ALGAO: England

Charging for Archaeological Curatorial Services

Advice note
Some Legal and Policy Issues

May 2012

(Revision of Advice Note issued July 2010)

Introduction and Context

ALGAO's predecessor, the former Association of County Archaeological Officers (ACAO), published guidance on polices for access and charging for Sites and Monuments Records in 1993[1]. This new guidance note has been prepared at a time of exceptional pressure on local authority resources to update aspects of that guidance in order to assist ALGAO members in considering the implications of charging for curatorial services, principally planning advice and historic environment records. It focuses on the situation in England relating to the management of heritage assets of archaeological interest through the planning system under the National Planning Policy Framework (NPPF); different arrangements apply in Scotland, Wales and Northern Ireland.

The NPPF states that local planning authorities should either maintain or have access to an historic environment record (HER) (paragraph 169) and that it should be consulted using appropriate expertise (paragraph 128). However, there is no statutory obligation on a local authority to either maintain an HER or provide archaeological advice.

For the purposes of this note, charging issues have been divided into two distinct types:

1) Charges related to the supply and re-use of information held in historic environment records.
2) Charges relating to archaeological advice given in connection with planning applications and other development schemes (e.g. pipelines).

This note is NOT a definitive or exhaustive statement nor is it a substitute for legal advice. ALGAO strongly recommends that members obtain their own legal advice prior to implementing any new charging policy, and cannot be held responsible the consequences of a failure to do so.

Powers to charge for historic environment services

The Localism Act 2011 brought in a general power of competence which allows a local authority to do anything that an individual can do that is not specifically prohibited. Section 3 of the Act covers charging for services and is essentially similar to powers previously provided under Section 93 of the Local Government Act 2003 – essentially it allows an authority to charge for a service which it is not required to provide by statute so long as the recipient agrees and the charges over the year do not exceed the cost of providing the service. Government guidance on fees and charges is set out in chapter 6 of

[1] Association of County Archaeological Officers, 1993
Sites and Monuments Record: Policies for Access and Charging. Second Edition.

HM Treasury's 'Managing public money', which includes annexes on calculating fees and charging for information[2].

Under the standing orders of a local authority, a new charging policy will almost certainly need formal approval either from a cabinet member or a senior officer under delegated powers. ALGAO members should therefore ensure that they have obtained all necessary authorisation from their employing authority for existing charging policies or to instigate a new policy.

[2] Managing Public Money (HM Treasury, 2 June 2011)
http://www.hm-treasury.gov.uk/psr_mpm_index.htm
(See especially chapter 6:Fees, Charges and Levies and Annexes 6.1: Checklist for setting up new services; 6.2: How to calculate fees and 6.3: Charging for information)

Historic Environment Records

Current practice for English HERs is that most, but by no means all, charge developer's consultants for consultations driven by commercial development[3]. Of those that do charge, some do so for all commercial consultations however processed, others only for 'remote' requests for data-downloads. Search charges vary considerably but in 2011 the average minimum search fee was just under £60. Whilst some HERs do add VAT, where specialist advice has been obtained this indicates that requests to access Sites and Monuments records are non-business and therefore VAT should not be charged[4].

Draft DCMS Guidance on HERs[5] envisaged that public access should be free of charge but with the proviso that some costs might be recovered for copying, production of reports based on HER content and priority service. There was also a brief mention of copyright and licensing.

Environmental Information Regulations and the Freedom of Information Act

In the absence of specific primary legislation relating to HERs, the relevant legislation is the Freedom of Information Act 2000 and the Environmental Information Regulations 2004[6]. There is occasional debate on whether HERs are subject to the EIR and the 1993 ACAO advice took the view that the then recently released EEC Directive did not appear to apply to archaeology. However, this exclusion does not appear to be consistent with regulation 2 of the 2004 Regulations which explicitly cover:

Any information in written, visual, aural, electronic or any other material form on: (inter-alia)

(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;

…

*(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 (a) or, through those elements, by any of the matters referred to in (b) and (c).*

[Our emphasis]

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[4] Advice obtained by Oxfordshire County Council from HMRC 28th March 2008.

