

Same thing, different gravy? The EIRs Part II

In Part II of his series on the Environmental Information Regulations, Paul Gibbons, aka FOIMan, looks at the areas of divergence between the regime and FOIA

In Part I of this exploration of the Environmental Information Regulations ('EIRs') (see pages 4-7 of Volume 13, Issue 4), I considered two key issues. Firstly, why there are separate regulations for environmental information at all. Secondly, I opened the can of worms that is the question of how environmental information is defined. In part II, I'm going to look at the primary differences between the EIRs and the Freedom of Information Act 2000 ('FOIA'). First though, what do the two pieces of legislation have in common?

The answer, of course, is a great deal. Each is designed to facilitate access to information held by public authorities, and the EIRs impose the same duties as FOIA. Whilst there is no mention of publication schemes in the EIRs — an apparent difference between the two laws—there is a duty at Regulation 4 to 'progressively make the information available to the public', taking 'reasonable steps to organise the information...with a view to the active and systematic dissemination to the public of the information.' Unsurprisingly, the Information Commissioner expects those subject to FOIA to meet this obligation by including environmental information in their publication schemes. Those subject to the EIRs are also required (by Regulation 5) to provide information in response to requests that they receive.

Further similarities: in specified circumstances, public authorities may refuse requests made under the EIRs which cover broadly the same ground as the exemptions in FOIA. Under Regulation 6, requesters may specify the format they want to receive information in — just as at section 11 FOIA. Requests, for the most part, have to be answered within 20 working days or sooner if possible (Regulation 5(2)). Fees can be charged, but only where listed in a schedule and for photocopying and postage (Regulation 8). Advice and assistance has to be provided to applicants (Regulation 9). A Code of Practice has to be issued by a Secretary of State (Regulation 16). Complaints can be made to the Information Commissioner, who has the same powers to enforce the regulations as she has to enforce FOIA (Part 5).

As such, it is difficult to imagine how the EIRs might differ from FOIA at all.

Yet even amongst that list, there are subtle, but important, differences to the way the obligations operate. Furthermore, there are key aspects not listed that constitute major departures from the way that FOIA works.

Let us first look at the most fundamental question. Which organisations have to comply with the EIRs?

Who is subject to the EIRs?

The EIRs specify at Regulation 2(2) that government departments and most other public bodies listed in Schedule 1 of FOIA are subject to the Regulations. Under section 4 FOIA, bodies may be added to Schedule 1, and where this happens, they will for the most part also become subject to the EIRs.

However, the public sector organisations that are listed in Schedule 1 FOIA are not always subject to the EIRs. Public bodies that are only partly covered by FOIA — for example, broadcasters like the BBC or Channel 4 — are not required to consider requests under the EIRs. Furthermore, where authorities are 'acting in a judicial or legislative capacity', for example the courts exercising their primary functions, the Regulations will not apply. The same is true for 'either House of Parliament to the extent required for the purpose of avoiding an infringement of the privileges of either House.'

Ministers are also able to bring organisations within the scope of FOIA without adding them to Schedule 1 by making an order under section 5 of the Act. Authorities that have been incorporated in this manner include the Financial Ombudsman Service and the Association of Chief Police Officers. In these circumstances, those bodies will not automatically become subject to the EIRs.

Publicly-owned companies, as defined at section 6 FOIA, will be subject to the EIRs as well as FOIA.

There are some circumstances where the EIRs will apply, but FOIA won't. If someone wanted to know about the environmental impact of an SAS operation, this would be covered by the Regulations, despite the fact that special forces are specifically excluded from

FOIA coverage. This does not preclude the use of exceptions to refuse disclosure of such information.

The Regulations also specify that any body carrying out functions of public administration will be covered by the EIRs. Having consulted the European Court of Justice ('CJEU'), the Upper Tribunal explored this in *Fish Legal v ICO* ([2015] UKUT 0052 (AAC)). In this case, it was established that the test for whether a body is carrying out such functions will be whether they have special legal powers to carry out services of public interest. According to the Information Commissioner, such powers might include compulsory purchase, being able to obtain access to property without the owner's permission, or powers to propose new laws to government.

In the *Fish Legal* case, it was decided that United Utilities, a water company, was subject to the EIRs on this basis. This approach confirmed that taken in earlier cases by the Commissioner and First Tier Tribunal, as far back as 2007 when the Port of London Authority was found to be a public authority under the regulations.

