

**Freedom of Information Act 2000 (FOIA)  
Environmental Information Regulations 2004 (EIR)  
Decision notice**

**Date:** 14 October 2019

**Public Authority:** Leicestershire County Council  
**Address:** County Hall  
Glenfield  
LE3 8RA

**Decision (including any steps ordered)**

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1. The complainant has requested an environmental records search. Leicester County Council advised of its standard charge raised for such requests, when made on a commercial basis, in accordance with regulation 8 of the EIR (charging for environmental information). The complainant accepted the charge and commissioned the report but subsequently complained to the Commissioner that the charging was excessive.
2. The Commissioner's decision is that Leicestershire County Council's has complied with regulation 8 of the EIR.
3. The Commissioner requires no steps.

## Request and response

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4. On 26 April 2018 a person from the complainant's organisation requested an environmental records search from the Leicestershire & Rutland Environmental Records Centre (LRERC), which is part of Leicestershire County Council, using the standard form. In the covering email it stated *"We require data for protected species and statutory and non-statutory sites within a 2km radius from the grid reference point above."*
5. The LRERC responded on 30 April 2018 and provided reports in response to the request, and an invoice for the work completed.
6. On 5 November 2018 the complainant wrote to Leicestershire County Council ('the council') stating *"I complain that my company has been overcharged for environmental information. Under the Environmental Information Regulations the County Council may only charge for the cost of staff time for providing the information."*
7. Following an internal review, the council wrote to the complainant on 8 November 2018. It provided justification for the charges raised, and upheld the decision.

## Scope of the case

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8. The complainant contacted the Commissioner on 24 April 2019 to complain about the way his request for information had been handled. Specifically the complainant raised that:
  - requesters are not treated equally, because *"the public is given the data free of charge but ecology consultants are charged. This is not treating everyone equally"*;
  - the charges are based on *"a) the time taken to carry out the data search, b) for database management, and c) an extra £90."* The complainant questions whether the intention of the EIR regulation is to cover only for the time taken to provide the information and not the other elements charged by the council;
  - the charging is excessive in relation to the time taken to undertake the work and in comparison to other authorities: *"A data request for protected sites and species within 2km radius of a point can cost in the region of £400 + VAT, which is disproportionately expensive for a piece of work which might take perhaps one hour to do. There are*

*similar situations in every English County; I am aware for example that Suffolk County Council charges £100 for a similar piece of work."*

9. The Commissioner considers the scope of the case to be whether Leicestershire County Council ('the council') has complied with regulation 8 of the EIR.

## Reasons for decision

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### Regulation 8 – Charging

10. Regulation 8(1) 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(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.
11. As stated in the Commissioner's guidance 'Charging for environmental information'<sup>1</sup>, the intention behind the EIR is to increase public access to environmental information. This can be seen in recitals 1 and 9 of Directive 2003/4/EC of the European Parliament of the Council ('the Directive') from which the EIR are derived. The Commissioner therefore considers that any charge should be compatible with encouraging transparency and should not be an obstacle to such access. Recital 18 of the Directive states "as a general rule, charges may not exceed the actual costs of producing the material in question."

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<sup>1</sup> <https://ico.org.uk/media/for-organisations/documents/1627/charging-for-environmental-information-reg8.pdf>

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 requester should not be disadvantaged by a public authority's poor records management.
13. The Commissioner considers that the context of a request can affect the reasonableness of any charge. In the East Sussex case, the charge was for providing property search information that is a necessary part of a commercial property transaction and the charge for information was a very small part of the wider costs involved in the transaction. A reasonable charge in this type of commercial context may therefore differ from a reasonable charge for non-commercial purposes.
14. For commercial charges, the Commissioner considers that, in general terms, a reasonable amount will not exceed the cost of making the information available. However, there are certain exceptions to this, one of which is where a public authority is permitted to make a commercial charge for information.
15. The Commissioner's guidance states that a market-based charge is considered to be reasonable where the information is made available on a commercial basis and the charge is necessary to ensure such information continues to be collected and published. This comes from the Directive (Recital 18); a "reasonable amount" will include a rate of return such as that achieved by comparable businesses who face a similar level of risk.

