

Information Tribunal

Appeal Number: EA/2005/0014
FER0061168

FREEDOM OF INFORMATION ACT 2000

Heard at Procession House, London
On 21 and 22 February 2006
Prepared 14 March 2006

Decision Promulgated

28th March 2006

Before

INFORMATION TRIBUNAL DEPUTY CHAIRMAN

CHRIS RYAN

LAY MEMBERS

JENNI THOMSON AND HENRY FITZHUGH

Between

DAVID MARKINSON

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Representation:

For the Appellant: Mr P Michaels
For the Respondent: Mr T Pitt-Payne

DECISION

We have decided, for the reasons set out below, that we should issue a Decision Notice, in substitution for the Commissioner's Decision Notice dated 20 July 2005, in the form set out in paragraphs 41 - 45 below.

Reasons for Decision

Background of the Appeal

- 1 On 25 January 2005 the Appellant, Mr David Markinson, inspected certain papers at the offices of the Kings Lynn and West Norfolk Borough Council (“the Council”). The papers related to the original planning application for his house and he requested photocopies of some of them. A Council representative drew his attention to its printed leaflet of fees and charges, under which it charged £6 for each building control or planning decision notice and 50p for each other photocopy sheet contained in a planning file. Mr Markinson has given evidence to us to the effect that he found the documents in question complex and difficult to follow. He therefore wished to take copies away with him for review at home, but found that the level of the Council’s charges meant that he could not afford to take copies of all those that he wanted.
- 2 On the same day Mr Markinson wrote to the Information Commissioner (“the Commissioner”) complaining about the Council’s charges. At this stage Mr Markinson believed that his complaint fell under the Freedom of Information Act 2000 (“FOIA”). Surprisingly, the Council’s Senior Support and Information Officer, in correspondence with Mr Markinson at the time, also sought to justify the Council’s stance by reference to the FOIA. However, it is now common ground that the documents in question fell within the meaning of “environmental information” and that their availability to the public had therefore to be judged under the Environmental Information Regulations 2004 (“the Regulations”) and not the FOIA.
- 3 For the purposes of this appeal the relevant provisions of the Regulations are paragraphs (1) to (3) of Regulation 8. They read:

“(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

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(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.”

- 4 The Council was therefore required to permit Mr Markinson to inspect the material in question at its office free of charge and was entitled to charge him for copies at rates that satisfied the reasonableness test set out in paragraph (3).
- 5 Regulation 18 provides that the enforcement and appeals provisions of the FOIA are to apply and sets out the manner in which the detailed provisions of the FOIA should be modified for this purpose. The effect is that, in dealing with Mr Markinson’s complaint, the Commissioner was required to apply section 50(1) of the FOIA and make a decision whether, in any specified respect, Mr Markinson’s request for copies had been dealt with in accordance with Regulation 8(3). His conclusion on that issue was set out, in his Decision Notice dated 20 July 2005, in the following terms:

“The Council is satisfied that the charge made for the provision of copies of the information requested is a reasonable amount in accordance with paragraph 8(3). Paragraph 8(3) of Part 2 of the Regulations states that any charge made by a public authority to make environmental information available ‘shall not exceed an amount which the public authority is satisfied is a reasonable amount.’”

On that basis he appeared to have satisfied himself that the Council had complied with Regulation 8(3) and he stated that he did not require any further action to be taken by the Council.

- 6 The Commissioner sent a copy of the Decision Notice to Mr Markinson under cover of a letter, dated 21 July 2005, in which he expanded on his reasons for reaching his decision. He wrote:

“As explained in the Decision Notice, the test of a reasonable charge under the Regulations is a subjective one in that the Council must satisfy itself that the charge for information does not exceed a reasonable amount. Whilst the Commissioner may have a different view from the Council as to what is reasonable, he may not substitute his view for that of the Council. In this case, the Commissioner accepts that the Council has satisfied itself that the charges do not exceed a reasonable amount. Therefore, his decision is that the Council has complied with the Regulations.”

The Investigation that led to the Decision Notice

- 7 In order to see how the Commissioner reached his decision as to what the correct test was, and how he applied it, it is necessary to review the history of his investigation, as it appears from the contemporaneous documentation made available to us and the evidence given by Mr Graham Smith. Mr Smith is a Deputy Commissioner in the office of the Commissioner. He was responsible for the decision set out in the Decision Notice and for supervising the Case Officer who was directly responsible for the investigations that were made.
- 8 On 7 February 2005 the Commissioner’s case officer wrote to the Council asking for the basis upon which the Council arrived at the charges which formed the basis of Mr Markinson’s complaint. The Council’s response took the form of a letter dated 10 February written by its Senior Support and Information Manager, Mr C Marshall. The relevant part of the letter read:

“Mr Markinson visited the Council’s Planning Department in order to obtain photocopies of the original planning application for his house. The fees and charges applied to the provision of these documents are clearly stated in the reception area of the planning department. I have been informed that the £6.00 per document charge was derived from referring to other local authorities charging structures in an exercise carried out approximately three years ago. The fee is deemed to be a reasonable charge and is indeed

neither the most or least expensive charge of the other local authorities contacted in that exercise. The charge is calculated taking in to account the officer time in locating and retrieval of the documentation, officer time in copying it and costs such as paper, toner and other on costs.”

