IN THE FIRST-TIER TRIBUNAL **EA/2012/0020 AND 0021**
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]

ON APPEAL FROM:

Information Commissioner's Decision Notice: FER0372970 and FER0354510
Dated: 19 December 2011

Appellant: LEEDS CITY COUNCIL

Respondent: THE INFORMATION COMMISSIONER

Second Respondent: THE APPS CLAIMANTS

Date of hearing: 4, 5 and 6 February 2013
Date of Decision: 22 March 2013

Before

Annabel Pilling (Judge)
Suzanne Cosgrave
and
Pieter de Waal

Subject matter:

Environmental Information Regulations 2004
Charging, Reg 8

Cases:
Markinson v Information Commissioner (EA/2005/0014)
Commission of the European Communities v Federal Republic of Germany Case C-217/97
Kirklees Council v Information Commissioner and PALI Ltd [2011] UKUT 104 (AAC)
R v Soneji and another [2005] UKHL 49

Representation:
For the Appellant: Eleanor Grey QC
For the Respondent: Anya Proops
For the Second Respondent: Sarah Lee

Decision

For the reasons given below, the Tribunal refuses the appeal and upholds the Decision Notices of the Information Commissioner dated 19 December 2011.

Reasons for Decision

Introduction

1. This is a linked appeal against two Decision Notices issued by the Information Commissioner ("the Commissioner") both dated 19 December 2011.

2. The central issue in the appeal is whether the Commissioner reached the wrong conclusion when, in each case, he decided that Leeds City Council ("the Council") had not been entitled under r. 8 Environmental Information Regulations 2004 ("the EIR") lawfully to impose a charge of £22.50 for making particular requested environmental information available to applicants.

Factual background

3. On 24 June 2010 and 20 October 2010, the Council received requests for information. The requested information amounted to information held by the Council that was required by the applicants so that they could complete a standard property search form ("the CON29R") in respect of two named addresses. The request specified that the applicants wished to examine the information.

4. Part of the information requested was made available by the Council free of charge, by means of enabling public inspection; this was the information relating to the queries at 1.1(a) – (e), 1.2. 2(a), 3.4(a), 3.4(e) – (f), 3.12(a) and 3.12(b)(ii) of the CON29R. Apart from the information relating to question 3.3(b) - which was held by the relevant

water authority, not the Council - the Council accepted it held the remainder of the information ("the disputed information").

5. The Council concluded that access to the disputed information could not be permitted by means of inspection, particularly given the manner in which it was held The Council's position was in effect that it was entitled to refuse the applicants' request for inspection on the basis that:

    (i) it was reasonable for it to refuse to permit inspection in all the circumstances; and
    (ii) the refusal to agree to inspection was accordingly lawful under r.6(1)(a) EIR (requests to access information in a particular form or format).

6. The Council therefore proposed to identify, collect and supply answers to the applicants' questions by way of a completed CON29R and to charge a fee for this service. The fee would be in the sum of £22.50, which is the fee levied for the completion of a full CON29R. The Council's position was that it was entitled to impose the charge in each case under r.8(1) EIR.

7. The applicants disputed the Council's right to charge such a fee, asserting that by law the Council was required to make all the information available, free of charge, by way of inspection. If the information could not be made available by way of inspection due to the way in which the information was held by the Council, the Council should make it available without levying the £22.50 fee. They referred the dispute to the Commissioner.

8. The Commissioner agreed with the Council that in the particular circumstances of this case it would be impractical for the Council to allow the applicants to inspect the requested information in the format

in which it is currently held. He therefore concluded that the Council was entitled to rely on r.6(1)(a) EIR to provide information in a format other than inspection.

9. The Commissioner found that the Council breached r. 8(3) EIR by levying an unreasonable charge for the provision of the information. He ordered the Council to provide the information to the applicants, on payment of a charge only for the costs of disbursements incurred in complying with the request, provided that it had already published these charges in accordance with r.8(8) EIR.

The Appeal to the Tribunal

10. The Council appeals against the Commissioner's conclusion that the charge was not a lawful charge for the purposes of r.8 EIR.

11. The Tribunal joined The APPS Claimants as Second Respondent at their request. The APPS Claimants are all property search businesses.

12. The appeal was originally listed to be heard over two days in October 2012. However the parties were in agreement that, as a result of communication between them, the issues which potentially fall for decision in this case were significantly wider than those initially identified and the hearing was therefore relisted over three days in February 2013.

13. The Tribunal was provided in advance of the hearing with an agreed bundle of material, and written submissions from the parties. On the day of the hearing we were also provided with a bundle of authorities. Although we do not refer to every document or repeat the evidence in detail in this Decision, we have had regard to all the material before us.

The Powers of the Tribunal

14. By r.8 EIR the enforcement and appeals provisions of the Freedom of Information Act 2000 (the 'FOIA') apply for the purposes of the EIR (subject to the amendments of such provisions as set out in the EIR).

15. The Tribunal's powers in relation to appeals under section 57 of the FOIA are set out in section 58 of the FOIA, as follows:

> *(1) If on an appeal under section 57 the Tribunal considers-*
>
> *(a) that the notice against which the appeal is brought is not in accordance with the law, or*
>
> *(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*
>
> *the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.*
>
> *On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.*

16. The starting point for the Tribunal is the Decision Notice of the Commissioner, but in determining whether that is in accordance with the law and ought to be upheld or modified by way of a substituted decision notice the Tribunal may also receive and hear evidence, which is not limited to the material that was before the Commissioner. The Tribunal, having considered the evidence (and it is not bound by strict rules of evidence), may make different findings of fact from the Commissioner and it may consider that the Decision Notice is not in accordance with the law because of those different facts. Nevertheless, if the facts are not in dispute, the Tribunal must consider whether the law has been applied correctly. If the facts are decided

differently by the Tribunal, or the Tribunal comes to a different conclusion based on the same facts, that will involve a finding that the Decision Notice was not in accordance with the law.

