IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

Appeal No: EA/2013/0037

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FER0464481 Dated: 29 January 2013

Appellant:	**East Sussex County Council**
First Respondent:	**The Information Commissioner**
Second Respondent:	**Property Search Group**
Third Respondent:	**Local Government Association**
Tribunal members:	**HH Judge Shanks, Jean Nelson and Malcolm Clarke**

REFERENCE TO THE COURT OF JUSTICE OF THE EUROPEAN UNION FOR PRELIMINARY RULING UNDER ARTICLE 267 OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION

QUESTIONS FOR THE COURT

Having regard to the facts and legal context set out below

(1) What is the meaning to be attributed to Art 5(2) of Directive 2003/4/EC and in particular can a charge of a reasonable amount for supplying a particular type of environmental information include:

(a) part of the cost of maintaining a database used by the public authority to answer requests for information of that type;

(b) overhead costs attributable to staff time properly taken into account in fixing the charge?

(2) Is it consistent with Arts 5(2) and 6 of the Directive for a Member State to provide in its regulations that a public authority may charge an amount for supplying environmental information which does "… not exceed an amount which *the public authority is satisfied* is a reasonable amount" if the decision of the public authority as to what is a "reasonable amount" is subject to administrative and judicial review as provided under English law?

BACKGROUND AND REASONS FOR REFERENCE

Introduction

1. This reference by the First-tier Tribunal for a preliminary ruling raises questions about what charges public authorities can lawfully make for supplying environmental information under Directive 2003/4/EC, which provides in Art 5(2) that such a charge "… shall not exceed a reasonable amount". It arises in the context of the English real property conveyancing system under which local authorities routinely supply information relating to properties which are the subject of a proposed transaction. Much of this information is by definition "environmental information" (as it was in this case where the information concerned proposed road, traffic and railway schemes likely to affect a particular property). There is widespread uncertainty about the extent to which local authorities can charge for supplying such information, which has given rise to many disputes between local authorities and applicants for information (in particular so called "personal search companies" [1]) and to several cases in the First-tier Tribunal.

2. The Tribunal sets out below:

   (a) the relevant legal and factual background relating to the property search system;

   (b) the relevant provisions of and case law on the Directive and the domestic regulations implementing it, namely the Environmental Information Regulations 2004 ("EIR")

   (c) details of the request for information in this case, the response and the course of the proceedings arising from it;

   (d) relevant findings of fact made by the Tribunal as to the charges made in this case;

   (e) the issues that arise under European law for the Court to determine.

[1] This is the phrase used in the government consultation paper called "Local Authority Property Search Services" dated January 2008 at para 2.4 on page 11 but other phrases ("private search companies" and "property search companies") appear in the papers seen by the Tribunal.

(a) The property search system

3. Under legislation going back to 1925 (currently the Local Land Charges Act 1975) local authorities are required to maintain a Local Land Charges Register which records local land charges relating to land within their areas. Local land charges are listed in section 1 of the 1975 Act: they are mainly prohibitions and restrictions on the use of land imposed under legislation by public authorities of various sorts. The 1975 Act provides for two types of "search": a "personal search" under which a person is allowed to inspect the Register; and an "official search" where a person makes a "requisition" (ie an official request in prescribed form) and the local authority issues an official certificate showing the results of the search of the Register. Originally the fees for these searches were prescribed by statutory instrument; in 2006 local authorities were given power to specify their own fees for "official searches"; in 2010 the Government formed the view that the vast majority of the information on the Register was "environmental information" so that Directive 2003/4/EC required that no fee could be levied for a "personal search".[2] Section 10 of the 1975 Act provides a statutory right to compensation for loss flowing from errors or omissions in the Register or the results of an "official search."

