

# Cockerels, cows and kick offs: what recent decisions tell us about the definition of environmental information

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**In this analysis of the ICO's database of decisions on environmental information, Paul Gibbons, aka FOIMan, looks at the lessons to be learned. Paul is Head of the Examination Board for the Practitioner Certificate in Freedom of Information ([www.foiqualification.com](http://www.foiqualification.com))**

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**M**ost Freedom of Information Officers will have to deal with requests made under not one, but two regimes: the Freedom of Information Act ('FOIA') and the Environmental Information Regulations ('EIRs'). The latter was examined at length in a previous series of articles (Volume 13, Issues 4-6) published in this journal.

The most fundamental problem for most practitioners is knowing when to apply the EIRs. The problem of what defines information as 'environmental' continues to challenge authorities and the regulator alike.

Of course, a good way to cast light on tricky definitions is to look at their application in practice. In the last edition, we were able to use the Information Commissioner's decisions over the last year to illustrate when burdensome requests can be refused as vexatious. The same approach can provide a clearer view of when a request should be dealt with under the EIRs.

In this article, we will use a series of Information Commissioner decisions to illustrate the definition of environmental information set out in the EIRs. As well as helping practitioners to tell the difference between the different regimes, this will tell us something about how the Information Commissioner's Office ('ICO') deals with authorities that handle requests under the wrong regime.

## The definition of environmental information

As explained in a previous article (Volume 13, Issue 4), the definition given in the EIRs at Regulation 2(1) should be interpreted broadly. It says that environmental information is 'information on' the following:

*(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;*

*(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*

*(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 (a) and (b) as well as measures or activities designed to protect those elements;*

*(d) reports on the implementation of environmental legislation;*

*(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and*

*(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)'.*

Where a case requires the ICO to look at the definition of environmental information, it will set out to explain how the information falls within one or more of these listed categories.

Led by this, we will look at some of these categories and examples of information that the ICO has decided fall into them.

## ICO decisions

ICO decisions are published on its website in a database that normally facilitates ready searching and analysis of cases. For example, when we looked at vexatious requests for a previous article, it was possible to search for all ICO decisions relating to section 14 FOIA.

When it comes to looking for decisions on the definition of environmen-

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tal information however, the database is not so helpful. For whatever reason, case officers at the ICO do not generally index decisions in such a way that discussions about whether a request should be handled under the EIRs or FOIA can be isolated. This can make finding examples a somewhat laborious exercise.

For the purposes of an exercise such as this one, the first step is to search for cases that are indexed with other EIRs Regulation numbers. So, for instance, it is possible to search for all decisions in relation to the use of Regulation 12(4)(b) of the EIRs which brings up decisions where the refusal of a request as being manifestly unreasonable is at issue. Sometimes, the summary description of a particular case returned through this search will indicate that the authority originally applied an FOI exemption (probably section 14 in this case), so we know that that decision notice will discuss why the ICO believed that the request ought to have been handled under the EIRs. In many cases though, it is simply a matter of dipping into the decision notice and scrolling through to the section titled 'Reasons for the decision' to see if the definition is discussed.

## Elements of the environment

Information on the state of the elements of the environment — including the '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 interac-

tion among these elements' — will be environmental information.

It is rare for a decision to conclude that information is environmental purely on the basis that it is on the state of the elements. In practice, it is the interaction of the other categories listed at Regulation 2(1) that leads to information being identified as environmental.

## Factors affecting the elements of the environment

More likely is that information will be environmental as it is on a factor which affects one or more elements of the environment. In decision FS50770341 (Neath Port Talbot Council, August 2019), the Commissioner concluded that information related to complaints about a cockerel crowing was environmental information. It was information on a factor (noise) which affected an element of the environment (the landscape).

## Measures affecting elements and factors

Readers will recall that a test for establishing whether information falls under the third category of environmental information was set out in *The Department for Energy and Climate Change v IC & AH* ('Henney') [2015] UKUT 0671 (AAC) at paragraphs 93-95. The test is as follows:

- is the request asking about a measure?
- would the measure be likely to affect the elements of the environment, or factors impacting on them?
- is the subject matter of the

request 'information on' the measure?

Public authorities' policies, procedures and actions will constitute 'measures'. It is the remaining questions that cause us to pause.

Local authorities' planning application arrangements are 'measures' which are designed to affect (limit) the impact of factors on elements of the environment. A request about planning applications or objections for example is going to be a request for information on these measures. Decisions FS50829201 (Leeds City Council) and FS50833295 (City of York Council) confirm that this kind of information is environmental.