Statutory background

17. The EIR were enacted in order to give effect to The Directive on Public Access to Environmental Information (2003/4/EC) ("the Directive"). The Directive itself was enacted in order to give effect to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ("the Aarhus Convention") . The Directive replaced an earlier version of the Directive (90/313/EEC) which, following the introduction of the Convention, expanded the existing access arrangements.

18. The relevant provisions of the EIR for this appeal are as follows: -

19. Regulation 4:

> ***Dissemination of environmental information***
> *(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. Regulation 5:

> ***Duty to make available environmental information on request***
>
> *(1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and*

Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request. "

21. Regulation 6:

Form and format of information

(1) Where an applicant requests that the information be made available in a particular form or format, a public authority shall make it so available, unless—

(a) it is reasonable for it to make the information available in another form or format; or

(b) the information is already publicly available and easily accessible to the applicant in another form or format.

(2) If the information is not made available in the form or format requested, the public authority shall—

(a) explain the reason for its decision as soon as possible and no later than 20 working days after the date of receipt of the request for the information;

(b) provide the explanation in writing if the applicant so requests; and

(c) inform the applicant of the provisions of regulation 11 and of the enforcement and appeal provisions of the Act applied by regulation 18."

22. Regulation 8:

Charging

(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.

.....

The Issues

23. The issues that fall to be decided in this appeal were agreed by the parties as follows:

Issue 1 – the Scope of the Charge: whether a charge which is levied under r.8(1) EIR can be calculated on the basis of the costs of staff time spent locating, retrieving, checking and collating information needed to answer a request, or whether it must be limited to the costs of disbursements (e.g. photocopying and postage).

If the Council loses on this issue, then the remaining issues fall away. However, if the Council is right to say that elements other than disbursements may be included in a fee, the Respondents have raised a number of further objections to the £22.50 fee.

Issue 2 – the Test of Reasonableness: whether, in determining whether a particular charge is reasonable for the purpose of r.8(3) EIR, the Commissioner and Tribunal should apply a 'public law' (or 'supervisory') approach or whether the Commissioner and the Tribunal should decide for themselves if the charge is a reasonable one, an "objective" approach.

Issue 3 – the Reasonableness of the Charge: whether (in the event that a fee under r.8(3) may include sums in respect of costs other than

disbursements) the fee levied by the Council in this case was reasonable, or whether it was not, on the grounds that -

i. It will act as a disincentive for public authorities to make further improvements in enabling free inspection of information;
ii. It thwarts or restricts access to information;
iii. It passes on to the applicants the entirety of the costs of responding to the application;
iv. It was formulated by reference to the motives of the applicants;
v. It is inconsistent with the charging regime under the FOIA;
vi. Other public authorities charge lower fees.

Issue 4 Calculation Issues: whether the charge was in any event unreasonable by virtue of the underlying calculations used, because:

i. It imposed an 'average' figure for the costs of a search;
ii. It was calculated by reference to the provisions of the Local Authority (England) Charges for Property Searches Regulations 2008 ("the CPSR"), and this is unlawful;
iii. It included an element for reproducing information that is available free of charge, by way of inspection;
iv. It might be cheaper to supply copies of documents held by the Council in response to queries than to collate the information by the methods adopted by the Council.

Issue 5 – Publication Issues: whether the Council has complied with its publication obligations under r.8(8) EIR in connection with the charges it imposes for property search information. If it has not complied with these obligations, then a further issue is whether the Council was entitled to impose any charge on the applicants under r.8(1).

Evidence

24. Four witnesses gave evidence before us. Each adopted the contents of their witness statement and was then cross-examined by both the APPS Claimants and the Commissioner.

25. In brief, the following was evidence of particular relevance. The systems used by the Council staff to find the data are not the same ones as available to the public and all the answers are collated into another system, TLC, which is not publicly available. In some instances the Council's systems do not communicate with each other. As a result, as part of the CON29R process staff spend time transcribing data from one system to another for the purpose of collating the answers. The answers in a CON29R play a significant part in a property transaction and the evidence from all of the witnesses confirmed how important it is to ensure that the answers are correct, and how considerable effort goes into validation of the answers; the Council carries insurance against the risk of any error. All witnesses considered the provision of a CON29R to involve the provision of a service that should be charged for.

26. Christopher Clarke, prior to recent retirement, was Customer Services Manager within the Planning Administration Team at the Council. His particular area of expertise was in answering search enquiries for the planning department for 36 years. He described the method used to answer the enquiries in the CON29R search which concern planning: 1.1, 1.2, 3.7a, 3.7c, 3.9 and 3.10.

27. David Whittaker has been the Applications and Information Manager in the Council's Highways and Transportation Service for 10 years. He described the method used to answer the enquiries in the CON29R search that concern his team: 2, 3.2, 3.4, 3.5, 3.6 and 3.7e.

28. Alison Howarth, Head of Service for the E Planning Team in the Council's Planning and Sustainable Development Service, has responsibility for the Planning and Building Control computer systems.

29. She described that although the Public Access system contains information relevant to the items in enquiries 1.1a-e of the CON29R, the system has not been designed in a way that someone doing a search could retrieve the information quickly and easily in order to answer those enquiries.

30. She accepted that it would be possible to provide a screen shot to the enquirer rather than for the Council to interpret the information held and provide the answers to the CON29R enquiries, but her evidence was that this would be time consuming, and would increase costs due to internal administrative arrangements such as the absence of a dedicated printer which means that printed screen copies would be hard to collate. It was her evidence that this approach might lead to additional questions being raised, which would have been anticipated and dealt with in the usual handling of CON29R enquiries.