- 9 On 7 March 2005 the case officer responded to that information by a letter in which, having quoted the material part of Regulation 8(3), he wrote:

“After due consideration, the ICO is of the opinion that it is not reasonable for authorities to pass on their full costs of responding to a request to an applicant. Furthermore, in considering a charge, the authority should have regard for what is reasonable from the applicant’s point of view as well as the authority’s own point of view.

“Our view is that £6.00 for a black and white A4 photocopy is an excessive charge. If, because of the documents in question, there is justification for higher charges, then please let us know. “

- 10 On 1 April 2005 the Council published a revised fee schedule under which, notwithstanding the Commissioner’s criticism of the charge structure, the charge for a copy planning/building control decision was actually increased from £6 to £6.50. The charge of 50p per sheet for other copy documentation was unchanged. By that date the Council had not replied to the Commissioner’s letter of 7 March, despite a progress chaser, but on 4 April Mr Marshall sent an email on its behalf stating that the Council’s Chief Executive had called for a report to the Council’s management team on the issue and that it was likely to be submitted to the management team on 12 April 2005.
- 11 On 4 May 2005 the Council wrote to the Commissioner reporting that its Management Team had considered the question of copy charges at a meeting held that day and had “determined that the fee for the production of photocopies of documentation (excluding Planning/Building Control Decisions) is to be reduced with immediate effect from the £6.50 (fee effective from 1 April 2005) to 50 pence per sheet”. We were provided with a copy of a document which evidently played a part in the Council reaching that decision. It was dated 22 April 2005 and was entitled “Report to Management Team - Photocopying Charges for the production of

information to the General Public". It was apparently prepared by Mr Marshall. We will refer to this document as "The Report to Management".

- 12 Although no one from the Council gave evidence before us, it is evident that the Report to Management formed at least part of the material that was before the Council's Management Team when it made its decision on 4 May 2005 to introduce this second change to the charging structure. It stated that it had been prepared in response to questions raised by the Commissioner and summarised the exchanges between the Council and the Commissioner leading up to, and including, the Commissioner's letter of 7 March. It then summarised the charge structure that was in place at the time and recorded the writer's belief that the relevant charges were legally justified. The next section, headed "Issues with charging" started by stressing the importance of any charging structure being clear, consistent, adequately publicised and compatible with relevant law. It then contained these passages:

"If the fee is reduced then obviously this would have an impact on revenue. Also a fee reduction may result in increased workload for administrative staff in Planning Services as more copies of information may be requested.

"It is envisaged that planning applications should be available via the West Norfolk website by the end of 2005, being available to view free of charge and therefore print at no cost to the Council. This will have a major impact on the revenue derived from the production of photocopies of documentation and will reduce the impact on administrative staff for the production of photocopies.

"Therefore due to the decreased fee production in the future and the Information Commissioner's offices view that the charge is unreasonable I question whether the fee should be reduced. The draft fees and charges booklet for 2005/2006 states under General Administration, the supply of miscellaneous information is, Admin fee of £10 plus 50 pence cost per sheet (photocopy). In order to have a more corporate approach to the production of photocopies should it be the same for all service areas? Indeed the admin fee is unlawful under FOI for any request which falls within that regime.

"If it is decided the fee for a photocopy of an A4 sheet was 50 pence then we will also need to address the fee for a Copy of a Planning / Building Control

Decision (per decision) which is currently £6.50. Although these may be contained within the same Planning File I would advocate that due to the legal significance of these documents the £6.50 could be maintained.

“The Department for Constitutional Affairs (DCA) has issued guidance in relation to the fees regulations. They have suggested that authorities should charge no more than 5 to 10 pence per sheet for photocopying and printing. In addition they have suggested that no fee should be charged where the fee calculated would be less than £5 or £10. It must be noted that this is guidance only and that it has no direct legal force.”

