

Charging for environmental information (regulation 8)

Environmental Information Regulations

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Introduction

1. The Environmental Information Regulations 2004 (EIR) give rights of public access to information held by public authorities.
2. An overview of the main provisions of the EIR can be found in [The Guide to the Environmental Information Regulations](#).
3. This is part of a series of guidance, which goes into more detail than the Guide, to help public authorities to fully understand their obligations and promote good practice.
4. This guidance explains how public authorities should comply with the charging regime laid out in Regulation 8 of the EIR, and, in particular, what constitutes a “reasonable amount”.
5. This topic is currently the subject of an appeal to the First-tier Tribunal in the case of *East Sussex County Council v Information Commissioner and Property Search Group (EA/2013/0037)*, which has referred questions to the Court of Justice of the European Union (CJEU) relating to what a public authority may charge for supplying environmental information under Directive 2003/4/EC on public access to environmental information (‘the Directive’). This version of the guidance reflects the Commissioner’s position while waiting for the court’s decision. Public authorities should be aware this position may be subject to change after the CJEU has handed down its judgment; this is unlikely to be before 2015. Please check the ICO website or newsletter for updates.
6. Previous guidance on charging under the EIR was drawn from the Upper Tribunal decision in *Kirklees Council v Information Commissioner and PALI Ltd [2011] UKUT 104 (10 March 2011)*. In that case the Upper Tribunal ruled only disbursement costs could be charged. However, the Commissioner considers this position is not now sustainable following a review of the legislative history of Article 5 of the Directive during the East Sussex case.

Overview

- The EIR allow public authorities to charge for making

environmental information available, but any charge must be reasonable.

- In general, a reasonable charge may include the disbursement costs in transferring the information to the applicant and the staff time taken to locate the information. This is in contrast to the Freedom of Information Act (FOIA) where disbursements are the only charges permitted unless the appropriate cost limit is exceeded.
- Public authorities cannot charge for overhead costs related to providing information, for example the ongoing cost of holding the information or other staffing costs. Neither can they charge for staff time spent reviewing and redacting excepted information.
- Commercial charges are permitted in limited circumstances.
- Public authorities must have a published schedule of charges in order to be able to charge applicants for environmental information.
- Public authorities cannot charge applicants for inspecting the information or accessing public registers or lists of environmental information.

What the EIR say

7. The EIR implements the provisions of the Directive into UK law. Article 5(2) of the Directive provides:

Public authorities may make a charge for supplying any environmental information but such charge shall not exceed a reasonable amount.

Article 5(2) is implemented into UK law by virtue of Regulation 8 EIR.

8. The key elements of Regulation 8 state:

8.—(1) Subject to paragraphs (2) to (8), where a public authority makes environmental information available in accordance with regulation 5(1) the authority may charge the applicant for making the information available.

(2) A public authority shall not make any charge for allowing an 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; and

(b) information on the circumstances in which a charge may be made or waived.

9. While Regulation 8(1) permits a public authority to make a charge for making environmental information available, Regulation 8(2) specifies tasks which it cannot charge for.
10. Regulation 8(3) states that when a public authority is able to make a charge it may only do so if the charge is reasonable.
11. Subsections (4) to (7) concern advance payment, which will be discussed later in this guidance.

A reasonable amount for making information available

12. Regulation 8(1) permits a public authority to charge for making environmental information available. However, Regulation 8(3) states any charge cannot “exceed an amount which the public authority is satisfied is a reasonable amount”. Regulation 8(3) does not provide any definition of the word “reasonable”. The meaning attributed to Article 5(2) of the Directive is one of the questions that has been referred to the CJEU.
13. 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. We therefore consider 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”.
14. There are two broad types of costs for which a public authority can charge:
 - The cost of staff time spent locating, retrieving and extracting the information.
 - The costs incurred when printing or copying the requested information and sending it to the applicant.
15. It is unreasonable for a public authority to include any further costs associated with a request, for example:
 - The costs associated with maintaining a register of environmental information.
 - The cost of maintaining a database used by the public authority to answer requests for environmental information.
 - Overhead costs attributed to staff time properly taken into account in fixing the charge.
 - Staff time spent redacting excepted information after it has been retrieved. For an explanation of what we mean by excepted information see our guidance [How exceptions and the public interest test work in the Environmental Information Regulations](#).

