



Scottish Information
Commissioner

**Decision 095/2007 – Mr John B. Mackintosh and
Renfrewshire Council**

*Dispute over fees notice under the Environmental Information
(Scotland) Regulations 2004*

**Applicant: Mr John B. Mackintosh
Authority: Renfrewshire Council
Case No: 200601199
Decision Date: 2 July 2007**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 095/2007 – Mr John B. Mackintosh and Renfrewshire Council

Fees notice issued in response to an information request made under the Environmental Information (Scotland) Regulations 2004 – questions concerning the calculation of the fees notice – the Commissioner ordered Renfrewshire Council to issue a revised fees notice.

Relevant Statutory Provisions and other Sources

Statutory provisions

Environmental Information (Scotland) Regulations 2004: regulations 2(1) (definition of “environmental information”) (Interpretation); 5 (Duty to make available environmental information on request); 7(1) (Extension of time); 8(1), (2) and (3) (Charging); 16(1) and (3) (Review by Scottish public authority) and 18(1) (Code of practice and functions of the Commissioner)

The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004: regulation 3

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

Other sources

Scottish Executive - Code of Practice on the Discharge of Functions by Scottish Public Authorities under the Environmental Information (Scotland) Regulations 2004 dated August 2006: <http://www.scotland.gov.uk/Publications/2006/08/14104256/0> (see in particular paragraphs 4 and 39)

Scottish Executive - Access to Environmental Information - Guidance for Scottish Public Authorities and Interested Parties on the Implementation of the Environmental Information (Scotland) Regulations 2004 dated September 2005
<http://www.scotland.gov.uk/Publications/2005/09/12134712/47142> (see in particular paragraph 64)

Information Tribunal Decision relating to David Markinson and the Information Commissioner:
http://www.informationtribunal.gov.uk/Files/ourDecisions/david_markinson_v_info.pdf

Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC



Facts

Mr Mackintosh requested copies of all information that Renfrewshire Council (the Council) held on the Royal Ordnance Factory, Bishopton (the Ordnance Factory) for the period 1 January 2004 to 31 December 2004. The Council issued a fees notice to Mr Mackintosh. Mr Mackintosh was dissatisfied with the fees notice and requested a review. On review, the Council capped the hourly rate and issued a revised fees notice.

Mr Mackintosh was dissatisfied with the revised fees notice as he considered the fees charged were a deliberate attempt to discourage him from obtaining the information he had requested. Mr Mackintosh applied to the Commissioner for a decision as to whether the fees notice was valid.

Following an investigation, the Commissioner found that the Council had not calculated the fees notice in line with the Environmental Information (Scotland) Regulations 2002 (the EIRs) and ordered the Council to issue a revised fees notice to Mr Mackintosh. The Commissioner also ordered the Council to publish and make available a schedule of charges under the EIRs.

Background

1. Mr Mackintosh wrote to the Council on 14 April 2006, requesting copies of all reports/documents/papers/correspondence/minutes (written, email, fax or by any other means) relating to the Ordnance Factory for the period 1 January 2004 to 31 December 2004. Mr Mackintosh also requested the same information held by the Glasgow and Clyde Valley Structure Plan Committee.
2. On 20 April 2006, the Council acknowledged Mr Mackintosh's request and advised him that his request would be dealt with under the EIRs. In that letter, the Council advised Mr Mackintosh that if, after undertaking research, his enquiry was found to be complex and voluminous, the Council would exercise its right (under regulation 7(1) of the EIRs) to extend the response period by a further 20 days to 40 days.



3. Subsequently, on 17 May 2006, the Council wrote to Mr Mackintosh extending the time period for the response to his request to 40 working days under regulation 7(1) of the EIRs (on the basis of the volume and complexity of the request and the amount of staff time and research required to deal with his request) and advising him that it was likely that a fee would be charged for the provision of the information he requested. (Mr Mackintosh did not ask me to consider whether the Council was correct to extend the response period and I therefore do not consider this matter in this decision.)
4. On 31 May 2006, the Council issued Mr Mackintosh with a fees notice for £850.87, on the basis that this is what it would cost the Council to locate, retrieve and collate the requested information he had requested.
5. Mr Mackintosh wrote to the Council on 5 June 2006, expressing his dissatisfaction with the fees notice in terms of regulation 16 of the EIRs. He was particularly unhappy with:
 - the charge for photocopying
 - the fact that the same fees notice had been issued to different people for the information requests about the Ordnance Factory but covering different years (I understand that Mr Mackintosh was one of eight people who had asked for information about the Ordnance Factory and that each of the people who had made the request had asked for the information over a specified year. However, only Mr Mackintosh has made an application to me.)

