

Open Focus and Sligo County Council

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CASE NUMBER: CEI/07/0006

Appeal to the Commissioner for Environmental Information

Case CEI/07/0006

Access to Information on the Environment Regulations 2007 (S.I. No. 133 of 2007)

Appellant: Ms. Mary Reilly, Regional Secretary - West, Open Focus

Public Authority: Sligo County Council

Issue: Whether the charging of a fee was in accordance with: article 5 of Directive 2003/4/EU as implemented by article 15 of the Access to Information on the Environment Regulations 2007 (S.I. No. 133 of 2007)

Summary of Commissioner's Decision

The Commissioner found that the charging of a fee by the Council was not in accordance with article 5 of the Directive as implemented by article 15 of the Regulations.

Background

On 9 August 2007, Open Focus requested environmental information from Sligo County Council in the form of sixteen queries about contracts for, and the operation of, proposed wastewater and sewage treatment plants in County Sligo. The request was made under the European Communities (Access to Information on the Environment) Regulations 2007 [S.I. No. 133 of 2007].

On 4 September 2007, the Council wrote to Open Focus saying that "the charge for making this information available is €285" and that "[o]n receipt of this fee, your request will receive further attention". Open Focus responded on 12 September 2007 by asking for the charge to be justified and for details of how it was computed. In its email response of 18 September 2007, the Council stated that the charge was calculated on the basis of seven hours staff time (five hours by a Senior Executive Engineer and two hours by a Staff Officer) taken to assemble the items of information. On 27 September 2007, by email, Open Focus applied for an internal review of the decision to charge €285. It contended that the amount was "excessive and beyond that allowed for in the EU Directive and provisions of ... Statutory Instrument No. 133 of 2007."

The Council failed to deal with this internal review application within the stipulated period of one month and, on 26 November 2007, Open Focus appealed to my Office against the decision of the Council. My Office accepted the appeal having regard to article 11(5)(c) of the Regulations which provides that a reference to a request refused includes, for the purposes of the right of appeal to my Office, a request "that has otherwise not been dealt with in accordance with Article 3, 4 or 5 of the Directive (2003/4/EC) (including the ground that the amount of the fee charged under article 15(1) is excessive)". Article 5 of the Directive deals with "Charges".

I am taking it that the decision of the Council was to grant the request but subject to the payment by the requester of a fee of €285. Accordingly, what I have to decide in this case is whether the charging of a fee by the Council was in accordance with article 5 of the Directive as implemented by article 15 of the Regulations.

Contacts with Council

My Office wrote to the Council on 26 November 2007, enclosing a copy of the appeal, notifying the Council that the appeal had been accepted and inviting it to make submissions. On 10 December 2007, my investigator gave the Council the following preliminary views:

- that where a fee is charged, a list of how fees are calculated must be available to the public;
- that only the actual costs of supplying the information may be charged; any staff time spent determining what information is held should not be counted;
- that the calculation of the charge, as in this case, by reference to the hourly salary of a senior officer was not reasonable.

My investigator requested a breakdown of how the officers' hours were spent i.e. what the Senior Executive Engineer and the Staff Officer did in relation to the supply of the information. She also invited the Council to settle the case, without the need for a formal binding decision, if it accepted her view that the charge was not in accordance with the Directive and not reasonable in the circumstances.

On 18 December 2007, the Council provided a summary report from its Senior Executive Engineer (Water Services) showing the estimated time taken in relation to each of the 16 queries contained in the request for information i.e. how the Senior Executive Engineer's five hours was calculated. This included a note clarifying that no charge was applied "where information is readily available or will be accessed in compiling replies to other questions". The report appears to relate solely to the work of the Senior Executive Engineer and the only reference to Staff Officer's time is a covering note from the Council to the effect that the Senior Engineer had asked that one hour of Staff Officer's time for "the collation of the report" be included.

My Office provided the Council's Summary Report to Open Focus which reiterated that it still wished to have access to all of the items. Open Focus made oral submissions in which it made reference to the emphasis in the Water Directive on information about water and

sewage schemes being made available to the public. It argued that there is a public interest in favour of release of this information and that the charge is acting as a barrier to public participation in matters of environmental importance.

On 3 March 2008, having considered all of the submissions, my investigator wrote to the Council to say that she would be recommending to the Commissioner that she should direct that the information sought should be provided without charge in this instance. The investigator again asked the Council if it would be prepared to settle the case on the basis of her assessment of the likely outcome of a formal decision by myself as Commissioner.

