

Decision Notice 062/2022

Fees Notice: paths and core paths

Applicant: The Applicant

Public authority: East Lothian Council

Case Ref: 202101179



Scottish Information
Commissioner

Summary

The Council was asked for information regarding paths and core paths, including their maintenance costs and funding. The Council disclosed some information under FOISA, but determined that the majority of the request was seeking environmental information and required to be handled under the EIRs. It issued a Fees Notice to the Applicant. The Commissioner found that, while the Council was entitled to issue a Fees Notice, the fee charged was not reasonable. The Council issued the Applicant with a revised Fees Notice during the investigation. Given this, the Commissioner did not require the Council to take any further action.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (paragraphs (a), (c), (d) and (e) 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)

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.

Background

1. On 3 September 2021, the Applicant made a request for information to East Lothian Council (the Council). The information requested was, for the period 2016/17 to 2020/21, broken down by year:
 - 1) How many Full Time Equivalent (FTE) access officer the Council employed.
 - 2) How many FTE non-seasonal rangers the Council employed.
 - 3) How many seasonal rangers the Council employed, if possible listed as an FTE figure.
 - 4) How many times the Council's Local Access Forum met.
 - 5) The total length (in km) of core paths in each financial year.
 - 6) The total Section 11 orders issued to exempt land from access rights for less than 6 days.
 - 7) The total Section 11 orders to exempt land from access rights for 6 days or more with confirmation by Scottish Ministers.
 - 8) The total Section 14 notices issued to a land owner requiring obstructions to be removed.
 - 9) The number of times the landowner complied and did not comply with Section 14 notices.
 - 10) The number of Section 21 path agreements issued.
 - 11) Total access authority capital expenditure on paths.
 - 12) Total matched capital funding for paths.
 - 13) Capital funding from other sources related to paths.
 - 14) Maintenance expenditure on core paths.

- 15) Maintenance expenditure on non-core paths.
2. The Council responded on 8 September 2021. It provided the Applicant with information falling within the scope of requests 1) to 4), under the Freedom of Information (Scotland) Act 2002 (FOISA). With respect to the information captured by requests 5) to 15), the Council issued the Applicant with a Fees Notice for £92.34, claiming that the information was environmental information and had to be handled under the EIRs. The Council explained that the EIRs allow public authorities to impose charges for responding to information requests.
 3. On 9 September 2021, the Applicant wrote to the Council, requesting a review of its Fees Notice on the grounds that the rate was unreasonable.
 4. The Council notified the Applicant of the outcome of its review on 16 September 2021. It maintained its right to charge for the provision of information, but reviewed the original Fees Notice and replaced it with a new, reduced, Fees Notice for £53.04.
 5. On 20 September 2021, the Applicant wrote to the Commissioner, applying 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. The Applicant stated he was dissatisfied with the outcome of the Council's review. He considered it was unreasonable for some authorities to charge for information which other bodies made freely available.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicant 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.
7. On 22 September 2021, the Council was notified in writing that the Applicant had made a valid application and the case was 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 to answer specific questions on its methods for calculating the Fees Notice.

Commissioner's analysis and findings

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

Application of the EIRs

10. The Applicant asked for a range of information about paths and core paths, including their maintenance, funding, and how the Council exercises its powers under sections 11, 14 and 21 of the Land Reform (Scotland) Act 2003 (the 2003 Act).
11. The Commissioner is satisfied that the information covered by requests 5 to 15 is environmental information, as defined in regulation 2(1) of the EIRs (paragraphs (a), (c), (d) and (e) of the definition of "environmental information").

12. The information relates to measures and activities (paragraph (c) of the definition of environmental information in regulation 2(1) of the EIRs) that affect the state of the elements contained in paragraph (a), specifically the land and landscape. The information also relates to the implementation of the Council's powers under the 2003 Act, which falls under the definition of paragraph (d), and to the financial and economic considerations involved in undertaking plans, programmes and other activities to create, manage and maintain elements of the environment, which falls within the definition set out in paragraph (e).
13. The Applicant has not disputed the Council's decision to handle requests 5 to 15 under the EIRs and so the Commissioner will consider the information solely in terms of the EIRs in what follows.

Regulation 8 of the EIRs - Charging

14. 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 a fee in advance and (if it does so) is not required to make the information available unless a fee is paid.
15. As the Commissioner has concluded that the Council was correct to consider the Applicant's requests 5 to 15 under the EIRs, it follows that it is permissible for the Council to charge a fee for making the information requested available, as provided for in regulation 8.
16. The Commissioner must now consider whether the Council's Fees Notice complied with the requirements in the EIRs.

