

Down the rabbit hole: the EIRs — Part I

Paul Gibbons, aka FOIMan, gives the often overlooked Environmental Information Regulations their time in the light

The journal that you're reading is called the *Freedom of Information Journal*. You may also subscribe to our sister publications, *Privacy and Data Protection* and *Compliance and Risk Journal*. However, you're unlikely to find a publication dedicated to the Environmental Information Regulations 2004 ('the EIRs') - not from PDP or anywhere.

These much neglected rules rarely receive academic attention outside of the rulings of the Information Commissioner and Tribunals. Often, they are an afterthought, a paragraph in an article on an interesting aspect of the Freedom of Information Act ('FOIA'). In fact, it is not uncommon for experienced practitioners to express ignorance of the EIRs, even to their very existence in some cases.

Yet, the EIRs are an important part of the array of information rights that UK law now recognises. They make up a relatively small proportion of the information access requests that central government as a whole receives (statistics suggest around 3-4%). However, a public authority's area of interest may mean that EIRs make up a much higher proportion of their requests. 55% of requests received by the Department for Energy and Climate Change ('DECC') in 2015 were handled under EIRs. Anecdotally, local authorities appear to receive many more environmental information requests than central government, due to their direct involvement in planning and waste management for example.

Leaving aside the numbers of EIRs requests, it is the subject matter covered by the Regulations that makes them significant. Often, they relate to matters that directly affect the public. If your neighbour builds an extension that casts a shadow over your garden, you might reasonably ask if your council had discharged its planning duties properly. Local authorities are familiar with the intensity of reaction to proposals to change waste collections from households within their boundaries.

Projects on the national stage arouse no less furious passions. In 2016, a Conservative MP resigned their seat — and lost the subsequent by-election — in protest at the government an-

nouncing its conversion to the cause of a third runway at Heathrow Airport. Few topics have resulted in more controversy in recent years than the proposals to build a high speed rail network between London, the midlands, and the north of England. Those wanting to hold public authorities to account on these important and heartfelt concerns are more likely to use EIRs to do so than FOIA — whether they realise it or not.

There is a discrepancy between the significance of the EIRs and the coverage that they receive. With a view to at least partially addressing this, I'm going to dedicate a series of articles on these pages to the EIRs. This piece looks at why the EIRs exist at all before turning to a fundamental question: what exactly *is* environmental information?

Why do we have EIRs?

One of the reasons that the EIRs are often ignored is that they seem to the casual observer at least to be unnecessary. As we will see during our exploration, most of the key requirements in FOIA are duplicated in the EIRs, so why bother to separate out access to environmental information?

The answer is that the UK is required to adopt legislation on access to environmental information under European law. Directive 2003/4/EC on public access to environmental information was adopted by the European Union in 2003 and, as with other directives, this meant that Member States were required to enact implementing legislation within two years.

The Directive itself was designed to give effect to a previous agreement, reached in 1998, called the Aarhus Convention, named after the city in Denmark where delegates agreed it. The objective of the Convention was "to contribute to the protection of the right of every person...to live in an environment adequate to his or her health and well-being", through signatories guaranteeing the three 'pillars' of "the rights of access to information, public participation in decision-making, and access to justice in environmental matters." Access to information was seen as a prerequisite of ensuring the other rights.

For most practitioners, it will only ever be necessary to refer to the EIRs themselves. The Commissioner and the courts however, regularly refer to both the Directive and the Convention as an aid to interpretation of the EIRs. On occasion, where there is doubt over, for example, whether information meets the definition of environmental information, it may be necessary for the practitioner to follow their lead.

Section 39 FOIA

Section 39 FOIA provides for an exemption from the section 1(1) requirement to disclose information if the EIRs apply to the information. In this sense, it is similar to section 40(1) which exempts the personal data of the applicant from FOIA. The underlying rationale for both exemptions is that the information is available to the applicant through an alternative mechanism. In the case of section 40(1), this is of course the subject access right at section 7 of the Data Protection Act 1998. In the case of section 39, the alternative is the EIRs.

However, there is a significant — and to some, rather odd — difference between section 39 and 40(1). At section 2 FOIA, which sets out which exemptions are absolute and which are qualified, section 40 is of course listed as an absolute exemption. This makes sense: it either is or it isn't personal data of the applicant, and therefore accessible through subject access.

Section 39 though is a qualified exemption. In other words, even if the information is covered by the Regulations, public authorities are meant to consider whether the public interest in handling the request under FOIA outweighs the public interest in handling it under the EIRs.

In its guidance on section 39, the Information Commissioner's Office successfully sidesteps addressing the apparent discrepancy by describing the public interest test as a formality on the basis that "it is difficult to envisage any circumstance where it would be in the public interest for the authority to also consider that information under FOIA."

Most, if not all, decisions of the UK Commissioner and courts have yet to explore the issue further.