In addition, Mr Mackintosh asked if he could view the files at the Council's offices.

6. The Council acknowledged Mr Mackintosh's request for review on 8 June 2006 and, on 4 July 2006, notified him of the outcome of the review. The Council explained that the photocopying charge had been agreed by the Council's General Management Policy Board, and was considered a reasonable charge. As the information requested was not stored in date order but in subject files, the same files would have to be searched for each request. The Council offered to refund any over-payment of fees should the cost of the work in answering any individual request fall below the amount in the fees notices and, at the same time, the Council also reduced the fees notice slightly to £760.23 by capping the hourly charge for staff time at £15. The Council acknowledged Mr Mackintosh's request to view the files at the Council offices, but advised him that a new fees notice would have to be issued for the location and collation of files solely.



7. Mr Mackintosh wrote to my Office on 12 July 2006, stating he was dissatisfied with the outcome of the Council's review and applying to me for a decision as to whether the Council had dealt with his information request in line with the EIRs and, in particular, whether the fees notice issued by the Council was reasonable.
8. The application was validated by establishing that Mr Mackintosh had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to his request.
9. My Office wrote to the Council on 18 July 2006, giving notice that an application had been received and that an investigation into the matter had begun and inviting comments from the Council as required under section 49(3)(a) of the Freedom of Information (Scotland) Act 2002 (FOISA). (This particular section of FOISA also covers investigations under the EIRs.) The Council was asked to supply my Office with, amongst other items, details of how it calculated the fees notice issued to Mr Mackintosh on 31 May 2006.
10. A detailed reply was received from the Council on 25 July 2006. In line with what the Council had previously told Mr Mackintosh, the reply confirmed that the information requested by Mr Mackintosh was stored in subject rather than in chronological order. This meant that every file would have to be searched to find information from 2004 relating to the Ordnance Factory. As a result, the Council had estimated the time and copying required for retrieving and collating the information for all eight enquiries and a standard fees notice was then be sent to each of the eight enquirers.
11. The case was then allocated to an investigating officer.

The Investigation

12. The main 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.
13. The investigating officer wrote to the Council on 3 August 2006, asking for additional information about the handling of the request and the calculation of the fees notice. The Council responded on 23 August 2006 and the key points have been detailed below. Further correspondence took place with the Council following the receipt of the submissions.



Submissions from the Council on 23 August 2006

14. The Council was asked by the investigating officer why it considered Mr Mackintosh's request to fall under the EIRs rather than under FOISA. It was important to check that the correct legislation had been relied on given the very different charging regimes in the two sets of legislation. The Council explained that the Ordnance Factory site was used to manufacture munitions for almost 100 years and different parts of the site were now affected by the risk of contamination. Proposals had been made by its owner BAe Systems for the remediation of the site and its redevelopment for housing and business use. The Council held information relating to:
- proposals for the remediation of contaminated land
 - proposals for the development of the site
 - development plan information including the Structure Plan and the Local Plan and consultations relating to these
 - information on the condition of the site
 - information on environmental aspects of the site
15. The investigating officer queried the fact that within the breakdown of the fees notice, the Council had not indicated whether the Glasgow and Clyde Valley Structure Plan Committee had been asked to locate the requested information (Mr Mackintosh's information request had also sought information held by the Committee). The Council advised the investigating officer that it acted as the lead body for the Committee, so it was regarded as part of the Council for the purposes of FOISA. The Committee held very little information on the Ordnance Factory. The Council ascertained that the majority of information was held by the Planning and Transport and Environmental Services Departments. Since very little information was held by the Committee, the Council decided to charge solely for the search of information held by the two Council departments.
16. Due to the volume and complexity of the information held on the Ordnance Factory, the Council felt that relatively senior staff (identified by grade) would have to be involved in the appraisal of records for release to Mr Mackintosh. The original fees notice was higher than the one issued on review to take account of the senior staff costs (on review the hourly charge for staff time was capped at £15 per hour).