[5] Published May 2008. The PPS5 Practice Guide noted that DCMS intended to publish guidance for local authorities on the maintenance of HERs but the position following the publication of the NPPF is uncertain.

[6] Environmental Information Regulations 2004
http://www.legislation.gov.uk/uksi/2004/3391/contents/made
Guidance to the Environmental Information Regulations 2004
http://archive.defra.gov.uk/corporate/policy/opengov/eir/index.htm

Thus, whilst some information held by HERs might still be held to lie outside the remit of EIR (e.g. general documentary history, destroyed sites), it seems inescapable that most HER information falls within their ambit. HER enquiries should therefore normally be handled under the terms of the Environmental Information Regulations not the Freedom of Information Act as where the former applies it takes precedence. However, where an HER consultation falls partly or wholly outside EIR then the FOI would apply to those elements which fall outside.

The Town and Country Planning (Environmental Impact Assessment) Regulations 2011 places an obligation on the local planning authority or other body notified of an intention to submit an environmental statement to enter into consultation about relevant information and make such information available under regulation 5(1) of the EIR (regulation 15).

Charging under the Environmental Information Regulations

Charging under EIR is covered under regulation 8, namely:

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

2) A public authority shall not make any charge for allowing an applicant
(a) to access any public registers or lists of environmental information held by the public authority; or
(b) to examine the information requested at the place which the public authority makes available for that examination.

(3) A charge under paragraph (1) shall not exceed an amount which the public authority is satisfied is a reasonable amount.

Understandably, regulation 8 has been interpreted by some HERs as permitting charging only for 'remote' or complex bespoke searches. EIR charges should be specified in the Council's 'publication scheme' – if in doubt, contact your FOI/EIR officer to ensure your HER is covered. However, this is not the end of the story as the accompanying guidance covers commercial activity and makes it clear that the supply of information under the EIRs does not give the person who receives the information an automatic right to re-use the information in a way that would infringe copyright [7].

Implications of the 'Markinson case'

Charging under the EIR was affected by the 'Markinson case' decision by the Information Tribunal (2006)[8]. In effect this concluded that:

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[7] Charging For Environmental Information Under The Environmental Information Regulations 2004. Department for Environment, Food and Rural Affairs. July 2010 http://archive.defra.gov.uk/corporate/policy/opengov/eir/guidance/pdf/eir-charge-guide.pdf

[8] EIR: the Markinson case http://archive.defra.gov.uk/corporate/policy/opengov/eir/decision/markinson.htm

1) *Any charges that a public authority makes for providing Environmental Information must be reasonable to the general public as well as to the authority themselves.*

2) *Public Authorities should review their policies on photocopying charges for environmental information and be aware that they will require strong justification to charge more than 10p per copy. Costs (such as staff) associated with the maintenance of the information, its identification or extraction from storage should be excluded.*

Thus charging the 'general public' more than 10p a copy for photocopies for HER information would be to be hard to justify. DEFRA guidance based on FOI suggests no charge if the cost of provision would be less than £450. However, the situation for commercial use is (potentially) more complicated – see on.

Commercial use of Environmental Information

The EIRs allow the levy of a market-based charge for information where that data is collected and published on a commercial basis in order to ensure its continued supply. Whether an HER could use this provision as a basis for commercial charging policy would require further expert and legal advice.

EIR focuses on responding to requests for environmental information and on the supply of that information to a person or organisation that requests it. **The supply of information under EIR does not give the person who receives the information an automatic right to re-use the information in a way that would infringe copyright.** Most environmental information held by public sector bodies would be covered by copyright under the Copyright, Designs and Patents Act1988. Although the Copyright, Designs and Patents Act 1988 makes provision for material to be re-used for the purposes of research, private study and for criticism, review and news reporting, other re-use would be subject to specific permission being granted by the copyright holder in the form of a licence. Charges for the re-use of material could be applied, although the complexity of copyright with respect to composite HER holdings is a potential issue; in practice an HER could probably claim 'database right'.