The Scottish Commissioner confronts the matter head on, though. The Freedom of Information (Scotland) Act ('FOISA') also contains an exemption for environmental information, which is at section 39(2) FOISA. It references Scotland's own EIRs and duplicates the public interest test in the UK legislation. In one recent decision, the Commissioner wrote:

"As there is a separate statutory right of access to environmental information available to Mrs W in this case, the Commissioner has concluded that the public interest in maintaining this exemption, and responding to the request in line with the EIRs, outweighs the public interest in disclosure under FOISA." (Decision 259/2016: Mrs W and South Lanarkshire Council, 6th December 2016)

This sums up the way that it appears section 39 is supposed to work. As long as the public authority is subject to EIRs, the public interest favours handling the request under that legislation. Experts (notably Anya Proops of 11KBW in her April 2008 guide to the EIRs) have suggested that where an exception in the EIRs is applied to withhold information, it would then be appropriate to consider whether the information could be disclosed under FOIA.

In practice, for reasons that will be apparent in a later article in this series, it is highly unlikely that consideration of the public interest under FOIA would be more likely to result in disclosure than consideration under the EIRs.

The ICO's section 39 guidance points out that the EIRs constitute an 'alternative means by which information may be accessed'. Therefore, where the section applies, section 21(1) (the exemption covering information accessible to the applicant through other means) will also be relevant. This is confirmed at section 39(3) FOIA which states that: 'subsection [39](1)(a) does not limit the generality of section 21(1).'

Section 17 FOIA requires a refusal notice to be issued where an exemption is applied. The Information Commissioner acknowledges that from a technical point of view, this means that where the EIRs apply, a response citing sections 21 and 39 ought to be provided to the applicant. However, she takes the pragmatic approach in practice:

"Rather than issuing a section 21 or a section 39 refusal notice we would recommend that the public authority simply deals with the request under the EIRs."

In practice then, authorities are unlikely to face criticism for bypassing FOIA altogether where a request falls under the EIRs. The key question therefore is: when should a request be considered under the EIRs?

What is environmental information?

Establishing what falls into the category of environmental information necessitates looking at how such information is defined. The definition of environmental information is set out at Regulation 2(1) of the EIRs. That section states that:

"'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."

From this, we can see for a start that as long as the information is in a 'material form', the format is immaterial. In her guidance on the definition of environmental information, the Information Commissioner lists as examples hard copy letters, email, drawings, sound recordings and CCTV footage. As with FOIA though, knowledge in people's heads will not be covered.

The definition should be interpreted broadly says the Information Commissioner, highlighting the phrase 'any information...on'. This has been accepted for the most part by the courts. In *Ofcom v IC and T-Mobile (UK) Ltd* (EA/2006/078, 4th Septem-

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ber 2007), the Tribunal indicated that the words of the definition at Regulation 2(1) should be given their ‘plain and natural meaning’, and that they were ‘not intended to set out a scientific test’. In that case, this meant that the names of the companies responsible for erecting mobile phone masts was environmental information. The writers of the Aarhus Convention implementation guide provide further support for this broad interpretation:

“The clear intention of the drafters... was to craft a definition that would be as broad in scope as possible, a fact that should be taken into account in its interpretation.”

Having said this, several Tribunal decisions have commented that the definition in the EIRs is being interpreted too broadly, without providing much guidance as to where the line should be drawn. In *Southwark v ICO and Lend Lease* (EA/2013/0162), the Tribunal commented that:

“We are inclined to agree with Mr Pitt-Payne QC that there may be a tendency to overuse the EIRs; almost an assumption that, for example, anything to do with land or anything to do with the planning process in England and Wales is outside the scope of FOIA.”

In that case, given the size of the development in question (at Elephant and Castle in South London), the Tribunal still concluded that the information was environmental.

In the recent *Mayor and Burgesses*

of the London Borough of Haringey v IC (EA/2016/0170, 27th January 2017), the Tribunal similarly agreed with the council that there “must be a common sense de minimis threshold for the engagement of EIRs”, but commented that “it is difficult to determine where that threshold lies, otherwise than in the fact-specific context of each case”.

So for now, even minor impacts on the environment — such as the limited external alterations to housing being discussed in Haringey which ‘the man in the street’ would not notice (para 17) — appear to be sufficient for information to be considered environmental.

The categories listed at Regulation 2(1)

The definition at Regulation 2(1) lists six categories (a-f) of information that will constitute environmental information, reproduced here:

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).

The first category will include air quality, and as the Information Commissioner suggests, water quality data, as well as information on land use, or even ownership. The Information Commissioner’s Office takes the view in its guidance that information on a specific species will not fall under this part of the definition, but that information on a species’ interaction with other species or elements of the environment will.