*What information has been requested?*

16. The request is for information regarding protected species, site and habitat data within a 2km radius of a given grid reference point. It covers designated and protected areas, for example Sites of Special Scientific Interest and Local Nature Reserves.
17. The information is requested via the "*Authorisation Form*" which is downloaded from the council's website and contains details of how to return it to LRERC by email or post. The form captures information about the requestor, the purpose for which the information will be used, and details of the request. It provides charging information for each

available request option which the requester selects, resulting in an overall cost for the request.

18. The completed form for this particular request states that the requester is an Environmental Consultant and the output data is *"to be used in a Preliminary Ecological Appraisal (PEA). The PEA is to be submitted as supporting document for a planning application."*

#### Regulation 8(2)

19. The council advises that the complainant's organisation *"had access to the Council's charges before it commissioned the environmental report"*; and that if it had considered the charges to be excessive *"it could have inspected the registers itself, or authorised third parties to interrogate the registers on its behalf."*
20. Furthermore the council stated *"Providing the data on request requires input from skilled and experienced ecologists. All staff supervising the preparation of data and the system of data-searches have academic qualifications and are experienced naturalists with a technical knowledge of species taxonomy and classification. This is necessary for quality control and for accuracy of data input."*
21. The Commissioner is satisfied that, on receipt of such requests, the information is not already collated and available for examination. Therefore the Commissioner accepts that this part of regulation 8 has been met.

#### Regulation 8(3)

*How has the Council calculated the charge?*

22. The council explained that the total charge of £445.50 comprises of £281.25 for the search (from the published tariff of charges); £90.00 flat rate administration fee (from the published tariff of charges); and the remainder is VAT, being £74.25.
23. The council advise that the *"requested material was held on a database (the species data) and on 2 GIS map layers (the site data). These three systems were searched to service the data-request, applying spatial criteria provided by the customer and semi-automated species reports set up within the species database, to produce a series of pdfs and spreadsheets. Information generated by these means was then collated into a single report."*
24. The council did not use an hourly rate to calculate charges relating to staff time for this specific report: *"Although the time taken to produce a standard report was taken into account by LRERC when compiling its*

*tariff of charges, the time taken to produce a specific report on request was not subject to an hourly rate change, and the time taken to produce each report was not recorded."*

25. The council explained that the costs associated with providing the reports include those incurred in the preparation and maintenance of up to date information its databases. Regarding the staff involved in the activities it stated: *"Providing the data on request requires input from skilled and experienced ecologists. All staff supervising the preparation of data and the system of data-searches have academic qualifications and are experienced naturalists with a technical knowledge of species taxonomy and classification. This is necessary for quality control and for accuracy of data input."*

*How has the Council determined that the charge is reasonable?*

26. The council advises that the requester was making a commercial data-search request on behalf of a private VAT-registered company, and that the authorisation form outlines that the reason for the data search is for a 'Planning Application.' Furthermore, it contends, that as the requester defines themselves as an Ecology Consultant, *"it is clear that [their] request was of a commercial nature."*
27. The council states *"The County Council's tariff of commercial charges is in accordance with paragraphs 27 and 28 of the ICO's 2016 publication 'Charging for Environmental Information (Regulation 8) V.1.5'...The County Council believes that the tariff of commercial data-search charges is reasonable and is necessary to ensure that such information continues to be collated, updated and published in a manner that assists commercial users."*
28. The council stated it is satisfied that its charges are reasonable because:
- The council periodically reviews its charges and those of other authorities to ensure that it is not *"out of kilter"*. Regarding the actual charge raised in this instance it stated that *"this cost is within the range of charges for Environmental Record Centres that the Council has surveyed."*
  - The complainant's organisation accepted the charges for the report and agreed to contract on the basis of those charges. It had access to the council's charges before it commissioned the environmental report. *"If it had considered the Council's charges to be excessive, it could have inspected the registers itself, or authorised third parties to interrogate the registers on its behalf."*