The Council's Response

The Council responded by letter dated 27 March 2008. It argued that it is entitled to charge for providing detailed environmental information, that the charge imposed does not exceed a reasonable amount and that each application must be costed on its own merits. In relation to the Senior Executive Engineer's involvement, it stated that most of the information was of a highly technical nature and that the queries could be addressed only by an appropriate person with technical knowledge and competence so as to provide accurate information in the most efficient manner. According to the Council, the charges sought "do not exceed the actual cost of producing the material and do not include any indirect costs"; for example, the costs of input by additional staff members were not included. The Council provided a table showing the hourly rates charged by consulting engineers for project work.

The information

The Council provided, at my Office's request, copies of the information it proposes to supply. The material identified by the Council as being covered by the request comprises a four page response by the Council to the questions posed by Open Focus together with a folder, with table of contents, of documents relating to the Enniscrone and Sligo Wastewater Treatment Plants. The folder has approximately 160 A4 pages - many of which are two sided copies. It includes several maps copied in A3 format.

Analysis and Findings

Statutory Provisions

Directive 2003/4/EU guarantees a right of access by the public to environmental information held by or for public authorities; the Directive also sets out "the basic terms and conditions of, and the practical arrangements for", the exercise of this right. The Directive has been given effect in Ireland by way of the European Communities (Access to Information on the Environment) Regulations 2007 [S.I. No. 133 of 2007], made by the Minister for the Environment, Heritage and Local Government.

Article 15(1) of the Regulations provides that a *"public authority may charge a fee when it makes available environmental information in accordance with these Regulations ... provided that such fee shall be reasonable having regard to the Directive."* Article 15(2) states that: *"Where a public authority charges a fee pursuant to sub-article (1), it shall make available to the public a list of fees charged, information on how they are calculated and the circumstances under which they may be waived."*

Article 5 of the Directive provides -

"1. Access to any public registers or lists established and maintained as mentioned in Article 3(5) 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."

It appears that Article 5.1 of the Directive has not been transposed explicitly into national law in as much as the Regulations do not contain any equivalent provision. However, the intent of Article 5.1 is reflected in Guidance Notes published by the Department of the Environment, Heritage and Local Government (considered below).

It is clear from these provisions of the Directive and of the Regulations that a public authority is not required to make a charge for the supply of environmental information; but where a public authority chooses to levy such charges, there are certain mandatory requirements to be satisfied. The primary issue for decision in this appeal, therefore, is whether the Council has met these mandatory requirements.

Mandatory requirements met?

The Council has made no case that it has made available to the public generally a list of the fees charged, nor that it has made available information on how the fees are calculated. I take it that this has not been done. At the same time, it is the Council's position that its practice in this case is in compliance with the mandatory requirements.

The Council rejects the view that the requirement to provide a list (or schedule) of fees, and the basis for their calculation, is a requirement which must be fulfilled prior to the imposition of any charge. It says that the Regulations as drafted do not state in absolute terms when the list of fees and the information on charges must be made available. The Council takes the view that it is not a mandatory requirement that the list of fees, and information on charges, should be available to the applicant in advance of a request; nor is it mandatory that it be made available at the point when the fee is being sought. The Council considers that it is reasonable that the schedule of charges would be made available to the applicant on request, which is what it did in this case.

It is clear, from the use of "may" in article 15(1) of the Regulations, that a public authority has discretion as to whether or not to charge a fee when making environmental information available. But where a public authority decides to impose fees, it must do so in accordance with the requirements of article 15(2) of the Regulations which, in effect, provides for a prior policy decision that fees will be charged. Thus, it seem to me that article 15(2) of the Regulations applies to applications generally rather than to a specific application. Accordingly, the fees to be charged (if any) in the particular case will depend on the general charging arrangements (including provision for waiver of fees) decided upon by the authority; and where such general charging arrangements have been decided upon, the public authority is required to make information on these arrangements available to the public.

If the intention was, as the Council argues, to provide for specific fee information to an applicant on request or in any case where a public authority is considering levying such charge, it would have been a straightforward matter for the statutory instrument to state this. I note also that article 15(1) includes provision for the charging of a fee by a public authority when information is made available following an appeal to my Office. I consider that this supports the position that a scheme of charges should be prepared which can be applied later when information is actually made available. This would have the effect of putting the public on notice of the likely scale of the charges incurred in a particular request though the actual charge would depend on the extent of the information provided.