4. Conveyancers involved in a property transaction will obviously want a search of the Local Land Charges Register to be made before completing the transaction. But traditionally they also make "additional enquiries" of local authorities to seek information held by local authorities not covered by the local land charges system about, for example, proposed road schemes near the property or planning enforcement proceedings which are outstanding in relation to the property. For this purpose, two standard form questionnaires have been developed by the Law Society in consultation with local and national government setting out lists of additional enquiries. They have been in common use in one form or another for over 50 years. The Tribunal attaches as Annex A copies of the 2007 versions of the two standard forms, the "CON29R", which is recommended for use in every transaction, and the "CON29O", which contains optional additional enquiries. It is clear that much of the information likely to be provided in response to such a

[2] See Local Land Charges (Amendment) Rules 2010 (SI 2010/1812) and the explanatory memorandum thereto.

questionnaire will also by definition be "environmental information" for the purposes of Directive 2003/4/EC.

5. In the context of the "additional enquiries" the terms "official search" and "personal search" are also used colloquially without any statutory basis: with an "official search" the local authority itself answers the enquiries on the CON29 form with a certificate in such a way as to make the authority potentially liable for errors and omissions; with a "personal search" records held by the local authority are inspected in order to answer an enquiry in so far as possible and the searcher is responsible for obtaining answers for himself. The work required to be carried out by a local authority on an "official search" and the scope of any possible "personal search" will depend on how, in practice, the particular local authority in question keeps and organises its records in relation to each area of activity covered by the enquiries: some local authorities have digitised the vast majority of relevant data and are able to allow access to it online or by allowing people to attend their offices and search for data using the local authority's own terminals; at the other end of the spectrum, some may still be working with largely paper-based, manual systems and have to retrieve the relevant paper based records for each property on request.

6. So far as charging for "official" and "personal searches" in relation to "additional enquiries" was concerned, fees were considered to be largely in the discretion of local authorities.[3] However, by regulation 8 of the Local Authorities (England) (Charging for Property Searches) Regulations 2008 (SI 2008/3248) it was provided that a local authority could charge a person (including another local authority) for answering enquiries about a property (which would include the "official search") and that any charge was in the local authority's discretion "…but must have regard to the costs to the local authority of answering enquiries about the property". The Department for Communities and Local Government issued a guidance document called "Local Authority Property Search Services – Costing and Charging Guidance" to co-incide with the 2008 Regulations. That guidance laid down a framework setting out what local authorities could charge; importantly in the Tribunal's view, it records that the costing principles on which it was based

[3] See Annex 2 pp 45-47 of the January 2008 consultation paper.

were consistent with existing local authority accounting arrangements.[4] However, it is clear that the 2008 Regulations were not intended to apply when a local authority was providing "environmental information"[5] and the guidance acknowledged that some information required to complete a property search may be "environmental information" in which case the regime under the EIR would apply.[6] Although the guidance said no more about the matter the January 2008 consultation paper on which it had been based had stated that the proposed guidance was consistent with the EIR criteria and would enable a local authority to address the issue of "reasonable charges"[7].

7. Part of the context for the proposed reforms in 2008 was that over the preceding 10 years "personal search companies" had entered the market for the provision of property search information traditionally supplied direct to conveyancers by local authorities. By making "personal searches" of the records of local authorities and obtaining information from other sources where possible those companies are able to compete with the local authorities in the provision of such information. They carry insurance against errors or omissions in the information they supply and charge a commercial rate for it; the Tribunal was informed that the price of a personal search company CON29 "equivalent" varies nationally and is currently between £40 and £280. The applicant for information in this particular case, PSG Eastbourne, is such a personal search company; it is also a member of the Property Search Group, which is a franchised network of similar businesses and the Second Respondent in the case.

