

Decision Notice

Decision 089/2017: Q and Aberdeen City Council

Charges for a plan

Reference No: 201700225

Decision Date: 1 June 2017



Scottish Information
Commissioner

Summary

The Council was asked for a copy of a plan relating to a specified planning application. The Council charged for the provision of this information.

The Commissioner concluded that the Council had incorrectly charged for this information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 23(1) and (2) (Publication schemes); 73 (Interpretation) (definition of “information” and “publication scheme”)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulation 2(1) (paragraphs (a) and (c) of definition of "environmental information"); 6(1)(b) and (2) (Form and format of information); 8(1) and (3) (Charging)

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

All references in this decision to "the Commissioner" are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA.

Background

1. On 26 May 2016, Q telephoned Aberdeen City Council (the Council) to ask for access to plans for a named planning application. Representatives of Q then visited the Planning Department and asked for a copy of a plan. The Council told Q a copy of the plan would cost £50. Q paid the £50.
2. On 27 May 2016, the Council responded in writing to the telephone request from Q (a valid request for the purposes of the EIRs) and provided a copy of the requested information.
3. On 4 July 2016, Q wrote to the Council requesting a review of its decision to charge £50 for the information. Q did not consider the charge to be reasonable or justified.
4. The Council notified Q of the outcome of its review on 4 August 2016. It upheld the charge of £50 for the provision of the information, stating that, under regulation 8 of the EIRs, public authorities are allowed to charge a “reasonable amount” for making environmental information available. It explained that any fee charged must not exceed the costs to the authority of producing the information. It also explained how the Council had determined that a charge of £50 should be made for a copy of a Planning Application plan.
5. On 1 February 2017, Q applied 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 specified modifications. Q considered that the £50 charge for the small amount of information provided (a single sheet) was unreasonable and unjustified.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Q made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 8 February 2017, the Council was notified in writing that Q had made a valid application. The case was then 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 Council was invited to comment on this application and answer specific questions including justifying its reliance on any provisions of the EIRs it considered applicable to the information requested.

Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to her by both Q and the Council. She is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

10. 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"). Q asked for a drawing from a planning application file, 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.
11. Q 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.

Q submissions

12. Q disputed the £50 fee charged by the Council. It considered that it was inappropriate for the Council to conflate the process of providing copies of plans with the process of providing a single copy of one sheet taken from a planning file containing many such sheets. It was illogical, unreasonable and unjustified for the Council to charge an "average" standard cost based on a survey of planning files of many pages, when Q only wanted one sheet of paper.
13. Q stated that the cost of provision of information in this instance was minimal to the Council, and this should have been reflected in the cost. Q considered the charge of £50 was excessive, and that a charge such as this dissuades people from requesting information. It stated that it had been dissuaded from making other such requests in the past when told the fee.

The Council's submissions

14. The Council submitted that planning documents are routinely published and available under its publication scheme¹:

¹ http://www.aberdeencity.gov.uk/council_government/dp_foi/freedom_information/publication_scheme.asp

- Class 1: About the authority (Charging schedule for environmental information provided in response to requests under the EIRs); and
 - Class 3: How we take decisions and what we have decided (Public consultation and engagement strategies).
15. The Council stated that the fees it charges for planning documents are published on the Council's website. Planning applications are available online through its Planning Portal². Older planning applications are not available online, but access can be arranged by contacting the Council's Application Support Team.
 16. The Council explained that the standard charge of £50 for the provision of a planning application had been determined after working out the average cost of providing such information, based on a random sample of five small files, five medium files and five large files and the print costs, paper costs and staff time costs per plan. This average cost was then benchmarked against other public authorities. The Council explained that planning application file plans are held offsite in storage so an officer has to arrange for the whole file to be delivered to a Council office from the offsite facility. This retrieval service takes officer time to undertake. The Council provided details of its sampling of planning files and the associated costs.
 17. The Council stated that it does not consider that such costs dissuade requesters from seeking to obtain environmental information. It submitted that the actual costs for this type of request generally exceeded £50 and such a charge was reasonable and not prohibitive. It acknowledged that the £50 charge may exceed the actual cost to the Council for some smaller planning application plans, but concluded that, for the majority of plans, the charge is much less than the cost of providing the information.
 18. The Council considered that it was in the public interest to set a standard charge as a "fee per sheet" set-up would dissuade the public from accessing this information. The Council submitted that it had published its charges on its website so applicants are aware of the proposed cost at the outset. It stated that there is no current provision to adjust costs on an individual basis.
 19. The Council was asked what actual costs it had incurred in providing Q with a copy of the single plan it required. The Council did not answer this question directly, but gave the figures of £3.05 for an A1 sheet and £2.70 for an A2 sheet.
 20. On 8 March 2017, the Council wrote to Q offering to refund the fee of £50 on receipt of banking details. It provided the Commissioner with a copy of its letter to Q.

The Commissioner's findings

21. The Commissioner must decide whether the information requested by Q is available through the Council's publication scheme and, if so, whether the £50 charge for the information is permissible.
22. All Scottish authorities have adopted the Commissioner's Model Publication Scheme (MPS). This requires them to publish a Guide to Information that they make available. The current

² / <https://publicaccess.aberdeencity.gov.uk/online-applications>

MPS (2016) and guidance on the MPS and Guide to Information are accessible on the Commissioner's website³.

23. The MPS guidance states that the published Guide to Information can take whatever form suits an authority best, including an A-Z format. Although the Commissioner accepts that a website A to Z guide can serve as a Guide to Information, this should not be taken to mean that everything listed in an A to Z guide will represent published information covered by the MPS.

