

Decision Notice 097/2021

Monthly counts of fly-tipping

Applicant: The Applicant

Public authority: East Lothian Council

Case Ref: 202001386



Scottish Information
Commissioner

Summary

The Council was asked for the monthly counts of fly-tipping in its area over a specified timescale.

The Council issued a Fees Notice to the Applicant, explaining that it considered the payment of a fee reasonable in order to comply with the request. The Council advised that, if the fee was not paid, it was not under any obligation to provide the information.

The Commissioner investigated and found that the Council was entitled to issue a Fees Notice to the Applicant and that the fee was reasonable.

Relevant statutory provisions

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a) and (b) of definition of “environmental information”) (Interpretation); 5(1), (2)(b) and (4) (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 Appendix forms part of this decision.

Background

1. On 28 September 2020, the Applicant made a request for information to East Lothian Council (the Council). The information requested was the following fly-tipping data, to be provided in csv format:
 - Monthly counts of fly-tips
 - Monthly counts of fly-tipping by primary waste type
 - Monthly counts of fly-tipping by land type
 - Monthly counts of fly-tipping by waste/incident size.
2. The Applicant asked that the information be provided from 1 January 2017 to 31 July 2020.
3. The Council responded on 2 October 2020, in line with the EIRs, informing the Applicant that it considered the payment of a fee to be reasonable in order for it to comply with the request.
4. The Council provided the Applicant with a Fees Notice, which explained that (with effect from 2019) it had a policy to recover full staff costs for every information request received which fell under the EIRs. In this case, the Council was seeking to charge £60.39 for the location, retrieval and production of the requested information. It provided a breakdown of the calculation made to arrive at that cost.
5. Various emails passed between the Applicant and the Council over the time period 2 October 2020 to 21 October 2020, in which the Applicant sought to clarify with the Council how the requested information was held and whether, in fact, he should be entitled to access this without the need to pay a fee.
6. In one particular email, dated 7 October 2020, the Applicant commented that, if it helped, the Council could send him what information it had and he would aggregate it into monthly counts. In response to this, the Council informed the Applicant, on 14 October 2020, that it

had approached the service area concerned to ask if his revised request would reduce the fee. The Council explained that there was a slight reduction in the fee and issued a revised Fees Notice for the sum of £53.92. The Council also clarified that the Fees Notice only applied to information covered by the first part of the Applicant's request "Monthly counts of fly-tips", as it did not hold any recorded information for the remaining parts of the request. As such it was relying on regulation 10(4)(a) of the EIRs (information not held) for the remainder of the request.

7. On 10 November 2020, the Applicant wrote to the Council, requesting a review of its decision on the basis that:
 - He did not think the Council should charge him for the provision of the information, as he did not believe he would have been charged if this had been a Freedom of Information request.. The Applicant stated that this has been enshrined in the law in England and referred to a specific decision of the UK Information Commissioner. The Applicant also referred to a discussion with this Commissioner's office, where he was advised that, when reaching a decision on any specific application, the Commissioner would consider any relevant rulings elsewhere in the UK.
 - The charge was excessive, because the Council was charging for three separate people for one hour each, when redacting a column in a spreadsheet should not take three people or one hour of one person's time.
8. The Council notified the Applicant of the outcome of its review on 19 November 2020, upholding its original response. Further explanations were provided in response to the points raised by the Applicant.
9. On 20 November 2020, 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 because:
 - He did not think he should be charged for the information, because had the information not been directly related to environmental information, for example accessible under Freedom of Information legislation, then he would not have to pay. The Applicant referred to case law in England that had ruled on a comparable case. He also stated that environmental information laws were meant to enhance the availability of environmental information, and using the charging scheme in this way hindered that availability.
 - He considered that the Council failed to give him adequate advice and assistance as, although he offered to modify his request and made enquiries about how the data was stored in order to modify his request, it had failed to respond directly to his questions about data format.

Investigation

10. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.

