

Decision Notice

Decision 208/2016: Clyde Docks Preservation Initiative Limited and Glasgow City Council

Fees notice: Govan Graving Docks

Reference No: 201600627

Decision Date: 3 October 2016



Scottish Information
Commissioner

Summary

On 25 January 2016, Clyde Docks Preservation Initiative Limited (CDPI) asked Glasgow City Council (the Council) for information concerning Govan Graving Docks.

The Council issued a fees notice in terms of the EIRs. Following a review, CDPI remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the Council had partially failed to respond to CDPI's request for information in accordance with the EIRs. While she found that the Council was entitled to issue a fees notice before providing the information requested, and that the fee charged by the Council was reasonable, she also found that the Council had failed in its duty to provide adequate advice and assistance to CDPI.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 39(2) (Health, safety and the environment)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (paragraphs (a), (c) and (f) of definition of "environmental information"); 5(1) and (2)(b) (Duty to make available environmental information on request); 8(1), (3), (4), (6) and (8) (Charging); 9(1) and (3) (Duty to provide advice and assistance), 10(1), (2) and (4)(a) (Exceptions from duty to make environmental information available)

The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations) regulation 3 (Projected costs)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 25 January 2016, CDPI made a request for information to the Council. The request was in eight parts and sought information concerning Govan Graving Docks. The full text of the request is reproduced in Appendix 2 to this decision. The Appendix forms part of this decision.
2. The Council responded on 19 February 2016. Applying section 39(2) of FOISA, the Council considered the request in terms of the EIRs. The Council informed CDPI that it did not consider part 1 or elements of part 2 of the request to be valid requests for information under the EIRs, as any correspondence between a Councillor and the parties mentioned did not fall within the scope of the EIRs. For parts 2 (where the correspondence did not involve a Councillor) to 8, the Council informed CDPI that it held some of the information requested. It notified CDPI that regulation 8 of the EIRs allowed it to charge a fee prior to disclosure of environmental information. It informed CDPI of the fee being charged in this case, stating this had been calculated in accordance with the Council's schedule of fees for the purposes of the EIRs.

3. On 23 February 2016, CDPI wrote to the Council requesting a review of its decision on the following basis:
- It did not believe the information was environmental, arguing that the Council ought to have considered the request under FOISA. It submitted that the Council should have explained which parts of the definition of environmental information applied to the information requested.
 - It did not understand why the Council had applied the public interest when deciding to consider the request under the EIRs rather than FOISA.
 - It believed the Council had issued a confusing response, firstly determining that the request related to environmental information, then stating that parts 1 and 2 of the request did not relate to environmental information.
 - It believed the Council failed to explain which exceptions it was relying on, including consideration of the public interest.
 - In relation to the fee charged, it noted that the Council was charging for some staff time in excess of the maximum of £15 per hour set out in the Fees Regulations (i.e. under FOISA). For this reason, it believed the request ought to have been dealt with under FOISA and any charges reassessed accordingly.
 - It considered the proposed charge to be objectively unreasonable, even assuming the EIRs did apply.

CDPI further stated it would prefer to receive the information in electronic PDF format if possible, which would reduce printing costs. Also, to ease administrative burden, it was happy to receive the information in stages.

4. The Council notified CDPI of the outcome of its review on 22 March 2016, upholding its original decision with modifications.
- It explained which parts of the definition of environmental information it considered relevant to the information under consideration, and why it was necessary to consider the public interest when relying on section 39(2) of FOISA, thus enabling it to consider the request solely in terms of the EIRs.
 - The Council changed its position in relation to parts 1 and 2 of the request, and informed CDPI that (with the exception of some information that would fall within the scope of part 4, namely correspondence with Council officers) it did not hold the information requested, relying on regulation 10(4)(a) of the EIRs. This, the Council informed CDPI, was because information held by a Councillor was not held by the Council.
 - In relation to the proposed fee, the Council confirmed this was accurate. It informed CDPI that were the information provided electronically, the photocopying charge could be removed but the fee would have to be adjusted to account for scanning.
5. On 6 April 2016, CDPI wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. CDPI stated it was dissatisfied with the outcome of the Council's review because:

- It believed it was in the public interest that all of the information requested be made available.
- It believed the Council had wrongly identified the information as environmental.
- It considered the Council had issued an incorrect response to parts 1 and 2 of the request, as the information requested related to the named Councillor's Council duties, and not to issues relating to party political or campaigning activities.
- It believed the proposed charge was objectively unreasonable.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that CDPI made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 4 May 2016, the Council was notified in writing that CDPI had made a valid application and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and answer specific questions. These focused on the Council's consideration of the request under the EIRs, the information identified as falling within scope and the fee charged by the Council.
9. The Council was also asked to provide a list of documents falling within the scope of the request, including a one-line description of each. Due to the large amount of documents the Council estimated to be held, it was agreed that the Council would provide the Commissioner with a summary of the information held, together with a sample of that information. This was duly provided.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner has considered the relevant submissions, or parts of submissions, made to her by both CDPI and the Council, plus the summary and sample of the information falling within scope. She is satisfied that no matter of relevance has been overlooked.