8. To complicate matters, the local authority concerned in this case, the Appellant East Sussex County Council, is part of a two-tier local government area and has district and borough councils below it. It is the district and borough councils within the area of East Sussex which provide "official searches" and those councils will themselves hold the information required to answer the majority of the enquiries on the CON29 forms. The county council has responsibility relating

[4] See page 5 of the guidance.
[5] See regulation 4(2)(a) of the 2008 Regulations which provides that regulation 8 does not apply "… to anything in respect of which a local authority may or must impose a charge apart from these Regulations." The Directive and the 2004 Regulations implementing it allow local authorities to make reasonable charges for supplying environmental information.
[6] See page 20 of the guidance.
[7] See para 22 of Annex 2 of the January 2008 consultation paper.

to roads, traffic schemes, railway schemes, public paths and common land and so it necessarily provides information arising from enquiries about those matters (see enquiry numbers 2(a)-(d), 3.2, 3.4(a)-(f), 3.5, 3.6(a)-(l), 3.7(e), 3.11, 4(a)-(b), 5.1, 5.2, 22.1 and 22.2 on the CON29R form). Most of the requests for information arising from CON29 forms therefore come to East Sussex County Council from other councils below it in the hierarchy to enable those other councils to provide a certified "official search" to conveyancers. Most of the remainder of such requests come from personal search companies, as in this case.

9. As set out in more detail below, following the introduction of the Local Authorities (England) (Charges for Property Searches) Regulations 2008, East Sussex County Council developed their own charging schedule for answering CON29 enquiries based on the government guidance referred to in paragraph 6 above. Annex B is a copy of the charging schedule and the guidance notes published by East Sussex County Council on its website with effect from 1 April 2009. The charges shown on that schedule are the charges in issue in this case. They are uniformly applied by the Council, whether the applicant is another council, an individual or a personal search company, and in all cases the information is supplied by email within two working days. The Council carries insurance which would cover it against liabilities for errors in the information supplied.

(b) Relevant legal provisions on environmental information

10. Art 5 of the Directive deals with charges; it provides:

> **1. Access to any public registers … and examination *in situ* of the information requested shall be free of charge.**
>
> **2. Public authorities may make a charge for supplying any environmental information but such charge shall not exceed a reasonable amount.**
>
> **3. Where charges are made, public authorities shall publish and make available to applicants a schedule of such charges as well as information on the circumstances in which a charge may be levied or waived.**

11. Recital (18) to the Directive, which is relevant to the question of reasonable charges, states as follows:

> **Public authorities should be able to make a charge for supplying environmental information but such a charge should be reasonable. This implies that, as a general rule, charges may not exceed the actual costs of producing the material in question. Instances where advance payment will be required shall be limited. In particular cases, where public authorities make available environmental information on a commercial basis, and where this is necessary in order to guarantee the continuation of collecting and publishing such information, a market-based charge is considered to be reasonable; an advance fee may be required. A schedule of charges should be published and made available to applicants together with information on the circumstances in which the charge may be levied or waived.**

12. The only case law of the Court relevant to the main issue in this case to which the Tribunal has been referred is *Commission v Germany* (case C217/97). That case concerned a predecessor of the directive in issue in this case (namely Directive 90/313/EEC) but the article relating to charging (also Art 5) was in somewhat different terms and there was no equivalent to recital (18). The Court stated in the course of its judgment:

> **46. In the absence of more details in the directive itself, what constitutes "a reasonable cost" must be determined in the light of the purpose of the directive.**
>
> **47. … the purpose of the directive is to confer a right on individuals which assures them the freedom of access to information on the environment and to make information effectively available to any natural or legal person at his request, without his or her having to prove an interest. Consequently, any interpretation of what constitutes "a reasonable cost" for the purposes of Article 5 of the directive which may have the result that persons are dissuaded from seeking to obtain information or which may restrict their right of access to information must be rejected.**
>
> **48. Consequently, the term "reasonable" for the purposes of Article 5 of the directive must be understood as meaning that it does not**

authorise Member States to pass on to those seeking information the entire amount of the costs, in particular indirect ones, actually incurred for the State budget in conducting an information search.

The Court also stated this in the context of dealing with an argument by the Commission that making a charge in a case where the information requested was refused was incompatible with Art 5:

57. It should be noted, first, that Article 5 of the directive permits Member States to make a charge for "supplying" information and not for the administrative tasks connected with a request for information.

