

The Environmental Information Regulations 2004

A practical guide

Foreword

Information law is a crucially important and increasingly high profile feature of the modern legal landscape. 11KBW stands at the forefront of this fast-developing area of law.

We regularly advise and act in cases involving Freedom of Information, Data Protection, and privacy rights under the European Convention of Human Rights. 11KBW barristers acted in 16 out of the 17 EIR cases detailed at the back of this guide.

Anya Proops the author of this guide is a leading member of our Information Law practice. Her guide to the Environmental Information Regulations reflects both her close knowledge of the legislation and her wide experience in its practical application.

We hope this guide will be an invaluable resource for all those working in this area.

The image shows a handwritten signature in black ink. The signature is written in a cursive style and consists of two parts: 'James' on the left and 'Goudie' on the right. The 'J' in 'James' is large and loops around the rest of the name. The 'G' in 'Goudie' is also large and loops around the rest of the name.

James Goudie QC
Head of Chambers

Introduction

The Environmental Information Regulations 2004 (“EIR”) came into force on 1 January 2005. They form part of a domestic statutory scheme under which members of the public can gain access to information held by public authorities. To date, much of the publicity surrounding this scheme has focused on the EIR’s statutory bed-fellow, the Freedom of Information Act 2000 (“FOIA”). As a result, the EIR has tended to operate very much under the radar, at least so far as the national media are concerned.

However, the importance of the EIR as a tool for accessing information held by public authorities cannot be underestimated. It opens the door to a category of information which, by its very nature, is hugely significant not merely in terms of the environmental health of the nation but also in terms of global environmental well-being. Moreover, in common with FOIA, the EIR is responsible for driving a cultural shift towards a fundamentally more open and transparent style of government. That the EIR embodies a more permissive access regime even than that embodied in FOIA only serves to reinforce its importance within the information law landscape.

The aim of this guide is to illuminate the workings of the EIR, particularly by reference to recent Information Tribunal case-law. The guide is divided into two parts. In the first, part, consideration is given to the general principles which apply under the EIR. The second part contains a summary of the Tribunal case-law under the EIR (current up to 23 April 2008). Whilst an attempt has been made to avoid unnecessary jargon, the guide does assume that readers will be practitioners with a reasonable working knowledge of FOIA. It should be noted that all of the Tribunal decisions referred to below can be found on the Tribunal’s website: <http://www.informationtribunal.gov.uk>.

23 April 2008

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Part I

Interpretation and Application of the EIR

1 Source of the EIR

1 The EIR was enacted under European Directive 2003/4/EC On Public Access to Environmental Information (“the Directive”).¹ The Directive was itself adopted by the EU partly because its predecessor, Directive 90/313/EEC, had proved to be unduly restrictive in terms of permitting access to environmental information² and partly in order to give effect to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice on Environmental Matters (“the Aarhus Convention”).³

2 It is important to be familiar with both the Directive and the Convention for two key reasons.

- (1) The EIR must be construed, as far as possible, in the light of the wording and purpose of the Directive in order to achieve the result pursued by the Directive.⁴ Thus, the Directive constitutes an interpretive guide which should always inform the construction of the EIR.⁵ As the Directive was itself intended to give legal effect to the Aarhus Convention, it is important that the Directive is itself construed with regard to that Convention.
- (2) The Directive and the Convention together embody bright-line policy principles which should routinely inform the way in which public authorities discharge their duties under the EIR. Those principles include, in particular, the following:
 - (a) the right to access to environmental information should now be seen as integral to the fundamental human right of present and future generations to live in an environment which is adequate to health and wellbeing;
 - (b) the right to access environmental information embraces a right to more effective public participation in decision-making relating to the environment and, accordingly;
 - (c) any legislative fetters on the right to access environmental information should be formulated and construed narrowly.⁶

1 The Directive was adopted by the EU on 28 January 2003: [http://http://www.ico.gov.uk/upload/documents/library/environmental_info_reg/detailed_specialist_guides/european_directive_\(eur-lex\).pdf](http://http://www.ico.gov.uk/upload/documents/library/environmental_info_reg/detailed_specialist_guides/european_directive_(eur-lex).pdf)

2 See recitals (2) and (8) to the Directive. The earlier Directive was given effect by the Environmental Information Regulations 1992. Those Regulations were replaced by the EIR with effect from 1 January 2005.

3 Recital (5) of the Directive. The Convention was adopted by the UN Economic Commission for Europe in June 1998. The Convention was ratified by the European Community and by the UK in February 2005. The Convention can be found at: <http://http://www.unece.org/env/pp/documents/cep43e.pdf>. In 2000, the UN published an ‘implementation guide’ to the Convention: <http://www.unece.org/env/pp/acig.pdf>.

4 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1992] CMLR 305 at 322-3; *Brinkman Tabakfabriken GmbH v Hauptzollamt Bielefeld* [2002] 2 CMLR 36, *Perceval-Price v Department of Economic Development* [2000] IRLR 380. This obligation may extend to the adoption of a construction which departs substantially from the ordinary meaning of the language of the statute: *Clarke v Kato* [1998] 1 WLR 1647.

5 See *Export Credits Guarantee Department v Friends of the Earth* [2008] EWHC 638 (Admin): the Directive is a ‘powerful aid to the interpretation of domestic legislation passed into law to give effect to it’, per Mitting J, para. 20.

6 See recital (1) and Arts 3.3 and 4.1(c) of the Directive and Art 4.3(b) of and the Preamble to the Convention. Recital (9) of the Directive states that: ‘It is also necessary that public authorities make available and disseminate environmental information to the general public to the widest extent possible, in particular by using information and communication technologies.’ See also the Council’s explanatory memorandum for an earlier draft of the Directive dated 29 June 2000. That memorandum stated that any exceptions to the general right of access to environmental information should be ‘very tightly drawn’ so as ‘to enable the Directive to actually meet its objective in practice’ (cited in *Export Credits Guarantee Department v Friends of the Earth* [2008] EWHC 638 (Admin), para. 12). A generally permissive approach to the disclosure of environmental information was approved even under the Directive’s more restrictive predecessor, 90/313/EEC. See further Commissioner of the European Community v French Republic Case C-233/00 (25 June 2003), paras. 1 and 2: <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:62000J0233:EN:HTML>. See also the DEFRA guidance, para. 7.1: <http://www.defra.gov.uk/corporate/opensgov/eir/guidance/full-guidance/index.htm>.

EIR Directly Effective?

- 3 Directly effective provisions within an EU directive may be relied upon directly as against the State and any emanation of the State. The direct applicability of EU directives becomes particularly important where the domestic legislation is inadequate in terms of implementing the provisions of a directive. In these circumstances, a claimant can effectively bypass the domestic legislation and directly apply the provisions of the directive as against the relevant State entity.⁷
- 4 The question of whether the EIR is directly effective as against public authorities has been posed in two Tribunal cases, *Markinson v Information Commissioner*⁸ and *Friends of the Earth v Information Commissioner and Export Credits Guarantee Department*.⁹ However, in both cases it was decided that the EIR did properly implement the Directive such that there was no need to consider the question of whether the EIR was directly effective. In *Friends of the Earth v Information Commissioner and Export Credits Guarantee Department*, the Tribunal concluded that the fact that the EIR deems the 'internal communications' exception provided for by regulation 12(4)(e) to apply equally to communications between government departments as it applies to communications internal to those departments did not prevent the EIR being compatible with the Directive. More recently, the High Court opined that the Directive¹⁰ 'has direct effect as regards its object in domestic law, but is otherwise not of direct effect'.¹¹

7 See, for example, *Maria Luisa Jiminez Melgar v Municipality of Los Barrios* [2001] IRLR 848 on the direct effectiveness of the Pregnant Workers Directive.

8 EA/2005/0014 (28 March 2006), para. 25.

9 EA/2006/0073 (20 August 2007), para. 48. An appeal against this decision was rejected by the High Court on 17 March 2008 (judgment was given extempore).

10 Regulation 12(8) is the relevant deeming provision in the EIR. An appeal against the Tribunal's decision in the *Friends of the Earth* case was dismissed by the High Court on 17 March 2008 (*Export Credits Guarantee Department v Friends of the Earth* [2008] EWHC 638 (Admin)).

11 *Export Credits Guarantee Department v Friends of the Earth* [2008] EWHC 638 (Admin), per Mitting J at para. 20.

2 General duty to make information available

5 Regulation 5(1) EIR imposes a general obligation on public authorities to disclose environmental information. In particular, it provides that:

6 ‘Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds information shall make it available on request.’

The Request

7 In contrast with FOIA, a request under the EIR does not need to be in writing and does not need to specify the applicant’s name or address.¹² Thus, a request under the EIR may include an oral request. Whilst individual applicants are not obliged under the EIR to give their names and an address for correspondence, in practice the authority is likely to struggle in responding to requests made by such individuals if this information is not provided.

8 Persons who may make requests under the EIR include individuals, companies and other legal persons, such as unincorporated associations.¹³ The Aarhus Convention states that the right is exercisable irrespective of citizenship, nationality or domicile.¹⁴ It is presently somewhat uncertain whether public authorities are entitled to refuse requests for information which are made from abroad.¹⁵ On one view, such requests are extra-territorial and, hence, should be regarded as falling outside the scope of the EIR. However, on another view, the Convention and the Directive inevitably require the EIR to be construed broadly so as to ensure that the members of the public who are served by the EIR are not merely confined to those who are physically situated in the UK.¹⁶ In practice, it may in any event be difficult or impossible for an authority to determine whether a particular request is or is not being made from abroad.

¹² Cf. para. 8 FOIA.

¹³ Recital (8) and Art. 2.6 of the Directive.

¹⁴ Art 3.9.

¹⁵ On the general principles as to the territorial scope of domestic enactments see further, for example, *Lawson v Serco* [2006] 1 All ER 823 (on the territorial application of the Employment Rights Act 1996).

¹⁶ See further Article 2(5) of the Convention which defines the concept of ‘public concerned’ as ‘the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest’. See also Article 3(1) of the Directive which provides for information to be made available by public authorities to ‘any applicant’ and recital (8) which provides that: ‘It is necessary to ensure that any natural and legal person has a right of access to environmental information held by or for public authorities without his having to state an interest’.

Public Authorities

9 The term ‘public authority’ is defined in regulation 2(2) and Schedule 1 EIR. Importantly, the definition is broader than the definition of ‘public authority’ contained in FOIA. This is because it applies not only to government departments (regulation 2(2)(a)) and public authorities as defined by section 3(1) FOIA (regulation 2(2)(b))¹⁷ but also to:

- (1) ‘any other body or other person, that carries out functions of public administration’ (regulation 2(2)(c)); and
- (2) ‘any other body or other person that is under the control of a person falling within sub-paragraphs (a), (b) or (c) and: (i) has public responsibilities relating to the environment, (ii) exercises functions of a public nature relating to the environment; or (iii) provides public services relating to the environment’ (regulation 2(2)(d)).