Background information – Govan Graving Docks

11. The Council explained that Govan Graving Docks was a listed historic structure that included the last remaining dry docks on the Upper Clyde, consisting of three slim docks, listed built structures and surrounding land.
12. The Council explained that Govan Graving Docks was located within a Strategic Development Framework Area, which was part of City Plan 2. The City Plan was the statutory development plan for the City, required under the Planning (Scotland) Act 2006, with the ultimate aim of improving the quality of the physical environment, improving the quality of life for people living and working in the city, and providing the conditions to promote sustainable development.

13. The Council stated that its role in relation to Govan Graving Docks was as the planning authority and, as such, it had a duty to enhance and protect the status of such structures. The Council explained that the information held concerned planning matters for the area.

FOISA or the EIRs?

14. Environmental information is defined in regulation 2(1) of the EIRs, and paragraphs (a), (c) and (f) of the definition are reproduced in full in Appendix 1. Where information falls within the scope of this definition, a person has a right to access it under the EIRs, subject to various restrictions and exceptions contained in the EIRs.
15. The Commissioner's views on the relationship between FOISA and the EIRs are set out in detail in *Decision 218/2007 Professor A D Hawkins and Transport Scotland*¹, and need not be repeated in full here. However, she will reiterate some of the key points which are relevant in this case:
- The definition of what constitutes environmental information should not be viewed narrowly, but in line with the definition of environmental information in the EIRs.
 - There are two separate statutory frameworks for access to environmental information and an authority is required to consider any request for environmental information under both FOISA and the EIRs.
 - Any request for environmental information, therefore, must be dealt with under the EIRs.
 - In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2) of FOISA.
16. The Commissioner must, therefore, first determine whether any of the information withheld is environmental information. If it is, she must go on to consider the Council's handling of the request in terms of both FOISA and the EIRs.
17. In this case, the Council applied the exemption in section 39(2) of FOISA and dealt with CDPI's request under the EIRs, having concluded that the information was environmental information as defined in regulation 2(1) of the EIRs.
18. The Council was asked to explain the basis upon which it considered the information to be environmental, with reference to the relevant parts of the definition of environmental information in regulation 2(1). It was also asked to explain whether it had given any consideration to elements of the information not being environmental.
19. The Council submitted that the information requested related to the state of the site and the listed docks structures. Accordingly, the Council considered the information would fall under:
- paragraph (f) of the definition of environmental information (cultural sites and built structures), as this was information relative to the docks, listed built structures and surrounding land
 - paragraph (a) of the definition, the relevant elements of the environment being water (the Clyde), land (surrounding the docks and built structures) and landscape (the industrial landscape of the Graving Docks)

¹ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2007/200600654.aspx>

- paragraph (c), the relevant measures being planning policies and legislation relevant to Govan Graving Docks and related activities (namely the internal processes which formed part of the Council's role in this matter).
20. The Council explained that its planning officers were involved in matters concerning the docks and surrounding land due to planning legislation relating to land development proposals. Referring to the Commissioner's guidance on environmental information², the Council noted that the Commissioner has found that *"information relating to planning applications will commonly fall under the definition of environmental information contained in the EIRs, given that that information will, in most circumstances, explicitly relate to plans and developments which will have a direct impact on the land use and landscape of a particular area (Decision 045/2008 Dr Alex Morrow and the City of Edinburgh Council)"*. The Council took the view that the processes considering matters relating to environmentally significant schemes should be considered as environmental information.
 21. Due to the subject matter of the information (i.e. concerning planning matters in a specific area), the Council submitted that it did not consider elements of the information to be non-environmental. In support of this, the Council again referred to the Commissioner's guidance on environmental information, which stated that *"court cases have confirmed that environmental information, and the scope of the Directive, should be interpreted broadly"*, and to *Decision 056/2008 Mr Rob Edwards and the Scottish Ministers*, where the Commissioner considered that *"information which in isolation may not be regarded as environmental can and should be regarded as having the quality of environmental information when read in context"*.
 22. Having considered the Council's submissions, together with the nature and content of the sample information provided by the Council in this case, the Commissioner is satisfied that the information requested by CDPI falls within the definition of environmental information set out in regulation 2(1) of the EIRs, in particular paragraphs (a), (c) and (f) of that definition.