Did the Council have a published schedule of fees?

17. 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.
18. Within the Fees Notice issued to the Applicant, the Council provided a link to a Schedule of Fees available on its website.
19. The Council's Schedule of Fees states that it charges a fee for responses to requests for environmental information under the EIRs. In summary, it makes clear what the proposed fee will incorporate in relation to the actual cost of staff time taken to locate, retrieve, redact (where relevant) and provide the information, together with any additional costs (such as postage or photocopying). The schedule of fees also makes it clear all costs must be paid in advance and, where the Council finds that it costs less to provide the information than quoted, it will refund the overpayment.
20. 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 its fees, as required by regulation 8(8) of the EIRs.

Was the fee reasonable?

21. 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.

22. In considering what is reasonable, the Commissioner has taken account of the considerations set out in his guidance on "[Charging for Environmental Information](#)"¹ under the heading *Is the charge reasonable or excessive?* (paragraph 12). These include:
- (i) 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.
 - (ii) 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.
 - (iii) 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.
23. 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 the Applicant's request.
24. The Council was asked to explain why only a member of staff at Grade 9 was able to carry out relevant tasks, and not staff at more junior grades. It was also asked to set out, in detail, the specific steps that would have to be carried out in order to comply with the request, allocating minutes to each individual task.

Staff involved, nature of tasks to be carried out and time taken

25. The Council explained that the requested information was only accessible via the Outdoor Access Officer's e-mails and locally-controlled files. It noted that the Outdoor Access Officer was a Grade 9 post. The only other Council officer with access to the relevant records was a more senior officer employed at a higher grade (Grade 11).
26. The Council provided the Commissioner with a table which contained details of the tasks that had to be carried out in order to comply with the request, along with the time taken. The submissions noted that, for requests 14 and 15, the mailbox of the Grade 9 officer was searched for information using the path project name. The Council estimated that, for each of these two requests, it would take 10 minutes to locate information in the email inbox and 10 minutes to locate information held in local files.
27. The table also demonstrated that, for requests 5 to 13, no email searches were required as all of the information was in locally held files. For requests 5 to 13, the Council calculated that it would take 5 minutes to locate information captured by each request. The Council explained that for requests 11 to 13, the information was held in multiple spreadsheets that covered the specified time period. Information falling within the scope of requests 6 to 9 was held in case files known to the officer (so no searches were required). Information meeting the terms of request 5 was held in an MS Access database and, for request 10, some of the information was in case files known to the officer and the remainder was held in an MS Access database.

¹<https://www.itspublicknowledge.info/sites/default/files/2022-03/Chargingforenvironmentalinformation.pdf>

28. The Council submitted that, during the process of answering the Commissioner's questions, the Outdoor Access Officer revised down the total time required to produce the information requested by the Applicant from 2 hours to 85 minutes. The Council submitted that its policy is to refund any overpayment, should the confirmed costs of producing the information prove to be lower than the estimate provided via the Fees Notice. Given the reduction of time required to comply with the request, the Council submitted that it would issue the Applicant with a new, revised Fees Notice that reflected this change.
29. On 29 March 2022, the Council issued the Applicant with a new Fees Notice for £37.66.

Commissioner's conclusions

30. Having considered the relevant submissions, the Commissioner is satisfied that the Council was entitled to charge for the grade of staff identified and that it correctly identified the relevant tasks required to fulfil the request. He accepts that the final Fees Notice issued to the Applicant was reasonable in all the circumstances. However, he finds that the time allocated to these tasks was initially too high, and did not accurately reflect the actual time required to comply with the request.
31. For the reasons given above, the Commissioner does not agree that the Fees Notices issued by the Council to the Applicant in response to his request and requirement for review were entirely reasonable. Specifically, the Council over-estimated the amount of time it would take to carry out the required tasks. The Fees Notices did not, therefore, comply with the requirements in regulation 8 of the EIRs.

Decision

The Commissioner finds that East Lothian Council (the Council) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant.

The Commissioner finds that the Council was correct to consider the request under the EIRs.

However, while the Commissioner acknowledges that the Council was entitled to issue a Fees Notice to the Applicant, he is not satisfied that the fee charged was reasonable, in line with regulation 8 of the EIRs.

Given that the Council has now provided the Applicant with a new Fees Notice that is reasonable, the Commissioner does not require the Council to take any action in respect of this failure, in response to the Applicant's application.

Appeal

Should either the Applicant 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

13 June 2022

Appendix 1: Relevant statutory provisions

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;

(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

...

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.

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