10 In *Port of London Authority v Information Commissioner and Hibbert*,¹⁸ it was decided that the Port of London Authority was a public authority for the purposes of regulation 2(2) on the basis that it performed functions of public administration for the purposes of regulation 2(2)(c).

11 In *Network Rail Ltd v Information Commissioner*,¹⁹ the Tribunal held that the EIR did not apply to two private ‘not for dividend’ limited companies, a parent and its subsidiary. In effect, both companies are responsible for running the UK railway system. The Tribunal found that these companies were not public authorities for the purposes of the EIR because their functions are not ‘functions of administration’, whether public or private, and their functions are not public functions.²⁰ The Tribunal did however go on to express concern that such companies were not subject to the EIR, particularly given that the subsidiary company was a major landowner whose estate is intensively visited by the public, has a significant impact on the daily lives of many people and comprised, according to its website, many sites of environmental, geological, historical and architectural importance.²¹

12 The DEFRA guidance suggests that bodies falling within the ambit of regulation 2(2)(d) could include private companies or public private partnerships with obvious environmental functions such as waste disposal, water, energy or transport regulators. Public utility companies may also fall within the scope of the EIR.²² The guidance also suggests that, for the purposes of regulation 2(2)(d), the control exercised by the relevant public authority must be sufficient to exert ‘a decisive influence on the body’. The mere existence of a contract between the body and a public authority will not necessarily be sufficient.²³

¹⁷ See further the specific requirements of regulation 2(2)(b).

¹⁸ EA/2006/0083 (31 May 2007).

¹⁹ EA/2006/0061 and 0062 (17 July 2007).

²⁰ Para. 54.

²¹ Para. 56.

²² Para. 2.22.

²³ Para. 2.20

- 13 Government departments are to be treated as separate persons for the purposes of Parts 2, 4 and 5 EIR (regulation 3(5)).
- 14 The EIR is expressly disapplied in respect of any authority which is *'acting in a judicial or legislative capacity'* (regulation 3(3)) and is also disapplied in respect to the Houses of Parliament to the extent required in order *'to avoid an infringement of the privileges of either House'* (regulation 3(4)).²⁴ If the EIR is inapplicable in respect of a particular public authority, an applicant who wishes to gain access to environmental information held by that authority will need to rely on the provisions of FOIA, although FOIA will itself only apply to 'public authorities' as defined in section 3 FOIA.
- 15 The exemption afforded under section 39 FOIA (exemption in respect of environmental information) will not apply to authorities which are not 'public authorities' for the purposes of the EIR. This is because the section 39 exemption is only engaged if the public authority is one which can be obliged to disclose information under the EIR.

Information Held

- 16 Regulation 3(2) EIR provides that environmental information is held by an 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.'*²⁵
- 17 It follows that an authority receiving a request for environmental information should consider not merely whether it holds the requested information but also whether that information is being held by another person on behalf of the authority. Where requested information may be held by another person on behalf of the authority, the authority must ensure that any searches it conducts in order to ascertain whether the requested information is held should extend to the information held by that other person.
- 18 The question of whether information is 'held' for the purposes of regulation 5(1) is to be determined on the balance of probabilities. The authority does not have to show that the information is not held as a matter of certainty.²⁶ In deciding whether, on the balance of probabilities, the requested information is held by the authority, the Commissioner and the Tribunal will wish to consider the quality and extent of any searches conducted by the authority.

²⁴ The concept of Parliamentary privilege has recently been considered and applied by the High Court in the case of *Office of Government Commerce v Information Commissioner* [2008] EWHC 737 (Admin).

²⁵ See further below the discussion of regulation 12(4)(a) which provides for an exception under the EIR where information is not held at the time of the request.

²⁶ *Linda Bromley & Ors v Information Commissioner and the Environment Agency* EA/2006/0072 (31 August 2007)

Duty to Confirm or Deny

- 19 In contrast with FOIA, the EIR makes no express provision to the effect that public authorities are obliged to confirm or deny whether particular information is held.²⁷ Indeed, the only reference to confirming or denying whether information is held is to be found in regulation 12(6). That regulation provides that an authority 'may' respond to a request by neither confirming nor denying whether information exists and is held in circumstances where: (a) the confirmation or denial would itself involve the disclosure of information which is subject to regulation 12(5)(a) (exception in respect of international relations etc.); and (b) the disclosure would not be in the public interest on the application of a public interest test.
- 20 Given that the EIR does not expressly provide for any duty to confirm or deny whether information is held and, further, that regulation 12(5)(a) merely endows authorities with a limited power to confirm or deny whether information is held in certain specific circumstances, it might be thought necessary to infer that the EIR does not impose any general duty on public authorities to confirm or deny whether information is held. Certainly, that is the result which ordinary principles of statutory construction arguably invite. However, that was not the inference which was drawn in *Port of London Authority v Information Commissioner and Hibbert*.²⁸ In that case, the Tribunal effectively construed the EIR as implicitly embracing a general duty to confirm or deny whether information exists or is held.²⁹ This decision is potentially uncontroversial.

Time Limits and Refusal Notices

- 21 The request must be responded to '*as soon as possible and no later than 20 working days after the receipt of the request*' (regulation 5(2) EIR). It follows that, in respect of a simple request which can be responded to within a matter of a few days, the authority may act unlawfully by waiting the full 20 days to respond. To the extent that the authority has to weigh public interest considerations when responding to a request, it must conduct that exercise during the 20 days provided for under regulation 5(2). It is not afforded any additional time to consider such matters.³⁰ However, the authority is afforded up to 20 additional working days to respond where '*it reasonably believes that the complexity and volume of the information requested means that it is impracticable either to comply with the request within the earlier period or to make a decision to refuse to do so*' (regulation 7(1)).

²⁷ Compare section 1(1)(a) FOIA which provides for a general duty to confirm or deny whether information is held.

²⁸ EA/2006/0083 (31 May 2007).

²⁹ See paras. 79-82.

³⁰ Cf. section 10(3) FOIA which, in any case where a qualified exemption is in issue, enables an authority to have such additional time as is reasonable in the circumstances to apply the public interest test.

22 Regulation 14(1) requires an authority to give written confirmation to the applicant of any decision to refuse a request where the request is refused on an application of regulations 12(1) (general exceptions) or 13(1) (exception in respect of personal data). It would seem to follow that regulation 14(1) does not bite on a decision not to provide environmental information to the extent that the information amounts to personal data of which the applicant is the relevant data subject (see the exception provided for under regulation 5(3)).

23 A regulation 14(1) refusal notice must be given to the applicant *'as soon as possible and no later than 20 working days'* after the receipt of the request (regulation 14(2)). Under regulation 14(3), the authority must specify in the refusal notice the reasons for the refusal. This includes identifying any exception relied on and the matters the public authority took into account when applying the public interest test. The refusal notice should also inform the applicant: (a) that he may make representations to the authority about the refusal under regulation 11 EIR and (b) of the enforcement and appeal provisions of FOIA which are applied to EIR matters by virtue of regulation 18 EIR (regulation 14(5)).

Request for Information in Particular Form/Format

24 If information is requested *'in a particular form or format'*, then regulation 6 is engaged. Regulation 6 provides that, where the applicant requests information in a particular form or format:

(1) information shall be provided in the requested form or format unless:

(a) *'it is reasonable to make the information in another form or format'* (regulation 6(1)(a)); or

(b) *'the information is already publicly available and easily accessible to the applicant in another form or format'* (regulation 6(1)(b));³¹

(2) if the information is not available in the requested form/format, the authority must: (a) explain the reason for its decision as soon as possible and no later than 20 working days after the receipt of the information; (b) provide an explanation in writing if the applicant so requests and (c) inform the applicant of his right to request a review and his enforcement and appeal rights (regulation 6(2)).

³¹ This formulation derives from Art. 4.1 of the Convention and recital (14) and Art. 3.4(a) of the Directive.

- 25 Regulation 6(1)(b) has been construed narrowly by the Tribunal. Thus, in *Perrins v Information Commissioner and Wolverhampton City Council*,³² the Tribunal found that regulation 6(1)(b) was not engaged merely because the applicant had managed to locate the information to which his request related in archives maintained by the authority. The Tribunal reached the conclusion that regulation 6(1)(b) did not apply to the case on the basis that, whilst the information may have been publicly available and easily accessible to the applicant, this was not a case where he had requested that information ‘in a particular form or format’. Accordingly, regulation 6(1)(b) was not engaged.³³
- 26 In *Rhondda Cynon Taff County Borough Council v Information Commissioner*,³⁴ the Tribunal appears to have concluded that, even where paragraph 6(1)(b) is engaged, this will not relieve the authority of the regulation 5(1) duty to make the requested information available (e.g. by inspection at the authority’s office). Instead, it will merely relieve the authority of the duty to make the information available in the particular requested format.³⁵ It follows that an authority cannot rely on regulation 6(1)(b) to refuse to disclose information under the EIR merely because that information is readily accessible to the applicant by other means.³⁶
- 27 In *Office of Communications v Information Commissioner and T-Mobile (UK) Ltd*,³⁷ the Tribunal considered the application of regulation 6(1)(b) in a case where, although the information requested could potentially be harvested from the authority’s website, this would be particularly onerous for the applicant, hence the applicant’s request for the information in a particular format. The Tribunal concluded that the authority could not rely on regulation 6(1)(b) to avoid disclosure of the requested information as the difficulties which the applicant would face in himself extrapolating the requested information from the website meant it was not ‘easily accessible’ for the purposes of regulation 6(1)(b).³⁸

Up to Date Information

- 28 The information compiled by the authority in response to the request must be ‘*up to date, accurate and comparable so far as the authority reasonably believes*’ (regulation 5(4)). It is unclear what the word ‘comparable’ means in this context. Presumably, it is intended to confirm that the information must broadly fall within the ambit of the request.

32 EA/2006/0038 (9 January 2007).

33 Para. 13.

34 EA/2007/0065 (5 December 2007).

35 Para. 27(i).

36 See further *Friends of the Earth v Information Commissioner and Export Credits Guarantee Department* EA/2006/0073 (20 August 2007), para. 77 (an appeal against this decision brought by the public authority was rejected by the High Court on 17 March 2008, [2008] EWHC 638 (Admin). Cf. the general exemption afforded under section 21 FOIA in respect of information which is reasonable accessible to the applicant by other means.

37 EA/2006/0078 (4 September 2007). An appeal against the Tribunal’s decision in this case was rejected by High Court on 8 April 2008.

38 Para. 69.

Relevant Guidance and Case-Law

29 When responding to requests for information under the EIR, the authority should ensure that it considers:

- (1) the Code of Practice issued under regulation 16 EIR;³⁹
- (2) the non-statutory guidance issued by DEFRA;⁴⁰
- (3) the non-statutory guidance issued by the Information Commissioner;⁴¹
- (4) any relevant case-law under the EIR; and, further,
- (5) any relevant case-law developed under FOIA.

