

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 26 April 2018

Public Authority: Kent County Council
Address: County Hall
Maidstone
ME14 1XQ

Decision (including any steps ordered)

1. The complainant has requested information about any statutory notices under the Highways Act relating to a specific property. Kent County Council ("the Council") informed the complainant that it was charging a fee of £25.20 (including VAT) for the information in accordance with regulation 8 of the Environmental Information Regulations ("the EIR"). The Council subsequently clarified to the Commissioner that the fee of £25.20 represented an actual charge of £21.00, and applied VAT of £4.20.
2. The Commissioner finds that the actual charge of £21 is reasonable and in accordance with regulation 8. The Commissioner does not find any basis under the EIR upon which the Council can also apply VAT of £4.20.
3. The Commissioner does not require the public authority to take any steps, but advises it to refer to her findings about VAT should the complainant wish to proceed with the request.

Request and response

4. On 24 July 2017, the complainant wrote to the Council and requested information in the following terms:

Could you please advise details of any outstanding statutory notices under the Highways Act that relate to the above property?

5. The Council responded on 17 August 2017. It stated that that requested information could be provided for the fee of £25.20 (including VAT). The Council advised that this is the standard fee charged by the Council to respond to the highways element (composed of 7 specific questions) of a CON29 form.
6. On 18 August 2017 the complainant asked the Council to undertake an internal review. This was on the basis that the request only sought information relating to one of the questions on the CON29 form, and that the fee was therefore not reasonable.
7. Following an internal review the Council wrote to the complainant on 18 September 2017. It maintained that the fee was reasonable.

Scope of the case

8. The complainant contacted the Commissioner on 3 October 2017 to complain about the way the request for information had been handled, and specifically that the fee charged by the Council was not reasonable.
9. The Council subsequently clarified to the Commissioner that the fee of £25.20 represented an actual charge of £21.00, and applied VAT of £4.20.
10. The Commissioner therefore considers the scope of the case to be the determination of whether the Council has complied with regulation 8 in respect of the actual charge of £21, and whether there is any basis under the EIR upon which the Council can also apply VAT of £4.20.

Reasons for decision

Regulation 8 - Charging

11. Regulation 8(1) of the EIR allows a public authority to charge for making environmental information available, subject to the following conditions:

- Regulation 8(2) provides that no charge can be made to allow access to a public register or list of environmental information, or to examine the information at the place which the public authority makes available;
 - Regulation 8(3) requires that any charge must not exceed an amount which the public authority is satisfied is reasonable;
 - Regulation 8(4) requires that the public authority must notify the requestor of any sought advance payment of a charge within 20 working days after the date of receipt of the request; and
 - Regulation 8(8) requires the public authority to publish and make available to applicants a schedule of its charges and information on the circumstances in which a charge may be made or waived.
12. The Commissioner accepts that a charge can include the staff costs of locating, retrieving and extracting the requested information, as well as any disbursement costs. This follows the findings of the First-tier Tribunal (Information Rights) in *East Sussex County Council v Information Commissioner and Property Search Group (EA/2013/0037)* which found that the drafters of the original EU Directive 2003/4/EC (from which the EIR are derived) made a clear decision not to exclude the cost of staff time in searching for the environmental information when considering a reasonable amount for a charge. However any charge should be reasonable, and a requestor should not be disadvantaged by a public authority's poor records management.

Context to the request

13. The complainant has asked for information that is typically provided through a property search. The Commissioner has published specific guidance about property searches and how they relate to the EIR¹.
14. The information used to answer property search enquiries is held by local authorities, and an enquiry is usually made through a standard 'CON29' form devised by the Law Society. The CON29 form contains questions about the various issues that may relate to a property (e.g. legal interests, rights of way, planning restrictions, etc.).
15. Where a public authority is asked to complete a CON29 form, or otherwise provide an 'official response' to a question or questions within

¹ <https://ico.org.uk/media/for-organisations/documents/1612/property-searches-and-eir.pdf>

it, then the Commissioner accepts that this goes beyond just providing environmental information, and therefore local authorities are free to use the *Charges for Property Searches Regulations 2008* ("the CPSR") charging provisions. However, when a local authority is asked to provide access to the underlying environmental information, so that a third party can answer the questions in the CON29 form themselves (as was the case here) the charging provisions in the EIR (and not the CPSR) will apply.

Regulation 8(2)

16. In respect of regulation 8(2), the Council has confirmed that the requested information is not contained within a public register or list. The Council has also confirmed that the requested information is not already collated and available for examination.
17. There is no evidence that suggests the Council's position is incorrect, so the Commissioner accepts that this part of regulation 8 has been met.