16. A public authority should be able to demonstrate why it believes a charge in each particular case is reasonable. This may mean providing a breakdown of the charges so the requester can understand the basis for the fees. In line with the Directive and Article 5(2) the Commissioner will carry out an objective assessment of whether the PA's charge was reasonable (as opposed to a public law test, that public authority's assessment must be so unreasonable as to be perverse).

Staff costs

17. The Commissioner's position on charging for staff time has changed as a result of arguments raised during the course of the appeal in the East Sussex case. Previously we held the view that the cost of staff time to comply with the request could not be included in charges made to the applicant. However submissions in the East Sussex case highlighted that the drafters of the Directive considered this point and 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. Therefore the Commissioner now takes the view that the EIR do allow public authorities to charge a reasonable amount to recover the cost of staff time taken to locate environmental information.
18. However, any charges for staff time must still be reasonable and applicants should not be unfairly penalised for a public authority's poor records management. Public authorities can demonstrate the effectiveness of their records management by following the [Code of Practice on the management of records issued under section 46 of FOIA](#).
19. Regulation 4 of the EIR requires a public authority to implement measures that will improve access to environmental information. If a public authority has failed to take reasonable steps to progressively make environmental information available to the public, including by electronic means, then it is unlikely that a significant charge for staff time will be reasonable. Further guidance on Regulation 4 is contained in the [Guide to EIR](#). Public authorities are also reminded of their responsibilities to make certain categories of environmental information available under the [INSPIRE Regulations 2009](#).

4.—(1) Subject to paragraph (3), a public authority shall in respect of environmental information that it holds—

- (a) progressively make the information available to the public by electronic means which are easily accessible; and
- (b) take reasonable steps to organize the information relevant to its functions with a view to the active and systematic dissemination to the public of the information.

20. The reasonableness of any charge for staff time will often depend on how wide ranging the request is and how well the authority maintains its records.

Example 1

It will sometimes be reasonable for a public authority to make a charge for locating information:

A public authority receives a request for the correspondence between an authority and a factory accused of polluting local rivers. The correspondence goes back several years and involves various individuals and departments within the authority. The staff responding to the request have to look through boxes of archive material ordered chronologically and by department. They also conduct an electronic search of archived emails. The authority is able to charge a reasonable amount to cover the cost of these searches. This is because there is no suggestion of poor records management; rather the costs are incurred because the request covers information held across a wide range of well-ordered records.

Example 2

Applicants should not be unfairly penalised in cases where the authority has failed to keep records in a reasonably accessible state:

A public authority receives a request for results of an environmental monitoring exercise. The authority realises that there was no system in place to file or record the statistics in a useful or

retrievable manner. The authority has to spend several hours looking through irrelevant archived material and various online systems. It is not reasonable to pass on the entire cost of this exercise to the applicant because it is the public authority's poor records management that has led to the high costs of retrieving the requested information.

21. The EIR do not specify the rate at which staff time should be calculated. Although the FOI Fees Regulations do not apply to the EIR, our view is that it is reasonable for public authorities to use the FOI rate of £25 per hour as a starting point. If a different rate is used it is the public authority's responsibility to demonstrate why the calculation is reasonable.

Disbursements

22. Disbursement costs incurred in transferring environmental information to the applicant will usually include photocopying and postage. The number and size of the sheets to be copied and the lease charge on the photocopying machine are some of the items a public authority may consider when determining the cost of photocopying. In [*David Markinson v Information Commissioner \(EA/2005/0014 28 March 2006\)*](#) the Tribunal ordered the public authority to adopt the guide price of 10p per A4 sheet as the cost of photocopying. This gives an indication of the level of charge to adopt and an authority would have to demonstrate a good reason for exceeding it. However, an authority would still have to consider the actual costs incurred in any particular case as the cost of reprographics will change over time.