In FS50845333, Stevenage Borough Council was asked for information on the redevelopment of Stevenage Town Centre. The Commissioner found that the town centre is land, and therefore that information on its redevelopment was information on a measure affecting an element of the environment. Wiltshire Council was asked to release details about rates paid by contractors for damage to street furniture (e.g. signs, lamp-posts, traffic lights, etc.). The rates were part of the contractual arrangements for highways and street scene service. The contractual arrangements are information on a measure affecting the landscape (FS50804402).

A report on fire safety measures is environmental information (FER0842720, Ministry of Defence). This does not extend, though, to email correspondence about preparations for publication of the report.

This question of where the boundary lies is a tricky one. In *Henney*, the judge supported the principle of looking at 'the big picture'. This was later questioned by the Court of Appeal but not entirely dismissed. A good example might be FS50841766, where information on a bid for funding by a school from the Department for Education was ruled to be environmental. It is not that bids for funding in and of themselves are environmental, but in this case, the funding was to be used to construct new school buildings. Due to that 'bigger picture' the funding

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information became environmental. In other cases, notably *DfT, DVSA and Porsche Cars GB Ltd v Information Commissioner and John Cieslik* [2018] UKUT 127 (AAC), the Upper Tribunal has cautioned against expanding the definition of environmental information too far. In *Cieslik*, the argument was effectively that whilst a motor car clearly impacts the elements of the environment, that does not mean that anything to do with a motor car is environmental.

In FER0827677 (York City Council), we see the Commissioner seeking to get this balance right. A request had been submitted to the council for information relating to the development of a new football stadium. The council had argued that a legal charge on the land of the existing football stadium was environmental information because it related to the value of the land, which was affected by the state of the land. The Commissioner, whilst agreeing that the legal charge was environmental information, disagreed. The reason it was environmental was because the charge was there as part of the financing of the new stadium, the building of a new stadium is a measure that affects the landscape, and the charge was information on the measure.

The same logic resulted in the Commissioner ruling that requested information about a loan agreement designed to support the building of the stadium and the sale of the land on which the existing stadium stood was environmental information. All of this was information on the building of the new football stadium.

However, the applicant had also asked for the 'lease and match day agreement' for the new stadium. The council was inclined to treat this as environmental information since it included details of rights to light and air, parking facilities, access to utilities, and rights to attach signs to the stadium.

The ICO disagreed though, explaining that 'the lease itself does not require any specific changes to the footprint of the building, or the surrounding area, and its terms do

not require any further planning consents'. On this basis, the ICO judged that the lease agreement was not environmental information.

### The state of human health and safety

There aren't any recent decisions on whether information constitutes 'reports on the implementation of environmental legislation', perhaps because this will rarely be in dispute. Similarly, there is not much discussion of cost analyses of measures in the ICO's decisions.

One of the more confusing elements of the definition at Regulation 2(1) is at (f) which refers to 'the state of human health and safety'. This is qualified by the statement '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)'.

In FS50833415 (Public Health England), the ICO concluded that an intention or otherwise to research children's exposure to radiation from ipads and laptops was information which fell into Regulation 2(1)(f). Radiation and emissions are listed as factors at 2(1)(b), and research on their effect on children's health is therefore environmental information under Regulation 2(1)(f).

The Animal and Plant Health Agency ('APHA') suggested that bovine tuberculosis ('TB') test data on cattle were not environmental information (FER0830908) since cattle are a 'farming commodity' and not an element of the environment. The tests were part of a programme designed to reduce bovine TB. The ICO argued that the reason the programme existed was to reduce the risk to human health. Whilst APHA disagreed, arguing that the risk to humans from bovine TB was small, the ICO was convinced that there was some risk and that the programme existed to reduce it still further. This meant that it fell under 2(1)(f).

### Does it really matter?

Given that some of these questions boil down to quite a complex analysis, and practitioners are often dealing with large volumes of requests, it is inevitable that from time to time, they will get this wrong. Practitioners will sometimes deal with requests for environmental information under FOIA, and occasionally they may handle requests under the EIRs when they ought to be dealt with under FOIA. When they do this, does it really matter?

If information is being disclosed, the legislation is so similar in effect that it will not normally matter which legislation is used. As long as the applicant gets their information, it is unlikely anyone will ever know that a mistake was made. Even where the authority fails to apply the correct law when refusing a request, it is unlikely to make much difference in most circumstances.