Regulation 8(3)

The Council's position

18. In respect of regulation 8(3), the Council has stated that the applied charge is £21. The Council has calculated this charge based on the following:
 - The request would be handled by the Highways Definition Team, which is a trained research team that processes the highways questions of the CON29 form. The cost of staff time for this team has been calculated by the Finance Team to be £21.97 per hour. This charge covers staff time in retrieving the information and preparing it to be supplied.
 - The Highways Definition Team has estimated that the average time spent conducting such searches is 58 minutes. The Council therefore applies a charge of £21 to these searches.
19. The Council has further stated that the applied charge is reasonable. The Council has concluded this based on the following:
 - The complainant's request seeks information relating to question 3.7e on the CON29 form. The question is worded as:

Do any statutory notices which relate to the following matters subsist in relation to the property other than those revealed in response to any other enquiry in this form?

[...]

*(e) highways
[...]*

- This question is a 'catch all' question as it asks whether any statutory notices exist which have not otherwise been revealed in associated highways questions elsewhere in the CON29 form (namely questions 2.1a, 2.1b, 3.2, 3.4, 3.6, and 3.12). To address question 3.7e, the Council would out of necessity be required to consider the associated questions as part of its searches.
- Statutory notices are not compiled in one location, and the Highways Definition Team would need to undertake searches across three Council webpages holding information about highways orders and schemes. In addition to these searches, the Team would need to consult different Highway Authority teams (e.g. the team responsible for Traffic Regulation Orders, etc.) in order to find out the location and relevant details of approved highway schemes, adoption agreements, and stopping up orders. All of these sources will provide details of statutory notices under the Highways Act, and would therefore need to be researched as a whole.

The Commissioner's conclusion

20. The Commissioner is aware that the underlying basis of this complaint is that the Council originally appeared to be charging the same fee to respond to one question (question 3.7e) under the EIR, as it would to respond to all the highways questions on the CON29 form under the CPSR charging provisions.
21. The Commissioner has considered the wording of question 3.7e, and recognises that it asks the public authority to provide any statutory notices which have not otherwise been provided in response to other questions. It must therefore follow that if no other highways questions have been responded to, the Council must search for, and provide, the statutory notices that would have otherwise fallen within their scope.
22. The Council has provided a clear explanation of the searches it would need to undertake, and an estimated time has been provided based on the previous experience of the specialist team that is responsible for handling requests for this type of information.
23. The EIR do not specify the rate at which staff time should be calculated. Although *The Freedom of Information and Data Protection (Appropriate*

*Limit and Fees) Regulations 2004*² do not apply to the EIR, the Commissioner's view is that it is reasonable for public authorities to use the given rate of £25 per hour as a starting point. In the circumstances of this case, the rate charged by the Council is less than this.

24. Having considered these factors, the Commissioner is satisfied that the Council's charge is reasonable.

Regulation 8(4)

25. In respect of regulation 8(4), the Council has confirmed that it notified the complainant within 20 working days of the applied charge.
26. The Commissioner has reviewed the dates of the request and response, and accepts that this part of regulation 8 has been met.

Regulation 8(8)

27. In respect of regulation 8(8), the Council has confirmed that the specific charge of £21 (for addressing the highways questions of the CON29 form) is stated in this schedule of charges:
http://www.kent.gov.uk/_data/assets/pdf_file/0014/13415/Highways-fees-and-charges.pdf
28. The Commissioner has reviewed the Council's schedule of charges, and accepts that this part of regulation 8 has been met.

Can the Council apply VAT to the request?

29. The Commissioner understands that, in addition to the actual charge of £21.00, the Council has also sought to apply VAT of £4.20 to the request.
30. The Commissioner has issued specific guidance about VAT and its relevance to the FOIA³. The guidance confirms that when information is only available from a public authority, VAT cannot be charged in relation to any FOIA fees.
31. Whilst that guidance has been issued in relation to the FOIA, the Commissioner considers it appropriate to refer to it in this case under the EIR.

² <http://www.legislation.gov.uk/ukxi/2004/3244/contents/made>

³ https://ico.org.uk/media/1635/fees_cost_of_compliance_exceeds_appropriate_limit.pdf

32. No evidence has been provided by the Council to indicate that the requested information can be sought from another source which is not a public authority (such as a private limited company). It is also evident that the requested information has been sought under the terms of the EIR, and not as part of an 'official search' under the CPSR (for which the Commissioner understands a public authority is required to charge VAT). The Commissioner must therefore find that there is no apparent basis upon which the Council can apply VAT to the request.

Right of appeal

33. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

34. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
35. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Andrew White
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