31. Gareth Moore, Acting Head of the Local Land Charges Section for the Council, made two witness statements.

32. In evidence he told us that he had never had a request from a customer asking for copies of documents or copies of screenshots from the Council's computer systems instead of the full CON29R answers that the Council usually provides. In his witness statement of November 2012, he said that: *"However, I do not think this would be an efficient or cost-effective alternative. As explained by my colleagues in other witness statements, the majority of staff time is spent in retrieving and checking relevant data, rather than transcribing answers into the TLC system, or editing the standard answers in that system. In addition, if copies of screenshots were provided without staff spending*

time on checking the various entries, this could lead to applicants spending time and money following up on matters which Council staff would have filtered out as not being relevant, and there would be an increased risk of inaccuracies."

33. Mr Moore also referred to seeing "search reports" prepared by the applicants using information freely available via the Public Access portal. He said that *"from my experience of seeing some of these search reports, I do not think they are nearly as informative as the full CON29R replies, and I have seen entries in search reports which were wrong or misleading."*

34. Mr Moore also conceded that if some information was missing or not available via the Public Access portal, the full CON29R fee would be payable for providing the answers to all the questions, not just the "missing" ones.

35. We were concerned with some of Mr Moore's evidence, and the focus and emphasis he appeared to place on the provision of the information in the form of the CON29R and not in any other form, and that this was a service which the Council provided to "customers". He did not appear to us to accept or even acknowledge that requests for environmental information fell to be considered by the Council under the EIR access regime. He referred to "stand alone" EIR requests, which were dealt with entirely separately from a request that related to information required to complete the CON29R independently. We appreciate that the Council wishes to ensure that the property search data it holds in its public registers is interpreted and provided correctly, but we consider that the Council must appreciate the difference between processing a CON29R and processing a request for environmental information (which may include property search information) in accordance with the provisions and requirements of EIR. It appeared to us from Mr Moore's written and oral evidence that the Council has

lost sight of this distinction and, in practice, has chosen an approach which shoehorns EIR requests for property search information (which are not made as requests for a property search service) into the CON29R process without any modification to allow for the fact that the requests are made under a public access regime with charging limitations.

Issue 1 – the Scope of the Charge

36. There is no appeal against the Commissioner's conclusion in his Decision Notices that the Council was entitled to rely on the provision in r.6 (1) (a) EIR to make the disputed information available in a format other than inspection.

37. The relevant question for the Tribunal to consider is whether a charge levied under r.8 EIR can be calculated on the basis of or include, in part, the costs of staff time spent locating, retrieving, checking and collating the information needed to answer a request, or whether it must be limited to the costs of disbursements (e.g. photocopying and postage). Resolving this issue turns in particular on how the concept of 'making available' environmental information as provided for in r.8(1) should be construed.

38. The Commissioner's position is that 'making available' should be construed narrowly so as to allow authorities to take into account only those costs that are incurred after the particular requested information has been located, retrieved and put into a condition where it can be disclosed to the applicant. On this construction, public authorities are entitled to take into account disbursements, i.e. the information "transfer costs", but are not entitled to take into account the time spent or the costs incurred in locating, retrieving and redacting information, i.e. the "administrative costs".

39. The Council's position is that the terms of r.8 EIR, consistent with the Directive, permit charges to be levied but require that such a charge must not exceed a reasonable amount and that, subject to that

consideration, the words “making the information available” in r.8(1) EIR do not import any restriction on the type of fees that may be levied.

40. The APPS Claimants agree in the main with the Commissioner, but submit that Article 5(2) of the Directive and r.8(3) EIR should not be construed in such a way that they preclude recovery for charges for location and retrieval in all cases. They submit that such charges may be recoverable in some cases, for example where the local authority is asked to provide an official report setting out answers to some or all of the CON29R questions, but not where the applicant has asked to be allowed to inspect the registers of the “raw data” (in this case the disputed information). They submit that it would be contrary to the purpose and wording of the Directive, which seeks to guarantee effective access to environmental information, to impose a liability on members of the public to pay the costs incurred by the Council solely as a result of the fact that its current storage and access facilities do not permit inspection of all the disputed information, or to impose a charge for providing a report based on that information as a service which has not been requested.

41. There is no Tribunal authority or other case law directly relevant to the issue under consideration. All parties made reference to the decision of a differently constituted panel of this Tribunal in *Markinson v Information Commissioner* (EA/2005/0014). This decision is not binding on us and has been referred to because of the apparent reliance by the Commissioner in his Decision Notices, a position not sustained during the appeal before us. We consider that there is little assistance to be gained from this decision. The case concerned information that had been available for inspection, free of charge. The requester wanted to take copies away with him and the local authority imposed a charge of £6.50. As the costs of locating and retrieving information should be disregarded for the purpose of making it

available for inspection, the Tribunal decided that it is not open to a public authority to regard it as reasonable to include those costs in the cost of copying that information. The Tribunal decided that the charge of £6.50 was therefore unreasonable and the local authority was entitled to charge for disbursements (such as printing, photocopying and postage) only.

42. We agree with the Council that the issue of scope of charges requires to be treated as one of principle.

43. In our consideration of the case, we looked at the wording of the original requests for information. Both requests were made in writing, pursuant to r.5 (1) EIR, and were requests to examine "all the information which the Council holds which will enable us to complete and/or answer the questions in the form CON29R" (emphasis added) in respect of a single identified property.