Section 39(2) of FOISA – Environmental information

23. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1) of the EIRs) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs.
24. The Council informed the Commissioner that it considered the information fell to be considered in terms of the EIRs and therefore wished to rely on section 39(2) of FOISA. As the information comprised "environmental information" as defined in the EIRs, the Council considered disclosure of such information was more appropriately considered under the specific regulatory regime provided for in the EIRs. In the Council's view, the public interest in considering the request in terms of the EIRs outweighed the public interest in disclosure of the information under the terms of FOISA.
25. Having considered the Council's submissions on this point, together with the sample information provided by the Council, the Commissioner accepts that, in this case, the Council was entitled to apply the exemption in section 39(2) to the information withheld under FOISA, given her conclusion that it is properly classified as environmental information.
26. As there is a statutory right of access to environmental information available to CDPI in this case, the Commissioner accepts, in all the circumstances of the case, that the public interest

² <http://www.itspublicknowledge.info/Law/EIRs/WhatIsEnvironmentalInformation.aspx>

in maintaining this exemption (and responding to the request under the EIRs) outweighs any public interest in disclosing the information under FOISA.

27. The Commissioner notes that CDPI's concerns regarding the request being considered under the EIRs are focused on the Council's decision to charge a fee for provision of the information, in accordance with regulation 8 of the EIRs. This matter will be addressed later in this decision.
28. The Commissioner therefore concludes that the Council was correct to apply section 39(2) of FOISA and consider CDPI's request under the EIRs. She will consider the request in what follows solely in terms of the EIRs.

Regulation 5(1) of the EIRs – Duty to make available environmental information on request

29. Regulation 5(1) of the EIRs requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant. This obligation relates to information that is held by the authority when it receives a request.
30. On receipt of a request for environmental information, therefore, the authority must ascertain what information it holds falling within the scope of the request. Having done so, regulation 5(1) requires the authority to provide that information to the requester, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).

Regulation 10(4)(a) of the EIRs – Information not held

31. Regulation 10(4)(a) of the EIRs states that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when the applicant's request is received.
32. In its review response to parts 1 and 2 of CDPI's request (which sought correspondence involving a named Councillor), the Council informed CDPI that, with the exception of some information that would also fall within the scope of part 4 of the request (which sought correspondence with Councillors and Council officers more generally), it did not hold the information requested. On that basis, it applied regulation 10(4)(a) of the EIRs. The Council explained to CDPI that this was because information held by a Councillor was not held by the Council. In this regard, the Council referred CDPI to the Commissioner's *Decision 132/2006 Mr John Egan and West Dunbartonshire Council*³, which considered this point.
33. In its application to the Commissioner, CDPI submitted that the Council had interpreted *Decision 132/2006* too widely, arguing that that the email correspondence requested related to the named Councillor's Council duties, and not to issues relating to party political or campaigning activities. The Council was asked for its submissions on this matter.
34. The Council submitted that the correspondence requested, involving the named Councillor, fell into two categories:
 - Correspondence in which the named Councillor provided a voice for constituents on matters for discussion, etc., as distinct from the Council's role as planning authority. In such situations, the Council submitted, the Councillor would be raising matters on behalf of, or which were of concern to, his constituents. Accordingly, the Council considered

³ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2006/200501202.aspx>

any such correspondence held by the named Councillor could not be viewed as being held by, or on behalf of, the Council.

- Correspondence sent or received by Council officers generally, which included the named Councillor. The Council confirmed that any such correspondence held would have been identified by the searches it had carried out for information falling within the scope of CDPI's request.

35. The Commissioner's views on correspondence involving Councillors held by Councils for the purposes of FOI are set out in *Decision 132/2006*, and need not be repeated in full here. However, she will reiterate some of the key points which are relevant in this case:

- There do not appear to be any set rules on when a Councillor is and is not acting on behalf of a Council, although the Councillors' Code of Conduct from the Standards Commission for Scotland⁴ draws a clear distinction between Council duties and party political or campaigning activities.
- Information relating to a Councillor's party political activities or constituency business is not considered to be held by the Council for the purposes of FOISA, only information relating to activities in which the Councillor is acting on behalf of the Council.
- The Information Commissioner's guidance on the implications of the Data Protection Act for Councillors⁵ appears to suggest that that only when the Councillor is acting as a member of the Council (i.e. in pursuance of its corporate functions) is he or she part of the Council.