- 13 The Report to Management then concludes by setting out the options available to the Council, which were said to be:
- (a) Maintaining the existing structure, with the risk of an adverse decision by the Commissioner;
 - (b) Harmonising all fees at 50p per sheet except for “Planning Permissions”, with the possible outcome said to be “Loss in revenue for Planning Services with possible short term increase in workload for administrative staff but more corporate approach to fee structure”;
 - (c) Harmonising all fees to 20p per sheet “in order to bring the fees more in line with DCA guidance”.

It is clear that the Council ultimately chose to adopt the second of these options.

- 14 As the reduction in charges announced in the Council’s letter of 4 May 2005 had excluded the categories of document that Mr Markinson was interested in, the effect of the decision (combined with the first change to the charging structure on 1 April 2005) was to actually increase the amount that he would be required to pay. Notwithstanding that fact, the Commissioner’s case officer wrote to Mr Markinson on 20 May 2005 asking him if he was satisfied with the new charge and, if so, whether he would wish to withdraw his complaint: This produced a not unexpected response from Mr Markinson, in a letter dated 1 June 2005, in which he wrote:

“I am afraid all the council has done is to say that their “new charge” is the same as the one they were charging before which was, is, and remains 50 pence for each sheet of paper copy. In other cases their charges are £6.50 per copy according to the letter to which you refer.”

On that basis, he said, he definitely did not wish to withdraw his complaint.

- 15 It is not entirely clear to us what further steps the Commissioner took in relation to Markinson’s complaint following that letter. Mr Graham Smith has said in his witness statement that the Commissioner’s case officer sent an email to Mr Marshall at the Council on 1 June to ask him to confirm that the Council was satisfied with the level of charge being made, following the 4 May review. However the documents provided to us in the agreed bundle do not contain a copy of any such communication. It appears that another complaint had been made to the Council on the same basis by an unnamed third party and that the Commissioner’s case officer wrote to Mr Marshall at the Council on that case on 1 June 2005. We have been provided with a copy of that document. It has been redacted in order to hide the identity of the other complainant. In that form it reads:

“After you informed me of the reduction in the price of photocopies to 50p, I wrote out to • to find out whether • was now satisfied that this new charge was in accordance with the Environmental Information Regulations 2004. • has replied stating that • is unhappy with the revised charge. Therefore I must make a decision on this matter and I will be issuing you with a decision notice in due course unless • • decides to withdrawn • complaint in the meantime.

In order to make this decision, could you please write to me stating that you are satisfied that 50p per photocopy is a reasonable charge. Could you also give me some further reasoning as to why you are charging £6.50 for a decision notice and £12.50 for a plan. I understood that you were dropping all your prices to 50p per copy.”

- 16 In connection with that case the Council responded by an email from Mr Marshall dated 2 June 2005 in these terms:

“The Council is satisfied that the 50 pence per photocopy is a reasonable charge. The £6.50 for a decision notice is justified by the legal significance of this document and you will find that many local authorities will have such a fee for the reproduction of this documentation, I also draw your attention to my letter of the 20 April 2005 when I explained how this was derived.

I look forward to hearing from you with the decision notice.”

It may be that the Commissioner considered that, having obtained from the Council confirmation that it considered the charges reasonable in relation to another, presumably comparable, case, it did not need to repeat the question in relation to Mr Markinson’s complaint. It is certainly clear from Mr Graham Smith’s witness statement that the Commissioner’s office proceeded to make the decision set out in the Decision Notice on the basis that the Council did believe that the £6.50 and the 50p charges were reasonable. We comment, in passing, that it would appear that at the stage when the Commissioner wrote to the Council on 7 March 2005 - see paragraph 9 above - his representatives were proceeding on the basis that the charges raised by the Council would only satisfy the requirements of Regulation 8(3) if the Commissioner was able to satisfy himself that they were reasonable, whereas by this stage they had moved to a position where the key issue was whether the Council believed that they were reasonable.

- 17 It is also apparent that the Commissioner’s decision was finalised without regard to the fact that, after the confirmation referred to in paragraph 16, but before the Decision Notice was issued, the Council changed its charging structure for a third time. Why this fact was not taken into account, or apparently even noticed, is not entirely clear, as two separate communications were sent to the Commissioner’s office containing information on the subject. The first was from the Council itself. It took the form of an email dated 16 June 2005, addressed to the Commissioner’s case officer, and informing him of its decision to reduce the fee for the production of Planning/Building Control Decision Notices from £6.50 to 50p per decision. It had attached to it a copy of a letter sent on the same day to a Mr Damien Welfare, an individual who had been assisting Mr Markinson. Mr Welfare himself wrote to the Commissioner on 5 June 2005 and reported the Council’s decision, before going on to criticise the 50p charge, which from that stage onwards was to apply to all copies

provided. His letter was stamped "Received" by the Commissioner's office on 6 July 2005 and "Received for Scanning" on 7 July 2005. There is no dispute that the letter was received by the Commissioner's office but it appears that, for some reason, it did not find its way to those handling Mr Markinson's case. Mr Graham Smith could not explain how this had happened, but in the course of cross-examination he speculated that the wrong file number may have been applied to the document when it was being scanned, with the result that the electronic image was wrongly filed in the document management system maintained by the Commissioner's office. He speculated that the earlier email correspondence from the Council may have suffered the same fate but the reality is that we do not know how it came about that neither of these documents were taken into account. We deal later in this decision with the question of whether the failure to take account of the third change to the charging structure had any significance to the appeal.