The judge in *Fish Legal* commented that other utility companies may be public authorities for the purposes of the EIRs under Regulation 2(2)(c). Since *Fish Legal*, the Information Commissioner has dealt with complaints in relation to a number of water companies who do not appear to have disputed their status as public authorities. In June 2016, the ICO issued a decision in relation to a gas company.

A fourth category of public authority is described in the EIRs. These are bodies that are under the control of public authorities listed in Regulation 2(2) that carry out functions relating

to the environment. The Upper Tribunal considered what 'control' might mean in *Fish Legal*. It took the view that the mere regulation of a body won't meet this definition, but that situations where public authorities are able to issue directions to the organisation or annul its decisions would qualify. This was not the case for water companies, and it would seem that few, if any, organisations would fall into this category in practice.

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Holding information

The EIRs state that: 'for the purposes of these Regulations, environmental information is held by a public authority if the information—

(a) is in the authority's possession and has been produced or received by the authority; or

(b) is held by another person on behalf of the authority.'

The most interesting part of this definition is what it omits. Unlike

FOIA, Regulation 3(2) does not mention information held on someone else's behalf. The Information Commissioner acknowledges that this could be interpreted to mean that information will be held in a wider range of circumstances than under FOIA. However, her guidance concludes that in practice, information won't be in the authority's possession unless it is held for the authority's own purposes.

So far then, despite the different wording, the definition of held under the EIRs has been interpreted as being in line with that under FOIA.

Pro-active publication

Regulation 4 of the EIRs requires that a public authority:

- '(a) progressively make [environmental] information available to the public by electronic means which are easily accessible; and
- (b) take reasonable steps to organize the information relevant to its functions with a view to the active and systematic dissemination to the public of the information.'

The Regulations themselves do not specify any particular categories of information that ought to be made available in this way. However, they do state that at the very least, 'facts, and analyses of facts, which the public authority considers relevant and important in framing major environmental policy proposals' should be published, along with information referred to in Article 7(2) of Directive 2003/4/EC (the Environmental Information Directive underlying the regulations). These include texts of treaties; policies, plans and programmes; progress reports on the implementation of these; reports and data on the state of the environment; authorisations with a significant impact on the environment; and environmental impact studies and risk assessments.

Whilst there is no explicit duty to adopt a publication scheme, the requirements at Regulation 4 are in effect very similar to the requirements at section 19 FOIA. It should come as no surprise then that the Information Commissioner recommends that public authorities fulfil the obligations at Regulation 4 by including environmental information within their publication schemes.

(Continued on page 6)

[\(Continued from page 5\)](#)

Differences in answering requests

Neither the EIRs nor the underlying Directive define what a 'request' is. FOIA specifies that requests must be in writing, and that the name and address of the applicant must be provided. The EIRs are silent on these matters. It is generally inferred therefore that requests may be made through other means — more specifically, they can be made orally. Whilst in practice, most requesters do submit requests for environmental information in writing, it may be appropriate to adopt procedures to cater for requests made over the telephone or in person.

Requests must be answered 'as soon as possible', and just like FOIA, no later than 20 working days following receipt. The Information Commissioner's guidance states that 20 working days should be considered a 'long stop'. Indeed, on at least one occasion (Walsall Borough Council, FER0355639, 24th March 2011), the Commissioner has found a public authority in breach of Regulation 5(2) because, even though they had responded within 20 working days, an administrative error meant that they had failed to respond as soon as possible.

Regulation 7 allows public authorities to extend the deadline for responding to a request from 20 working days to 40 working days. They can do this where they reasonably believe that it would be impractical to comply with the request within the normal timeframe due to the complexity and volume of the request. Public author-

ities must inform applicants that they require further time within the original 20 working days.

Like section 11 FOIA, Regulation 6 of the EIRs allows applicants to specify the format in which they wish to receive information.

The Directive provides that this can include copies of the original documentation. This means that unlike FOIA, there is an explicit right to documents under the EIRs. Public authorities can, however, resist the wishes of the applicant where it is reasonable for them to make the information available in another form, or it is already available and easily accessible. They must explain why they are not providing it in the form requested in their response.

Where a public authority decides that information should not be disclosed as it falls under an exemption (or exception, to give them their proper name under the Regulations) then, as with FOIA, they must issue a refusal notice.