30 FOIA case-law should be considered in particular because, whilst the EIR is markedly different from FOIA in a number of key respects, the legal and policy principles which emerge from FOIA case-law will often substantially inform the ways in which the Commissioner and the Tribunal approach decision-making under the EIR. See e.g. *Kirkaldie v Information Commissioner*⁴² and *Archer v Information Commissioner*.⁴³ FOIA decisions relating to legal privilege inform application of regulation 12(5)(b) EIR (course of justice exception); and *Friends of the Earth v Information Commissioner and Export Credits Guarantee Department*: FOIA case-law on the need to have a ‘safe space’ for deliberation within public authorities informs application of public interest test in respect of information falling within regulation 12(4)(e) (exception in respect of ‘internal communications’).

39 The Code can be found on the ICO website at:
http://www.ico.gov.uk/upload/documents/library/environmental_info_reg/detailed_specialist_guides/environmental_information_regulations_code_of_practice.pdf.

40 This guidance is non-statutory and, hence, not binding on authorities. However, it constitutes a relevant consideration which should be taken into account by authorities: *Markinson v Information Commissioner EA/2005/0014* (28 March 2006), para. 34(b). The guidance can be found at:
<http://www.defra.gov.uk/corporate/opengov/eir/guidance/full-guidance/index.htm>.

41 The Commissioner has issued a number of guidance on the EIR. These can be found on the ICO website at:
http://www.ico.gov.uk/what_we_cover/environmental_information_regulation/guidance.aspx.

42 *EA/2006/001* (4 July 2006).

43 *EA/2006/0037* (9 May 2007)

3 ‘Environmental Information’

The Definition

31 The term ‘environmental information’ is defined in regulation 2(1) EIR:

‘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;*
- (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)⁴⁴*

32 In common with the generally permissive approach to disclosure required under the EIR, the concept of ‘*information on*’ should be construed broadly. The lists of items provided in each sub-paragraph of regulation 2(1) should be regarded as non-exhaustive. The DEFRA Guidance indicates that environmental information may be included in maps, letters, applications, inspection reports, concession agreements, contracts, tables, databases, spreadsheets, emails, photographs, sketches and handwritten notices or drawings.⁴⁵ Examples of environmental information given in the DEFRA guidance include: information relating to GM crop trials; information on pesticide testing; information on diseased cattle and on land-use planning; environmental policy appraisals and regulatory impact assessments.⁴⁶

44 Emphasis added.

45 Para. 3.6.

46 Para. 3.1.

Relevant Case Law

33 The Tribunal confirmed in *Office of Communications v Information Commissioner and T-Mobile (UK) Ltd*,⁴⁷ that the definition of environmental information in regulation 2(1) ‘was not intended to set out a scientific test’ and its words should be given their ‘plain and natural meaning’. In reaching this conclusion, the Tribunal made clear that application of the EIR should not turn on any scientific debate.⁴⁸ One difficulty with such an approach is that there may be cases where it is difficult to determine whether the information is environmental for the purpose of regulation 2(1) without attaining at least some degree of scientific learning. In general, however, authorities should adopt a pragmatic approach and seek to determine whether, as a matter of ordinary common sense, the information is ‘information on’ one of the matters provided for under regulation 2(1).

34 In the *Office of Communications* case, the Tribunal decided that radio frequency waves (i.e. energy and radiation) emitted from mobile telephone base stations constituted ‘emissions’ and, further, was a factor which was otherwise likely to affect the state of the elements for the purposes of regulation (2)(1)(b).⁴⁹ In the course of reaching these conclusions, the Tribunal:

- (1) rejected arguments that ‘emissions’ applied only to emissions amounting to pollutants;⁵⁰
- (2) took into account that the radio waves emitted by the base stations could not be said to be ‘totally’ without adverse health implications;⁵¹
- (3) confirmed that even seemingly low level, innocuous matters, such as drainage from a small garden, could potentially fall within the ambit of the definition (although other low level matters, such as noise emanating from a baby alarm, would not have the necessary effect on the state of the elements to fall within the definition);⁵²
- (4) confirmed that regulation 2(1)(f) (information on the state of human health) was intended to apply to information on environmental factors affecting human health rather than to information on the state of human health per se;⁵³ and

35 The Tribunal also concluded that the names of the mobile phone companies which operated the base stations also constituted environmental information. This was because the fact that the companies operated the base stations which produced the emissions ensured that their names fell ‘comfortably’ within the ambit of the definition.⁵⁴

47 EA/2006/0078 (4 September 2007). The Office of Communication’s appeal against the Tribunal’s decision in this case was rejected by the High Court on 8 April 2008.

48 Para. 27.

49 Paras. 25-28.

50 See paras. 25-26.

51 Para. 28.

52 Para. 28.

53 Para. 29.

54 Para. 31.

36 Other cases where the Tribunal has found or accepted that the requested information constituted ‘environmental information’ include:

- (1) *Markinson v Information Commissioner*:⁵⁵ information relating to application for planning permission;
- (2) *Kirkaldie v Information Commissioner*:⁵⁶ legal advice held by local authority in respect of night-flying policy;
- (3) *Perrins v Information Commissioner and Wolverhampton City Council*:⁵⁷ information relating to erection of boundary fences;
- (4) *Port of London Authority v Information Commissioner and Hibbert*:⁵⁸ a river works licence;
- (5) *Burgess v Information Commissioner*:⁵⁹ legal advice on planning inspector’s decision and on the meaning of certain provisions of planning legislation;
- (6) *Lord Baker of Dorking v Information Commissioner and Department for Communities and Local Government*:⁶⁰ submissions to a Minister on a called in planning enquiry;
- (7) *Friends of the Earth v Information Commissioner and Export Credits Guarantee Department*:⁶¹ correspondence between government departments on potential UK involvement with a major oil and gas project;
- (8) *Dainton v Information Commissioner and Lincolnshire County Council*:⁶² statements made by members of public in respect of proposal to modify map showing rights of way;
- (9) *Watts v Information Commissioner*:⁶³ environmental health reports on meat supplier; and
- (10) *Young v Information Commissioner and Department of the Environment for Northern Ireland*:⁶⁴ enforcement file containing personal data relating to individuals who had complained of breach of planning law and legal advice on planning enforcement action.⁶⁵

55 EA/2005/0014 (28 March 2006).

56 EA/2006/001 (4 July 2006).

57 EA/2006/0038 (9 January 2007).

58 EA/2006/0083 (31 May 2007).

59 EA/2006/0091 (7 June 2002).

60 EA/2006/0043 (1 June 2007).

61 EA/2006/0073 (20 August 2007). An appeal against this decision was rejected by the High Court on 17 March 2008.

62 EA/2007/0020 (10 September 2007).

63 EA/2007/0022 (20 November 2007).

64 EA/2007/0048 (12 December 2007).

4 Limits on Obligation to Make Information Available

37 Where a request for information is made, the authority must make the requested information available under regulation 5(1) EIR unless:

- (1) the requested information does not include any information falling within the definition of ‘environmental information’ (regulations 2(1) and 5(1));
- (2) the requested information is not ‘held’ by the authority (regulation 5(1));⁶⁶
- (3) an exception to disclosure applies under paragraphs 12(4) or (5) and ‘*in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure*’ (this is the so-called ‘public interest test’) (regulations 5(1) and 12(1));
- (4) the requested information includes ‘personal data’ of which the applicant is the ‘data subject’ (regulation 5(3));⁶⁷
- (5) the requested information includes ‘personal data’ of which the applicant is not the relevant data subject and:
 - (a) disclosure of the information would contravene any of the data protection principles provided for in Schedule 1 to the Data Protection Act 1998 (“DPA”) (regulations 12(3), 13(1), (2)(a)(i) and (3)); or
 - (b) disclosure of the information would contravene section 10 DPA⁶⁸ and ‘*in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure*’ (regulations 12(3), 13(1) and 13(2)(a)(ii));⁶⁹ or
- (6) the authority has notified the applicant that he is required to pay an advance fee for making the information available and the applicant has failed to pay the fee within the period of 60 working days after the notification has been given (regulations 8(4) and (5)).

65 Cf. *Foreign and Commonwealth Office v Information Commissioner and Friends of the Earth EA/2006/0073* (20 August 2007): communications between UK and US authorities on decommissioned US warships containing toxic waste to be dismantled in the UK did not constitute environmental information.

66 See e.g. *Perrins v Information Commissioner and Wolverhampton City Council EA/2006/0038* (9 January 2007), paras. 14-16 and 20: fact that applicant thought information should be held did not mean information in fact held. See also *Port of London Authority v Information Commissioner and Hibbert EA/2006/0083* (31 May 2007), para. 59, although see further the discussion of the regulation 12(4)(a) exception at paras. 79-82 of that decision.

67 The terms ‘personal data’ and ‘data subject’ are defined in section 1 of the Data Protection Act 1998. In effect, such request should be treated as subject access requests under section 7 DPA.

68 Section 10 DPA requires authorities to desist from processing personal data where it has received a valid notification from the subject of the data that the processing would cause damage or distress to particular persons.

69 This approach to the disclosure of personal data mirrors the approach provided for under section 40 FOIA.

38 As for whether disclosure can be refused on an application of regulation 6(1)(b) (information requested in particular form or format), this is currently somewhat uncertain. On one view, where information is requested in a particular form or format and the information is already publicly available and readily accessible to the applicant in another form or format, then regulation 6(1)(b) will operate to disapply the regulation 5(1) duty to make information available. On another view, however, regulation 6(1)(b) does not disapply the duty to make information available but merely relieves the authority of the obligation to make the information available in the requested form. It appears that the Tribunal currently prefers the latter view, see further *Rhondda Cynon Taff County Borough Council v Information Commissioner*.⁷⁰ In view of the permissive nature of the EIR regime generally it is probably prudent for authorities to err on the side of assuming that regulation 6(1)(b):

- (1) does not disapply the regulation 5(1) duty to make information available; but
- (2) does relieve the authority of the obligation to make information available in a particular requested form or format where the information is publicly available and readily accessible to the applicant in another form or format.

5. Part III Exceptions

39 Part III EIR contains two provisions under which an authority may refuse to disclose requested environmental information. They are regulation 12 and regulation 13. Regulation 13 is concerned with exceptions applying in respect of personal data where the applicant is not the subject of the data.⁷¹

40 Regulation 12(1) provides that an authority may refuse to disclose environmental information if:

- (1) the information is subject to an exception under regulations 12(4) or 12(5); and
- (2) in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosure of the information.

⁷⁰ EA/2007/0065 (5 December 2007), para. 27(i).

⁷¹ Cf. regulation 5(3) which disapplies the regulation 5(1) duty to make environmental information available in respect of personal data of which the applicant is the data subject.