44. It is significant to note that each request was for information that would enable the requester to do a particular task, namely, complete the form CON29R. In other words, the request was for the raw data. It was not a request for the completed CON29R form, or for answers to the CON29R. It was clear to us from the evidence of Mr Moore that the Council chose to treat such a request as a request for the "standard CON29R" search. The Council's standard form, appended to his first witness statement, suggests that in addition to the usual categories of property information in the CON29R specific questions could also be posed as an option. This also demonstrates that the Council does not allow for any alternative method for a request to be made for this type of property search data distinct from the standard CON29R search report.

45. Each party sought to draw support for the position they advanced by reference to the Convention, the Directive and both European and domestic case law.

The statutory framework

46. The principles in respect of the effect of the Convention and the Directive on the interpretation of the EIR were common ground:

47. The underlying purpose of the Directive is set out in recital 1:

> *"Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually to a better environment."*

48. "Environmental information" is defined very widely in the Directive and reproduced in r.2 (1) EIR. There is no dispute in this case that all the disputed information is environmental information.

49. Ms Grey, for the Council, submitted that in order to decide what 'making available" means in r.8(1) EIR, it is necessary to examine the underpinning legislation and some relevant case law. She took us first to Articles 3 and 5 of the original 1990 Directive:

> *(3) "Member States shall ensure that public authorities are required to make available information relating to the environment to any natural or legal person at his request and without his having to prove an interest."*
>
> (5) "*Member States may make a charge for supplying the information, but such charge may not exceed a reasonable cost.*

50. We were then taken to Article 4(8) of the Convention:

> *"Each Party may allow its public authorities to make a charge for supplying information, but such charge may not exceed a reasonable amount."* …

51. Ms Grey submitted that although the Convention reflects "transparency" and "publication" requirements, there is no clarification in respect of the "reasonable amount" of any charge imposed for supplying information, and no further assistance could be found in the implementation guidance to the Convention. She also suggested that the last line of the passage dealing with charges in the implementation guidance - *"To ensure that financial barriers are not an impediment to access to information, and every person can afford information, public authorities often waive fee requirements for individuals and non-governmental organisations"* - may require a public authority to take into account the identity of a requester to assess whether a charge would be imposed or not.

52. We disagree that there is no further assistance to be gained from the implementation guidance. The lines immediately above the extract quoted above refer to the schedule of charges and the fact that some countries provide clear criteria of when charges can be levied. *"For example, a country may decide not to levy charges for copies of a limited number of pages, for electronic transmissions, for non-commercial use or for limited postage."*

53. The guidance provided is in respect of charging, and specifically gives examples of when, and which, charges might be appropriately waived. We consider that the fact that the only types of charges referred to in the implementation guidance are for disbursement expenses (or "transfer costs" as described by Ms Proops) suggests that there was no expectation that costs for staff time spent would form part of any such charge.

54. The Convention was implemented by the Directive, and we were invited to examine the Recitals which foreshadow the requirements of the Directive itself and the Articles of the Directive.

55. Recital 18 to the Directive.

> *"(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. ...*

56. Ms Grey submitted that the phrase "actual costs" is most naturally understood in opposition or contrast to the provision which follows in the Recital:

> *"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 the information, a market-based charge is considered to be reasonable."*

57. She submitted that as this governs the circumstances in which the public authority may make a charge which enables it to make a profit, the "actual costs" comprise any cost incurred by the public authority in responding to a request.

58. Article 5 itself is headed "Charges". Article 5(1) provides that examination in situ of public registers or lists established and maintained as mentioned in Article 3(5) shall be free of charge. Article 5(2) provides that public authorities may make a charge for supplying any environmental information but such charge shall not exceed a reasonable amount. Article 5(3) provides that where charges are made, public authorities shall publish and make available a schedule of such charges as well as information about the circumstances in which a charge may be levied or waived.

59. Ms Grey submitted that the Directive left open the basis upon which a public authority was to approach the issue of what was a reasonable amount to charge.

60. Ms Grey submitted that r.8(3) EIR requires a public authority to ensure that charges do not exceed an amount which it is "satisfied" is a reasonable amount and, in setting a reasonable fee, 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 recognition by the Directive that a reasonable fee can be levied implies, she submitted, that there is a balance to be struck between the interests of individual members of the public in accessing information and that of the broader public who as taxpayers meet the costs which result.

61. She further submitted that provided it does not thwart the purpose of the Directive, the imposition of a fee to offset the public costs in meeting the request is reasonable; if the Directive did not provide for it specifically, it would be wrong to impose those costs on a public authority.

62. R.8 EIR reflects the articles of the Directive concerning charging, although r.8(1) provides that the public authority may charge the applicant for making the information available. It does not use the word "supply" which appears in the Directive.

63. Each party also sought to draw support for their case from the only European case that deals with article 5, *Commission of the European Communities v Federal Republic of Germany* Case C-217/97 ('*Commission v Germany*'). We were asked to examine in some detail both the Opinion of the Advocate General and the Decision itself.

Some time was spent during submissions from all parties on different nuances in and interpretations of the language used in the Advocate General's Opinion and by the Court in its Decision.

64. The case concerned the earlier Directive and the judgment was delivered after the Convention was signed but predates the 2003 Directive. It is conceded that, since the scope of the litigation brought by the Commission was to establish whether the Directive had been correctly transposed into German law, the Court was not required to adjudicate upon the tariff of charges that had been established.

65. Ms Grey submitted that the guidance we can draw from *Commission v Germany* is that, in a situation such as the case before us where inspection is reasonably refused: -

a) Charges must not have the effect of restricting access;
b) Member States must not pass on the entire amount of the costs, "in particular indirect ones", actually incurred from the State budget in conducting an information search"; but
c) Charges including an element for staff costs were not, per se, unreasonable or prohibited; and
d) Provisions allowing charges to be reduced when (inter alia) the information "had no economic value" are not objectionable.