A database may be protected by copyright and/or the database right. Irrespective of whether the database is entitled to full copyright protection it may be given the database right. This is an automatic right which protects the investment (i.e. time, money and energy) that goes into obtaining, verifying or presenting the contents of a database. [9]

The re-use of public information is covered by the 'The re-use of Public Sector Information Regulations 2005' (PSIR)[10] but they explicitly exclude 'cultural establishments', such as archives, museums and libraries – whether an HER located outside such an institution (e.g. in a planning department) would be considered a 'cultural establishment' in its own right is a moot point but for the

[9] For a summary of database right see:
http://www.caret.cam.ac.uk/copyright/Page92.html
[10] The re-use of public sector information regulations 2005
http://www.opsi.gov.uk/si/si2005/20051515

present purposes it is assumed not. The guidance says that most information held by such excluded bodies would be made available for re-use (but does not specify on what basis). Thus the location of an HER within the local authority structure could be relevant.

The PSIR Regulations themselves state:

Charging

15. *- (1) A public sector body may charge for allowing re-use.*

(2) The total income from any charge shall not exceed the sum of -

(a) the cost of collection, production, reproduction and dissemination of documents; and

(b) a reasonable return on investment.

(3) Any charges for re-use shall, so far as is reasonably practicable, be calculated -

(a) in accordance with the accounting principles applicable to the public sector body from time to time; and

(b) on the basis of a reasonable estimate of the demand for documents over the appropriate accounting period.

(4) A public sector body shall not charge an applicant for costs incurred in respect of activities mentioned under paragraph (2)(a) in respect of a request for re-use, if the same applicant had been charged in respect of those same activities by that public sector body for access to the same document under information access legislation.

(5) Where a public sector body charges for re-use, so far as is reasonably practicable, it shall establish standard charges.

(6) A public sector body shall specify in writing the basis on which a standard charge has been calculated if requested to do so by an applicant.

(7) Where a standard charge for re-use has not been established, the public sector body shall specify in writing the factors that will be taken into account in calculating the charge if requested to do so by an applicant.

The OPSI web site FAQ also contained a number of useful explanations (see annex).

Conclusions

The legal and policy framework for HER charging regimes is complicated and potentially ambiguous. The Freedom of Information Act, Environmental Information Regulations 2004 and the Re-use of Public Sector Information Regulations 2005 may apply depending upon circumstances. However it appears that:

- All the above regimes expect a local authority to publish a charging policy, unless offering the service for free.

- A general policy of charging for access to HER information is not permissible.
- Charges for photocopying should not normally exceed 10p per copy and staff and other related costs should be excluded from such calculations.
- It may be possible to charge for re-use HER information on the basis of a copyright or database right license.
- Although widely practiced, selective charging for commercial HER access only needs careful justification and may be best linked to licensing through the PSI Regulations, which allow for different charging regimes for different types of use.
- The organisation location and status of the HER may be relevant (e.g. whether in a ‘trading fund’ or ‘cultural establishment’)
- Completion of the Draft DCMS HER Guidance would be desirable but it needs to be clarified in its final version with respect to the status of HER information in relation to FOI, EIR and PSIR and the section on Fee charging needs to be strengthened.

Archaeological Planning Advice

Archaeological planning advice is currently sourced by local authorities in several different ways:

- From the County Council in two-tier areas.
- In-house within unitary authorities
- Through externalised or joint arrangements

In some places county councils recover a proportion of their costs from the district councils receiving advice through Service Level Agreements. At present, very few authorities charge developers or their consultants for pre-application advice, project briefs or monitoring.

Somewhat analogous situations occur within planning where many local authorities charge for pre-application advice[11]. There are statutory scales of charges for submitting planning applications and discharging conditions but these do not appear to take into account the need for expert advice. DCLG is considering allowing planning authorities to set local application fees but it is uncertain if this initiative started by the previous Government will be progressed.

Basic Principles and Issues

In considering whether and how to bring in a new charging regime the following questions need to be considered:

- Who to charge?
- What is to be charged for?
- How much to charge?
- The implications of a refusal to accept a charge.

In principle, an archaeological service could charge the developer (potentially through their consultant) or, in two-tier areas, the local planning authority to whom advice is provided. Utility companies (gas, water etc) are a special case as they operate largely outside the planning system – whilst such large companies would manifestly be able to afford modest curatorial fees there are few levers to require them to do so, and their willingness remains largely untested.