To the extent that there may be some imprecision in the language of article 15(2) of the Regulations, it is helpful to look at the Directive provision which article 15(2) is intended to implement. Article 5(3) of the Directive as cited above requires that, where charges are made, public authorities must publish a schedule of their charges as well as making this information available to applicants. Bearing in mind that domestic courts are obliged to interpret national law so as to achieve consistency with, and give effect to, European law, the Directive's provisions would tend to support the above interpretation of the Regulations. The ordinary meaning of "publish" is to make something generally known or to disseminate to the community in general. Clearly, what is provided for is the making available of charging information both to the public generally, including potential applicants for environmental information, as well as to actual applicants who have already made a request for access to environmental information.

I have looked also at the Guidance Notes published by the Department of the Environment, Heritage and Local Government (Section 16; page 33). Although this document does not purport to be a legal interpretation of the Regulations, public authorities are obliged under Article 14 of the Regulations to "have regard to" these guidelines when performing their functions under the Regulations. The Department says that, in general, it is to be expected that public authorities should adopt a policy in favour of providing information without charge "as long as the costs involved to the authority are not significant". It goes on to state that public authorities "must make publicly available a list of fees, if any, charged for provision of environmental information and the method by which those fees were calculated."

Conclusion

My conclusion is that the Council's imposition of a fee in this case is not in compliance with the requirements of article 15 of the Regulations. This is because the Council failed to make available to the public details of its charges, how they are calculated and the circumstances in which they will be waived. Given that the requirement to publish such information on charges is prefaced in the Regulations by the phrase "Where a public authority charges a fee..." [and in the Directive by the phrase "Where charges are made..."], I take the view that a charge should not have been made in this case where no such information was published.

While it is not strictly necessary to do so, in the light of my primary conclusion above, for the sake of completeness I will also consider whether the fee as calculated by the Council in this instance is reasonable.

Is the fee charged reasonable?

In response to a request by Open Focus for clarification on the calculation of the proposed fee of €285, the Council replied that:

- no charge was being made for "the items of information"
- a total of seven hours was the time it would take to assemble the information requested, and
- the seven hours were made up of five hours at the Senior Executive Engineer rate of €47.05 per hour and two hours at the Staff Officer rate of €24.50 per hour.

It seems to me that if a scheme for charging had been adopted and published, as required, its application could be reviewed by reference to its provisions e.g. whether a copying or other charge was reasonable and properly applied having regard to the volume of information identified as coming within the scope of the request. Given that no such list of fees has been made available by the Council outside of its specific calculations in this case, I must review the reasonableness of the charge by reference to the details provided by the Council. I accept that the Council spent the staff time it says it did in dealing with the request. However, the Regulations clearly foresee that there may be cases in which the

amount of the fee sought by the public body will be found by me not to be reasonable. The most important consideration here is the provision in article 15(1) of the Regulations which provides that the fee must be reasonable *"having regard to the Directive"*.

Article 5(1) of the Directive makes it clear that access to public registers and examination in situ of the information requested shall be free of charge. Article 5(2) of the Directive permits the charging of a fee for *"the supply of information"*.

The 18th recital in the Directive's preamble deals with the matter of charges for the supply of environmental information. While the Directive preamble does not constitute an operative provision, it does provide helpful guidance. The 18th recital touches on the question of what constitutes a "reasonable charge" and includes the following:

"18. 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 actual costs of producing the material in question."

The recital goes on to discuss instances where public authorities make available environmental information on a commercial basis. I am satisfied that this does not apply in this case.

In its Guidance Notes, the Department states that public authorities may not charge *"for the actual making of a request for environmental information, for access to registers or lists of environmental information or for the examination in situ of such information"*. It advises that a reasonable charge will vary depending on the volume of information to be released but could include staff and other costs *"connected with searching, retrieving, compiling or copying of the information."* It goes on to clarify that the charge may only relate to the supply of information and should not be made in respect of provision of advice on the information available, for time spent discussing a request or for determination of what information is discoverable.

Search and retrieval of information

I have considered the question of whether the Council was entitled to include in its charges the staff time spent in searching for and retrieving the information the subject of the request. The Council's submissions indicate that the fee is based on the direct costs of the time spent by those staff best placed to supply the information. It says that the charges do not exceed the cost of "producing the material". Its written submissions do not make reference to the two hours of Staff Officer time included in the original charge of €285. In a telephone conversation with my investigator, a member of the Council's staff indicated that this element of the charge (€49.00) was not being pursued.