In the first instance, it will be relatively rare that an applicant will notice (unless they — as sometimes happens — object to the application of the EIRs, not realising that if anything, this is likely to help their case). Even if a complaint reaches the ICO, a quarter of complaints are resolved informally. The quarter that result in a decision notice are the tip of the iceberg and even these suggest that practitioners should not generally fear applying the wrong legislation.

As I indicated earlier, the ICO does not index its decisions in such a way to readily identify cases where the incorrect law has been applied. This is because this issue is rarely the focus of an ICO decision, as it, like applicants, is more interested in whether or not information ought to be disclosed. For example, in FER0790309 (London Borough of Sutton) the ICO quickly dispenses with the issue of the right legislation. Having identified that the request should have been handled under the EIRs, it does not waste time asking the council to resubmit its arguments in favour of the appropriate exception to withhold the information:

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'In the circumstances of this case, the Commissioner has concluded that the most expeditious and appropriate action is to read arguments as to prejudice to commercial interests and confidentiality under the relevant provision of the EIRs, namely Regulation 12(5)(e)' (paragraph 24).

The worst that happens in an ICO decision is that it will highlight the mistake, and might ask the authority to restate their arguments in the light of the change in legislative framework. Very often though, as the above example illustrates, it won't even do that. For the most part then, if a public authority applies the wrong legislation, it won't make very much difference. Practitioners might well conclude that they should not therefore expend much time and energy on the decision as to which legislation to apply where it is not apparent or is a matter of internal debate.

## When it does matter

There will be some occasions where getting the correct regime does matter. There are several aspects of the EIRs that make it more likely that information will be released than under FOIA — in theory if not always in practice — including:

- all exceptions are subject to a public interest test (except for third party personal data);
- there is an explicit presumption to disclose; and
- some exceptions can only be applied if disclosure 'would' adversely affect a specified factor (as opposed to having the option of 'would be likely to prejudice' in FOIA).

In practice, it is very difficult to identify many examples where the use of legislation made a difference to the eventual outcome. Having identified which legislation to apply, the focus of ICO decisions is on whether information ought to be disclosed under that statute, and it does not comment on whether the result would have been different if the other law had been applied.

One situation in which the definition of environmental information will be significant to the outcome will be where requested information would be subject to an absolute exemption under FOIA. Since this option does not exist under EIRs, it makes it much more likely that information found to be environmental will be disclosed.

In FER0769649, the Ministry for Housing, Communities and Local Government ('MHCLG') sought to withhold parts of a letter between the Secretary of State and the Prince of Wales and a ministerial briefing to the Secretary of State ahead of a meeting with the same individual. It was successful in protecting the redacted extracts in the letter using the absolute exemption at section 37(1)(a) FOIA. However, the Commissioner ruled that the briefing was environmental information. The Department attempted to use the exception for internal communications at Regulation 12(4)(e) of the EIRs, but the ICO decided that the public interest favoured disclosure.

Another circumstance where the difference is clearly significant is where an authority is subject to the EIRs but not to FOIA. This can happen due to the different definition of 'public authority' in the EIRs to that in FOIA. As well as the authorities covered by FOIA, the EIRs apply to a range of other bodies, most significantly those carrying out functions of public administration. As the *Fish Legal* case (*Fish Legal v ICO* ([2015] UKUT 0052 (AAC)) found some years ago, one key test for this is whether an organisation has 'special legal powers' to carry out services of public interest.

Past decisions have found that utilities such as water and gas companies are subject to the EIRs as a result of this definition. More recently, in decision FER0844872, the ICO concluded that Heathrow Airport Limited ('HAL') was subject to the EIRs due to it having powers under the Aviation Act 1986 and Civil Aviation Act 1992. These powers included the ability to compulsorily purchase land and create byelaws. The ICO also noted the impact that HAL has on the environment. HAL may well appeal against this decision, but if it is unsuccessful, it will have to answer EIRs requests — and spotting the requests that are not asking for environmental infor-

mation will be important for it.

### Course — the Role of the FOI Officer

What is the actual job of an FOI Officer? How do you interpret caselaw on FOI? Is there a right way to process FOI requests? Paul addresses these issues in the training course, 'Role of the FOI Officer'. Details of the course can be found on the PDP website, [www.pdptraining.com](http://www.pdptraining.com)

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**Paul Gibbons**  
FOI Man  
[paul@foiman.com](mailto:paul@foiman.com)

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