11. On 16 December 2020, the Council was notified in writing that the Applicant had made a valid application. The case was then allocated to an investigating officer.
12. Section 49(3)(a) of the Freedom of Information (Scotland) Act 2002 (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. These related to the Council's decision to process and respond to the request under the EIRs, and its decision to charge for the provision of the information (including the basis of the charge), together with any action taken by the Council to provide advice and assistance to the Applicant.
13. The Council responded with submissions. Submissions were also received from the Applicant during the investigation, setting out why he considered the fee charged by the Council to be excessive and to act as a deterrent to accessing environmental information.

Commissioner's analysis and findings

14. 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 the Applicant and the Council. He is satisfied that no matter of relevance has been overlooked.

Application of the EIRs

15. In his application to the Commissioner, the Applicant expressed the view that had the Council processed and responded to the request under FOISA as opposed to the EIRs he would not have to pay for this information to be made available to him.
16. As the Commissioner makes clear on his website¹, where an authority (the Council, in this case) receives a request for information which comes within the definition of "environmental information" in regulation 2(1) of the EIRs, it is required to process and respond to this in line with EIRs. It is not a matter of choice for the Council to decide which legislation to process the request under.
17. Having considered the subject matter of the information requested, the Commissioner is satisfied that this is environmental information, as defined in regulation 2(1) of the EIRs (paragraphs (a) and (b) of the definition of "environmental information"). The Applicant asked the Council for monthly data for the number of fly-tipping incidents in its area over a specific time period. This is information which relates to waste being released into the environment, affecting or likely to affect the state of the elements of the environment.
18. The Commissioner is therefore satisfied that the Council was correct to process and respond to the Applicant's request in line with the EIRs.
19. The Commissioner will therefore go on to consider the information covered by the first part of the Applicant's request (as he did not challenge the Council's response in relation to the remainder) solely in terms of the EIRs.

¹ <https://www.itspublicknowledge.info/YourRights/WhatCanIAskFor.aspx>

Matters to be investigated

20. The Applicant challenged several points in relation to the Council's response. Having considered these matters, the Commissioner has identified the following key points of dissatisfaction which he will consider below:
- whether the Council was hindering the availability of environmental information by using the charging scheme in this case.
 - whether the Council failed to provide adequate advice and assistance when the Applicant sought to modify his request.

Regulation 8 of the EIRs - charging

21. 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) is not required to make the information available unless a fee is paid.
22. As the Commissioner has concluded that the Council was correct to consider the Applicant's request 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.
23. The Commissioner must now consider whether the Council's Fees Notice complied with the requirement of the EIRs.

Did the Council have a published schedule of fees?

24. 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.
25. Within the Fees Notice issued to the Applicant, the Council provided a link to a Schedule of Fees available on its website. This facilitated access to the "East Lothian Council Schedule of Fees for the purpose of the Environmental Information (Scotland) Regulations 2004 (v2 – July 2019)".
26. The Schedule of Fees stated that the Council charged a fee for responses to requests for environmental information under the EIRs. In summary, it set out what the proposed fee would 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 made it clear all costs must be paid in advance and, where the Council found it cost less to provide the information than quoted, it would refund the overpayment.
27. 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 published a schedule of its fees, as required by regulation 8(8) of the EIRs.

Was the fee reasonable?

28. 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.

29. In considering what is reasonable, the Commissioner has taken account of the considerations set out in his guidance on “Charging for Environmental Information”² 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 public 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 a website or by email than to send it out in hard copy, and this should be reflected in the charge.
30. 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.
31. The Council was asked to explain why three members of staff of different grades were required to carry out relevant tasks, what these tasks were, and how long they would take.