Regulation 14 specifies what must be included: which exceptions apply, why they apply,

what public interest arguments were considered, and how to complain to the public authority or to the Information Commissioner.

Charging for information

Under FOIA, public authorities can only charge for disbursements (including photocopying, postage, printing, and costs of conversion to an alternative format) or where the cost of compliance will exceed the appropriate limit at section 12. Other charges can only be made if they are listed in the publication scheme.

A 'reasonable' charge can be made for information under the EIRs and calculation of this can include staff time searching for information, and the context will be relevant in establishing how 'reasonable' the charge is. This was examined by the CJEU in a case involving property search information requested from *East Sussex County Council* (East Sussex CC v IC, C-71/14). The Court's view was that public authorities can only charge 'the costs attributable to the time spent by staff of the public authority concerned on answering an individual request for information'. Any charges must not have a deterrent effect on those wishing to access environmental information.

As far as disbursements are concerned, the Markinson case (*Markinson v IC*, EA/2005/0014) suggested that 10p a sheet was a reasonable charge for photocopying (though inflation may by now justify a slightly higher charge).

At first sight, these rules look significantly different from FOIA. However, the EIRs also state that public authorities must publish a schedule of information that they wish to charge for. If this is not done, then a charge cannot be made. The best way to meet this EIRs requirement will obviously be to list the circumstances in which environmental information will be charged for within the public authority's publication scheme.

It should also be noted that there is no 'appropriate limit' in the EIRs. Neither do the associated regulations on fees and cost limits apply to environmental information. We will explore the implications of this in more detail in the next article.

Complaints and enforcement

Public authorities are not required to conduct internal reviews under FOIA, though it is good practice and recommended by the section 45 Code of Practice. FOIA is silent on the subject and therefore does not indicate how long such reviews should take. This is something that has been criti-

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cised many times by applicants waiting indefinitely for the outcome of their complaint, and was mentioned in both the post-legislative scrutiny in 2012 and by the Independent FOI Commission in 2016.

The EIRs are different in this regard. Regulation 11 sets out the right of applicants to 'make representations' where they believe that the authority has failed to comply. The EIRs even spell out a deadline within which such representations must be made: such complaints must be made 'no later than 40 working days after the date on which the applicant believes that the public authority has failed to comply' with the requirements under the EIRs. For practical purposes, this date is usually considered to be the date that the authority responded.

The public authority then has 40 working days in which to consider the complaint. Having done so, it must respond, and where it upholds the representation, must state that it failed to comply, what it intends to do to resolve the situation, and by when it will fulfil this.

Beyond the point of internal review, however, the EIRs are largely brought into line with FOIA. Regulation 18 applies the enforcement and appeals provisions of the latter to the Regulations with a few minor adjustments. Similarly the FOIA section 77 offence of altering, destroying, or concealing records is duplicated in the EIRs by Regulation 19. The Information Commissioner's role and powers in relation to the EIRs are much the same as her role and powers in relation to FOIA.

A couple of differences remain though. The Supreme Court (in *R (Evans) & Anor v Attorney General* [2015] UKSC 21), confirmed that Ministers will not be able to use their veto to block the disclosure of environmental information, as set out at regulation 15. The use of such a power contradicts the underlying directive which states that: 'Applicants should be able to seek an administrative or judicial review of the acts or omissions of a public authority in relation to a request.'

The veto under FOIA remains, albeit within the apparent constraints established by *Evans*.

Tribunals will – for the time being at any rate – still be able to request an opinion from the CJEU on tricky EIRs issues. Obviously, this is not a facility open to them in respect of FOIA.

Conclusion

Whilst there are clearly a lot of similarities between the EIRs and FOIA, there are also some, often fundamental, differences. Some organisations subject to FOIA will not have to concern themselves with the EIRs at all, whilst certain private companies who can be confident (for now) that they do not have to comply with FOIA, do now have to ensure that they have procedures in place to cater for requests for environmental information.

Some differences appear to be matters of mere semantics where, despite different wording, or even omissions of words, the requirements under the EIRs have been interpreted in much the same way as FOIA. Information is held in the same circumstances, and publication schemes will aid compliance with both pieces of legislation.

Amongst the most profound differences between the EIRs and FOIA are how refusals of requested information are justified. Not only do they have a different name in the EIRs (exceptions) but they also operate very differently. In the next article, we'll explore the exceptions under the Regulations and consider what they have in common with the exemptions under FOIA.

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