Factors affecting the environment (b) can include radio waves (even though the scientific evidence in this regard is inconclusive), and domestic drainage. The Commissioner lists substances, energy, noise, waste disposal, radioactive waste, discharges and other emissions amongst the factors that might be found to affect the environment.

A cursory analysis of the decisions of the Commissioner and Tribunals reveal that where information is found to be environmental, it is commonly because it meets the definition at (c) covering measures that affect or are likely to affect the elements of the environment and factors likely to

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“Whilst there might be debate about the interpretation of this definition, public authorities do not have a choice as to whether to consider requests under the EIRs or under FOIA. If the information in question falls under the definition of environmental information set out at Regulation 2(1), it will be necessary for the public authority to process it in line with the requirements of the EIRs.”
 —

affect them. This makes sense, as it is the impact that public authorities and others have on their environment that is most likely to be of concern to the public.

All of the examples mentioned at the beginning of this article – plans to construct a runway or railway, restraints on surrounding buildings, and disposal of waste – fall into this category. So I will focus here on category (c) – the measures affecting the elements of the environment.

The elements and factors listed at (a) and (b) are most commonly significant in their relation to the measures taken (c). So an Equality Impact Assessment relating to the erection of a monument was environmental information because it was a measure affecting the landscape (*Omagh District Council v IC*, EA/2010/0163, 20th May 2011, para 33).

Decisions to sell land (*Department for Education v IC*, EA/2013/0107 and 0108, 17th October 2013) or make alterations to the external appearance of properties (*Mayor and Burgesses of the London Borough of Haringey v IC*, EA/2016/0170, 27th January 2017), fall under the definition for the same reason. Information on a smart meter programme designed to reduce carbon emissions is environmental information because the programme is a measure (c) designed to reduce a factor (b) that impacts on an element of the environment (a), namely the atmosphere (*The Department for Energy and Climate Change v IC & AH* (Henney) [2015] UKUT 0671 (AAC)).

Conversely, information on internal alterations to properties will not be environmental, because whilst they are a measure, in most cases they do not (sufficiently) affect any of the elements of the environment (*Black v IC*, EA/2011/0064, 8th September 2011).

A ‘road map’ for establishing whether information will fall under category (c) is set out in *The Department for Energy and Climate Change v IC & AH* (Henney) [2015] UKUT 0671 (AAC) at paragraphs 93-95:

- 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?

Applying this to the *Haringey* decision, the future development of a housing estate is a measure; the external features of houses subject to planning controls are part of the landscape; and a document summarising options for the development of the estate is information on the measure.

The scope of category (d) is self-explanatory, though there may be dispute over when legislation will fall to be ‘environmental’, especially given that no definition is offered for that word in the regulation nor in its antecedents.

The Information Commissioner explains in her guidance that category (e): ‘ensures the definition of environmental information extends to information about the economic and financial implications of environmental measures and activities.’

As this suggests, there is often overlap between category (e) and category (c).

In *Southwark v IC & Lend Lease*, the redevelopment of Elephant & Castle was found to be a measure falling under category (c), whilst an assessment of the financial viability of the development was found to fall under category (e) — it was an economic analysis used within the framework of the overall measure.

In other cases, notably the Upper Tribunal in *DECC v IC & AH*, similar analyses were found to be a measure under category (c), and the Tribunal found it unnecessary to conclude whether it also fell under category (e).

Category (f) does not cover everything to do with human health. It is focused on environmental factors that affect human health (*Ofcom v IC*). An example is information on contamination of the food chain, as in *Watts v IC* (EA/2007/0022, 6th July 2007), where reports on the potential sources of an outbreak of e-coli were found to be environmental information. Amin & Montague (‘EIRs without the Lawyer’,

2013) suggest that information on the health effects of coal mining or asbestos exposure will fall within this category.

Not a matter of choice

On occasion, I have heard applicants complain that a public authority has handled their request under the EIRs or under FOIA when they wished it to be handled under the other. I have also heard practitioners and others ask whether they can decide which to apply.

It is important to emphasise that information either is, or it isn’t, information on the matters above. Whilst there might be debate about the interpretation of this definition, public authorities do not have a choice as to whether to consider requests under the EIRs or under FOIA. If the information in question falls under the definition of environmental information set out at Regulation 2(1), it will be necessary for the public authority to process it in line with the requirements of the EIRs.

Conclusion

It is commonly said that no one is an island. We cannot avoid impacting on or being affected by the world around us. In recent decades, this has been emphasised by the impact that humanity appears to have had on the climate of our world, but it can be seen whenever we set foot outside our homes. Given the immediacy of matters affecting our environment, it is perhaps odd that the EIRs are not more widely heard of or used. After all, it should be obvious from the above that they provide a mechanism to interrogate a wide variety of decisions that affect us.

In this article I have attempted to establish the scope of these important regulations. In the next article, I will discuss what difference this makes in practice.

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