- *"The Council is entitled to take into account its general fiduciary duty to council taxpayers and the need to protect public revenue. Provided the fee levied does not act so as to restrict access to the data or to thwart the purpose of the Directive or EIR, it is reasonable to seek to recover the additional costs to it of supplying the information, or a proportion thereof."*
- The council argues that its charging policy has not acted as a deterrent for environmental reports as the volume of requests is increasing. The number of commercial searches in 2018 was 43% higher than in 2009.
- Charging restrictions would have a negative impact, resulting in fewer staff being available, and making it more likely for public bodies to assert that it is unreasonable for them to answer such detailed requests for information.
- *"With fewer staff the quality of information actually available to members of the public would be compromised. This is because members of the public are, without assistance, likely to be less capable than professionals of sourcing data and searching publicly available databases in ways which produce meaningful or reliable information. Some individuals and amateur naturalists or organisations that provide data to Environmental Record Centres because it is in the public benefit to do so would not necessarily provide the data on request to a member of the public, even if the member of the public was aware of the source."*
- *"Environmental Records Centres collate data from many different sources, presenting and packaging this data to customers in a manner that assists the understanding, use and value of the individual records. With fewer staff this activity would be reduced. This would actually have a deterrent effect on the uptake of environmental searches (particularly because environmental information is technical in nature with many acronyms and scientific terminology)."*
- *"It would also mean that commercial operators may approach specialist providers (in the private sector) to conduct environmental searches and produce reports. This would simply shift the charges burden, avoid the protections under article 8 of the EIR 2004 and promote a secondary market for the provision of environmental information."*
- *"With fewer staff, public environmental databases would stagnate, and be populated with new data and updated information less often."*

- The council considers that the search was made in connection with a commercial development and that *"The cost of the report was miniscule (and certainly reasonable) in that context. It is also likely that the report was used as a basis for earning profits with the Complainant's client."* It contended that if the council's charges are to be set aside then an account of the profits that would be earned on the basis of the information provided should also be taken into account.
  - The council assumes that the complainant can recover the VAT element of the charge, being a VAT registered company.
29. The Commissioner asked for further information regarding the comparison made on the range of charges from other Environmental Record Centres. The council provided the following information (note this is a comparison of 1km searches, whereas the request was for a 2km search):

*"The following ERCs have costs over £200 for a 1km search of designated sites and protected/priority species. LRERC's current charge is £170.00 +VAT for a similar search; it has changed since the complaint as LRERC moved to an on-line automated data-search system shortly after. When the complaint was made, the charge for a 1km search was £206.25 +VAT.*

*I am not sure if the other ERCs' costs include VAT:*

*Cumbria £210*

*Gtr London (GiGL) £275*

*Hampshire (HBIC) £220*

*Kent and Medway £250*

*N and E Yorks (NEYEDC) £250 (unsubsidised cost; some planning LPAs subsidise searches to half-price)*

*Sussex £210*

*Thames Valley (TVERC) charge £310 for a fast response, which is comparable to our current response time.*

*In terms of the time taken to do searches – when the complaint was made they took between 30 mins and an hour, depending on the complexity. We did not record the time taken."*

#### *The Commissioner's Analysis*

30. The council has confirmed that it did not base its charges on the cost of staff time to complete the required report. It stated, however, that expert staff were required to produce such reports and to maintain and update the input data required for such reports. The council's case, therefore, is that it is making information available on a commercial basis and that the charge is necessary to ensure that the information

continues to be collected and published for this purpose. It has provided the Commissioner with a detailed explanation of why it considers that the charge raised is reasonable.