17. The Council also explained since the volume of information relating to the eight requests was so vast, it was not possible to go through each year's worth of records held and provide a separate estimate for each year within the time available. Staff assessing the records estimated that the amount of material held was likely to be fairly constant over the time period. The Council felt that the best approach was to take the estimated costs for one year (i.e. one individual request) and apply these to all years requested. One of the requests was for correspondence from 1 January 2006, for which a fees notice for half the estimated fee was issued.
18. The investigating officer enquired whether the eight applicants could have been asked if their requests could have been combined. However, the Council felt it was correct to keep the requests separate, in line with the legislation.
19. The Council also provided a break-down of the charge of 36 pence per page for photocopying, as follows:
 - removal of files from their physical storage area
 - location of appropriate pages, either marked or indicated by reference
 - disassembly of the file
 - copying of the page(s)
 - reassembly of the file
 - relocation of the file to its storage area
20. Aware that Mr Mackintosh was hoping to access the information in March 2007, the investigating officer contacted the Council in February 2007 to ascertain whether the Council would consider releasing a subject list of the files it held on the Ordnance Factory to Mr Mackintosh in order to allow him to narrow down the scope of his request and whether the photocopying charge could be reduced. The investigating officer also sought clarification as to what the staff time covered (the Council had said that it would take 24 hours and 30 minutes to respond to Mr Mackintosh's request).
21. The investigating officer spoke to the Council on 21 February 2007 and 6 March 2007 and was advised that the Council was in the process of reducing the photocopying charge to 11 pence per page and the staff time of 24 hours and 30 minutes included the location, retrieval and preparation of information solely. On 14 March 2007, the Council confirmed the above in a letter and it also agreed to release the subject list on the Ordnance Factory to Mr Mackintosh.



22. The investigating officer also emailed Mr Mackintosh on 19 February 2007, to further clarify the scope of his request, whether the eight requests could be combined and whether he was willing to pay for photocopying the information. Mr Mackintosh responded to these questions on 22 February 2007, making it clear that he was unwilling to pay to receive any of the information and that he would be willing to view the documents within the Council's premises if this is the only no cost option.

The Commissioner's Analysis and Findings

23. In coming to a decision on this matter, I have considered all of the information and the submissions that have been presented to me by both Mr Mackintosh and the Council during the investigation and I am satisfied that no matter of relevance has been overlooked.
24. I shall consider whether Mr Mackintosh's request is a request for environmental information and will then go on to consider whether the Council correctly calculated the fees notice.

Is the information requested by Mr Mackintosh environmental information?

25. "Environmental information" is defined in Regulation 2 of the EIRs and includes information on:
- "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...and the interaction among these elements" (regulation 2(1)(a))
 - "Measures (including administrative measures) such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements..." (regulation 2(1)(c))
 - "The state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment..." (regulation 2(1)(f))
26. As noted above, Mr Mackintosh's initial request sought information relating to the Ordnance Factory. The Council took the view that the information being requested on the Ordnance Factory was inherently about the environment. For example, the redevelopment proposals would include the remediation of the contaminated land.



27. Having considered the types of information held by the Council, it is my opinion that the Council was correct in its decision to process Mr Mackintosh's request under the EIRs. The information that the Council holds on the Ordnance Factory will have a direct impact on the land use and landscape of the Ordnance Factory site.
28. I shall now go onto consider whether the fees notice issued by the Council was in line with regulation 8(3) of the EIRs.

Were the fees charged reasonable?

29. Regulation 8 of the EIRs covers what charges can and cannot be made for responding to requests for environmental information. In particular, regulation 8(3) states that fees charged shall not exceed a reasonable amount and shall not exceed the costs to the authority of producing the information requested.
30. Regulation 8(8) of the EIRs 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. However, the Council has not published such a schedule.