…

59. …the charge made where the request for information is refused cannot be described as reasonable, since in such a case no information has in fact been supplied within the meaning of Article 5 of the directive.

13. The EIR implement the Directive in the United Kingdom (except in relation to Scottish public authorities for which there are separate regulations). Regulation 8 which appears on Part 2 deals with charging and reads as follows:

(1) **Subject to paragraphs (2) to (8), where a public authority makes environmental information available … the authority may charge the applicant for making the information available.**

(2) **A public authority shall not make any charge for allowing the applicant-**

(a) to access any public registers or lists of environmental information held by the public authority; or

(b) to examine the information requested at the place which the public authority makes available for that examination.

(3) **A charge under paragraph (1) shall not exceed an amount which the public authority is satisfied is a reasonable amount.**

…

(8) A public authority shall publish and make available to applicants-

(a) a schedule of its charges …

14. Also relevant for the purposes of this reference is Art 6 of the Directive which is headed "Access to justice" and provides as follows:

> **1. Member States shall ensure that any applicant who considers that his request for information has … not [been] dealt with in accordance with … Article … 5 has access to a procedure in which the acts or omissions of the public authority can be reconsidered by … another public authority or reviewed administratively by an independent and impartial body established by law…**
>
> **2. In addition to the review procedure referred to in paragraph 1, Member States shall ensure that an applicant has access to a review procedure before a court of law or another independent and impartial body established by law, in which the acts or omissions of the public authority concerned can be reviewed and whose decisions may become final …**

15. Under regulation 18 of the EIR the "enforcement and appeals provisions" of the Freedom of Information Act 2000 are in effect incorporated into the EIR. Thus by virtue of section 50 of the 2000 Act any person may apply to the Information Commissioner for a decision on whether a public authority has failed to deal with a request for environmental information in accordance with Part 2 of the EIR (which includes regulation 8 on charging), the Commissioner can then investigate the complaint and can issue a decision notice addressed to the public authority requiring it to take the necessary steps to comply with the EIR. If either the public authority or the applicant for the information is not satisfied with the Commissioner's decision notice they can appeal to the First-tier Tribunal under section 57 of the 2000 Act and the Tribunal can allow the appeal and/or substitute a new decision notice if it considers that the Commissioner's decision notice was not in accordance with the law; on such an appeal the First-tier Tribunal is entitled to (and frequently does) review findings of fact made by the Commissioner *de novo* and receive new evidence for that purpose. There is a right of appeal from the First-tier Tribunal to the Upper Tribunal on a point of law. This Tribunal is confident that the Commissioner is an "independent and impartial body established by law" for the purposes of Art 6(1) of the Directive and that the

Tribunal itself is either a "court of law" or an "independent and impartial body established by law" for the purposes of Art 6(2).

(c) The course of these proceedings

16. The request for information in this case and the answer to it are copied at Annex C. The request was made by PSG Eastbourne on 3 June 2011; it was not a request for an "official search" (not least for the reasons explained in para 8 above) but rather a request for the Council to answer certain CON29 questions about a specific property; it must be inferred that that property was the subject of a conveyancing transaction and that the request was made so that PSG Eastbourne could itself supply the information to the conveyancer at a commercial rate. It is not in dispute that the information concerned was "environmental information". The information was clearly requested from the Council's Highway Land Information Team in accordance with the charging schedule and guidance notes in Annex B which are referred to in paragraph 9 above. In accordance with those documents East Sussex County Council charged PSG Eastbourne £17 for the information which was paid.[8]

17. Against a background of a long-running dispute between PSG Eastbourne and the Council over the lawfulness of the Council's charges, an internal review was requested and carried out by the Council, who responded on 30 November 2011 stating that regulation 8 of the EIR entitled it to make the charge. A complaint was then made to the Information Commissioner under section 50 of the 2000 Act. Having investigated the matter the Commissioner issued a decision notice on 29 January 2013 stating that the Council had not dealt with the request for information in accordance with Art 8(3) of EIR because it had calculated the charge on a "cost recovery basis" and the Commissioner's view was that a "reasonable amount" was restricted to "the disbursement costs associated with making the information available in the specified form ie postage and photocopying charges".