- 41 It follows that information is not exempt from disclosure merely because one of the regulation 12(4) or regulation 12(5) exceptions are engaged. This is a minimum requirement. The authority must always go on to apply the public interest test prior to determining whether the information may lawfully be withheld. Thus, information falling within the ambit of an exception must still be disclosed by the authority unless, on an application of the public interest test, the public interest in maintaining the exception positively outweighs the public interest in disclosure.
- 42 Each of the exceptions provided for under regulations 12(4) and (5) will be discussed in detail below. However, it is important to note here that regulation 12(4) exceptions are, in essence, class-based exceptions as they are concerned with particular classes of information. This is to be contrasted with the regulation 12(5) exceptions which are engaged only where disclosure of information ‘would adversely affect’ particular interests.⁷²

Regulation 12(4) Exceptions

43 The regulation 12(4) exceptions comprise two different types of exception:

- (1) procedural exceptions which apply in particular where:
 - (a) the requested information is ‘*not held when the request is received*’ (regulation 12(4)(a));
 - (b) the request is ‘*manifestly unreasonable*’ (regulation 12(4)(b));
 - (c) the ‘*request was formulated in too general a manner and the authority has complied with its obligations to provide advice and assistance*’ (regulation 12(4)(c)); or
 - (d) the request relates to ‘*material which is still in the course of completion, to unfinished documents or to incomplete data*’ (regulation 12(4)(d)); and
- (2) an exception which applies where the request involves the disclosure of ‘*internal communications*’ (regulation 12(4)(e)).

⁷² See *Export Credits Guarantee Department v Friends of the Earth* [2008] EWHC 638 (Admin), per Mitting J at para. 23

Regulation 12(4)(a) – Information Not Held

44 The regulation 12(4)(a) exception applies where the information is not held when the request is received. This is a curious exception. In particular, it is curious because the regulation 5(1) duty to make information available only applies where the authority ‘holds’ the requested information and, in the circumstances, it seems rather strange that the EIR would need to provide also for an exception in respect of information which is ‘not held’ when the request is received. It is perhaps even stranger that the public interest test could apply where the requested information is not held and yet that is the result which is seemingly required under regulation 12(1)(b).

45 Regulation 12(4)(a) was considered by the Tribunal in *Port of London Authority v Information Commissioner and Hibbert*.⁷³ In that case, the Tribunal concluded that the exception would be engaged in respect of:

- (1) information which has never been held (e.g. because it never existed);
- (2) information which was previously held but is no longer held at the date of receipt (e.g. because it has been destroyed); and
- (3) information which was obtained by the authority after the request was received.⁷⁴

46 The Tribunal reached this conclusion on the basis of the following analysis:

- (1) regulation 12(6) EIR provides that, for the purposes of regulation 12(1), an authority may refuse to confirm or deny whether the requested information ‘exists and is held’ in circumstances where a confirmation or denial would engage regulation 12(5)(a) (i.e. it would adversely affect international relations etc);
- (2) the presence of regulation 12(6) in the EIR ‘implies that in all other cases a public authority is expected to confirm whether information exists or is held’;
- (3) such an obligation must be implied under the EIR because otherwise, where the requested information was not held: (a) there would be no mechanism to require an authority to respond to the request; (b) the applicant would not be able to discover why the information has not been disclosed; (c) the applicant would not be in a position to challenge the thoroughness of any search or the accuracy of any assertion that the information had never or no longer existed; (d) the applicant would be deprived of the opportunity to seek a review under regulation 11; (e) the applicant would not be informed of the appeal provisions under regulation 18 and (f) would have no way of progressing or challenging the decision on his request.⁷⁵

⁷³ EA/2006/0083 (31 May 2007).
⁷⁴ Paras. 79-81.

⁷⁵ Para. 81. See further regulation 14 which obliges an authority to issue a refusal notice only if information is exempt from disclosure under regulations 12(1) or 13(1).

47 Applying this reasoning to the case before it, the Tribunal went on to find that: the information requested by Mr Hibbert (a river works licence) had never existed; regulation 12(4)(a) was accordingly engaged in respect of the information; and the Port of London Authority had been entitled to treat the requested information as excepted information under regulation 12(1).⁷⁶

48 Whilst this decision is not wholly uncontroversial, it has its attractions in that: (a) it appears to afford the regulation 12(4)(a) exception real practical purchase and (b) it ensures that authorities cannot avoid providing the applicant with a refusal notice merely because the information is not held. Query whether *Hibbert* is also authority for the proposition that an authority must make available environmental information it receives after the date of the request where this would be in the public interest on an application of the public interest test.

49 The DEFRA guidance confirms that an authority is not obliged to create information in order to respond to a request but may consider it appropriate to advise the applicant of any similar information which is held.⁷⁷

Regulation 12(4)(b) – Manifestly Unreasonable Requests

50 The DEFRA guidance suggests that requests may be ‘manifestly unreasonable’ where they would place a substantial and unreasonable burden on the resources of a public authority, particularly because of the time it would take to search for the information or to redact excepted information.⁷⁸ An argument which relied on this approach was advanced in *Linda Bromley & Ors v Information Commissioner and Environment Agency*.⁷⁹ However, no conclusion was reached on the point because it was determined that in any event the requested information was not held. The Code of Practice issued under regulation 16 EIR indicates that the costs burden imposed by the request may be a relevant consideration when assessing whether the request is manifestly unreasonable.⁸⁰

51 However, even if a request would result in a disproportionately burdensome search such that it can be regarded as ‘manifestly unreasonable’, the authority should have regard to its obligations under regulation 9 to provide advice and assistance. If the provision of advice and assistance could result in the request being refined such that it does not impose disproportionate search burdens, then the authority will face difficulties relying on the regulation 12(4)(b) exception.

76 Para. 82.

77 Para. 7.1.4.1. Such advice would be given pursuant to the authority's obligations under regulation 9 EOR (duty to provide advice and assistance).

78 Para. 7.4.2.1.

79 EA/2006/0072 (31 August 2007), para. 32.

80 Para. 20.

52 Similarly, where a compendious request is manifestly unreasonable because of the burdens it places on the authority, it may be possible for an applicant to split the request into a number of more manageable requests with the result that there is nothing unreasonable about each individual request.⁸¹

53 The fact that a request may be part of an organised campaign does not render it per se unreasonable.⁸²

54 At first blush, it might seem odd that, where a request is ‘manifestly unreasonable’, the authority must still go on to consider the public interest test. However, this is the approach which is required by regulation 12(1). Moreover, it should be remembered here that the fact that a request is unreasonable, for example because of the burdens it imposes on the authority, does not mean that there cannot be very strong public interests in the disclosure of the particular information falling within the ambit of the request.

Regulation 12(4)(c) – Requests too General

55 The regulation 12(4)(c) exception will potentially be engaged where a request for information is formulated in ‘too general a manner’. The DEFRA guidance suggests that regulation 12(4)(c) applies particularly to requests which are too general ‘to permit the information to be identified and supplied’.⁸³

56 However, importantly, the exception will not be engaged if the request could have been successfully narrowed had the authority discharged its duties to provide advice and assistance to the applicant under regulation 9 EIR, see in particular regulation 9(2) which applies specifically in respect of requests which are too general. In the circumstances, if a very generalised request for information is received by the authority, the authority should not merely refuse the request but should go on to correspond with the applicant with a view to exploring whether the request can be narrowed or more effectively focussed.

57 Even where the request is formulated in ‘too general a manner’, the authority will still need to consider whether the public interest weighs in favour of disclosure of the requested information. That being said, it is hard to see how the public interest could weigh in favour of disclosure where the request is so general that the requested information cannot be identified and supplied.

81 Compare section 14(2) FOIA which entitles an authority to refuse to comply with a request on the ground that it is ‘substantially similar’ to an earlier request which was responded to, unless there has been a reasonable interval between the two requests.

82 DEFRA guidance, para. 21.
83 Para. 7.4.3.1.

Regulation 12(4)(d) – Incomplete Information

58 The regulation 12(4)(d) exception will be engaged where the request relates to ‘material which is still in the course of completion, to unfinished documents or to incomplete data’. In effect, subject to the application of the public interest test, this exception allows authorities to delay disclosure of environmental information which is still at a formative stage.

59 In *Maile v Wigan MBC* [2001] Env LR 11, the High Court considered, the application of the EIR’s predecessor, the Environmental Information Regulations 1992, to a request for disclosure of a database containing raw data relating to potentially contaminated sites. The database was being prepared in advance of the authority implementing remediation obligations in respect of the sites. The authority refused access to the information relying on regulations 4(2) (c) and (d) of the 1992 Regulations (exemptions in respect of information relating to confidential proceedings and incomplete information). The High Court upheld the authority’s decision. In particular, Eady J concluded that revealing ‘these purely speculative thoughts could cause unnecessary alarm and despondency among the local citizens or landowners’ and that it would be ‘highly unsatisfactory to reveal to the public material which has variously been described as inchoate, embryonic and hypothetical’.

60 However, even where the regulation 12(4)(d) exception is engaged, the public interest may still weigh in favour of disclosure. This may be the case, for example, because effective public participation in decision-making is impossible without the disclosure.

61 Notably, regulation 14(4) EIR provides that, where an authority has relied on regulation 12(4)(d) as a basis for refusing disclosure of information, it must specify in its refusal notice the name of any other public authority preparing the information and the estimated time in which the information will be finished or completed, if known to the public authority.

Regulation 12(4)(e) – Internal Communications

62 The concept of ‘internal communication’ is not defined in the EIR, save that regulation 12(8) deems such communications to include communications between government departments. The broad purpose of the regulation exception is to afford public authorities a ‘safe space’ in which to deliberate.⁸⁴ In this sense, the exception bears some similarities to the exemptions provided under section 35 (exemption in respect of formulation of policy) and section 36 (exemption where disclosure prejudicial to effective conduct of public affairs) FOIA.

63 In *Friends of the Earth v Information Commissioner and Export Credits Guarantee Department*,⁸⁵ The Tribunal found that this exception was engaged in respect of correspondence between government departments in respect of potential UK involvement in a major oil and gas project, although it concluded that the correspondence was nonetheless disclosable on an application of the public interest test.⁸⁶ In *Lord Baker v Information Commissioner and Department for Communities and Local Government*,⁸⁷ the Tribunal found that advice given by civil servants to Ministers in respect of a planning application was an ‘internal communication’. However, it went on to decide that the public interest nonetheless weighed in favour of disclosure of the advice. In reaching this conclusion, the Tribunal rejected arguments that disclosure of this type of information would have the generally deleterious effect on civil service advice which was claimed by the Department for Communities and Local Government.

64 It is a moot point whether the regulation 12(4)(e) exception applies to communications received from third party agents instructed on behalf of the authority (e.g. consultants and other private sector advisers). In particular, query whether agency principles can be prayed in aid so as to enable such communications to be treated as sufficiently ‘internal’ so as to engage regulation 12(4)(e).⁸⁸

⁸⁴ See *Friends of the Earth v Information Commissioner and Export Credits Guarantee Department* EA/2006/0073 (20 August 2007), para. 47 (an appeal against this decision was rejected by the High Court on 17 March 2008, [2008] EWHC 638 (Admin)) and the DEFRA guidance, para. 7.4.5.1. See also the European Council’s explanatory memorandum for an earlier draft of the Directive dated 29 June 2000 where it is acknowledged that ‘public authorities should have the necessary space to think in private’ (cited in *Export Credits Guarantee Department v Friends of the Earth* [2008] EWHC 638 (Admin), para. 12).