36. At this point, the Commissioner must note that she can only consider CDPI's request insofar as it relates to information held by the Council. This will not include information held by individual Councillors, unless that information can be deemed to be held on behalf of the Council. Individual Councillors are not Scottish public authorities for the purposes of FOISA or the EIRs, nor can they be considered to be employees (or the equivalent) of the Council.

37. In the Commissioner's view, where a Councillor is representing constituents in his capacity as an elected member, he cannot be viewed as acting in his capacity as a member of any Council committee, or otherwise in pursuance of the Council's corporate functions. While the Council may allow Councillors to use its IT systems for constituency business, she considers any such information that might be held on Council systems could not be deemed to be held by the Council (under the EIRs) for its own business purposes.

38. Consequently, the Commissioner is satisfied that the Council was entitled to conclude that any information that might be held on its systems, involving a Councillor acting in his capacity as an elected member on constituency business (and not pursuing the Council's corporate functions) was not held by the Council. She is further satisfied that the Council has recognised that any information held, involving the named Councillor, relating to his Council duties, would be captured by part 4 of the request.

⁴ <http://www.standardscommissionscotland.org.uk/codes-of-conduct/councillors-code-of-conduct>

⁵ <https://ico.org.uk/media/for-organisations/documents/1432067/advice-for-elected-and-prospective-councillors.pdf>

The public interest

39. The exception in regulation 10(4)(a) of FOISA is subject to the public interest test in regulation 10(1)(b) of the EIRs. In this case, for the reasons set out above, the Commissioner is satisfied that the Council does not (and did not, on receiving the request) hold the information to which it applied this exception. Consequently, she accepts that there is no public interest in requiring the disclosure of such information and finds that the public interest in making information available is outweighed by that in maintaining the exception.

Regulation 8 of the EIRs – Charging

40. In this case, the Council issued a fees notice in terms of regulation 8 of the EIRs, which states that where a Scottish public authority is under a duty to make environmental information available under regulation 5(1), it may charge a fee for doing so (regulation 8(1)). By virtue of regulation 8(4) and (6), the authority may require the payment of the fee in advance and is not required to make the information available unless the fee is paid.
41. Having found that the Council was correct to consider CDPI's request under the EIRs, the Commissioner recognises that it was afforded the option to charge a fee for producing the information requested, as provided for in regulation 8.
42. In its application to the Commissioner, CDPI submitted that the fee proposed by the Council was objectively unreasonable.
43. The issue to be considered here is whether the Council's fees notice was calculated in line with regulation 8 of the EIRs, in particular regulation 8(3) which states that the fees to be charged shall not exceed a reasonable amount and in any event shall not exceed the costs to the authority of producing the information requested.

Was the fee charged reasonable?

44. Page 6 of the Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under FOISA and the EIRs⁶ (the Section 60 Code of Practice) deals with the matter of charging for responding to requests for environmental information. This states that:
- A fee may be payable for receipt of the information requested. Regulations set out the basis on which fees may be charged for FOI requests, which are subject to an upper cost limit. There are no comparable fees regulations for EIRs; when responding to EIRs authorities may charge "a reasonable amount". Authorities should publish their scheme of charges for all requests for information.*
45. There is no definition of what is considered to be "reasonable" in the EIRs or the Section 60 Code of Practice, or of what charges can be taken into account, although (in line with regulation 8(3) of the EIRs) the charge must not exceed the actual cost of providing the information.
46. In considering what is reasonable, the Commissioner has taken account of the considerations set out in her guidance on "Charging for environmental information"⁷ under the heading "Is the charge reasonable or excessive?". These include:

⁶ <http://www.gov.scot/About/Information/FOI/Section60Code/s60codeofpractice>

⁷ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Fees/ChargingEIRs.aspx>

- Any costs charged must not be such that applicants are dissuaded from seeking to obtain environmental information or that the right to access is restricted.
 - Public authorities should be able to demonstrate to the Commissioner that, in setting charges, they have undertaken a proper study of all of the relevant factors which should be taken into account; that they have given those factors proper consideration and that they have not taken into account any other, irrelevant, factors.
 - Account should be taken of the actual costs to the authority of providing the information. For example, it is likely to be cheaper to provide a document on the website or by email than to send it out in hard copy, and this should be reflected in the charge.
47. In its submissions to the Commissioner, the Council stated that some of the general principles it considers when providing information cost-effectively include:
- using the lowest grade of staff, in the circumstances, to undertake the required work,
 - establishing whether any information is publicly accessible and directing the applicant to that source, and
 - considering whether it would be appropriate to suggest the applicant narrows their request.
48. The Council confirmed that the information requested was not available in public registers or in lists of environmental information held by the Council or published on its website, nor was it routinely available for inspection at Council offices.
49. The Council informed the Commissioner that the information requested by CDPI was held by its Development and Regeneration Services department (DRS), which was made up of four teams. The Council explained that the information, the vast majority of which comprised email communications, in addition to minutes of meetings, was currently held electronically within the inboxes of the relevant officers.
50. The Council explained that the teams involved had no direct administrative support, such support being provided through a centralised department with no specialised knowledge of the subject matter or the work undertaken by the DRS teams. Given the interaction between the various teams, and the complexity of the subject matter, the Council submitted that a high degree of co-ordination was required to ensure all relevant information was identified. This, the Council argued, meant that the inbox owners themselves (Grades 6-8) were required to locate and retrieve the requested information, and that this task could not be carried out by more junior staff.
51. The Council was asked to explain why locating and retrieving the information would take 14 hours, as claimed in its response to CDPI. The Council submitted that following initial assessment of the information, it was estimated that approximately 900 pages of information were held. Using previous experience of similar tasks, the Council calculated it would take a Grade 3 member of staff (at an hourly rate of £14.77) 10 hours to print and redact the relevant information, equating to 40 seconds per page. The Council considered this to be a conservative estimate.
52. The Council confirmed that the fee did not include time for collating the information, or the time required for inbox searches by Grade 6 and 7 staff members. Accordingly, the 14 hours comprised the 10 hours at Grade 3 (at £14.77 per hour) and 4 hours at Grade 8 (for searching their inboxes, at £38.32 per hour), in addition to the charge for photocopying

700 pages (the number identified by the Council, at 10p per page). The Council confirmed that the total fee (£370.98) covered the extraction of all of the information falling within scope.

What consideration was given to reducing the cost of provision?

53. As stated previously, the Council provided the Commissioner with a sample of the information held. This included internal and external communications, together with some minutes of meetings.
54. In its submissions, the Council informed the Commissioner that it anticipated that the majority of internal communications could be released (following payment of the fee), subject to any necessary personal data redactions, but noting that it might be necessary to withhold some information under exceptions in the EIRs. The Council also explained that the minutes were not specific to Govan Graving Docks and therefore extensive redactions would be required to remove information that did not fall within the scope of the request.
55. The Council was asked what consideration it had given to reducing the cost of compliance, were it the case that, for example, a substantial number of entire documents might be considered exempt from disclosure, and therefore withheld in their entirety.
56. The Council argued that the bulk of the information falling within scope comprised emails and, as such, it did not consider that the cost of compliance could be substantially reduced by withholding entire emails.
57. It was pointed out to the Council that public authorities could not charge for redacting information that had not been requested, and therefore not under consideration, without there being compelling reasons for doing so. With reference to the minutes of meetings, the Council was asked what consideration it had given to providing extracts only of the information falling within scope, or to providing the minutes in full and directing the applicant to the relevant sections therein, all with a view to reducing the overall cost of compliance.
58. The Council acknowledged that both of these approaches were options, but conceded it had not considered either of them when responding to CDPI's initial request or request for review. Based on the sample information provided, and the initial method of calculation described above, the Council estimated that 125 pages would comprise minutes which, when deducted from the Grade 3 staff member's time, would reduce the cost by £20.50. However, the Council submitted that this saving would likely be cancelled out by the time required to open, read, locate, copy and paste the relevant extracts into a new document. The Council was of the view that providing extracts only would not reduce the overall cost of providing the information to CDPI.
59. As CDPI's initial request was submitted electronically, with no stipulation as to the means of providing the information, the Council was asked to explain why electronic provision of the information was not considered from the outset. The Council was also asked to explain whether electronic redaction of information was feasible in this case, and what impact electronic redaction would have on the overall cost of compliance, should this be an option.
60. The Council explained that, where redactions were required, the standard administrative practice within the DRS was to print and manually redact the information. It confirmed this had been found to be the most time-efficient method and that posting out the redacted information would be time-neutral due to the redactions required. While electronic redaction was possible, the Council explained that a limited number of software licences were held across the Council.