Nationally, experience of upper tier authorities charging lower tier authorities seems to be mixed with some areas reporting success whilst others face strong resistance or disinterest. With local government funding under severe pressure it seems likely that resistance will if anything increase. here is an obvious risk to the archaeological resource if a county council were to withdraw the advice service from a district council because it would not contribute towards costs.

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[11] Planning Advisory Service, 2007
A material world: charging for pre-application planning advice
http://www.pas.gov.uk/pas/core/page.do?pageId=111323

Whilst a local planning authority which determined applications without proper archaeological advice could risk complaints, or even judicial review of its decisions, some may deem this a relatively low risk worth taking in straightened times. One possible approach for upper tier authorities might be to offer a basic advice service on planning applications with 'extras' (briefs, monitoring etc) chargeable either to the local authority or developer. Such an approach would at least ensure that the planning authority was aware that archaeology is a material consideration in a particular case, and in general terms what action should be taken.

Charging developers (or their consultants) could be an option both in the above two-tier scenario and for advice given in relation to applications to the host authority. In the latter case special consideration should be given to the charging policies of the in-house planning authority – for example, it may be questionable to levy two charges for pre-application advice or to make charges which are effectively an additional to statutory planning application charges. Where advice is given effectively on behalf of a lower-tier authority but without payment from that authority it may be legitimate to seek to recover costs. In either case the scope of charges ought to carefully considered: should charges be levied on all developments or should some (e.g. householders, not-for-profit community developments, small businesses, listed building consents etc) be exempted (they usually are from LPA's pre-application charges)? Should 'major' developments, or schemes having greater archaeological impact, have higher fees? As to what should be charged for, it would not seem either reasonable or practicable to charge developers for the initial advice letter to the LPA but pre-planning advice and pre- or post-application preparation of briefs, comment of written schemes of investigation, on-site monitoring and consideration of reports are all potentially chargeable items – in any case a clear schedule of prices and products would be necessary. Difficulties arise for the LPA if a report is submitted to them but their expert adviser is unable to comment upon it because they have not been paid. Professional difficulties arise for the archaeological consultant/contractor if they cannot obtain agreement/involvement from the local archaeological curator because no payment has been made.

Charging rates

Charging rates should be informed by the HM Treasury guidance (see footnote 2 above). It appears that full cost recovery may be legitimate, but income should not exceed the cost of delivering the service. The basis for calculating costs should be checked with financial services. Consideration should be given to the use of fixed or hourly rates, different rates for written advice or meetings and payment arrangements (e.g. e-commerce). Advice should be bespoke and helpful, not formulaic.

Pragmatism & Good Practice

Whilst there is insufficient experience of this area to offer definitive advice some preliminary conclusions can be arrived at as to how to proceed:

- Identify charging points where the customer requires and gains a benefit from the service - e.g. commenting on a project design in order to obtain its approval.
- Make charging arrangements clear & easy to understand & administer – e.g. place request forms on website, use e-commerce
- Maintain dialogue with customers
- Make advice constructive – e.g. be clear about what changes are required to make the proposal acceptable
- Present as part of a structured approach to help the customer – e.g. alongside other planning or environmental advice

Conclusion

Charging for archaeological planning advice is still largely a case of sailing in uncharted waters; a situation not helped by the lack of clarity in government guidance and the weak national response to those local authorities that have not had access to such advice – a situation which may have encouraged a view that this is a discretionary service. The options available to services facing financial pressures in this area would appear to be:

- County Council services to negotiate an SLA with District Councils.
- County Council services to provide a basic service to District Councils with 'extras' chargeable either to the district or developer.
- County/Unitary Authority services to agree charging arrangements with in-house planning authority, potentially with 'extras chargeable to developers.

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SK v.5.1 - 01/05/12

Annex : Selected FAQ from decommissioned OPSI Regulations web site (downloaded July 2010)

Q. I have spent time and money producing this information why should I allow others to re-use it?

A. Information prepared as part of a public sector organisations public task has been gathered at the taxpayers' expense and for their benefit. As such the taxpayer has a right to access and re-use that information. It is also reasonable to expect the re-user, not the taxpayer, to cover the costs of making the information available for re-use and some of the costs of gathering that information.