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

32. The Council explained that information covered by the first part of the Applicant’s request is held on two separate systems. Complaints and reports of incidents relating to fly-tipping are received by the Council via different routes and teams. The Council commented that, while there is some cross-over between the information held in the two systems, some is different. As a consequence, the two sources of information have to be extracted separately and verified before the information can be forwarded to the FOI team to provide a response.
33. With regard to the actions that would have to be undertaken by a Grade 4 member of staff, the Council explained that they would have to access and search one of the Council’s systems to identify issues relating to fly tipping. They would then extract this information and add it into a spreadsheet to prepare monthly numbers. The Council provided the Commissioner with an example of this process. The Council noted that it would then be for a Grade 7 staff member to cross-check this information prior to forwarding it to the FOI team. The Council explained that these actions would take each of the officers one hour to complete.
34. As mentioned above, a second system is also in use within the Council which holds data relevant to the first part of the Applicant’s request. The Council submitted that it would be for a Grade 6 member of staff, from a different service area, to filter an Excel spreadsheet to collate all relevant jobs recorded on a monthly basis and then submit a return to the FOI team. The Council provided the Commissioner with a step-by-step breakdown of what this process would involve and noted that it would take officer concerned one hour to complete.
35. The Commissioner is aware that, during correspondence between himself and the Council, the Applicant invited the Council to provide the information held by it relevant to his request, which he would then sort into monthly figures. Having looked at the examples provided of the work that would be required to be undertaken by officers in the Council, the

² [Charging for environmental information - EIRs \(itspublicknowledge.info\)](https://itspublicknowledge.info)

Commissioner is satisfied that actions to group or aggregate the fly-tipping data into monthly amounts forms a very small part of the overall tasks required. Therefore, the Commissioner accepts the Council's inclusion of this in its estimation of the time taken to be able to locate, retrieve and provide the requested information to the Applicant.

36. Based on the explanations provided by the Council, the Commissioner accepts that the three grades of staff set out above would be required to carry out the tasks identified by the Council. The Commissioner also accepts that the tasks identified as necessary to locate, retrieve and provide the information for the first part of the Applicant's request were reasonable in the circumstances, as was the time quoted for each officer.
37. Under regulation 5(4) of the EIRs, where information covered by the request is compiled by or on behalf of the authority, it should be up to date, accurate and comparable as far as the authority believes it to be. The Commissioner is satisfied, based on the submissions received from the Council, that the steps to be taken by the Grade 7 member of staff to cross-check this information would be necessary for the Council to meet its obligations under this regulation. Therefore, the Commissioner accepts that, as part of the process of producing the information, this could be charged for.

Did the charging of a fee hinder access to environmental information?

38. In his application, the Applicant referred to a decision of the UK Information Commissioner (the UK ICO) which he considered to be of relevance to this case. This decision of the UK ICO³ considered whether Folkestone and Hythe District Council (the Council) was entitled to charge a fee to allow a requester to have information made available to them regarding agendas, circulated documents and minutes of meetings of the Kent Planning Officers Group.
39. The UK ICO decided that the fee charged by the Council in this case was not reasonable. This was because they concluded that the charge of £325.00 was significantly within the upper cost limit of £450.00 (equivalent to the £600 limit set for Scotland for the purposes of section 12 of FOISA – i.e. the limit over which a Scottish public authority would not be required to comply with a request), which the ICO considered to be an indication of what Parliament intended would be a reasonable cost for a public authority to incur when responding to a request under the Freedom of Information Act. The UK ICO was of the view that it was reasonable to consider that such a charge (£325.00), applied to environmental information that might have a wider public value beyond the complainant in this case's own immediate interest, would represent a clear deterrent effect on the right to obtain environmental information.
40. It is the Applicant's view that the charge levied in his case should be regarded as excessive and that it acted as a deterrent.
41. The Applicant submitted that information held by the Council should be made freely available where possible. This would include where some minimal data reformatting was required. The Applicant considered the charge to be excessive as he was trying to get an understanding of fly-tipping on a national level and was of the view that, if every Council charged this amount, it would cost him well into the thousands of pounds to access the data.

³ <https://ico.org.uk/media/action-weve-taken/decision-notice/2019/2615045/fer0763266.pdf>