Adjustment to fee for electronic provision of information

61. In its review response, the Council had advised CDPI that were the information provided electronically, the photocopying charge (£70.00) could be removed, but the fee would require to be adjusted to account for scanning. The Council was asked to carry out a sample costing exercise to provide evidence of the cost of providing the information.
62. The Council informed the Commissioner it had undertaken a sample scanning exercise, involving 50 pages of information, which took 52 seconds. Based on this, the Council estimated that the time required to scan 900 pages would be 16 minutes, equating to a cost of £3.94. The Council acknowledged that CDPI could have been informed that the original fee could be reduced by a net cost of £66.06, were the information provided electronically.

Regulation 8(8) – fees information to be published by public authorities

63. Regulation 8(8) of the EIRs also requires a Scottish public authority to publish and make available to applicants a schedule of its fees, and information on the circumstances in which a fee may be charged, waived or required to be paid in advance.
64. The Council was asked to explain how it believed it had complied with regulation 8(8) of the EIRs in this case. In response, the Council submitted that its schedule of fees, as required by regulation 8(8) of the EIRs, was available on its website. It provided the Commissioner with the corresponding link to access this information online, together with evidence showing that this information was publicly available at the time of CDPI's request and request for review.
65. Having examined the schedule of fees published on the Council's website, the Commissioner notes that Council states it may charge a fee for responses to requests for environmental information under the EIRs. In summary, the information states that the proposed fee will represent the actual cost to the Council in providing the information, will include any costs associated with putting the information into a particular format, copying and postage costs, and that staff time will be calculated at the actual hourly rate per staff member(s) (with no minimum or maximum rate, and no limit to the sum chargeable), utilising the lowest graded member(s) of staff available to carry out the task (and having the requisite skills and knowledge).

Commissioner's findings – proposed fee

66. In this particular case, having considered the submissions presented by the Council, the Commissioner is satisfied that that the Council was entitled, under regulation 8 of the EIRs, to charge for producing the information, and that the fees notice issued by the Council was reasonable in terms of regulation 8(3). While she is also satisfied that the fees information published by the Council is sufficient to meet the requirements of regulation 8(8), she has some concerns regarding the level of detail this information actually provides to requesters. These concerns are addressed later in this decision.
67. Having considered the Council's explanations against all relevant considerations, the Commissioner accepts that the time charged for and the hourly rates were reasonable in all the circumstances, with the result that a reasonable fee was charged. Consequently, in terms of regulation 8(6) of the EIRs, the Council is not required to make the information requested available under regulation 5(1) unless the outstanding fee of £304.92 is paid (for electronic provision) – or, in the case of hard copy information being provided, £370.98.

Regulation 9 of the EIRs – Duty to provide advice and assistance

68. Regulation 9(1) of the EIRs provides that a Scottish public authority must, so far as it would be reasonable to expect it to do so, provide advice and assistance to applicants and potential applicants. Regulation 9(3) provides that a Scottish public authority which conforms with the relevant Code of Practice (in relation to the provision of advice or assistance) is to be taken to have complied with this duty.

69. The Section 60 Code of Practice states (at paragraph 5.1 in Part 2):

Authorities should offer advice and assistance at all stages of a request

Authorities have a duty to provide advice and assistance at all stages of a request. It can be given either before a request is made, or to clarify what information an applicant wants after a request has been made, whilst the authority is handling the request, or after it has responded.

The full text of Section 5 gives more detailed guidance on good practice in offering advice and assistance in relation to various stages and aspects of a request.

Narrowing of request

70. It was clear to the Commissioner that CDPI's request for review was seeking to reduce the cost of provision. The Council was asked to explain what advice and assistance it gave (or would now consider giving) to CDPI in relation to narrowing the scope of its request, or otherwise assisting it to reduce cost.

71. The Council took the view that, given the broad scope of the request, there was no obvious way to narrow the request without suggesting CDPI reduced the number of questions asked. The Council was reluctant to suggest this as an approach as it believed this could easily manifestly change the nature of the request.

72. In terms of advice and assistance, the Council submitted that CDPI had been supplied with an estimate of the number of pages, redactions required and the cost of providing the information. This, the Council hoped, gave the applicant sufficient information to be able to determine what reductions would be possible to reduce the overall cost.

73. Having considered the Council's submissions on this matter, the Commissioner is concerned with the Council's approach to its obligation to provide advice and assistance. In this case, it appears to her that, rather than proactively taking steps to advise and assist CDPI in order to help it narrow the scope of its request, the Council has made an assumption that doing so would change the nature of the request. In the Commissioner's view, whether this would or would not be the result of any such narrowing is for the applicant, and not the Council, to decide.