What is a reasonable charge?

31. The Scottish Executive has published both a Code of Practice and Guidance on the EIRs (see the "Relevant Statutory Provisions and Other Sources" section at the start of this decision).
32. The question of charging for responding to requests for environmental information is dealt with at paragraph 39 of the Code. This states that the EIRs do not require charges to be made, but that Scottish public authorities have discretion to make a reasonable charge for environmental information. There is no definition of what is considered to be "reasonable" in the Code or of what charges can be taken into account, although, in line with regulation 8(3) of the EIRs, the Code recognises that the charge must not exceed the cost of providing the information.
33. However, the guidance issued by the Scottish Executive goes further in defining what is "reasonable." Fees are considered in paragraphs 62 to 68 of the guidance. Paragraph 64 includes the following statement:

"A Scottish public authority may charge a reasonable fee for the provision of environmental information but this should not exceed the actual cost of supplying the information, for example, the actual cost of location, retrieval and photocopies."



34. This guidance is similar to the FOISA charging regime, given that regulation 3(1) of the Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations) allow public authorities to charge costs they are likely to incur in locating, retrieving and providing information.
35. In addition to the Executive's code and guidance, I have considered a variety of other sources of information in coming to a decision on how public authorities should decide what is a reasonable charge under the EIRs. For example, I have taken into account Directive 2003/4/EC and have read with interest the Information Tribunal Decision dated 28 March 2006 as to what could be charged for under the (UK-wide) Environmental Information Regulations 2004. This decision considered a request made by a David Markinson to West Norfolk Borough Council. In that case, the Tribunal found that West Norfolk Borough Council was entitled only to charge for the cost of producing the information and not for costs related to the location etc. of the information. However, the Information Tribunal Decision in Markinson can be distinguished from this particular application as it related to information which had already been provided free of charge to view at the public authority's offices. In this instance the information Mr Mackintosh has requested has not been made publicly available and so I found that the Markinson decision was not relevant to Mr Mackintosh's application.
36. I generally take the view that if a public authority relies on the FOISA charging regime to calculate a fees notice under the EIRs, then that fees notice is likely to be reasonable in terms of regulation 8(3) of the EIRs. I accept, however, that there will be occasions when other matters will need to be taken into account as to what is and is not reasonable and, of course, should the FOISA charging regime change then I may take a different view. It is also important to remember that under the FOISA charging regime a Scottish public authority is not required to comply with a request for information if the authority estimates that the cost of compliance will exceed the Fees Regulations (currently £600). Under the EIR regulations there is no such upper limit.
37. In this particular case, I considered that the fees notice issued by the Council was not reasonable in terms of regulation 8(3) of the EIRs. For example, the cost per page of photocopying was expensive at 36 pence per sheet. From my research I have found that many public authorities charge 10/11 pence per page of photocopying. As a result, I instructed the investigating officer to ask the Council whether it would be willing to re-calculate the fees notice on the basis of the FOISA charging regime. The Council agreed to this proposition in respect of this particular case. A fees notice based on the following calculations was agreed with the Council.



Staff Time

Staff time of 24 hours and 30 minutes capped at £15 per hour (staff at various levels required to locate, retrieve and collate information)	£362.79
Minus £100 (FOISA charging regime)	£262.79
Sub Total	£262.79

Photocopying

1104 sheets at 11 pence per sheet	£121.44
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Total Fees Chargeable	£384.23
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Schedule of fees

38. As noted above, regulation 8(8) of the EIRs imposes a duty on Scottish public authorities 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.
39. The Council has confirmed that it does not have such a schedule of fees, in breach of regulation 8(8) but has stated that it will put in place a schedule of fees.

Decision

I find that Renfrewshire Council (the Council) failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request from Mr Mackintosh.

I find that the fees notice issued to Mr Mackintosh was not for a reasonable amount and according did not comply with regulation 8(3) of the EIRs. I therefore require the Council to reassess the charges that it will incur in responding to Mr Mackintosh's information request and issue a revised fees notice for £384.23 to Mr Mackintosh within 45 (calendar) days of receipt of this decision notice.