The Appeal

- 18 Mr Markinson was not happy with the Decision Notice and on 17 August 2005 he launched an appeal to the Tribunal under section 58 of the FOIA. As mentioned in paragraph 5 above, the effect of Regulation 18 is that this section of the FOIA, among others, applies to any appeals under the Regulations. It provides that if the Tribunal considers that the Decision Notice is not in accordance with the law it shall allow the appeal or substitute such other notice as could have been served by the Commissioner. It also provides that the Tribunal may review any finding of fact on which the Decision Notice was based.
- 19 The appeal was heard by us on the 21st and part of the 22nd February. Mr P Michaels, a solicitor from the Friends of the Earth Rights & Justice Centre, represented Mr Markinson and Mr T Pitt-Payne of Counsel represented the Commissioner. Both advocates presented their client's case with skill and commonsense and we are grateful to them for their assistance.
- 20 The issues we have to decide are:
- (a) Did the Commissioner identify the correct test to apply in order to determine whether the Council complied with Regulation 8(3) in fixing its charging structure?

- (b) If the Commissioner identified the correct test did he then apply it properly to the facts of the case?
- (c) If the Commissioner was in error on either (a) or (b) what steps should the Tribunal take?

21 We should add that the parties agreed that we should make our decision on the basis of the charges that were in place at the date of the Decision Notice (that is, after the third change had been made) and should not limit ourselves to considering them only as at the date when Mr Markinson made his complaint to the Commissioner.

What is the correct Legal Test?

22 The language of Regulation 8(3) is set out in paragraph 3 above. It states that the charge for copies “shall not exceed an amount which the public authority is satisfied is a reasonable amount”. As mentioned in paragraph 6 above, the explanation that the Commissioner previously gave to the parties suggests that he had proceeded on the basis that he was required only to establish that the Council was in fact satisfied that the charge did not exceed a reasonable amount. The Amended Reply to the Notice of Appeal, which was lodged on the Commissioner’s behalf on 24 November 2005, reinforced that impression. It read (at paragraph 27):

“In reaching his decision the Commissioner directed himself that the test under regulation 8(3) was whether the Council was itself satisfied that the charge in question did not exceed a reasonable amount”.

23 Mr Michaels, representing Mr Markinson, argued that this test was the wrong one to apply. He characterised the test set out in the letter of 21 July 2005, explaining the reasoning for the Commissioner’s decision, as a “subjective” test and argued that, in depriving himself of the jurisdiction to adjudicate upon the reasonableness of a public authority’s charges, the Commissioner had erred in law. He submitted that if the correct test had been applied, (which was from time to time characterised by one side or the other as an “objective” one), the Commissioner would have carried out a full review and the charges would have been found to have failed the Regulation 8(3) test.

24 In support of this position Mr Michaels drew attention to Directive 2003/4/EC on public access to environmental information etc (“the Directive”). It was common ground between the parties that the Regulations were introduced in order to implement the Directive and that the provision of the Directive that equates to Regulation 8(3) is Article 5(2). Article 5(1) provides that information of the kind in issue in this appeal must be available for inspection free of charge. Article 5(2) then reads:

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

25 The parties very helpfully provided us with a set of agreed propositions on the impact of an EU directive on the interpretation of domestic legislation. We set them out in full below:

“Agreed Propositions of European Law

- 1 The 2004 Regulations are intended to implement the 2003 Directive.
- 2 Domestic courts are under an obligation to interpret national law so as to achieve consistency with, and give effect to, European law.
- 3 This obligation applies with particular force where the national law in question was passed in order to give effect to a provision of European law.
- 4 In order to give effect to this obligation the courts may be required to “adopt a construction which departs boldly from the ordinary meaning of the language of the statute”. *Clarke v Kato* [1998] 1 WLR 1647.
- 5 In addition, a provision of a European Directive that is “directly effective” may be relied upon directly against the State.
- 6 However, given the scope of the interpretive obligation referred to at points (2) - (4) above, the parties are agreed that it is highly unlikely that the Tribunal will need to consider whether the 2003 Directive (or the relevant provision of that Directive) is directly effective.”