66. Ms Grey relied particularly on paragraphs 46 to 48 of the Court's Decision. It states: -

> *"**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** As the Advocate General observed in paragraph 23 of his Opinion, the purpose of the directive is to confer a right on individuals which assures them 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."*

67. We were asked to consider these paragraphs against paragraph 23 of the Attorney General's Opinion:

"23. The notion of what is 'reasonable' must in my view be interpreted in the light of the general scheme and purpose of the Directive, and of the context in which it is used. As already noted, the Directive proceeds upon the basis that access to environmental information will 'improve environmental protection.' Its primary objective is 'to ensure freedom of access to..[such] information', and it seeks to achieve this end by obliging the Member States to ensure such information is effectively 'made available…to any natural or legal person at his request without his having to prove an interest'. In the light of this objective and the means chosen to achieve it, the question of whether the charges for the supply of the information are 'reasonable' must be judged from the

> *perspective of the member of the public requesting the information, rather than from that of the public authority. While it does not expressly preclude a Member State levying a charge for the time and effort of public officials, such an approach seems to me to be fundamentally incompatible with the principal features of the Directive."*

68. Ms Grey submitted that the choice of words used by the Court in paragraph 47 of its Decision illustrates that although the Court noted the observations of the Attorney General in paragraph 23 of his Opinion, this was confined to the purpose of the Directive. The Court declined to go further and accept or endorse the view expressed in the final sentence of paragraph 23 of the Attorney General's Opinion.

69. Ms Grey submitted that paragraph 48 of the Court's Decision required a balancing of the interests of those seeking access to information against the interests of the public authority. She submitted that the construction of the language in paragraph 48 did not preclude recovery of any indirect costs (such as the cost of time spent by public officials), that it permitted the recovery of some but not all of those costs. This interpretation, she submitted, was endorsed by the reasoning in paragraph 53 of the Decision where there was a "ringing failure to endorse the Attorney General's view that condemns charges", and since the Court declined to say that indirect costs were not recoverable the Tribunal could assume that the Court considered that they were (at least in part) recoverable.

70. Ms Proops and Ms Lee, who also took us in detail through the relevant passages in the Opinion and Decision, submitted that the Council is not assisted by *Commissioner v Germany* as the case was not concerned per se with the question of what type of costs could properly be taken into account when determining what charge to impose. Instead, it was concerned with the question of whether the German equivalent to the

EIR, which did not in terms provide that charges should be limited to a reasonable amount, was incompatible with Article 5(2) of the Directive.

71. Ms Proops' analysis of the language in paragraph 48 of the Decision is that a public authority is not entitled to pass on all the costs of responding to a request and that the costs entailed in searching for requested information constitute indirect costs which should not be passed on to the applicant.

72. Ms Proops' interpretation of paragraphs 47 and 48 is that the Court did go further than Ms Grey would allow and that the Court agreed with the Attorney General's conclusion in paragraph 23 of his Opinion. In her submission, the use of the word "consequently" at the start of paragraph 48 must be interpreted to mean "as a consequence of our accepting the analysis in paragraph 23 of the Opinion." She submitted that, even if the words were ambiguous, the interpretation advanced by Ms Grey would not fit with the subsequent paragraphs of the Decision. The two possible interpretations of paragraph 48 were either that a public authority cannot pass on the entire cost, and in particular a public authority cannot pass on *any* of the indirect costs, or that a public authority cannot pass on the entire cost and in particular not *all* of the indirect costs (in other words it could pass on some of the indirect costs of locating and retrieving the information requested).

73. Ms Proops then relied on paragraph 57 of the Decision (in which the Court was considering the second part of the case which concerned levying a charge for the refusal of a request):

> *"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 associated with a request for information."*

74. Ms Proops submitted that this is a freestanding principle and plainly means that public authorities are not permitted to make a charge for

the administrative tasks performed by staff associated with a request for information.

75. Ms Grey asked us to look back in the Decision to draw assistance for what the Court meant by the term 'administrative tasks'. She sought to draw a distinction between the administrative tasks associated with retrieving and locating information to make the information available, and those tasks merely connected with the handling of and dealing with the request. She suggested that we could infer that there were missing words in paragraph 57 and that it should be read as:

> *"It should be noted, first, that Article 5 of the directive permits Member States to make a charge for [the administrative acts for] 'supplying' information and not for the administrative tasks associated with a request for information."*

76. We do not think that it is necessary to "read in" these words in order to give meaning to the relevant paragraph of the Decision. The meaning is clear: The costs that can be imposed relate to the act of supplying information in order to comply with a request, not to the act of identifying or retrieving or collating the relevant material in the first place.

77. In our opinion, in order to make a decision whether or how to comply with a request, the 'administrative tasks' associated with the request will, in the majority of cases, be the same. We acknowledge that there may be some administrative tasks involved in the handling of and dealing with a request that may be relevant to the manifestly unreasonable exception. But in respect of any request for information, whether under EIR or FOIA, a public authority will have to undertake the same evaluative work to establish what, if any, information it holds that falls within the scope of the request and the amount of time and effort it may have to incur to respond to it. We repeat what was said in the decision of the Upper Tribunal in *Kirklees Council v Information*

Commissioner and PALI Ltd [2011] UKUT 104 (AAC) ('*Kirklees*') at paragraph 82; "There is a measure of protection in each set of legislation against unreasonable administrative or cost burdens in complying with a statutory request but that is achieved by express provisions that limit or alleviate the authority's obligation to comply with the request (r.12(4) EIR and s. 14 FOIA)".

78. We consider that the relevance of *Kirklees* to the present case is as follows. *Kirklees* confirms that a public authority may not impose any charge or recover any cost for making information available for inspection. It would be wrong, in principle and in light of the purpose of the Directive, that a public authority which has not done the work necessary to put in place systems so that the information is in a form in which it can be inspected, free of charge, to be able to pass on to a requester the costs of locating and retrieving the information to put it into a format in which it can be made available.