[8] The confusing reference to a payment of £28.50 in the answer arose, the Tribunal was told, because PSG Eastbourne's cheque included payment for another set of information which is not relevant to this case.

18. East Sussex County Council appealed against this decision notice on 1 March 2013. The Commissioner (who is, under the relevant procedure, always the Respondent to such an appeal) maintained in his formal Response to the appeal dated 8 May 2013 that a "reasonable amount" was restricted to mere disbursements. However by an amendment to the Response dated 9 August 2013, the Commissioner raised (in effect) two new issues which are relevant to this reference: first, an issue about the nature of the review that the Commissioner and the Tribunal should carry out when determining whether a particular charge exceeded a "reasonable amount"; and second, on the assumption that the local authority was entitled to make a charge beyond mere disbursements, a general challenge to the reasonableness of the charges in this case, a matter on which the Commissioner stated that further evidence was required.

19. In response to that challenge the Council submitted written evidence from Nichola Robson (the Team Leader in the Council's Highway Land Information Team) and Samuel Cornelius (a financial manager with the Council who was responsible for the calculations which led to the charging schedule at issue in this case). The Tribunal also allowed the Property Search Group and the Local Government Association ("LGA") to join the proceedings to give a wider perspective on the two sides of the argument and they each submitted helpful written evidence (from Neil Clayton and Amanda Renshaw respectively).

20. In the "run up" to the hearing counsel for the Council and the LGA prepared a helpful note on the legislative history of the charging provisions in the Directive. This led in due course to a concession by the Commissioner and the Property Search Group that the expression "reasonable amount" in Art 5(2) of the Directive was not confined to disbursements but could include costs attributable to staff time spent on dealing with a request for information. Having regard to the contents of that note and to recital (18) to the Directive in particular, the Tribunal regards that concession as clearly correct. Nor was there any dispute that it was open to a public authority to make a standard pre-fixed charge for answering specific requests for information based on average costs; again, having regard to the practicalities of the situation and recital (18), the Tribunal regards that as clearly correct.

(d) Findings of fact

21. At a hearing on 16 and 17 December 2013 the Tribunal received oral evidence from Ms Robson, Mr Cornelius and Ms Renshaw and heard submissions from all parties. Based on all the evidence presented to date the Tribunal makes the following relevant findings of fact in relation to the charges made in this case:

    (1) The Council's Highway Land Information Team (which is part of its Transport and Development Control Department) has three staff and some part-time support; most of the output of the team (about 60%) relates to dealing with enquiries in the CON29 form like the one in this case which come from other councils or personal search companies; the balance of their output involves providing information relating to highways arising, for example, from boundary disputes and Land Registry queries;

    (2) The data used by the team to answer enquiries in the CON29 forms is held by it in various formats, some of which are computer based (in particular the Geographical Information System ("GIS")), some paper-based;[9]

    (3) In answering enquiries the team also often have to seek information directly from other teams or departments within the Council, often verbally, to check the current status of, for example, an on-going traffic scheme;

    (4) Only a few of the answers to enquiries in the CON29R form can currently be obtained by an applicant inspecting "raw data" held by the Council, in particular the answers to enquiries 2(a), 3.4 or 3.5; in practice it is very unusual for anyone to ask to see this raw data as opposed to simply seeking direct answers from the Council and, if they did, they may encounter problems obtaining reliable answers for themselves without input from a member of the team;

    (5) Reasonable efforts are being made to offer more access to raw data held by the team but there are genuine logistical problems, including copyright, data protection and software licensing issues;

[9] We shall refer to all this data as forming the team's "database" although some is not held on computer.