- 26 Mr Michaels submitted that the language of Article 5 - “shall not exceed a reasonable amount” - is clear and unambiguous and argued that there was no room for the Council’s subjective belief in the reasonableness of its charges to play a part. He drew our attention, also, to the following provisions of the Directive:
- (a) Article 1, the relevant part of which provides that the objectives of the Directive are “to guarantee the right of access to environmental information held by or for public authorities and to set out the basic terms and conditions of, and practical arrangements for, its exercise...”; and
 - (b) Recital 18 of the Directive, which provides that “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”.
- 27 On this basis Mr Michaels argued that the Commissioner should have investigated the basis of the Council’s charges and have stated what he, the Commissioner, believed to be a reasonable charging structure.
- 28 For the Commissioner Mr Pitt-Payne submitted that the correct way to approach Regulation 8(3) was to view it in the context of the normal English law rules that apply to decisions of public bodies. He said that a decision of a public authority may be judicially reviewed even when it would appear, from the language of the legislation in question, that the public authority has been given an unfettered discretion to make whatever decision it chooses. It follows, he said, that if a decision is one that no reasonable public authority could hold, or was reached either disregarding relevant considerations or having regard to irrelevant ones, it will be set aside on judicial review. Mr Pitt-Payne relied on the House of Lords decision in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] A.L. 1014 at 1047. Lord Wilberforce, in considering a statutory provision that appeared to give an equally wide discretion (in that case it was the Secretary of State who had been given wide powers of intervention in local education matters if he were “satisfied” that a local education authority had acted unreasonably) said that the provision he was considering was:

“... framed in a “subjective” form - if the Secretary of State “is satisfied”. This form of section is quite well known, and at first sight might seem to exclude judicial review. Sections in this form may, no doubt, exclude judicial review on what is or has become a matter of pure judgment. But I do not think that they go further than that. If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the court must inquire whether those facts exist, and have been taken into account, whether the judgment has been made upon a proper self-direction as to those facts, whether the judgement has not been made upon other facts which ought not to have been taken into account. If these requirements are not met, then the exercise of judgment, however bona fide it may be, becomes capable of challenge.”

- 29 Mr Pitt-Payne said that the Commissioner was required to adopt the same approach in reviewing the Council’s application of the similar, apparently widely drawn, power to fix charges and that Regulation 8(3), when viewed in the light of that supervisory power, is not inconsistent with Article 5(2).
- 30 On this issue we prefer the argument of Mr Pitt-Payne to that of Mr Michaels. It seems to us that the UK Government was not obliged to re-state the precise language of Article 5(2) in the Regulations, it was left with some discretion, or margin of appreciation, on the way that Article 5 was transposed into English law. It was entitled to take account of the existing English law on Judicial Review and to adopt a form of words which, when read in the context of that law, provided equivalent protection to that set out in Article 5(2). We believe that the language of Regulation 8(3) has that effect. This also has the practical effect of avoiding the imposition on the Commissioner of a review task that would, in our view, be unnecessarily burdensome for his staff, excessively intrusive for the public authority and disproportionate, in terms of cost and complexity, to the harm that the Directive and Regulation are intended to avoid.

The Application of the Legal Test to the Facts

- 31 If we are right in our assessment of the appropriate test to apply, then the effect was that the Commissioner was required to consider, first, whether the Council honestly

believed that the charge structure it had set out did not exceed a reasonable one and, if it did so believe, to consider, secondly, whether that was a belief that a reasonable authority, properly directing itself to the relevant law and facts, could hold, or was one that had been arrived at by either taking into consideration irrelevant factors or ignoring relevant ones. It is evident that the Commissioner asked the first question. It has been suggested to us by Mr Michaels that he did not go further than that. That he did not address the second question at all. However Mr Graham Smith has said in his witness statement that he did go further and that he concluded that the Council did not hold its belief on the reasonableness of the charges in disregard of relevant considerations or having regard to irrelevant considerations and that the charging structure did not seem to him to be unreasonable, based on his past experience in local government, before taking up employment with the Commissioner.