I also find that in failing to publish and make available a schedule of its fees and the information on the circumstances in which a fee may be charged, waived or required to be paid in advance, the Council has failed to comply with regulation 8(8) of the EIRs. I therefore require the Council to publish and make available a schedule which complies with regulation 8(8) within 3 months of receipt of this decision notice.



As noted above, the Council has already agreed to issue a fees notice for this amount to Mr Mackintosh and to publish a schedule of charges in line with regulation 8(8).

I note that Mr Mackintosh has stated that he is unwilling to pay any amount for the information he has requested. However, it remains the case that a public authority is entitled to charge a reasonable fee for making available environmental information, subject to the other restrictions contained in regulation 8 of the EIRs.

Appeal

Should either the Council or Mr Mackintosh 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 of receipt of this notice.

Kevin Dunion
Scottish Information Commissioner
2 July 2007



APPENDIX

Relevant Statutory Provisions

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;
 - (d) reports on the implementation of environmental legislation;
 - (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c)

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)-
 - (a) shall be complied with as soon as possible and in any event no later than 20 working days after the date of receipt of the request; and
 - (b) is subject to regulations 6 to 12.
- (3) Any enactment or rule of law which would prevent the making available of information in accordance with these Regulations shall not apply.



- (4) A Scottish public authority shall, in making environmental information compiled by it available in accordance with paragraph (1), ensure so far as practicable that that information is up to date, accurate and comparable.
- (5) Where information of the kind referred to in paragraph (b) of the definition of "environmental information" in regulation 2(1) is made available, the authority shall, if the applicant so requests, provide such information as is available to it of the place where information can be found on the measurement procedures, including methods of analysis, sampling and pre treatment of samples, used in compiling the information, or refer the applicant to the standardised procedure used.

7. Extension of time

- (1) The period of 20 working days referred to in-
 - (a) regulation 5(2)(a);
 - (b) regulation 6(2)(a); and
 - (c) regulation 13(a),may be extended by a Scottish public authority by a further period of up to 20 working days if the volume and complexity of the information requested makes it impracticable for the authority either to comply with the request within the earlier period or to make a decision to refuse to do so.

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.
- (2) A Scottish public authority shall not charge a fee for allowing an applicant to-
 - (a) access any public registers or lists of environmental information held by it; or
 - (b) examine the information requested at a place which the authority makes available for that purpose.
- (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.



- (7) No working day from and including the day on which notice under paragraph (5) is given up to and including the day on which a fee is paid shall count for the purposes of determining any period of working days in accordance with regulations 5(2)(a), 6(2)(a) and 13(a).
- (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.

16. Review by Scottish public authority

- (1) Subject to paragraph (2), an applicant may make representations to a Scottish public authority if it appears to the applicant that the authority has not complied with any requirement of these Regulations in relation to the applicant's request.
- (3) The Scottish public authority shall on receipt of such representations –
 - (a) consider them and any supporting evidence produced by the applicant; and
 - (b) review the matter and decide whether it has complied with these Regulations.

18. Code of practice and functions of the Commissioner

- (1) The Scottish Ministers may issue, and may from time to time revise, a code of practice providing guidance to Scottish public authorities as to the practice which it would, in the opinion of the Ministers, be desirable for those authorities to follow in connection with the discharge of their functions under these Regulations and with the keeping, management and destruction of their records.

The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004

3. Projected costs

- (1) In these Regulations, "projected costs" in relation to a request for information means the total costs, whether direct or indirect, which a Scottish public authority reasonably estimates in accordance with this regulation that it is likely to incur in locating, retrieving and providing such information in accordance with the Act.
- (2) In estimating projected costs –
 - (a) no account shall be taken of costs incurred in determining –
 - (i) whether the authority holds the information specified in the request; or
 - (ii) whether the person seeking the information is entitled to receive the requested information or, if not so entitled, should nevertheless be provided with it or should be refused; and
 - (b) any estimate of the cost of staff time in locating, retrieving or providing the information shall not exceed £15 per hour per member of staff.