79. Ms Grey suggested that further support for the Council's position could be found elsewhere, albeit from sources that are not binding. The Code of Practice on the discharge of the obligations of public authorities under the EIR, issued in February 2005, provides in Section V on "charges": "*When making a charge, whether for information that is proactively disseminated or provided on request, the charge must not exceed the cost of producing the information unless that public authority is one entitled to levy a market-based charge for the information, such as a trading fund.*"

80. Ms Grey submitted that this does not appear to preclude indirect costs being included and that the reference (in paragraph 29 of the Code) to "the charge per unit of work" can only mean staff time.

81. Ms Grey also sought to draw support from the Defra Guidance: 'Charging for Environmental information under the Environmental

Information Regulations 2004". In section 6 ("What is a reasonable amount") it provides:

> *However, where a charge may be made for making environmental information available pursuant to Regulation 8(1) (i.e. where the public authority is sending electronic or hard-copy documents to the applicant) it will be up to a public authority to determine what a reasonable amount should be. This may, depending on the circumstances, include the cost of locating, retrieving and extracting information; the cost of communicating that information to the applicant; and staff time spent on carrying out the activities related to supplying the information.*

82. The Tribunal notes that this is inconsistent with Defra's published "Environmental Information Frequently Asked Questions" guidance which has not been updated since February 2007, and which appears to be available alongside the guidance quoted above.

83. As in *Kirklees*, Defra declined to participate in this appeal and so we do not have the advantage of any assistance it could offer.

84. Ms Proops for the Commissioner regards Defra's guidance as wrong on this point.

85. We do not consider that we properly can draw any additional support for the Council's position from this conflicting guidance, which it is conceded is only one piece of guidance and cannot be regarded as having any binding effect.

86. The Council's witnesses conceded that the fee sought to impose on the applicants was arrived at by reference to the time taken to determine the answers to all the CON29R questions and did not reflect or take into account the fact that some information could be accessed free of charge. Ms Grey suggested that, as part of our determination, we

might give guidance in respect of whether there should be alternative fee arrangements to cover different factual scenarios, and on how these fees can be structured. We consider that this should be determined on a case-by-case basis, and with reference to what is reasonable in the circumstances.

87. The Commissioner disagrees with the Council's interpretation of the Directive and the EIR and submits that a narrower approach to the meaning of 'supplying' (or 'producing' or 'making available') is to be preferred.

88. Ms Proops submitted that this is because a narrow approach:

(i) effectively limits the costs which the authority can take into account when deciding what charges are to be imposed, and, accordingly

(ii) limits the risk that authorities will impose prohibitively high charges in individual cases that effectively thwart the objectives of the legislation.

89. She submitted that allowing public authorities to impose charges taking into account all the costs of responding to a request would inevitably operate as a disincentive for public authorities to discharge their obligation under r.4(1) EIR, implementing Article 7(1) of the Directive, to disseminate environmental information. This is because if public authorities were able to recoup all their costs in responding to a request in circumstances where the information was stored in such a way as to preclude inspection and therefore required an exercise in location and retrieval, there would be no or limited incentive to improve and update their systems to achieve improved levels of dissemination. This was, she submitted, at odds with the purpose of the legislation to

achieve the widest possible dissemination of environmental information.

90. The evidence from the Council's witnesses was to the effect that there had been no complaints by any applicants about the "modest" charge imposed and that there was therefore no basis to suggest that access to environmental information had been "thwarted". We were not attracted to this line of reasoning. We agree with Ms Lee for the APPs Claimants that the fact that applicants have paid the fee (without any choice) cannot be regarded as a measure of their agreement to or satisfaction with the level of the fee.

91. Ms Proops submitted that there was no risk of public authorities being exposed to excessive resource burdens because it was possible that a request could, in appropriate cases, be refused as manifestly unreasonable under r.12(4) EIR on the grounds of the cost of complying. Ms Grey accepted this proposition, however if the cost involved in a single request did not exceed the appropriate level the Council would not be able to avail itself of that course of action.

92. Ms Proops criticised the Council's wider interpretation of the costs of "making information available" as leading to the absurdity that individuals who wish to access environmental information under EIR may be subject to more onerous charges than individuals who wish to access other types of information under the FOIA. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 provide that public authorities cannot charge under the FOIA for locating, retrieving or redacting information. Ms Proops submitted that it is highly unlikely that Parliament would have intended that the position should be different in another access regime such as EIR.

93. In support, she relied upon recital 24 to the Directive:

> *(24) The provisions of this Directive shall not affect the right of a Member State to maintain or introduce measures providing for broader access to information than required by this Directive.*

94. Ms Proops submitted that, in view of this permissive approach, it was highly unlikely that Parliament should take a more restrictive approach to access to environmental information compared to other information accessed under the FOIA access regime.

95. Ms Grey discouraged us from drawing any assistance from the FOIA access regime. She submitted that the decision by Parliament to make access to information more generous under the FOIA has no relevance to the interpretation of the EIR, which has to be consistent with the construction of its underlying European legislation.

Our decision

96. The purpose of the Directive is to increase public access to environmental information and to make available and disseminate environmental information to the general public 'to the widest extent possible'.

97. It follows that any approach to the interpretation of charges in respect of 'supplying' or 'producing' or 'making available' must be narrow in order to be consistent with these aims.

98. For the reasons given above, we agree with the Commissioner and the APPS Claimants that, having regard to the provisions and underlying aims of the legislation, the cost of 'making available' environmental information should be construed narrowly so as to apply only to the cost associated with the process of supplying (i.e. transferring) the information to an applicant once the requested information has been located, retrieved and put in disclosable form. Any other interpretation would have significant adverse consequences to those wishing to access environmental information.