- 32 We do have some difficulty in taking into consideration evidence on the reasoning apparently followed by the Commissioner, which did not find its way into the Decision Notice. There may be occasions when it is appropriate for the Tribunal, (for example in reviewing a finding of fact) to receive evidence from the Commissioner, or those in his employment, about the investigations carried out. However, as a general rule we believe that a Decision Notice should be capable of standing on its own in setting out the Commissioner's reasons for his decision, so that appellants may be properly informed when deciding whether to launch an appeal and, if they decide to do so, in determining the lines of argument on which the appeal should be based. We regard it as particularly unsatisfactory to find that a Decision Notice apparently left out an important part of the legal test to be applied, and/or the manner in which it was applied to the facts, and that the Tribunal is then asked to consider an appeal on the basis of evidence about the Commissioner's reasoning that had not been disclosed to the appellant at the time when he launched his appeal.
- 33 In the event, supplementing the Decision Notice with Mr Smith's evidence did not affect the outcome of the appeal. This is because our review of all the facts placed before us has led us to conclude that, even accepting the evidence of Mr Smith as to the test that he applied and the matters he took into account, the Commissioner clearly did not give due consideration to a number of factors, which we consider were

relevant in considering whether the Council's decision was one that should be allowed to stand. They are as follows:

- (a) A justification for the £6 per document charge put forward by the Council (in its letter of 7 February 2005 - paragraph 8 above) was that it had checked that it was not dissimilar to those of other councils - it did not offer (and was not asked for) any justification based on the calculation of its own cost base for either that charge or the 50p charge.
- (b) The comparative exercise on which the Council relied was, in any event, stated to be three years old - a relatively long time in the context of falling costs in the field of reprographics;
- (c) The letter of 7 February also disclosed that the Council had taken into account "the officer time in locating and retrieval of the documentation", a factor which we believe the Council, and the Commissioner, should have regarded as irrelevant. Regulation 8(2)(b) 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 calculating the cost of copying the same material. We find support for this in Recital 18 to the Directive which, while not forming part of the operative part of the Directive (still less the Regulations), provides guidance that only the actual cost of "producing" copies should be taken into account in considering what a reasonable charge should be. We have seen no evidence that the Council took these issues into account in fixing any of the charges, or that the Commissioner considered it in deciding whether or not the Council's charge structure satisfied Regulation 8(3).
- (d) It is evident from the Report to Management that, as late as April 2005, the Council was taking into consideration irrelevant factors, namely, a possible drop in revenue and a possible increase in workload, if the charges were reduced. We infer from this that those factors had formed part of its original decision in fixing those charges and that they were taken into account in deciding not to opt for a 20p per sheet charge (option (c) set out in paragraph 13). This was

despite the fact that Recital 18 to the Directive makes it clear that the permitted charges should not create a profit (“may not exceed actual costs”) and that considerations of either a contribution to revenue or impact on workload were clearly irrelevant in calculating a charge that was required to be reasonable in the context of the Regulations (which expressly provided for a free-of-charge right to inspect).

- (e) The Council appears to have ignored the Commissioner’s own letter of 7 March 2005 in which he stated that it was not reasonable for it to pass on the full cost of responding to a request. The Commissioner, having set that factor as clearly relevant to his own consideration of the Council’s decision, then appears to have ignored it in reaching his decision.
- (f) It is also evident from the Council’s e-mail to the Commissioner of 2 June 2005 - paragraph 16 above - (as well as the Report to Management) that, in relation to planning documents, it considered that the legal significance of a document was a legitimate factor to take into account in fixing a fee (albeit, in this case, not the 50p one).

34 Both the Council and the Commissioner also failed to take account of relevant material in that they appear to have given no, or no adequate, consideration to the guidance that was available at the time. Guidance on appropriate regimes for charging for copying and staff time is given in the following:

- (a) In February 2005 the Department for Environment, Food and Rural Affairs (“DEFRA”) published a document entitled “Code of Practice on the discharge of the obligations of public authorities under the Environmental Information Regulations 2004”. We acknowledge, as the text of the Code itself does, that it is not legislation, but only guidance. The Council was not therefore under any compulsion to follow its recommendations. However, it is a document that was created under Regulation 16(1) (“The Secretary of State may issue, and may from time to time revise, a code of practice providing guidance to public authorities as to the practice which it would, in the Secretary of State’s opinion, be desirable for them to follow in connection with the discharge of their functions under these Regulations”) and is clearly relevant to the question of

fixing copying charges. It contains a section headed “Charges” which includes the following:

“The EIR [i.e. the Regulations] does not require charges to be made but public authorities have discretion to make a reasonable charge for environmental information....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...”

When the Council was first challenged by Mr. Markinson it did not even refer to the Regulations, let alone the Code of Practice created by reference to it (see paragraph 2 above), but sought to justify its charges by reference to the FOIA. There is, in addition, no reference to the Code of Practice in any of the correspondence between the Council and the Commissioner or in the Report to Management. We conclude that the Council did not take it into account in fixing either its original charges or the first or second changes and that the Commissioner did not direct the Council’s attention to it, or to the requirement that the Council should not recover more than the cost of producing the copies.