74. The Commissioner acknowledges that the Council provided CDPI with some information regarding the cost of providing the information, but does not consider this was sufficient, in itself, to allow CDPI to determine how it would be possible to reduce the cost of provision.

Notification of revised fee

75. As stated above, in its review response, the Council advised CDPI that were the information provided electronically, the photocopying charge could be removed but the fee would require to be adjusted to account for scanning. The Council was asked to explain why it had failed to provide CDPI with a revised fee, taking account of any adjustments for providing the information electronically.

76. The Council conceded it had not provided CDPI with a revised fee and acknowledged it would have been helpful to do so, to enable CDPI to make a decision.
77. The Commissioner considers that, in line with the requirement in regulation 9(1) of the EIRs, when making any adjustments to fees for providing information (such as in this case), it is reasonable to expect public authorities to provide applicants with the actual revised fee. This allows applicants to make a fully informed decision as to whether or not to proceed with their request. In the Commissioner's view, it is neither sufficient nor helpful, to merely inform an applicant that a fee would need to be adjusted.

Publication of fees and charges (Regulation 8(8) of the EIRs)

78. As stated previously, the Council was found to have complied with the requirements of regulation 8(8) of the EIRs by publishing a schedule of its fees and information on the circumstances in which a fee may be charged, waived or required to be paid in advance.
79. Notwithstanding this, the Commissioner is concerned that the level of information contained in the Council's schedule of fees is, in itself, basic and appears to expect that individuals requesting information would have an understanding of the charging regime under FOISA or the EIRs. The Commissioner notes that the schedule of fees does not (and did not at the time of CDPI's initial and review requests) contain any reference to where further information concerning associated costs might be located. She considers, at the very least, that the schedule of fees should set out, or include a link to, any relevant predetermined charges, for example reproduction costs (such as those for photocopying or computer discs).
80. While the schedule of fees published by the Council is fit for purpose in providing the basis for charging for environmental information, the Commissioner considers it does not fully explain the Council's approach, particularly with regard to any predetermined rates.
81. The EIRs do not stipulate the level of information required to be included in a schedule of fees. However, the Commissioner considers that, in line with the requirement in regulation 9(1) of the EIRs, public authorities should explain their charging regime as clearly and comprehensively as possible, so that applicants and potential applicants can fully understand the authority's approach and make an informed decision. In the Commissioner's view, this extends to the inclusion, in an authority's schedule of fees, of information on predetermined rates (such as reproduction costs), particularly when these are the costs used by public authorities when calculating fees for the provision of information under FOISA or the EIRs.

Commissioner's findings – advice and assistance

82. In the circumstances narrated above, the Commissioner finds that by failing to:
 - advise and assist CDPI to narrow the scope of its request, with a view to reducing the overall cost of compliance,
 - provide CDPI with a revised fee, taking account of all adjustments for providing the information electronically, and
 - include, in its schedule of fees, information on predetermined rates used in calculating fees for the provision of information under FOISA or the EIRs,

the Council failed in its duty to provide CDPI with an adequate level of advice and assistance, and thereby failed to comply with regulation 9(1) of the EIRs.

83. The Commissioner does not require the Council to take any action in respect of the first two of these failures. In respect of the third, she requires the Council to review its schedule of fees, to ensure that it includes information on predetermined rates used in calculating fees for the provision of information under the EIRs, or links to where that information is published. She would encourage all Scottish public authorities to do the same.

Decision

The Commissioner finds that Glasgow City Council (the Council) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Clyde Docks Preservation Initiative Limited (CDPI).

The Commissioner finds that the Council was correct to apply section 39(2) of the Freedom of Information (Scotland) Act 2002 to the information requested, and consider the request under the EIRs.

The Commissioner finds that the Council was entitled to conclude that, in terms of regulation 10(4)(a) of the EIRs, it did not hold information concerning a Councillor's constituency duties in his capacity as an elected member (and not in pursuance of the Council's corporate functions).

The Commissioner also finds that the Council was entitled to issue a fees notice before providing the information requested, and that the fee charged by the Council was reasonable, thereby complying with regulation 8 of the EIRs.

For the reasons stated in this decision, the Commissioner also finds that the Council failed in its duty to provide CDPI with a reasonable level of advice and assistance when responding to its request and requirement for review, and thereby failed to comply with regulation 9(1) of the EIRs.

The Commissioner requires the Council to review its schedule of fees produced for the purposes of the EIRs, to ensure that it includes information on predetermined rates used in calculating fees for the provision of environmental information, or links to where that information is published, by **9 January 2017**.