42. The Applicant explained that, as a consequence of this financial barrier, he did not have the requested data from the Council, but did have equivalent information from around ten other Councils who did not levy a charge. The Applicant stated that, given the rules laid down under FOISA, the utilisation of this charge under the EIRs prevented rather than helped with the openness of environmental data.
43. The Council submitted that regulation 8 of the EIRs permits it to charge a fee for making environmental information available. The Council considered that, as this is set down in law, by exercising this right it did not believe that the right of access to environmental information is hindered. Furthermore, the Council argued that Parliament has decided that fees should be chargeable and denied that by implementing these charges it is hindering access to information. The Council asserted that, had Parliament considered charges hindered access, it would not have allowed charges to be made. It believed it was acting entirely in the spirit of the legislation.
44. Having considered the submissions from both parties, together with the content of the Decision of the UK ICO, the Commissioner acknowledges that the Applicant is acting in the interests of the wider public in trying to understand the extent to which fly-tipping is an issue on a national basis. However, as the Commissioner has accepted that:
- the information covered by this request is environmental and the request was correctly processed under the EIRs
 - the Council was entitled to issue a Fees Notice in this case and
 - the staff involved, actions to be taken and time allocated to these by the Council was reasonable,
- he must conclude that the fee levied by the Council in the revised Fees Notice issued to the Applicant on 14 October 2020 was entirely reasonable in the circumstances.
45. The decision of the UK ICO referred to above clearly recognises that each case must be considered on its own merits and the Commissioner cannot accept it as saying that the charging regime in question should always be interpreted as excluding a charge where no/a lesser charge applies under the parallel FOI regime (which, it should be noted, allows for charging in some form in Scotland). The Commissioner can identify no legislative basis for identifying a cost level under which no charge may be levied for environmental information.
46. For all of these reasons – and noting that the Applicant has not, by his own admission, experienced a substantial number of public authorities imposing similar charges – the Commissioner does not accept that the cost quoted in the revised Fees Notice (which was not unreasonable in itself) had the effect of dissuading or hindering the Applicant from seeking to obtain environmental information or that the right to public access to environmental information has been restricted in this case.

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 to 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 Code of Practice⁴ 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 on Section 5 gives more detailed guidance on good practice in offering advice and assistance in relation to various stages and aspects of a request.)

49. In his application, the Applicant commented that the Council had failed to give him adequate advice and assistance because, when he offered to modify his request and made enquiries about how the data was stored, in order to do this, the Council had failed to respond directly to his questions about data format.
50. The Council submitted that the Applicant contacted it on 7 October 2020 to refine his request stating that “On reading the regulations it says that I should not be charged for wanting to inspect the information that you have – only if it needs to be prepared. If it helps you can send me the information that you have and I can aggregate it into monthly counts”. The Council states that, in light of the Applicant’s comments, further enquiries were made with the relevant service areas and a reduced Fees Notice was issued to him. The Council also advised the Applicant that it had established that it only held information in respect of the first part of his request and so applied regulation 10(4)(a) to the remainder. The Council also notified the Applicant of his right to request an internal review.
51. The Council explained that further contact was received from the Applicant on 14 October 2020, in which he asked “can you confirm if the data exists as monthly data or is it held daily. I don’t have to pay for the costs to inspect and I want to know what data you have in what form so that I can request to inspect it only – hopefully there should be no preparation involved.”
52. In response, the Council informed the Applicant that it was unable to make the requested data available to him without prior preparation. The Council explained that the data was not held in a register and that the records contained personal data of third-party individuals which would need to be redacted first (and a failure to do that would constitute a breach of Data Protection legislation). The Council again informed the Applicant of his right of review.
53. The Council is of the view that it has complied with its duty to provide advice and assistance and modified its fee. It explained that it was not able to assist the Applicant to modify his request in such a way that no fee at all would apply.
54. Having considered the submissions from the Council and the correspondence between it and the Applicant, it is clear that the Council sought to respond to the Applicant’s questions and queries about why it was charging for the information on each occasion. The Council also made it clear that the information covered by the first part of the Applicant’s request was not held in a register or any place where it could be readily provided, for inspection or otherwise, without some preparation being required. The Commissioner is therefore satisfied that the

⁴ <https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2016/12/foi-eir-section-60-code-of-practice/documents/foi-section-60-code-practice-pdf/foi-section-60-code-practice-pdf/govscot%3Adocument/FOI%2B-%2Bsection%2B60%2Bcode%2Bof%2Bpractice.pdf>

Council has fulfilled its obligation to provide relevant advice and assistance to the Applicant, in line with regulation 9 of the EIRs.

Decision

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

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

17 June 2021

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;
- (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);

...

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.

...

(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.

...

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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