Given that Article 5 of the Directive specifies that information requested should be made available free of charge where it is examined *in situ*, it seems to me that it is not reasonable to include a charge for searching for the files and, for example, taking them from storage and extracting the relevant information. This exclusion from charges does not appear to be restricted to information which public bodies would normally be obliged to have available for inspection under other statutory provisions e.g. planning files. I note that the Council prepared answers to the requester's queries about the water and sewage plants together with copies of relevant documents and maps. However, I consider that if the information which was held by the Council had been inspected by the requester in the Council offices, the Council would not be entitled to make a charge for facilitating this.

Furthermore, in order for a decision maker within the Council to deal with the request for information and form a view as to whether it could be supplied under the Regulations, it would be necessary for the information at issue to be identified and retrieved. There is no provision in the Directive or in the Regulations for the charging of fees for the processing of a request for access to environmental information. Following the assessment of the information and, as in this case, a decision to release it, I consider that it is the next step - the supply of the information to the requester in copy form - that potentially attracts the charge. I note that, although the wording of the relevant provision in the United Kingdom's regulations made under the Directive differs somewhat from that in the Irish Regulations and the decision is in no way binding on me, the UK Information Tribunal has made a finding

on the cost of locating and retrieving information. In the *Markinson* case [*Appeal EA/20050014 FER0061168 - David Markinson and the Information Commissioner - Decision 28 March 2006*], the UK Tribunal observed that the relevant UK regulation:

"... provides that the information in question should be made available for inspection free of charge and we believe that, if the costs of locating and retrieving a piece of information should be disregarded for that purpose, it is not open to a public authority to regard it as reasonable to include them in the cost of copying the same material."

My Office brought this case to the attention of the Council; it did not address it in its submissions.

I do not agree with the Department's view as expressed in its Guidance Notes that the charge could include, for example, staff costs connected with searching and retrieving the information. I have difficulty in reconciling this advice with the provision in the Directive (repeated in the Guidance Notes) that no charge can be made if the requester examines the environmental information in situ. The question also arises as to how a search and retrieval charge can be seen as reasonable when charging for the determination of what information is releasable (which presumably involves the retrieval and examination of the same information) is not chargeable. I have no difficulty with the advice that costs connected with compiling or copying of the information may be included.

What is "reasonable" having regard to the Directive?

I cannot find anything in the Regulations or in the Directive to support the Council's position that charging for the time expended by reference to the salary of such a senior officer as a Senior Executive Engineer is reasonable. I consider that the argument concerning the technical competence and knowledge required to identify the relevant information applies to the processing of the request and the decision as to what falls to be released under the Regulations. It is not relevant to the actual supply or provision of the information to the

requester after that decision has been made. If the charge were to be calculated on the basis of the salary of senior staff dealing with particular projects, it seems to me that this could be unfair to applicants. For example, in the case of a request to a public authority whose information was managed so as to be accessible by relatively junior administrative staff, the charge would be less than that applicable were the information managed so as to be accessible only to senior staff.

The European Court of Justice, dealing with provisions for charging under the previous directive on Freedom of Access to Information on the Environment (90/313/EEC), held that, 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 [*Case C- 217/97 - The Commission of the European Communities v Federal Republic of Germany*]. The overriding purpose of Directive 2003/4/EU is to guarantee the right of access to environmental information held by or for public authorities. Article 1 of the Directive sets out its objectives which include ensuring the making available and dissemination of environmental information to the public to achieve the "*widest possible systematic availability*". Article 3 requires that Member States put practical arrangements in place in relation to such matters as facilities for the examination of material required and registers and lists of the information held with clear indications of where such information can be found. I do not see that the information provided by the Council, regarding the hourly rates charged by private sector engineers, has any relevance in this case.

Were it necessary to make a decision on the matter, I am clear that decision would be that the fee sought by the Council in this case was not "reasonable having regard to the Directive".

Decision

In accordance with article 12(5) of the Regulations, I have reviewed the decision of Sligo County Council in this case and I find that its purported imposition of a charge was not in compliance with the requirements of article 15 of the Regulations. Accordingly, I hereby annul the Council's decision regarding the charge and direct that the information sought be supplied to Open Focus without charge.

Under article 12(7) of the Regulations, the Council is obliged to comply with my decision "within three weeks after its receipt". Where a public authority fails to comply with my decision within that time, article 12(8) provides that I may apply to the High Court for an order directing compliance with that decision.

Appeal to the High Court

A party to the appeal or any other person affected by this decision may appeal to the High Court on a point of law from the decision. Such an appeal must be initiated not later than two months after notice of the decision is given.

Emily O'Reilly

Commissioner for Environmental Information

26 May 2008



Coimisinéir um Fhaisnéis Comhshaoil
Commissioner for Environmental Information (/)

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