99. Where environmental information is not available for inspection, public authorities are not entitled to pass on to an applicant the costs associated with retrieving the information and putting it in an inspectable form. Public authorities may make charges for providing or supplying the information to the applicant, i.e. the actual transfer disbursement cost. For avoidance of doubt, this means that they cannot charge for the cost of administrative tasks or administrative acts which may include, but are not necessarily limited to, the time spent by staff in locating, retrieving or redacting the information requested. Any service which is offered by a public authority involving the supply of information which has been checked and verified by its staff (such as the CON29R property search report in this case), and the charges levied by it for such a service, stands separate from its obligations under public access regimes such as the FOIA and EIR and the limited charges that may be levied under those regimes.

Issue 2 –the Test of Reasonableness.

100. In light of our decision in respect of Issue 1 (the scope of the charge) it is unnecessary to reach a decision in respect of the remaining issues.

101. However, we agree with Ms Grey that the approach to be taken in respect of whether a charge was reasonable should be based on public law principles rather than an objective approach.

Issues 3 and 4 – the Reasonableness of the Charge and Calculation Issues

102. If we are wrong in respect of Issue 1 and a public authority is entitled to charge a reasonable amount which is not limited to direct disbursement costs and may include indirect costs such as staff time, we consider that the fee charged by the Council in this case was not reasonable for the following reasons:

i) It included the cost of providing all the answers in the CON29R, not just the cost of providing the data relating to those questions that could not be answered from information already available or by inspection free of charge.

ii) It was calculated by reference to matters that ought not to be taken into account, including the nature of the information, the motives and assumed means of the applicants, the use to which the information would be put, and the fact that no objections had been received to the CON29R fee.

iii) It was calculated by reference to the Local Authorities (England) (Charges for Property Searches) Regulations 2008 (" the CPSR"). We agree with the Commissioner that the charging provisions of the CPSR must be treated as disapplied in the context of charging under r.8 EIR. R.5(6) EIR provides that any enactment or rule of law that would prevent the disclosure of information in accordance with these regulations shall not apply. Even in the absence of r.5 (6) EIR, r.4 (2) CPSR itself disapplies the charging provisions of the CPSR if a local authority is exercising powers to impose a charge precluded under other legislation (e.g. the EIR).

iv) Although Mr Moore said in evidence that the charge was modified to take account of EIR, he was unable to provide any evidence to this effect or to explain how this was actually done;

v) It would appear that the Council follows a "one size fits all" approach, charging the full fee for providing a CON29R search and failing to allow for any flexibility to account for cases where the request is not for the CON29R "service" but for environmental information (and made under EIR) which is necessary to complete a property search.

vi) The Council has also elected to take this approach without considering whether some of the information could be provided in a different way and free of charge or at a cheaper rate and without the time and cost of additional analysis by its staff;

vii) It is irrelevant that the Council answers 85% of CON29R requests within 5 days or that customers may be dissatisfied if they had to wait 20 days which is the longest period within which a public authority must respond to a request under EIR. We consider this to be a misconceived approach: i) it is a matter for customers to choose whether they wish to request a CON29R service or whether they wish to avail themselves of their rights under EIR; ii) there is no evidence that the Council would take 20 days to respond to an EIR request. We are indeed concerned that this suggests that, for commercial reasons, the Council would treat an EIR request as a matter of less importance than a CON29R request.

viii) The time spent (and therefore the charge levied) to answer the questions on the CON29R includes both an element of checking and verifying information and an analysis of the information to generate the answer to the specific CON29R enquiry. We agree with the Commissioner that there is a duty on public authorities to ensure that the environmental information they hold is accurate, complete and up to date (under r. 5(4) EIR, implementing Article 8(1) of the Directive) and that this cost should not be passed on to applicants.

ix) The fact that the charge may be viewed by some as a "modest" fee in the context of the values involved with conveyancing transactions is irrelevant. We agree with Ms Lee that the Council cannot justify its charge on the basis that, in the context of a property transaction, the charge of £22.50 is a small amount.

103. The complaint against the Council in this case arises, in part, because the Council's charge includes the time taken to answer all the CON29R questions and does not reflect the fact that some information could be accessed free of charge.

104. Ms Howarth admitted that it would be possible to print out or email a screen shot of some of the information. She qualified this by explaining that it would not be "cheaper or easier" and she focused on the practical difficulties which the Council could face, such as having to walk to shared printers located in different places, collating information, exceeding email size restrictions or triggering further requests or questions from applicants.

105. The implementation of the EIR (and indeed the FOIA) inevitably causes financial consequences for public authorities. These costs include the costs that have to be incurred to meet their obligations under EIR, such as the duty to progressively make environmental information available to the public by electronic means that are reasonably accessible (r.4(1)(a) EIR).

106. The fact that the Council has addressed its obligations with limited haste should not permit it to gain a financial advantage compared with other public authorities that may have invested in systems of public dissemination or to gain a financial advantage over requesters who exercise their rights under EIR.

Issue 5 – Publication Issues

107. The Council submits that what it did publish complied in full with its obligations under r.8(8) EIR.

108. R.8(8) provides as follows:

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.

109. The Council submitted that it had complied with the obligations imposed on it under r.8(8). The schedule of fees provided to us with Mr Moore's first statement was published on the Council's website and at the Council's offices, and was sent out by post to firms of solicitors and search agents.

110. Ms Grey accepted that the schedule does not set out when charges would be waived, but as the evidence was that there were no circumstances in which the charge would ever be waived there is therefore nothing that the Council could publish.

111. Ms Grey criticised the Commissioner's own guidance which fails to inform public authorities of the extent of its obligations under r.8(8) EIR. She argued that as the Council complied with the Commissioner's guidance, it has accordingly complied with its obligation under EIR.