24. The current version of the Commissioner's guidance on the MPS (2016) addresses the question of what is "published" information. On page 14 it states:

Publication has a slightly different meaning under FOI than in everyday usage. In terms of FOI it simply means making available information that is already prepared. The information must be available to anyone and easy to access quickly without having to make a request for it.

25. The Commissioner's guidance describes six MPS principles which set out the access requirements in FOI law for published information. Principle 1 relates to the availability and format of information, and states that information should, wherever possible, be made available on the authority's website. There must be an alternative arrangement for people who do not wish to, or who cannot, access the information either online or by inspection at the authority's premises.

26. In this case, the information required by Q is not available on the Council's website, as the planning application to which it relates is not recent. However, the planning application is available to inspect at the Council's offices. The Commissioner accepts that even though the requested information is not available online, it is still covered by the Council's publication scheme.

27. The next question is whether the Council was entitled to charge £50 for a single plan from a planning application covered by its publication scheme.

28. The MPS guidance states (paragraph 59):

Any charges must be consistent with the following **charging criteria**:

(i) Any charges must be "reasonable". That is, the charge must not be more than it costs the authority to provide the information e.g., the actual postage cost. Photocopying charges should reflect only the cost per copy and a relevant proportion of the cost of any consumables. As a general guide, it is expected that a photocopying charge will be significantly less than a commercial copying service. Where printed materials are published, an authority can derive a cost per copy from the total printing price, divided by the number of copies.

29. This reflects the general rules for charging for environmental information contained in regulation 8 of the EIRs – see, in particular, regulation 8(3), which is set out in full in Appendix 1.

30. The Council has set a standard charge of £50 for providing information from a planning application. However, in this case, Q requested a copy of a **single plan**: it did not request a copy of the entire planning application file.

³<http://www.itspublicknowledge.info/ScottishPublicAuthorities/PublicationSchemes/TheModelPublicationScheme.aspx>

31. The Council was asked why the charge of £50 for a planning application file was applicable in this case, when all that was requested was a copy of a single plan. It did not respond to this question or explain why the charge levied for a complete planning application file was appropriate.
32. The MPS guidance makes clear that Scottish public authorities providing information under their publication scheme cannot charge more than the cost they incur in doing so. The Council has confirmed that it costs £3.05 for A1 and £2.70 for A2 prints. It has not confirmed the actual cost of providing the requested plan. Q stated in its application that it required one sheet from the architect's plan so that it could submit appeal to the Scottish Government Reporters Unit. Q commented that it did not keep a copy of the plan provided, but recalled that it was possibly two pages printed larger than A4 size.
33. Working on the basis that the requested plans comprised, at most, a few sheets of paper, the Commissioner has concluded that the cost to the Council of providing this information would be a fraction of the £50 charged for a complete planning application file.
34. The Council's argument that it benchmarked the cost of providing a planning application file against other authorities is irrelevant. The publication scheme guidance (and the guidance in regulation 8(3) of the EIRs) is clear: the charge to the applicant must not be more than the actual cost of providing the information. This makes it unlikely that a Scottish public authority can rely on a standard charge for particular types or classes of information provided under its publication scheme. If a standard charge is applied, the authority must be prepared to reduce the charge if the actual cost of providing the information is less than the standard charge.
35. The Commissioner has issued guidance on charging fees⁴, which sets out the following principles:
 - 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.
36. The Commissioner concludes that it was not permissible for the Council to apply the standard charge of £50 for a complete planning application file when dealing with the request for a single plan, given that the cost of providing the information was less than the standard charge.

⁴ http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Fees_and_charging/ChargingEIRs.aspx

37. The Commissioner notes that the Council has offered to refund the monies paid by Q and that Q has provided its bank details to the Council so that the monies can be refunded.

Decision

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

The Commissioner concluded that the Council was not entitled to charge a fee of £50 for the provision of a single plan from a planning application file.

Given that the Council has offered to refund the monies paid by Q, the Commissioner does not require the Council to take any action in response to this failure in response to Q's application.

Appeal

Should either Q 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
Acting Scottish Information Commissioner

1 June 2017

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.

23 Publication schemes.

- (1) A Scottish public authority must -

- (a) adopt and maintain a scheme (in this Act referred to as a “publication scheme”) which relates to the publication of information by the authority and is approved by the Commissioner;
- (b) publish information in accordance with that scheme; and
- (c) from time to time review that scheme.

- (2) A publication scheme must specify -

- (a) classes of information which the authority publishes or intends to publish;
- (b) the manner in which information of each class is, or is intended to be, published; and
- (c) whether the published information is, or is intended to be, available to the public free of charge or on payment.

...

73 Interpretation.

In this Act, unless the context requires a different interpretation –

...

“information” (subject to sections 50(9) and 64(2)) means information recorded in any form;

...

“publication scheme” has the meaning given by section 23(1)(a);

...

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;

...

6 Form and format of information

(1) Where an applicant requests that environmental information be made available in a particular form or format, a Scottish public authority shall comply with that request unless-

...

(b) the information is already publicly available and easily accessible to the applicant in another form or format.

(2) Where a Scottish public authority relies on a provision of paragraph (1) not to make the information available in the form or format requested it shall-

(a) give its reasons for that decision as soon as possible and in any event no later than 20 working days after the date of receipt of the request for the information;

(b) give its reasons in writing if the applicant so requests;

(c) inform the applicant of the review provisions under regulation 16 and of the enforcement and appeal provisions available in accordance with regulation 17.

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.

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