Commercial charges

23. 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.
24. 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) and is also referred to in guidance issued by DEFRA, which states that a “reasonable amount” will include a rate of return such as that achieved by comparable businesses who face a similar level of risk.

Example

The [DEFRA Code of Practice](#) provides the example of a public authority that is a trading fund as being entitled to levy such a market-based charge.

The Ordnance Survey is a government department and so a public authority for purposes of the EIR, but as a trading fund it is able to use income from the goods and services it provides in order to meet outgoings and invest in its business.

One of its main functions is the collection and supply of information (much of which will be environmental) to both the public and private sectors. Pricing of the information is permitted to be set at rates which reflect the commercially competitive market the Ordnance Survey operates within.

Other legislation

25. Public authorities should not assume that charges based on other statutory provisions are reasonable under the EIR.

Example

[The Local Authorities \(England\)\(Charges for Property Searches\) Regulations 2008 \(CPSR\)](#), and similar regulations for Wales, set out charging provisions for property search services. However, there are caveats within the CPSR that mean the charging provisions in the EIR take precedence. These are to be found in regulation 4(2) of the CPSR which disapplies the charging provisions of the CPSR if a local authority is imposing charges that are not permitted under other legislation, such as the EIR.

Further detail on this is provided in our guidance on [property searches](#).

So, despite an apparent statutory basis for permitting an

alternative charging mechanism, a public authority must base its charging provision on the test of reasonableness, and the requirements for free access in the EIR.

26. Nevertheless, there may be circumstances where charges based on an alternative statutory provision can be regarded as reasonable for the purposes of the EIR. This emphasises the importance of a public authority being able to satisfy itself on a case-by-case basis that charges are reasonable.

Tasks for which no charge can be made

27. Regulation 8(2) prevents a public authority from making any charge to access public registers or lists of environmental information it holds, or to examine the information that has been requested at a place made available by the public authority.

Public registers and lists of environmental information

28. The Directive says that the intention of this provision is to help members of the public to access environmental information by allowing them to see, free of charge, what environmental information is held by a public authority.
29. One method of achieving this is for authorities to provide public registers and lists of environmental information that are easy to access and straightforward to use. They should also provide clear instructions on how to access the information listed. The Directive is derived from the [Aarhus Convention](#) and as the [Aarhus Implementation Guide](#) (AIG) states, in this way, an applicant will be able to frame a request for environmental information more precisely. Charging for assisting in this is incompatible with promoting the right to access environmental information.
30. Not all public authorities will have public registers or lists of environmental information. However, authorities should note that providing this information will also enable them to help meet the obligation set out in Regulation 4 to proactively and progressively disseminate the environmental information they hold. Public authorities can achieve this can by including the lists and registers in their guide to information (the means by

which a public authority meets its obligations to publish information in accordance with the [model publication scheme](#)).

31. Although neither the EIR nor the Directive provide a definition of a “public register”, it is likely to comprise a record of documents the public is entitled to access in accordance with statutory legislation. Examples of public registers of environmental information include the Planning Register, the Contaminated Land Register, the Hazardous Waste Register, the Water Quality and Pollution Control Register, and the Register of Radioactive Substances.
32. Neither do the EIR or the Directive provide a definition of a “list of environmental information”. However, the AIG suggests that the terms “lists”, “registers” and “files” are often used interchangeably and the form of the list, register or file can vary. This indicates that Regulation 8(2)(a) EIR is not limited to formal, statutory registers and can also include lists that are compiled by public authorities for a variety of reasons and in a variety of forms. For example, the AIG states that this may include collections of documents relating to a decision-making process such as an environmental impact assessment. The underlying purpose of these lists is that they will be able to assist applicants in accessing environmental information they are interested in.

