.

(The full text of Section 5 of the Code gives more detailed guidance on good practice in offering advice and assistance in relation to various stages and aspects of a request.)

49. During the investigation the Council was asked whether information and correspondence between the Council and Mrs N (and possibly her immediate family) could be excluded from the scope of the search, and whether the Council might provide Mrs N's own correspondence to her outwith the EIRs. This would potentially reduce the cost of complying with her request.

50. In response, the Council referred to the comments made by Mrs N in her application to the Commissioner:

The talk of Council providing correspondence relating to requests made by other family members concerns me. I have my data rights and other family members have their own data rights.

51. The Council submitted that Mrs N's request is wide in scope and it encapsulates correspondence to and from her and her family members. The Council would therefore be required to redact family members' names and contact information before disclosing the documents containing this information under the EIRs.

52. Mrs N will already have copies of the correspondence she has sent and received. The Council considered she is also likely to have access to correspondence to and from her family members, and suggested that she may wish to consider reducing the scope of her request to exclude this information if she does not wish to receive it under the EIRs.

53. The Commissioner is satisfied that Mrs N's request could potentially be reduced in scope, reducing the fee charged by the Council, but this would be a matter for Mrs N to instigate by submitting a new, narrower request: for example, a request which focussed on a single key matter of interest to her and excluded correspondence to and from herself and her family.

54. The Commissioner notes that, as part of its review response, the Council suggested that Mrs N could exclude correspondence from herself and members of her family. On the basis of Mrs N's application and the Council's submissions, he accepts that Mrs N was offered advice on a way to reduce the scope (and cost) of her request, but chose not to accept it. He has concluded that the Council provided relevant advice and assistance to Mrs N in line with regulation 9 of the EIRs.

Decision

The Commissioner finds that Glasgow City Council complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by Mrs N.

Appeal

Should either Mrs N or the Council 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.

Margaret Keyse
Head of Enforcement

11 December 2018

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;

...

(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.

...

- (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.

9 Duty to provide advice and assistance

- (1) A Scottish public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

...

- (3) To the extent that a Scottish public authority conforms to a code of practice under regulation 18 in relation to the provision of advice and assistance in a particular case, it shall be taken to have complied with the duty imposed by paragraph (1) in relation to that case.

...

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