(6) The charges shown in the schedule in Annex B were calculated by Mr Cornelius on the basis of information supplied by the team in 2009 as to the time they spent on maintaining the database and in providing a response to each type of CON29 enquiry; they were calculated in accordance with the government guidance referred to in para 6 above with the aim of recovering the costs incurred in performing these two activities;

(7) The hourly rate charged for each member of staff in the calculation included not only salary costs but also an amount for overheads (which included, for example, heating, lighting, and internal services like human resources and training); this was in accordance with normal accounting principles;

(8) The *full* annual staff costs of maintaining the team's database was included in the overall calculation of charges because Mr Cornelius understood that it was maintained primarily for the purpose of answering CON29 enquiries and that no apportionment of time on maintaining it was necessary; in that respect the Tribunal considers that the Council's approach was wrong: it was clear on the evidence that parts of the team's database were also maintained for the purposes of other work by the team and were also used by other parts of the Council and accordingly the Tribunal considered that only a proportion of the cost of maintaining the team's database should on any view have been included in the calculation of a charge for answering CON29 enquiries; it was not possible on the evidence for the Tribunal to suggest a suitable proportion but this could no doubt easily be established in due course in accordance with normal accounting principles;

(9) Subject to the point at (8), the Tribunal was satisfied that no element of surplus or profit was included in the charges and that they represented a reasonable estimate of the actual cost to the Council of responding to CON29 enquiries;

(10) The charges have not been reviewed since they were introduced; this was in part because of the on-going disputes about their applicability; the Tribunal accepted Mr Cornelius's assessment that

taking into account all the variables the charges would have remained broadly similar even if they had been reviewed.

22. There is a further matter which the Tribunal would record as a finding of fact: given the context in which the CON29 information is sought, namely as part of a conveyancing transaction which will typically involve the purchase of a property worth many thousands of pounds, the Tribunal do not consider that the charges levied by the Council would be likely to dissuade anyone from seeking that type of information or in any substantial way restrict their access to it.

The issues for the Court

23. East Sussex County Council and the LGA maintain that the charges on the Council's schedule do not exceed a "reasonable amount" for supplying the relevant information. The Commissioner and the Property Search Group, however, maintain that, on a proper construction of Art 5(2) of the Directive, it is wrong in principle to include in any charge (a) any part of the cost of maintaining a database used to answer a request for information and (b) any element for overheads. Their submissions are based in particular on the wording of Art 5(2) (the charge can be made only for *supplying* information) and on the Court's statement in *Commission v Germany* that "indirect costs" should not be passed on to those who are seeking information. It seems to the Tribunal that these points must be arguable and ought to be resolved by the Court before the Tribunal gives a final decision in the case: that is the purpose of question (1) for the Court.

24. There is also a further issue which remains outstanding between the parties; it is not clear if it will make any practical difference in this case but it could affect the approach of the Tribunal and the Commissioner in future. The EIR provide in regulation 8(3) that the charge made by a public authority "shall not exceed *an amount which the public authority is satisfied is* a reasonable amount". If the italicised words are interpreted strictly under English law any challenge to a charge made by a public authority before the Commissioner or the Tribunal should only succeed if the decision of the public authority about what was a reasonable amount was itself "unreasonable" in an administrative law sense (ie

irrational, illegal or unfair), but there would be very limited scope for a challenge to any relevant factual conclusions reached by the public authority. East Sussex County Council and the LGA maintain that this is perfectly consistent with the Directive and that it provides a sufficient review for the purposes of Arts 6(1) and (2) of the Directive. The Commissioner and the Property Search Group say that the italicised words in regulation 8(3) of EIR are not consistent with Art 5(2) of the Directive and that any review by the Commissioner or the Tribunal should be carried out on an "objective basis", the reviewing body asking itself on the evidence before it whether the charge exceeded a "reasonable amount". Again, it seems to the Tribunal that both positions are arguable and the Tribunal therefore seeks the Court's ruling on question (2).

HH Judge Shanks
4 February 2014