Examination of the information ‘in situ’

33. A public authority may provide facilities for applicants to inspect the information, either by visiting the authority’s offices or alternative premises, for example a library. The public authority cannot make a charge specifically for allowing access to the information in situ. However, the EIR do allow the authority to make a charge to recover the costs of locating the information and collating it in order to make it available for inspection (see Regulation 8(2)(b) EIR).
34. A charge made for locating and collating information to be inspected must be reasonable. If the information is held in a system that allows for straightforward public access, it is unlikely that a charge is reasonable. If an applicant requests inspection of material that would require a significant cost to prepare for inspection, the EIR may allow the authority to make a charge.

35. It is important that authorities ensure the right of access to environmental information can be effectively exercised by applicants, and that facilities are established and maintained for the examination of information that is requested. This is set out in Article 3(5) of the Directive.
36. The Commissioner considers public authorities have a duty under Regulation 9 to consider whether they should provide advice and assistance to the applicant on different options to make information available. If it is possible for the public authority to offer an in-situ inspection at no cost then the public authority must offer this option to the applicant alongside any charges they propose for making the information available via other means. A public authority may comply with its duty under Regulation 9 if it includes in its schedule of charges that certain information is available to inspect free of charge.

Example

No collation costs:

A public authority receives a request for air and water pollution readings made at a various sites over the previous six months, and the applicant asks to inspect the information. Although the information is not held in a public register and can only be read by specialist software, it is kept by the authority in an electronic database for its own monitoring purposes. The authority arranges for the applicant to visit their office and access the information using their systems. Authority staff have not been required to specifically locate the information in advance of the request. As the public authority has not incurred any costs in getting the information ready for inspection it is not reasonable for the public authority to charge the requester a collation or preparation fee.

Collation costs:

A public authority receives a request to inspect all the planning applications submitted by a particular developer over several years. Although the applications are held in a structured and easily retrievable format they are not filed by reference to the developer. The authority has to identify which applications are relevant to the request and then look through the files to locate the requested information. The authority is entitled to charge a reasonable amount to cover the cost of the time spent

searching for the information, but cannot add further costs to allow inspection.

Schedule of charges

37. Regulation 8(8) EIR requires all public authorities to publish and make available to applicants a schedule of charges and information on the circumstances in which a charge may be made or waived. This reflects the provisions of the [Aarhus Convention](#) and the [Directive](#) (Article 5(3)), that both state a public authority shall make available a schedule of charges which may be levied.
38. Regulation 8(1) makes clear the ability to make a charge for making environmental information available is subject to all the other subsections, including Regulation 8(8).
39. This means in order to charge applicants for environmental information, a public authority must first have published the schedule (together with details of when charges may be made and when they may be waived) and made it available to applicants.

Example

The First-tier Tribunal provided support for this approach in the case of [Bickford-Smith v Information Commissioner and the Rural Payments Agency \(an executive agency of DEFRA\)\(EA/2010/0031; 19 August 2010\)](#).

At paragraph 79 the Tribunal stated "*Since the Rural Payments Agency had not published and made available to the Appellant a schedule of charges, seeking to charge her for the information would not accord with Regulation 8(8).*"

Example

Similarly, in the case of [Leeds City Council v Information Commissioner and the APPS Claimants \(EA/2012/0020 and 0021; 22 March 2013\)](#) the First-tier Tribunal made very clear the connection between regulation 8(1) and 8(8).