⁸⁵ EA/2006/0073 (20 August 2007).

⁸⁶ On 17 March 2008, the High Court rejected an appeal against the Tribunal’s decision, *Export Credits Guarantee Department v Information Commissioner and Friends of the Earth* [2008] EWHC 638 (Admin).

⁸⁷ EA/2006/0043 (1 June 2007).

⁸⁸ See the DEFRA guidance, para. 7.4.5.2.

Regulation 12(5) Exceptions

65 Regulation 12(5) provides for exceptions where the disclosure of the information *'would adversely affect'* one of a number of specifically protected matters (these are known as 'prejudice-based' exceptions). The protected matters are as follows:

- '(a) international relations, defence, national security and public safety;*
- (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority conduct an inquiry of a criminal or disciplinary nature;*
- (c) intellectual property rights;*
- (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;*
- (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest';*
- (f) the interests of the person who provided the information where that person:*
 - (i) was not under, and could not have been put under any legal obligation to supply it to that or any other public authority;*
 - (ii) did not supply it in circumstances such that that or any other public body is entitled apart from these Regulations to disclose it; and*
 - (iii) has not consented to its disclosure; or*
- (g) the protection of the environment to which the information relates.⁸⁹*

'Would Adversely Affect'

66 In *Archer v Information Commissioner*,⁹⁰ the Tribunal considered the concept of 'would adversely affect'. It held that this concept required:

- (1) that the information did not merely relate to one of the matters specified in regulation 12(5) but that its disclosure would adversely affect one of those matters;
- (2) that the information was excepted only to the extent that its disclosure would cause an adverse effect; and
- (3) that the adverse effect would in fact occur.

⁸⁹ Where the information relates to information on 'emissions', the authority will not be entitled to refuse disclosure under the exceptions provided for by regulations 12(5)(d) to (g) (regulation 12(9)). It may be that this more permissive approach to the disclosure of information on emissions stemmed from a perception that information as to emissions amounting to pollutants should not as a matter of general public policy be kept secret, see further *Office of Communications v Information Commissioner and T-Mobile (UK) Ltd EA/2006/0078* (4 September 2007).

⁹⁰ EA/2006/0037 (9 May 2007).

67 In *Hogan v Information Commissioner and Oxford City Council*,⁹¹ the Tribunal held that ‘would...prejudice’ for the purposes of section 31 FOIA meant ‘more likely than not’ that the relevant prejudicing effect would occur. Moreover, the prejudice must be ‘real, actual or of substance’.⁹² This formulation applies equally to the regulation 12(5) concept of ‘would adversely affect’.⁹³

Regulation 12(5)(a) – National Security Etc.

68 The exception afforded under regulation 12(5)(a) bears some similarity to the exemptions afforded under FOIA, particularly sections 24 (national security), 26 (defence), 27 (international relations), and 38 (health and safety). However, in contrast with most of those exemptions, it will only be engaged where the disclosure ‘would adversely affect’ a regulation 12(5)(a) matter.⁹⁴

69 In *Office of Communications v Information Commissioner and T-Mobile (UK) Ltd*,⁹⁵ the Tribunal concluded that regulation 12(5)(a) was engaged in respect of the disclosure of information relating to mobile telephone base stations, particularly because of the impact disclosure would have on public safety. In particular, the Tribunal concluded that the disclosure would adversely affect public safety because it might lead to criminals stealing materials from or vandalising base station sites and might, accordingly, render the base stations unsafe and, hence, a danger to staff and the general public. Such criminal damage could also result in the failure of part of the mobile phone network which supported the Police and Emergency services radio functions.⁹⁶ However, the Tribunal went on to conclude that the public interest nonetheless weighed in favour of the information being disclosed. It reached this conclusion on the basis that extensive information as to the location of base stations was already in the public domain and, accordingly, disclosure of the requested information would not substantially increase the risks to public safety.⁹⁷

70 Notably, regulation 15(1) provides that a Minister of the Crown may certify that a refusal to disclose information under regulation 12(1) is because the disclosure would adversely affect national security and would not be in the public interest. The certificate is deemed to be ‘conclusive evidence’ of these matters (regulation 15(3)).

71 Even where the regulation 12(5)(a) exception is engaged, the authority must still go on to apply the public interest test.

91 EA/2006/0026 and 0030 (17 October 2006).

92 Paras. 35-36.

93 See *Dainton v Information Commissioner and Lincolnshire County Council* EA/2007/0020 (20 September 2007), para. 36.

94 Cf. sections 26, 27 and 38 FOIA where the exemption is engaged merely if the disclosure ‘would be likely to’ have the necessary prejudicing effect.

95 EA/2006/0078 (4 September 2007), currently on appeal to the High Court,

96 Paras. 37, 40 and 42.

97 Paras. 40-41.

Regulation 12(5)(b) – Course of Justice

72 The regulation 12(5)(b) exception applies to information the disclosure of which would adversely affect: ‘the course of justice, the ability of a person to receive a fair trial or the ability of a public authority conduct an inquiry of a criminal or disciplinary nature’.

Course of Justice

73 The precise scope of this concept is uncertain. However, at the very least it will apply in respect of disclosures which would adversely affect formal legal proceedings, whether criminal or civil, including enforcement proceedings.⁹⁸ It will also apply to information which is subject to legal professional privilege, see further *Kirkaldie v Information Commissioner*⁹⁹ and *Archer v Information Commissioner*.¹⁰⁰

74 In terms of the application of the public interest test to legally privileged information, the case-law under FOIA indicates that there is a very strong public interest in protecting legally privileged information which is ‘built-in’ to the public interest test available under section 2 FOIA.¹⁰¹ As *Kirkaldie* and *Archer* show, this principle should broadly inform the application of the public interest test to legally privileged information under regulations 12(5)(a) and 12(1)(b) EIR.

75 However, importantly, it cannot simply be assumed that the public interest will always weigh in favour of the exception being maintained. This is so for two reasons. First, given the importance which the Convention, the Directive and the Regulations attach to the right to access environmental information (see not least the general presumption in favour of disclosure provided for by regulation 12(2)), on the facts of a particular case there may well be strong counter-veiling interests in favour of disclosure. This will particularly be the case where, for example, the disclosure is necessary to further public participation in decision making on environmental matters. Second, even under FOIA, the principle of legal privilege has not been seen as sacrosanct. Thus, for example, in *Mersey Tunnel Users Association v Information Commissioner and Merseytravel*,¹⁰² it was not sufficient to prevent disclosure of counsel’s advice in respect of a controversial decision by the authority involving the expenditure of many millions of pounds.

⁹⁸ See e.g. *Young v Information Commissioner and Department of the Environment for Northern Ireland* EA/2007/0048 (12 December 2007)

⁹⁹ EA/2006/001 (4 July 2006).

¹⁰⁰ EA/2007/0037 (9 May 2007).

¹⁰¹ See the leading case on section 42 FOIA (exemption in respect of legally privileged information), *Bellamy v Information Commissioner*.

¹⁰² EA/2007/0052 (15 February 2008)

Fair Trial

76 In *Watts v Information Commissioner*,¹⁰³ which concerned a request for disclosure of environmental health reports relating to a particular meat supplier, the Tribunal reached a number of important conclusions on the ‘fair trial’ provision in regulation 12(5)(b).

- (1) It concluded that disclosure of the reports would not prejudice ‘the right to a fair trial’ of the owner of the premises in the context of related criminal proceedings. The Tribunal reached this conclusion on the basis that: (a) the content of reports did not indicate that disclosure would adversely affect the defendant’s right to a fair trial and, further, (b) when confirming to the authority that particular documents should be withheld pending the outcome of the criminal trial, the relevant police authority had made no reference to the reports. The Tribunal did go on to comment obiter that authorities should generally ‘adopt a cautious approach’ when deciding whether to disclose such information ‘because of the importance of not prejudicing a fair trial in criminal proceedings’.¹⁰⁴
- (2) The Tribunal went on to hold (obiter) that, had regulation 12(5)(b) been engaged because of the fair trial risks, the public interest would have weighed in favour of the information being withheld. This was because, whilst there was a particular interest in receiving information relating to the performance of an authority’s health and safety enforcement functions, particularly given that the outbreak in question had caused widespread suffering and had led to the death of a child, these considerations were outweighed by the important public interest in ensuring that a defendant in criminal proceedings has a fair trial.¹⁰⁵ This conclusion highlights that there is a strong public interest against disclosure which is, in effect, built into the ‘fair trial’ exception in regulation 12(5)(b).

103 EA/2007/22 (20 November 2007).

104 Para. 7.

105 Para. 10.

Criminal and Disciplinary Inquiries

77 The concept of an ‘inquiry’ is not defined by the EIR. However, it would presumably apply to disciplinary investigations concerning an employee of the authorities or investigations conducted by the authority with respect to a potential criminal breach of planning law, environmental law and so on. In *Watts v Information Commissioner*, the Tribunal concluded that regulation 12(5)(b) was not engaged in respect of a public inquiry being conducted by the National Assembly of Wales in respect of an outbreak of E. Coli. This was on the basis that the relevant inquiry was not ‘an inquiry of a criminal or disciplinary nature’ for the purposes of regulation 12(5)(b).¹⁰⁶ Once again, the fact that the disclosure relates to a criminal or disciplinary inquiry is not sufficient for the exception to be engaged. The disclosure must adversely affect the inquiry in the sense of causing some real harm in order for the exception to be engaged.

78 Even where the regulation 12(5)(b) exception is engaged, the authority must still go on to apply the public interest test.

Regulation 12(5)(c) – Intellectual Property Rights

79 This exception would be engaged, for example, in respect of information which was subject to copyright, patent, trade marks or formed part of a registered design.

80 The Copyright, Designs and Patents Act 1988 (“the 1988 Act”) makes provision in respect of copyrighted information. In particular, section 16 provides that copyright will be infringed if the ‘whole or any substantial part’ of the work is subject to unauthorised copying.¹⁰⁷ The Copyright and Rights in Databases Regulations 1997 makes provision for the protection of information contained in databases. Regulation 16(1) provides that, subject to the provisions of Part III (data base rights), a person infringes database rights in a database if, without the consent of the owner of the right, he extracts or re-utilises all or a substantial part of the contents of the database. These enactments will evidently have a particular relevance where it is thought that intellectual property rights are in issue under the EIR.

¹⁰⁶ Para. 9.

¹⁰⁷ Section 50(1) of the 1988 Act provides that a disclosure of information ‘specifically authorised by an Act of Parliament’ will not infringe copyright. The EIR is a statutory instrument enacted by the Secretary of State exercising powers under the European Communities Act 1972. In the circumstances, it is doubtful that it can be regarded as ‘an Act or Parliament’ for the purposes of section 50(1). It follows that section 50(1) of the 1988 Act may be probably not relevant when assessing whether disclosure of information under the EIR would breach copyright so as to engage regulation 12(5)(e). Cf. *Information Rights* (ed. Coppel), 2nd edit, footnote 311 in para. 6-049.