112. We do not consider that this approach by the Council is in line with purpose of the Directive to make environmental information accessible. The Guidance to the Convention makes it clear that Member States need to be alert to the limited means of some applicants and it follows that there is an important obligation to consider specific circumstances where a charge may or will be waived. It is inconceivable that the Council will not, under any circumstances, waive a charge for providing environmental information.

113. Even if the Council did not comply with its publication obligations under r.8(8) EIR, Ms Grey submitted that the failure is not one that results in the Council losing the ability to charge a fee.

114. She relied on the judgment of Lord Steyn in *R v Soneji and another* [2005] UKHL 49 where, after reviewing the relevant case law on the approach to be taken to the consequences of failure to comply with a statutory duty, his Lordship said in paragraph 23:

> *"having reviewed the issue in some detail I am in respectful agreement with the Australian High Court that the rigid mandatory and directory distinction, and its many artificial refinements, have outlived their usefulness. Instead, as held in Attorney General's Reference (No 3 of 1999) the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity."*

115. Ms Grey submitted that, in this case, there was "minimal" non-compliance because the Council did not publish any information about the circumstances in which a charge may be waived (because none existed). As a result, in reality there was no prejudice to anyone because there was no potential benefit of any waiver of a charge.

116. We disagree that there had been only "minimal" non-compliance or (for the reasons set out further below) that the failure to publish information about the waiver of charges was the only non-compliant aspect of the Council's publication duty.

117. Ms Lee argued that the onus is on the Council to publish information in respect of all the options available to applicants so that they can make an informed decision, for example inspecting information at no charge, or obtaining a copy of certain items of information at certain charges, or to receive the full CON29R "service" at a charge which includes staff time.

118. While we do not consider that r.8(8) EIR requires the Council to publish all the information in respect of the various options, the Council is in breach of r.8(8) as it does not publish any basis for the calculation. This is particularly relevant in this case where the Council has conceded that the charge it imposed on the applicants was arrived at by reference to the collective time taken to answer all the CON29R

questions and did not reflect or take into account the fact that some information could be accessed free of charge.

119. There is also an important public interest consideration: 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. We agree with Ms Proops that 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).

Conclusion and remedy

120. For the reasons set out above, we refuse this Appeal.

121. The Council was not entitled to levy a charge of £22.50 to make the disputed information available and it breached r.8(3) by imposing an unreasonable charge.

122. The Council must make the disputed information available to the applicants and any charge levied by it must be reasonable and limited to the direct transfer costs of making the information available, provided that a schedule of such costs has been published by it in accordance with r.8(8) EIR.

123. Our decision is unanimous.

Other matters

124. During the course of the hearing of this appeal, we were invited by the Commissioner to make a reference to the Court of Justice of the European Union in respect of whether a public authority is entitled to impose a charge under r.8 EIR calculated on the basis of (or including, in part) the costs of staff time spent locating, retrieving, checking and collating the information or whether the charge must be limited to the costs of disbursements. We were not strongly urged to do so by the Commissioner, and neither the Council nor the APPS Claimants appeared to support this course of action.

125. The UK SC Practice Direction 11 was provided to us. Article 267 (ex 234) of the Treaty on the Functioning of the European Union provides:

> *The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:*
>
> *(a) the interpretation of the Treaties;*
>
> *(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;*
>
> *Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.*

126. Ms Grey did not support the suggestion of referral but commented that if we took that course the reference could be expanded, as the Court might also be able to assist in respect of the effect of non-compliance with the publication requirement on the ability of a public authority to charge a fee.

127. As we have been able to reach a decision in this case based on our analysis of the relevant law, the evidence given and the submissions made on behalf of the parties, we do not consider that a decision by

the Court of Justice of the European Union on any question is necessary to enable us to give judgment. .

Signed

Annabel Pilling
Judge

22 March 2013

IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL (INFORMATION RIGHTS)
UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

EA/2012/0020 and 21

BETWEEN:

LEEDS CITY COUNCIL

Appellant

And

THE INFORMATION COMMISSIONER

Respondent

And

THE APPS CLAIMANTS

Second Respondent

DECISION ON APPLICATION FOR PERMISSION TO APPEAL

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1. The Appellant council applies under Rule 42(1) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 for permission to appeal to the Upper Tribunal against a decision of this Tribunal, dated 22 March 2013, refusing their linked appeals against two Decision Notice issued by the Information Commissioner (the 'Commissioner') both dated 19 December 2011.

2. The central issue in the appeal was whether the Commissioner reached the wrong conclusion when, in each case, he decided that Leeds City Council ("the Council") had not been entitled under r. 8 Environmental Information Regulations 2004 ("the EIR") lawfully to

impose a charge of £22.50 for making particular requested environmental information available to applicants.

3. The right to appeal against a decision of the Tribunal is restricted to those cases which raise a point of law. Under Rule 43(1) of the Rules I am required to consider, taking into account the overriding objective in Rule 2, whether to review the decision in accordance with Rule 44. I have taken account of the recent discovery of the existence of the "Report from the Commission to the Council and the European Parliament on the experience gained in the application of Council Directive 90/313/EEC of 7 June 1990, on Freedom of Access to Information on the Environment". I do not consider that this Report alone would be sufficient to interfere with the decision of this Tribunal. In this case, I am not of the opinion that I should review the decision; the Appellant council has identified a number of matters which could amount to errors of law and I consider that these should be considered by the Upper Tribunal.

4. I am of the opinion that the Application for Permission to Appeal does raise points of law, including the correct interpretation of European legislation, and which are of significant public importance. Permission to appeal is therefore granted.

Annabel Pilling
Judge

3 May 2013