- (b) DEFRA also published a booklet entitled “Guidance to the Environmental Information Regulations 2004”. Again this is guidance and not law. But it is, once more, guidance that the Council should have considered when fixing its charges and the Commissioner should have taken into account when deciding if the Council’s decision on charges should stand. It is clear that neither of them did so. On the question of charges for copies it says, at paragraph 6.26:

“A public authority may make a reasonable charge for the supply of environmental information. These should not exceed the cost of providing the information, for example, the cost of photocopies”.

- (c) The Report to Management does make passing reference to a third body of guidance. This was published by the Department for Constitutional Affairs (“DCA”) under the title “Guidance on the application of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations

2004". We are aware that the provisions for charges under the FOIA are different to those under the Regulations, in that a FOIA request may be refused if the cost of complying will exceed a specified sum. The DCA guidance addresses both the way in which that sum should be calculated and the factors that may be taking into consideration in calculating the charge that may be made if the specified sum is not exceeded. The first of those issues is not relevant, but it seems to us that the second issue involves a very similar judgment to that required to be made under the Regulations and that the Guidance is a relevant document, in that context, which the Council should have considered. In particular the Council should at least have considered the following passages:

"if ...you were providing information to an applicant:

- *you could not charge for the time taken to locate, retrieve or extract the information or to write a covering letter to the applicant explaining that the information is being provided,*
 - *you could charge for the cost of paper when photocopying or printing the information and printing the covering letter, as well as the cost of postage"*
- [Para 3.4.3]

"Authorities can charge for the actual costs incurred, but charges are expected to be reasonable. For example, in most cases, photocopying and printing would be expected to cost no more than 10 pence per sheet of paper" [Para 3.4.5]

As mentioned in paragraph 13 above the Council did make passing reference to "DCA guidance" when it mentioned the option of charging 20p per sheet for all copies supplied. If this was a reference to this document then the author evidently misunderstood the recommendation of a 10p per sheet charge. The Council therefore either failed to take account of the DCA Guidance at all, or committed so fundamental an error in considering it that the effect was the

same. The Commissioner did not take it into account, or enquire, whether the Council had done so.

- (d) In September 2004 the Office of the Deputy Prime Minister published a booklet entitled "Making the planning system accessible to everyone: Good-practice guidance on access to and charging for planning information". This publication did not address specifically the provision of information under either the Regulations (as the DEFRA Code and Guidance did) or the similar, but not identical, rules on charging under the FOIA (as the DCA Guidance did). However, its purpose was expressed to be to help local planning authorities to encourage access to information and to "make sure that any charges are reasonable" (paragraph 1.3) - the same principles that clearly underpin both the Directive and the Regulations. We have again approached this document with some caution, as it might be said that the advice and recommendations contained in it are too remote to have been allowed to influence the interpretation by the Council and the Commissioner of the obligations imposed by Regulation 8(3). However, paragraph 5.19 of the booklet includes the following information:

"...a 'reasonable' charge would be similar to commercial rates at photocopying shops, that is, 10p for each sheet of A4. This also reflects the lease charge on most photocopier machines."

We believe that this particular element of factual information, in an evidently thoroughly researched publication from an authoritative source, should have been taken into consideration by the Council, and subsequently by the Commissioner, and that it would have assisted in deciding how to fix a charge that did not exceed the cost of providing the copies.

- 35 Although, as we have stated, we have approached each element of guidance with a degree of caution, the fact that the Council appears to have ignored all of it, (save, possibly, for a passing and erroneous reference to the DCA guidance in the Report to Management), reinforces our view that the Commissioner was wrong to conclude that

the Council's decision was one that a reasonable public authority, which had properly instructed itself as to the applicable law and relevant facts, could have reached.

Conclusion

36 In the light of what we have said in paragraphs 33 to 34 we have concluded that the Commissioner did not apply to the facts the legal test which he persuaded us was the correct one to apply. In our view the Council, in fixing its charges, failed to address, properly or at all, the test imposed on it and the Commissioner, in reviewing the Council's decision, failed to investigate, and therefore to identify, any of the errors mentioned in paragraph 33(a) to (f) above, or the guidance, and was consequently in error in not striking it down as being contrary to Regulation 8(3).

Additional Issue

37 Mr Michaels raised a further issue which he said justified the conclusion that the Commissioner had fallen into error. He said that the Commissioner had not taken into account the fact that a third change in the charge structure had been announced in the Council's email of 16 June 2005, as mentioned in paragraph 17. The failure to take the third change into account certainly undermines confidence in the Commissioner's investigation. In particular, the fact that he was apparently prepared to conclude that charges ranging from £6.50 to 50p all fell within the range of charges permitted under the Regulation, supports our conclusion that the Council's decision was not subjected to a level of scrutiny that came near to the standard required by section 50 of the FOIA. However, it is the issues mentioned in paragraph 33 and 34, rather than the events leading to the third change being overlooked which, in our view, determine the outcome of the appeal.