81 In *Office of Communications v Information Commissioner and T-Mobile (UK) Ltd*,¹⁰⁸ the Tribunal found that information drawn from a database compiled by Ofcom and containing datasets of information provided by mobile phone operators were protected by database right and copyright. It went on to conclude that disclosure of the information would cause commercial harm and, hence, adversely affect those rights.¹⁰⁹ Accordingly, it found that regulation 12(5)(c) was engaged. However, the Tribunal went on to conclude that the public interest did not weigh in favour of the exception being maintained in respect of the requested information all the circumstances of the case.¹¹⁰ In the course of its decision, the Tribunal confirmed that not every infringement with property rights would have the necessary adverse effect for the purposes of the regulation and that breach of the right ‘must result in some degree of loss or harm to the right-holder’, i.e. it must be more than a mere technical infringement.¹¹¹ The Tribunal also confirmed however that it did ‘not think that the threshold for establishing an adverse effect is particularly high’.¹¹²

Regulation 12(5)(d) – Confidentiality of Proceedings

82 Regulation 12(5)(d) applies to information the disclosure of which would adversely affect ‘the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law’.

83 In *Archer v Information Commissioner*,¹¹³ the Tribunal expressed the view (obiter) that this exception would apply to confidential legal proceedings as well as confidential meetings of a local authority at which deliberations take place on matters within the authority’s jurisdiction.¹¹⁴ However, in that case, the exception was held not to apply to a joint report which had not been prepared for the purposes of or discussed at a council meeting.¹¹⁵

84 It will not be sufficient that the information merely relates to the confidential proceedings. In order for regulation 12(5)(d) to be engaged, it must be the case that the disclosure would adversely affect the confidentiality of proceedings. Such an adverse effect may not be possible, for example, where the authority has already waived any confidentiality relating to the proceedings by allowing minutes of the proceedings to be made publicly available.¹¹⁶

85 Regulation 12(5)(d) does not apply to information on emissions (regulation 12(9)).

108 EA/2006/0078 (4 September 2007), currently on appeal to the High Court.

109 See in particular paras. 5-55.

110 Para. 62.

111 Para. 47.

112 Para. 48.

113 EA/2007/0037 (9 May 2007).

114 Para. 68.

115 Para. 70.

116 Cf. *Kirkaldie v Information Commissioner EA/2006/001* (4 July 2006): authority had waived privilege by disclosing to the public a summary of counsel’s advice; regulation 12(5)(a) accordingly was not engaged in respect of the information.

Regulation 12(5)(e) – Confidential/Commercial Information

86 Regulation 12(5)(e) applies to ‘the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest’. This regulation is not easy to unpack. However, it should be taken to apply where the following conditions are met:

- (1) the information in question is commercial or industrial in nature;
- (2) the information is confidential;
- (3) the confidentiality of the information protects a legitimate economic interest; and
- (4) disclosure would adversely affect the confidentiality of the information.

Commercial and Industrial Information

87 The term ‘commercial information’ is not defined in the EIR and does not find a precise analogue in FOIA.¹¹⁷ However, at the very least, such information would be likely to cover information which could be of commercial value to a third party, e.g. a competitor. Industrial information would cover for example trade secrets.¹¹⁸

Information is Confidential

88 When considering whether the information is ‘confidential’, consideration should be given to the leading case on confidential information, *Coco v AN Clark (Engineers) Ltd (Ch D)* [1969] RPC 41. In that case, Megarry J confirmed that the law of confidence would protect information where: (a) the information itself had the necessary quality of confidence about it and (b) the information had been imparted in circumstances importing an obligation of confidence. As to whether the information had been given in confidence, Megarry confirmed that the test was whether: ‘any reasonable man standing in the shoes of the recipient of the information would have realised upon reasonable grounds the information was being given to him in confidence’.¹¹⁹

117 Cf. the ‘commercial interests’ exemption provided for under section 43 FOIA.

118 See further *Faccenda Chicken Ltd v Fowler* [1984] ICR 589 and in the Court of Appeal [1986] ICR 297 on the definition of a trade secret and confidential information generally.

119 *Ibid.*, para. 48.

89 In *Office of Communications v Information Commissioner and T-Mobile (UK) Ltd*,¹²⁰ the Tribunal concluded that regulation 12(5)(e) was not engaged in respect of information provided to Ofcom by mobile phone operators with respect to the operation of mobile telephone base stations. This was because the information in question had already entered the public domain via Ofcom's website and, hence, was not confidential.¹²¹

Legitimate Economic Interests

90 Again, this term is not defined in the EIR and does not find a precise analogue in FOIA. However, depending on the facts, such interests might include: the interest in retaining or improving market position; the interest in ensuring that competitors do not gain access to commercially valuable information; the interest in protecting a commercial bargaining position in the context of existing or future negotiations; the interest in avoiding commercially significant reputational damage and the interest in avoiding disclosures which would otherwise result in a loss of revenue or income.

Would Adversely Effect

91 In order for regulation 12(5)(e) to be engaged it is not sufficient that the relevant information is confidential. It must also be the case that disclosure 'would adversely affect the confidentiality' of the information. It is to be inferred that what the regulation is aiming at here is protecting confidential information against unauthorised disclosures which would give rise to a detriment, particularly a detriment amounting to damage to legitimate economic interests.¹²²

92 Regulation 12(5)(e) does not apply to information on emissions (regulation 12(9)).

¹²⁰ EA/2006/0078 (4 September 2007), currently on appeal to the High Court.

¹²¹ Para. 66.

¹²² Although cf. para. 65 of *Office of Communications v Information Tribunal and T-Mobile (UK) Ltd* EA/2006/0078 (4 September 2007). In this paragraph, the Tribunal appears to assume that regulation 12(5)(e) will be engaged simply if there is an actionable breach of confidence. Whilst this formulation is clearly relevant to the application of the confidential

information exemption under section 41 FOIA, it is suggested that this approach is not wholly consistent with the rather different requirements of regulation 12(5)(e). This decision is currently on appeal to the High Court.

Regulation 12(5)(f) – The Interests of Persons Providing Information

93 Regulation 12(5)(f) applies in the following circumstances:

- (1) the information in question has been provided by a person;
- (2) the information has been provided by that person in circumstances where:
 - (a) they was not under, and could not have been put under any legal obligation to supply it to that or any other public authority; and
 - (b) the authority or any other public body is not entitled, apart from the EIR to disclose it;
- (3) the person providing the information has not consented to its disclosure; and
- (4) disclosure of the information would adversely affect that person's interests.

94 Such information might include, for example, information provided by an individual in the context of a voluntarily complaint about a neighbour's breach of planning law where the complainant does not want the complaint to be made public for fear of reprisals from the neighbour, although only if no public authority would have power to disclose such information. However, in such a case as this, the authority will still need to ask itself the question whether any part of the complaint could be disclosed without the interests of the complainant being adversely affected.

95 In view of the fact that regulation 12(5)(f) applies to information provided by 'a person', application of this exception will often go hand in hand with an application of the personal data exception provided for under regulation 13(1). However, if 'the person' providing the information is not a living individual (e.g. they are a company or an unincorporated association), then, whilst regulation 12(5)(f) may apply, regulation 13(1) will not.¹²³

96 *Dainton v Information Commissioner and Lincolnshire County Council*,¹²⁴ concerned a request for disclosure of statements made by individuals in respect of a proposed right of way. The request was made by the person over whose land the right of way would fall. The Tribunal found that the regulation 12(5)(f) exception was not engaged in respect of some information contained in statements provided to a local authority by members of the public. This was because the disclosure of that particular information would not adversely affect the interests of those persons.¹²⁵ However, it did conclude that information amounting to the personal data of the individuals providing the statements could be withheld under regulation 13(1).

¹²³ Section 1(1) DPA provides that 'personal data' must relate to a 'living individual'.

¹²⁴ EA/2007/0020 (10 September 2007).

¹²⁵ Para. 36.

97 Regulation 12(5)(f) does not apply to information on emissions (regulation 12(9)).

Regulation 12(5)(g) – Protection of the Environment

98 It is entirely logical that the EIR should make provision to guard against disclosures of environmental information which would themselves result in damage to the environment. The DEFRA guidance suggests that such information might include, for example, information about possible sites of scientific interest on the basis that there might be a risk that disclosure of the information before the site is given special protected status in law could result in pre-emptive damage being caused before the legal protection is confirmed.¹²⁶

99 However, in assessing whether regulation 12(5)(g) is engaged the authority should not rely on any actual or perceived motives on the part of the person requesting the information. This is because, in common with FOIA, the EIR is intended to be motive blind. That being said, when deciding whether the regulation 12(5)(g) exception is engaged, the authority may lawfully ask itself whether the disclosed information may be misused by members of the public, including the applicant, in the sense of its being used in a way that is damaging to the environment. For example, if a person with a criminal record for stealing eggs from protected birds requests information as to the location of a particularly rare pair of osprey, the authority holding the information should not speculate as to the reasons why the applicant wants the information. However, it may conclude on all the evidence before it that regulation 12(5)(g) is engaged because of the risk that disclosure of the information would culminate in the eggs being stolen. It would then need to go on to consider whether the information should nonetheless be disclosed on an application of the public interest test.

100 Regulation 12(5)(g) does not apply to information on emissions (regulation 12(9)).

Personal Data Exceptions

101 Regulation 5(3), which is contained in Part II EIR, provides that, to the extent that environmental information includes personal data of which the applicant is the relevant data subject, the regulation 5(1) duty to make the information available does not apply 'to those personal data'. It follows that, where environmental information contains personal data of which the applicant is the data subject, regulation 5(3) permits the authority to strip out the relevant personal data (e.g. through redaction). Regulation 5(3) does not, however, permit the authority to withhold all the requested information, unless that is all of the information constitutes personal data of which the applicant is the data subject. In respect of any withheld personal data, the authority should go on to apply the subject access request provisions of the DPA with a view to determining whether the data is disclosable under the DPA.

102 Regulation 13, which is contained in Part III EIR, also makes provision in respect of environmental information which includes personal data. It applies where the information is requested by a person other than the data subject (i.e. third party personal data). Under regulation 13(1), where environmental information includes personal data of which the applicant is not the data subject, the authority 'shall not disclose' the personal data if:

- (1) disclosure would breach one of the data protection principles contained in schedule 1 DPA; or
- (2) disclosure would contravene section 10 DPA (damage/distress notification) and, on an application of the public interest test, the public interest weighs in favour of disclosure.

103 As with regulation 5(3), the regulation 13 exception only applies to the personal data elements of the environmental information. Thus, where environmental information is mixed personal and non-personal data, the issue for the authority under regulation 13(1) is whether it should strip out the personal data (e.g. by redaction).