The PSI Regulations recognise that publicly-owned copyright operates to different rules and that public sector organisations have responsibilities not to discriminate between potential users, to be open and to trade fairly.

Q. What is the difference between access and re-use?

A. Access, under Freedom of Information legislation (FOI) is all about obtaining the information. Often individuals or companies want the information for their own use.

Re-use involves making copies, publishing the information and perhaps commercially exploiting it. Re-use is therefore very closely linked to copyright and licensing.

For this reason, public sector organisations state in responding to FOI requests that the supply of documents under Freedom of Information does not give an automatic right to re-use those documents.

Q. How much may a public sector organisation charge for a licence to re-use information?

A. A public sector organisation may recover some of the costs initially incurred in collecting the data, even though this was part of the public sector organisations public task and charge to cover the costs of allowing re-use.

This decision should not be based upon the perceived value of the information or the type of organisation requesting it. It should be based upon the way the information is being re-used. This does allow for discrimination between different types of re-use (e.g. between re-use for educational compared with commercial purposes) but ***not*** *for different re-users.*

Q. Is a public sector organisation allowed to make money from licensing?

A. The re-use of most public sector information will be allowed free of charge as it is prepared as part of the basic public task. This is particularly the case with core government material freely re-usable under the PSI Click-Use Licence.

The taxpayer, having met the cost of collecting the information, is entitled to see a reasonable return on their investment (in the form of income from licensing) where such information has the potential to be re-used for commercial gain.

Charging for use helps to reduce overall public expenditure, improves transparency and ensures that costs are properly levied on those who benefit from using the information other than for its primary purpose. Those public sector organisations allowing re-use should follow Treasury guidelines.

Q. What is meant by reasonable return on investment?

A. It is a matter for individual public bodies to decide on what basis they wish to make such information available and what they calculate to be a reasonable return on investment.

Q. Will the charges be based on the type of re-user?

A. No. The key consideration is the form of re-use. All applicants will be charged the same rate if the type of re-use is the same.

Q. Is a public sector organisation obliged to charge a charity the same as it charges a commercial organisation?

A. Charges should be based upon how information is used, and not according to the type of organisation requesting re-use. Therefore if a charity is using the information in a commercial way, it should be charged the same as any other re-user.

Different rates may be set for charitable and commercial re-use irrespective of the nature of the organisation re-using.

Q. What is the basis for deciding whether the information has a possible commercial re-use? Can the decision be challenged?

A. It is a matter for individual public bodies to consider what information might be available for re-use and on what terms it should be offered. Public bodies may also be able to provide non-standard, value added products to meet the needs of individual customers - in which case the charge would be a matter for negotiation.

The Re-use of PSI Regulations 2005 (SI 2005 No. 1515, regulation 15) specifies what may be charged for.

In all cases, the public body itself will be required to have a complaints procedure, and if that does not resolve matters, the OPSI complaints procedure can be used.

Q. How do I know that the charge quoted to me is appropriate and reasonable? Will the charging be transparent? Do I have a right to appeal?

A. In most cases the charge quoted will not exceed the cost of collection, production, reproduction and dissemination of information and a reasonable return on investment. Public bodies will publish asset lists, standard licence terms, and details of any charges, electronically where possible.

Public sector organisations must comply with the Re-use of Public Sector Information Regulations 2005. Trading funds with delegations from the Controller of HMSO to manage the licensing of Crown copyright, such as Ordnance Survey and the Met Office, are also members of OPSI's Information Fair Trader Scheme. This independently verified scheme ensures that members meet certain standards of openness, fairness and transparency. There are also both internal and independent complaints procedures

Q. Can local government make a charge, or even profit, from allowing re-use of their information?

A. Unlike trading funds, local authorities were not set up to be commercial bodies, therefore different rules apply. Unless the local authority is doing something outside its public task, and/or adding value to the data it is releasing, the charge should be limited to those costs incurred in permitting re-use. For example, a council is involved in gathering information from its archives, collating that information, making copies and sending them out to a re-user.