31. The council confirmed that it does not raise a charge for non-commercial based requests from the public for similar information.
32. The Commissioner's guidance on regulation 8 emphasises that public authorities should avoid routinely charging for environmental information, and additionally, should take account of the wider aims of the EIR. The guidance also notes the findings of the Court of Justice of the European Union ("CJEU") in the case of C-71/14 East Sussex County Council v Information Commissioner, in which the CJEU found that an applied charge must not have a deterrent effect on the right to obtain environmental information.
33. The Commissioner recognises that, if an applied charge does have a deterrent effect, this undermines the intended purpose of the EIR and the fundamental objectives that it is seeking to achieve in line with the Convention of Access to Information, Public Participation in the Decision-Making and Access to Justice in Environmental Matters (commonly known as the 'Aarhus Convention'), and the subsequent EU Directive 2003/4/EC.
34. The charges raised were in regard of a commercial request for a specific environmental report therefore the Commissioner considers that the council is not routinely charging for access to all types of environmental information. Furthermore, on the basis that requester accepted the charge prior to commissioning the report, and the council's assertions that the volume of LERC requests are increasing, the Commissioner has no basis upon which to find the applied charge has had a deterrent effect.
35. The Commissioner's guidance explains that the context of a request may affect the reasonableness of any charge. A reasonable charge in one context (e.g. for property search information requested as part of a commercial transaction), may differ from a reasonable charge in other (e.g. a public group seeking information about pollution in relation to environment concerns).
36. In the context of this case, the Commissioner must decide whether the charge is reasonable. In addressing this, the Commissioner has considered whether the charge was for information required as a necessary component of a commercial transaction, being a part of the wider costs involved in the transaction. And, whether it is a market-based charge where the information has been made available on a

commercial basis and the charge is necessary to ensure such information continues to be collected and published.

37. Both the complainant and the council provided examples of commercial charges for similar information from other local environmental records centres ('LERCs') that are higher or lower than those raised in this case. The Commissioner has also reviewed published charging schedules that are available on the internet for a number of LERCs. She observes that there is wide range, and that the council's charges appear to be towards the higher end of charges. However she accepts the council's argument that the charge is broadly comparable with some LERCs. The Commissioner also notes that the council has, subsequent to this request, further automated the reporting process and reduced its charges accordingly.
38. The request form confirmed that the information is to be used in a Preliminary Ecological Appraisal (PEA), to be submitted as a supporting document for a planning application. The Commissioner has no basis upon which to validate the council's assertions regarding the value of future profits that may be earned from the planning application. However she accepts that, as part of a planning application, it is a necessary component of a wider commercial transaction.
39. The Commissioner notes the council's arguments regarding the public availability of underlying data sources. She therefore accepts the council's argument that the charge is necessary to ensure the continuation of activities to provide the reports which source, package and therefore add value to the underlying data records.

*Can the Council apply VAT to the request?*

40. The Commissioner has issued specific guidance about VAT and its relevance to the FOIA<sup>2</sup>. Whilst the guidance has been issued in relation to the FOIA the Commissioner considers it appropriate to refer to it in this case under the EIR.
41. The guidance confirms that if the requested information is only available from a public authority, any charges would not attract VAT. However, if the requested information is available from another source that is not a public authority, VAT can then be added to the fees to be charged.

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<sup>2</sup> [https://ico.org.uk/media/1635/fees\\_cost\\_of\\_compliance\\_exceeds\\_appropriate\\_limit.pdf](https://ico.org.uk/media/1635/fees_cost_of_compliance_exceeds_appropriate_limit.pdf)

42. The Commissioner understands that the base environmental records, upon which the reports are based, are available to the public to view free of charge and therefore she concludes that VAT can be added to the fees.
43. Having considered all the above factors, the Commissioner is satisfied that the charge is reasonable, and therefore complies with regulation 8(3).
44. Having concluded that the charge reasonable, the Commissioner has proceeded to consider regulation 8(8).

#### Regulation 8(8)

45. The LRERC charging policy, which includes the schedule of charges, is published on the council's website.<sup>3</sup>
46. The council has explained the process followed in this case. The requester completed the authorisation form, which was obtained from the council's website, and sent it to LRERC on 24 April 2018. The form includes the costs, which are part of a standard tariff. The request was for a standard search, which appears on the form therefore the requester was aware of the cost when the form was returned. The form was completed correctly and it shows that the requester has ticked the boxes against the required search, and that the form clearly indicates the cost of the search requested. As the tariff of charges was included on this form, the requester cannot have been unaware of the cost of the search. By sending the authorisation form with the costs filled in, the requester was agreeing to the charge for the data-search.
47. The Commissioner has reviewed the form and the website and accepts that this part of regulation 8 has been met.

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<sup>3</sup> <https://www.leicestershire.gov.uk/sites/default/files/field/pdf/2018/5/2/LRERC-charging-and-data-use-policy.pdf>

## Right of appeal

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48. 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@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

49. 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.
50. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
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