Appeal

Should either Clyde Docks Preservation Initiative Limited or Glasgow City Council wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Enforcement

If Glasgow City Council (the Council) fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Council has failed to comply. The Court has the right to inquire into the matter and may deal with the Council as if it had committed a contempt of court.

Margaret Keyse
Head of Enforcement

3 October 2016

Freedom of Information (Scotland) Act 2002

1 General entitlement

(1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

(6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

(1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

(b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

39 Health, safety and the environment

...

(2) Information is exempt information if a Scottish public authority-

(a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or

(b) would be so obliged but for any exemption contained in the regulations.

...

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

(1) In these Regulations –

...

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on

-

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

...

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

...

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

...

5 Duty to make available environmental information on request

(1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

(2) The duty under paragraph (1)-

...

(b) is subject to regulations 6 to 12.

...

8 Charging

(1) Subject to paragraphs (2) to (8), where a Scottish public authority is under a duty to make environmental information available under regulation 5(1), it may charge a fee for so doing.

...

- (3) Fees charged under paragraph (1) shall not exceed a reasonable amount and in any event shall not exceed the costs to the authority of producing the information requested.
- (4) A Scottish public authority may require that payment of the whole or part of a fee under paragraph (1) be made in advance of making information available.
- ...
- (6) Where a Scottish public authority has notified an applicant that advance payment is required under paragraph (5) then that authority is not obliged to-
- (a) make the information requested available under regulation 5(1); or
 - (b) comply with regulations 6, 7 or 13,
- unless the fee is paid; and any such fee must be paid within a period of 60 working days beginning with the day on which the authority gave such notification.
- ...
- (8) A Scottish public authority shall publish and make available to applicants-
- (a) a schedule of its fees; and
 - (b) information on the circumstances in which a fee may be charged, waived or required to be paid in advance.

9 Duty to provide advice and assistance

- (1) A Scottish public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.
- ...
- (3) To the extent that a Scottish public authority conforms to a code of practice under regulation 18 in relation to the provision of advice and assistance in a particular case, it shall be taken to have complied with the duty imposed by paragraph (1) in relation to that case.
- ...

10 Exceptions from duty to make environmental information available—

- (1) A Scottish public authority may refuse a request to make environmental information available if-
- (a) there is an exception to disclosure under paragraphs (4) or (5); and
 - (b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
- (2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-
- (a) interpret those paragraphs in a restrictive way; and
 - (b) apply a presumption in favour of disclosure.
- ...

(4) A Scottish public authority may refuse to make environmental information available to the extent that

(a) it does not hold that information when an applicant's request is received;

...

Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004

3 Projected costs

- (1) In these Regulations, "projected costs" in relation to a request for information means the total costs, whether direct or indirect, which a Scottish public authority reasonably estimates in accordance with this regulation that it is likely to incur in locating, retrieving and providing such information in accordance with the Act.
- (2) In estimating projected costs-
 - (a) no account shall be taken of costs incurred in determining-
 - (i) whether the authority holds the information specified in the request; or
 - (ii) whether the person seeking the information is entitled to receive the requested information or, if not so entitled, should nevertheless be provided with it or should be refused it; and
 - (b) any estimate of the cost of staff time in locating, retrieving or providing the information shall not exceed £15 per hour per member of staff.

Appendix 2: Clyde Docks Preservation Initiative Limited's request of 26 January 2016

Please can you provide me with the following under Freedom of Information that is available for the past two years (up to 25 January 2016).

1. Copies of all email correspondence between Councillor Stephen Dornan (Govan Ward 5) and the owners of Govan Graving Docks (property land registry ref GLA145989) – New City Vision and/or New City Vision Chairman Mr Harry O'Donnell.
2. Copies of all email correspondence between Councillor Stephen Dornan and any other parties regarding Govan Graving Docks.
3. Copies of all email correspondence between council officers and the owners of Govan Graving Docks – New City Vision and/or New City Vision Chairman Mr Harry O'Donnell – relating to Govan Graving Docks.
4. All other available Councillors' and Council officers' correspondence, internally and with third-party organisations, relating to Govan Graving Docks.
5. Minutes of Central Govan Action Plan Steering Committee meetings during 2015.
6. Details of any pre-planning discussions that have taken place about Govan Graving Docks with New City Vision and/or ZM Architecture.
7. Details of any sources of public funding that Councillors or Council officials have advised New City Vision that they may be able to access.
8. Any Councillors' and Council officers' correspondence in which specific reference has been made to The Clyde Docks Preservation Initiative Limited and/or any of the company's directors - Liz Gardiner, James Stringfellow and myself.

Scottish Information Commissioner

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