123 Section 1(1) DPA provides that 'personal data' must relate to a 'living individual'.

124 EA/2007/0020 (10 September 2007).

125 Para. 36.

104 The regulation 13 approach to exempting personal data from disclosure broadly mirrors the approach to personal data adopted under section 40 FOIA. Accordingly, the existing FOIA case-law on the application will inevitably be relevant to the application of the EIR exceptions relating to personal data. A detailed analysis of the FOIA authorities on section 40 FOIA is outside the scope of this guide. The following is merely a summary of some of the key principles.

‘Personal Data’

105 The concept of personal data is defined in section 1(1) DPA.¹²⁷ In *Durant v Financial Services Authority* [2003] EWCA Civ 1746, the Court of Appeal found information will amount to ‘personal data’ for the purposes of section 1(1) where it is ‘biographical in a significant sense’ and has the putative data subject as its ‘focus’.

106 The Commissioner’s recently published ‘*Data Protection Technical Guidance: Determining What is Personal Data*’ appears to allow for a much broader approach to the definition of ‘personal data’ as it states that information will constitute personal data if the information in question is merely ‘obviously about’ a particular individual, rather than having the putative data subject as its focus.¹²⁸ However, the Tribunal has recently rejected that wider interpretation on the basis that it is bound by the judgment in *Durant*.¹²⁹ The issue of the scope of the concept of ‘personal data’ has recently been considered by the House of Lords in *Common Services Agency v Scottish Information Commissioner*, judgment is awaited.

Breach of Data Protection Principles

107 It is typically the first data protection principle (fair and lawful processing – DPP1) and the second data protection principle (processing in manner incompatible with purpose for which data obtained – DPP2) which will be in issue where an applicant requests environmental information embracing personal data relating to a third party.

¹²⁷ See further the definition of ‘data’, ‘data subject’ and ‘data controller’ in that section.

¹²⁸ Para. 3.1. of the Guidance.

¹²⁹ *Harcup v Information Commissioner and Yorkshire Forward*. In that case, The Tribunal found that a list of names of individuals attending a business event run by a public authority did not contain personal data.

The First Data Protection Principle - DPP1

108 DPP1 will be contravened unless:

- (1) one of the requirements of Schedule 2 DPA are met;
- (2) in respect of 'sensitive personal data',¹³⁰ one of the requirements in Schedule 3 DPA is also met; and
- (3) the processing is otherwise fair and lawful.

Paragraph 6 of Schedule 2

109 The Schedule 2 condition which is most commonly in issue under DPP1 is that provided for by paragraph 6(1) of Schedule 2:

'6(1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.'

110 In marked contrast with the public interest test provided for under regulation 12(1)(b) EIR, it is the interests in disclosure which must positively override the data subject's interests if the paragraph 6(1) condition is to be met.

111 Meeting this requirement will often be difficult in practice because of the generally paramount nature of the data subject's interests.¹³¹ However, the requirement will more readily be met where the data relates to the discharge by a public official of public duties.¹³²

¹³⁰ Section 2 DPA.

¹³¹ See e.g. *London Borough of Camden v Information Commissioner EA/2007/21* (19 December 2007) (requirement not met in respect of potential disclosure of names of individuals who were subject to ASBO orders).

¹³² *The Corporate Officer of the House of Commons v Information Commissioner EA/2006/0015 and 0016* (16 January 2007)

Unlawful and Unfair Processing

112 Even where one of the requirements of Schedule 2 (and where relevant) Schedule 3 are met, processing may still breach DPP1 because it is otherwise ‘unlawful’ or ‘unfair’.

(1) Processing may be ‘unlawful’, for example, because it would give rise to an unlawful breach of confidence.¹³³

(2) Processing may be ‘unfair’ either:

(a) because the technical requirements as to fair processing provided for in Part II of Schedule 1 DPA have not been met; or

(b) because the processing would more generally be unfair, e.g. because of the risk that disclosure may result in the data subject suffering or fearing reprisals from the recipient of the information;¹³⁴ or because it would result in the data subject suffering unjustified humiliation.¹³⁵

113 In *Dainton v Information Commissioner and Lincolnshire County Council*,¹³⁶

The Tribunal considered the application of regulation 13 EIR in respect of a request for disclosure of statements made by members of the public. The statements were provided in response to a proposal to confirm a right of way. The person requesting the statements was the person over whose land the relevant right of way would fall. The Tribunal concluded that the statements included ‘personal data’ because they revealed information as to the name and address of the person making the statement, the use made by the individual of the relevant footpath and their opinions on the status of the footpath. The Tribunal further concluded that disclosure of the data would breach DPP1 because: (a) individuals providing the statements would not have expected the information to be disclosed in advance of a decision by the authority as to whether to make an order in respect of the footpath, particularly as such disclosures would be perceived as risking possible reprisals; and (b) accordingly, the disclosure would be unfair. Thus, the Tribunal found that the authority was entitled to withhold the personal data under regulation 13. It is worth noting that the Tribunal opined obiter that the risk of identification arising from the fact that the statements were in the handwriting of the individuals who had provided the statements could be overcome by the authority providing transcripts of the information in question.¹³⁷

133 *McTeggert v Information Commissioner & Department of Culture Arts and Leisure* EA/2006/0084 (4 June 2007), para. 42.

134 *Alcock v Information Commissioner* EA/20060022 (3 January 2007), para. 29.

135 *London Borough of Camden v Information Commissioner*, supra, paras. 28 and 31.

136 EA/2007/0020 (10 September 2007).

137 Para. 36.

114 In *Young v Information Commissioner and Department of the Environment for Northern Ireland*,¹³⁸ Mr Young requested a copy of the enforcement file relating to a property which he had developed. The file contained personal data relating to individuals who had complained to the authority of breaches of planning obligation in respect of the development. The Tribunal held that disclosure of the data would breach the first data protection principle (DPP1) as none of the requirements in Schedule 2 DPA had been met. In particular, the Tribunal concluded that the requirements of paragraph 6 of Schedule 2 were not met as Mr Young did not have a legitimate interest which would be served by the disclosure of the data.¹³⁹ Moreover, even if Mr Young had such a legitimate interest, disclosure was unwarranted for the purposes of paragraph 6 in view of the resulting prejudice to the rights and freedoms of the complainants. Such individuals had a 'strong legitimate interest in continued anonymity'.¹⁴⁰ That Mr Young may have guessed the identity of one or more of the complainants was irrelevant to the analysis under paragraph 6 and DPP1.¹⁴¹

The Second Data Protection Principle - DPP2

115 DPP2 will only be contravened if the disclosure is actually 'incompatible' with the purpose or purposes for which the information was obtained. In practice, it will often be difficult to show that a disclosure is incompatible with the purposes for which the information was obtained. Certainly, the mere fact that the purpose is different from the purpose for which the information was obtained will not usually suffice.¹⁴²

The Public Interest Test

116 The authority will be obliged to apply the public interest test under the EIR:

- (1) whenever a regulation 12 exception is engaged (regulation 12(1)(b)); and, further,
- (2) in circumstances where the request relates to third party personal data and disclosure of the data would contravene section 10 DPA (regulation 13(2)(a)(ii)).

¹³⁸ EA/2007/0048 (12 December 2007).

¹³⁹ Para. 31

¹⁴⁰ Para. 32.

¹⁴¹ Para. 33.

¹⁴² See e.g. *The Corporate Officer of the House of Commons v Information Commissioner* EA/20060015 and 0016 (16 January 2007), para. 97.

General Principles

- 117 When construing the public interest test under section 2 FOIA, the Tribunal has found that it requires authorities to disclose information, save where the interests in maintaining the exemption positively outweigh the interests in disclosure.¹⁴³ If the public interest scales are evenly balanced, disclosure must be effected. This principle applies equally in respect of the exceptions provided for under Part III EIR.¹⁴⁴
- 118 The outcome of an application of the public interest test will always depend on the particular facts and circumstances of the individual case.¹⁴⁵ However, the age of the information and whether it relates, in effect, to historic matters will usually be particularly important considerations.¹⁴⁶
- 119 The public interest factors in favour of maintaining the exception must be related specifically to the particular interest which the exception is designed to protect. In *Office of Communications v Information Commissioner and T-Mobile (UK) Ltd*,¹⁴⁷ the Tribunal rejected an argument that, when weighing the public interest in respect of a particular exception, it was appropriate to take into account public interest considerations applicable to other exceptions. If the public interest considerations relevant to one exception were insufficient to enable the information to be withheld under that exception, those considerations could not be prayed in aid in respect of other exceptions. In other words, public interest considerations arising naturally from one exception must be treated as relevant only to that exception unless they also arose naturally from another exception.¹⁴⁸ Thus, in the *T-Mobile case*, public interest considerations relevant to a public safety exception under regulation 12(5)(a) could not be applied in the context of the intellectual property rights exception afforded under regulation 12(5)(c). This approach was specifically approved by the High Court in an appeal brought by the Office of Communications against the Tribunal's decision.¹⁴⁹

143 DFES v Information Commissioner EA/2006/0006, paragraph 65.

144 See e.g. *Burgess v Information Commissioner and Stafford Borough Council* EA/2006/0091 (7 June 2002), para. 43. Although see further. *Lord Baker v Information Commissioner and Department of Communities and Local Government* EA/2006/0043 (1 June 2007): principles derived from case-law on the public interest test under FOIA offer only 'broad guidance' as to the application of the public interest test under the EIR.

145 See further *Export Credits Guarantee v Friends of the Earth* [2008] EWHC 638 (Admin), para. 26.

146 See e.g. *Pugh v Information Commissioner* EA/2007/0055 (17 December 2007), para. 53, *Mersey Tunnel Users Association v Information Commissioner and Merseytravel* EA/2007/0052 (15 February 2008) and *Burgess v Information Commissioner and Stafford Borough Council*, para. 43.

147 EA/2006/0078 (4 September 2007), currently on appeal to the High Court, 148 Paras. 57-58.

149 The appeal was dismissed on 8 April 2008. A transcript of the High Court's judgment is awaited.

- 120 In assessing the strength of any public interest in favour of withholding the requested information, the authority should always consider what specific harm would follow from the disclosure of the particular information in question.¹⁵⁰ Moreover, it should ensure that it avoids relying on specific harms which are more illusory than real.¹⁵¹
- 121 By way of contrast, public interests in disclosure may be cast more generally (for example, the public interest in promoting transparency and accountability within public institutions).¹⁵²
- 122 An authority which is seeking to apply the public interest test must always ensure that it considers both the interests in favour of disclosure and those in favour of maintaining the exception. A one-sided approach to the public interest test risks inviting a complaint to the Commissioner.
- 123 The fact that the EIR was enacted in part to improve public participation in decision-making on environmental matters¹⁵³ will be a relevant consideration when weighing the public interest test. Also, particularly where the requested information relates to information which impacts on the health of any individual or on an individual's home, the ECHR may need to be considered, particularly the Article 8 right to respect for private and family life and a person's home. Consideration should be given here to relevant Strasbourg case-law. In *McGinley v UK* (1999) 27 EHRR 357, a case involving information relating to exposure of individuals to radiation, the Court concluded that, where a government engaged in hazardous activities which may have hidden consequences on the health involved in those activities, respect for private and family life under Article 8 requires that an 'effective and accessible procedure' be established enabling such persons to seek all relevant and appropriate information. In *Taskin v Turkey* (2006) 42 EHRR 50, the Court reconfirmed the importance of affording public access to decisions on environmental matters which may impact on human rights.¹⁵⁴
- 124 In *Office of Communications v Information Commissioner and T-Mobile (UK) Ltd*, the Tribunal took into account the potential risk to health arising from mobile telephone base stations when deciding whether disclosure of information relating to those stations was in the public interest.¹⁵⁶

150 *Export Credits Guarantee Department v Friends of the Earth* [2008] EWHC 638 (Admin), per Mitting J at paras. 27-28.