At paragraph 119 the Tribunal stated that *"it is a requirement, not an option, for public authorities to publish a schedule of charges capable of being scrutinised and tested to ensure that it is fair and takes into account relevant and permissible costs. This is to safeguard applicants from abuse and inconsistency. Parliament cannot have intended for a publication breach to have no implications, and that there is a reason why the ability to charge in r.8(1) is subject to" the publication requirement in r.8(8). It follows that the failure of the Council to publish a schedule of charges results in the loss of its entitlement to levy a charge under r.8(1)."*

40. As well as being a prerequisite for charging, the provision of a schedule of charges gives an applicant the opportunity to consider the cost of the request before actually making it.
41. The Commissioner recommends public authorities publish a schedule of charges on their website as part of their publication scheme. This will also complement the requirement of the model publication scheme.
42. A public authority should ensure the basis for the calculation of charges is set out in the schedule, as well as the following items:
 - Standard costs involved in the supply of information, such as the charge per sheet of photocopying and the charge for providing information on CD-ROM and other formats.
 - A list of priced publications.
 - Any concessions offered to applicants such as pensioners and those receiving benefits.
 - Circumstances where the supply of information is conditional on advance payment.
 - An explanation of how charges for staff time will be calculated.

Advance payment (regulation 8(4)-(7))

43. Regulation 8(4) allows a public authority to require advance payment of a charge for making environmental information available.
44. Where a public authority decides it requires an advance payment it must notify the applicant of this within 20 working days of receipt of the information request, together with the amount of payment required. The period from the day of this notification to the day the payment is received does not count towards the time limit for responding to the request.
45. The applicant then has 60 working days following issue of the notification to make the payment. If payment is not made within this period the authority is not obliged to proceed with the request.

Relationship between the EIR and FOIA

46. The approach under the EIR contrasts with that in FOIA, where the only charges permitted are for disbursements unless the appropriate fees limit is exceeded. The Commissioner has published guidance on ['Requests where the cost of compliance with a request exceeds the appropriate limit'](#).
47. Section 39 of FOIA states information is exempt from disclosure under that Act if the public authority would be obliged to disclose the information under the EIR. The exemption is subject to a public interest test, and there is a public interest in information being made freely available under FOIA. However the Commissioner takes the view there is a stronger inherent public interest in the implementation of the EIR as intended by the Directive. Therefore the Commissioner would not accept the argument that it would be in the public interest for requests for environmental information that would be chargeable under the EIR to be handled under FOIA instead.

Datasets

48. Under section 19(2A) of the Freedom of Information Act (FOIA), a public authority's publication scheme must include a requirement to publish any dataset that has been requested,

and any updated version it holds, unless the authority considers it is not appropriate to do so. The authority is required to publish the dataset in a re-usable form, where reasonably practicable. If the information in the dataset is a relevant copyright work of which the authority is the only owner, then the authority is required to make it available for re-use under the terms of a specified licence.

49. The EIR do not include any similar provisions. However, the FOIA provisions refer to any dataset that has been requested. Therefore, provided the public authority is also subject to FOIA, then the requirement to make the dataset available for re-use under the publication scheme also extends to environmental datasets that have been requested, even though the public authority has dealt with the request under the EIR.
50. The public authority may charge a fee for allowing the re-use of the dataset, using any powers it may have under any enactment other than FOIA, or under the [Freedom of Information \(Release of Datasets for Re-use\) \(Fees\) Regulations 2013 no. 1977](#).
51. However, if the licence the public authority is using to make the dataset available for re-use under its publication scheme is the [Open Government Licence](#), then there is no re-use fee.
52. There is a further explanation of the datasets provisions in FOIA and how they relate to the EIR in our [guidance document on datasets](#).

Other considerations

53. This guidance relates only to the EIR. If the information is not environmental information, the EIR are not relevant and public authorities will instead need to consider the charging regime under FOIA. Guidance is available on this on [our guidance pages](#).

More information

54. This guidance has been developed drawing on ICO experience. Because of this, it may provide more detail on issues that are often referred to the Information Commissioner than on those we rarely see. The guidance will be reviewed and considered

from time to time in line with new decisions of the Information Commissioner, Tribunals and courts.

55. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.
56. If you need any more information about this or any other aspect of freedom of information, please [contact us](#): see our website www.ico.org.uk.