Consequences of our conclusion

38 The consequence of our conclusions is that the Decision Notice is not in accordance with the relevant law. Section 58(1) of the FOIA, as it applies to the Regulations, provides that in these circumstances we "should allow the appeal or substitute such other notice as could have been served by the Commissioner". We have to look at section 50 of the FOIA to see what notices it was open to the Commissioner to issue in the circumstances of this case. It provides that, where the Commissioner decides

that a request for copies has not been dealt with in accordance with the Regulations, he should serve notice of his decision and specify in the notice the steps which must be taken by the public authority in question to comply with the relevant requirement and the period within which such steps must be taken.

- 39 We interpret those provisions to mean that the Tribunal has the power to issue a Decision Notice that includes either a direction as to the amounts to be charged for copying, or detailed guidance on how they should be calculated. We have some concern that the Tribunal, unlike the Commissioner, lacks the resources to carry out a detailed investigation into a public authority's costs structure. Mr Pitt-Payne for the Commissioner suggested that, although the Tribunal does not have an express power to remit a matter to the Commissioner to reconsider his decision, the same practical effect may be achieved by providing appropriate guidance and then adjourning the hearing of the appeal to allow the Commissioner to reconsider the matter and make further representations at a later date.
- 40 It is not necessary for us to decide whether we have an inherent power to remit or whether Mr Pitt-Payne's procedural device may properly be adopted (or whether it would be likely to achieve a sensible outcome in the context of this case). This is because we believe that there is more than sufficient guidance and information available to us to enable us to issue a Decision Notice having sufficiently detailed directions to satisfy the requirements of section 50 of the FOIA. It is our intention, therefore, that the following sections of this decision shall stand in substitution for the Decision Notice dated 20 July 2005.

Substitute Decision Notice

- 41 The complaint of Mr Markinson was that the Council had not complied with Regulation 8(3) in that it had sought to charge:
- (a) £6 for a copy of any planning/building control decision notices (a charge that was increased to £6.50 on 1 April 2005 and then reduced to 50p on 16 June 2005, both dates post-dating the date when Mr Markinson had lodged his complaint with the Commissioner); and
 - (b) 50p for each piece of all other A4 size copy documents.

- 42 The Commissioner's decision should stand on the following questions:
- (a) The information in question fell to be considered under the Regulations; and
 - (b) The circumstances were such as to trigger the Commissioner's duty to consider the matter and reach a decision.
- 43 The Tribunal has decided that the Council did not comply with its obligations under Part 2 of the Regulations in that, although the information was available for inspection at the Council's office free of charge, (in accordance with paragraph 8(2)(b) of the Regulations), each of the charges made by the Council for the provision of copies of the information, as set out in paragraph 41(a) and (b) above, failed to satisfy the requirements of Regulation 8(3), for the reasons set out in paragraphs 33 and 34 above.
- 44 The actions that the Council is required to take, in the light of that decision, are as follows:
- (a) The Council should reassess the charges that it makes for providing copies of "environmental information" for the purposes of the Regulations.
 - (b) In making that reassessment the Council should adopt as a guide price the sum of 10p per A4 sheet, as identified in the "Good practice guidance on access to and charging for planning information" published by the Office of the Deputy Prime Minister and as recommended by the DCA.
 - (c) The Council should be free to exceed that guide price figure only if it can demonstrate that there is a good reason for it to do so, and in considering whether any such reason exists the Council should:
 - (i) take due regard of the guidance set out in the "Code of Practice on the discharge of the obligations of public authorities under the Environmental Information Regulations 2004" and the "Guidance to the Environmental Information Regulations 2004", both published by DEFRA, to the effect that any charge should be at a level that does not exceed the cost of producing the copies;

(ii) disregard any costs, including staff costs, associated with the maintenance of the information in question or its identification or extraction from storage; and

(iii) disregard any factors beyond the number and size of sheets to be copied, in particular, the real or perceived significance of the content, or the effect that any charging structure may have on the Council's revenue or its staff workload.

(d) If the Council wishes to, and can, justify a higher charging rate, on the basis of the guidance set out above, then it may do so provided that there has been proper study, scrutiny, decision and authorisation for such a charge, and the process for arriving at the higher charge is published and available for scrutiny.

45 We direct that a copy of this decision, incorporating this substituted Decision Notice, be served on the Council and that it complete the process of re-assessment, and publishes details of the resulting charges, by no later than 2 May 2006

Signed

Date

15 March 2006



Chris Ryan
Deputy Chairman