151 See further *Friends of the Earth v Information Commissioner and Export Credits Guarantee Department* EA/2006/0073 (20 August 2007) where the Tribunal rejected arguments that disclosure of inter-departmental correspondence on a controversial scheme to develop offshore oil and gas fields would generally damage the quality and efficacy of government decision making processes. This decision was upheld on appeal in *Export Credits Guarantee Department v Information Commissioner Friends of the Earth* [2008] EWHC 638 (Admin).

152 See *Guardian Newspapers and Brooke v Information Commissioner and BBC* EA/2006/0011 (8 January 2007) and *Burgess v Information Commissioner and Stafford Borough Council*, para. 43.

153 See recital (1) of the Directive.

154 Para. 119. See also *Giacomelli v Italy* App.59909/00, November 9, 2006, para. 83.

155 EA/2006/0078 (4 September 2007), currently on appeal to the High Court.

156 Paras. 40-41.

125 The fact that other information relevant to the request is already in the public domain and readily accessible may be a factor which is relevant to whether there is a public interest in disclosing the particular information. In particular, it may be that the public interest in receiving that information is diminished by virtue of information which is already in public circulation. However, this will not always be the case and, indeed, to date, the Tribunal has tended to take the view that the fact that other related information is publicly available is irrelevant when weighing the public interest test. This was certainly the approach adopted by the Tribunal in *Lord Baker of Dorking v Information Commissioner and Department for Communities and Local Government*¹⁵⁷ and in *Friends of the Earth v Information Commissioner and Export Credits Guarantee Department*.¹⁵⁸

Relevant Case-Law

126 Cases where the Tribunal has applied the public interest test under the EIR include:

- (1) *Archer v Information Commissioner*¹⁵⁹ and *Burgess v Information Commissioner and Stafford Borough Council*.¹⁶⁰ public interest weighed in favour of withholding legally privileged advice;
- (2) *Lord Baker of Dorking v Information Commissioner and Department for Communities and Local Government*.¹⁶¹ public interest weighed in favour of disclosing civil servants' advice to Minister on planning application;
- (3) *Friends of the Earth v Information Commissioner and Export Credits Guarantee Department*.¹⁶² public interest weighed in favour of disclosure of correspondence between government departments on potential UK involvement with major overseas oil and gas project.
- (4) *Office of Communications v Information Commissioner and T-Mobile (UK) Ltd*¹⁶³ (requested information: a database containing information on mobile telephone base stations):
 - (a) even though disclosure would pose some risk to public safety (regulation 12(5)(a) exception accordingly engaged), the risk was small and accordingly the public interest weighed in favour of disclosure.¹⁶⁴
 - (b) disclosure would breach copyright and database rights of the mobile phone operators and thereby cause some commercial harm (regulation 12(5)(c) exception accordingly engaged), however, the public interest still weighed in favour of disclosure.¹⁶⁵

157 EA/2006/0043 (1 June 2007), para. 23.

158 EA/2006/0073 (20 August 2007), para. 77. An appeal against the Tribunal's decision in *Friends of the Earth* was rejected by the High Court on 17 March 2008, [2008] EWHC 638 (Admin).

159 EA/2007/0037 (9 May 2007).

160 EA/2006/0091 (7 June 2002).

161 EA/2006/0043 (1 June 2007).

162 EA/2007/0073 (20 August 2007). An appeal against the Tribunal's decision in this case was rejected by the High Court on 17 March 2008, [2008] EWHC 638 (Admin).

163 EA/2006/0078 (4 September 2007). An appeal against the Tribunal's decision in this case was rejected by the High Court on 8 April 2008. A transcript of the judgment is awaited.

164 Paras. 40-41.

165 Para. 62.

6 Withholding Information: General Considerations

127 When considering whether it is relieved of the regulation 5(1) duty to disclose environmental information, the authority should take into account in particular the matters set out below.

Burden of Proof

128 In common with FOIA, it is the authority which bears the burden of proving that the decision to withhold the requested information was lawful. Discharging this burden in a particular case requires the authority to prove, not merely that a relevant exception is engaged but also, where the public interest test applies, that the public interest weighs in favour of the exception being maintained.

Presumption in Favour of Disclosure

129 The authority must apply a general presumption in favour of disclosure (regulation 12(2)), which is to say that disclosure must be effected unless there is a lawfully permissible basis for refusing disclosure. No comparable presumption has been expressly provided for in FOIA.¹⁶⁶ In *Burgess v Information Commissioner and Stafford Borough Council*, the Tribunal found that this constituted a significant difference between the EIR and FOIA. In *Export Credits Guarantee Department v Friends of the Earth* [2008] EWHC 638 (Admin), Mitting J observed that it was common ground that regulation 12(2) 'serves two purposes: (1) to provide the default position in the event that the interests are equally balanced; (2) to inform any decision that may be taken under the Regulations'.¹⁶⁷

¹⁶⁶ EA/2006/0091 (7 June 2002). See also *Archer v Information Commissioner and Salisbury District Council* EA/2006/0037 (9 May 2007): the threshold for justifying the non-disclosure of environmental information 'is a high one'.

¹⁶⁷ Para. 24.

Exceptions Must be Narrowly Construed

130 The exceptions within the EIR are to be construed narrowly so as to ensure that the objectives of the Directive (and, by extension, the Convention) are met.¹⁶⁸

Contrast with Foia Exemptions

131 The exceptions available under the EIR are at least superficially more tightly drawn than those available under FOIA. For example, there are no specific, express exceptions in respect of information the disclosure of which would or would be likely to prejudice the effective conduct of public affairs;¹⁶⁹ or information in respect of a claim to legal professional privilege could be maintained.¹⁷⁰ In the circumstances, the authority can only rely on these considerations either: (i) in circumstances where the exceptions can be construed as implicitly embracing them¹⁷¹ or possibly (ii) in the context of an application of the public interest test.¹⁷²

132 Even where the EIR exceptions appear to bear some resemblance to the exemptions afforded under FOIA, they may apply more restrictively. Thus, for example:

- (1) regulation 12(5) requires that disclosure ‘would adversely affect’ a regulation 12(5) matter – cf. FOIA, sections 31 (law enforcement); section 36 (prejudice to effective conduct of public affairs); section 43 (commercial interests). All of these provisions adopt the looser formulation: ‘would or would be likely to’ adversely affect/prejudice;
- (2) regulation 12(5)(b) will only be engaged where the disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the conduct of criminal or disciplinary inquiries – cf. section 30 FOIA where a qualified exemption is engaged merely if the information is held ‘for the purposes of’ criminal proceedings;¹⁷³
- (3) regulation 12(5)(e) will only be engaged where the confidentiality in the information is ‘provided by law to protect a legitimate economic interest’ - cf. FOIA, section 41 where confidential information is exempt from disclosure merely if it was provided by another person and its disclosure would give rise to an actionable breach of confidence.

¹⁶⁸ See Art 3.3 and 4.1(c) of the Directive and Art 4.3(b) of the Convention. See also the DEFRA guidance, para. 7.1.

¹⁶⁹ Section 36 FOIA.

¹⁷⁰ Section 42 FOIA.

¹⁷¹ See further *Kirkaldie v Information Commissioner EA/2006/001* (4 July 2006) where the Tribunal found that regulation 12(5)(b) implicitly embraced protection for legally privileged information, see paras.19-20.

¹⁷² *Friends of the Earth v Information Commissioner and Export Credits Guarantee Department EA/2006/0073* (20 August 2007): need to afford government safe space in which to conduct policy deliberations relevant to the public interest test (an appeal against this decision was rejected by the High Court on 17 March 2008, [2008] EWHC 638 (Admin)). Cf. the policy and prejudice to public affairs exemptions in sections 35 and 36 FOIA

¹⁷³ See *Watts v Information Commissioner EA/2007/0022* (20 November 2007), para. 7.

133 That requests cannot be refused under the EIR merely on grounds of expense also highlights the EIR's more permissive approach to accessing information.¹⁷⁴

Legal Prohibitions on Disclosure

134 The authority cannot refuse to disclose the requested environmental information merely on the basis that, quite apart from the EIR, it is subject to a statutory or other legal obligation which prohibits disclosure. This is because regulation 5(6) EIR expressly disappplies: *'any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations'*. The effect of regulation 5(6) is to ensure that the provisions of the EIR comprehensively trump any enactment or rule or law which would serve as a prohibition on the disclosure of environmental information. This very permissive approach to is to be contrasted with FOIA which absolutely exempts from disclosure any information the disclosure of which is prohibited by or under any enactment, or is incompatible with Community obligations, or would constitute or be punishable as a contempt of court.¹⁷⁵

135 However, depending on the facts of the particular case, the fact that the authority is, apart from the EIR, subject to a legal prohibition on disclosure may help to support an argument that there is a strong public interest against disclosure.

Searching for Information

136 If an authority wishes to persuade the Commissioner or the Tribunal that requested information is not held, it will have to ensure that it has carried out adequate searches following the request. The Commissioner and the Tribunal may consider the scope, quality, thoroughness and results of those searches when determining whether information is held. However, particularly where potentially relevant records are substantial and are spread across a large number of departments or are to be found in different locations, the authority will not have to prove that it has considered every potentially relevant record. The test is not certainty but rather whether the information was held, 'on the balance of probabilities'.¹⁷⁶ Estimates of time spent and lists of categories of document considered are likely to be relevant to the overall assessment of whether the information is held.

¹⁷⁴ Compare regulation 8 EIR and section 12 FOIA. See further the discussion of 'fees' below.

¹⁷⁵ Section 44 FOIA.

¹⁷⁶ See *Linda Bromley & Ors v Information Commissioner and Environment Agency* EA/2006/0072 (31 August 2007), paras. 12 and 13.

Mixed information and Redaction

137 Where information which may lawfully be withheld under the EIR is mingled together with other non-exempt information, the authority must still go on to disclose any disclosable non-exempt information falling within the ambit of the request, unless that information 'is not reasonably capable of being separated from the other information for the purpose of making available that information' (regulation 12(11)). Thus, where exempt information can be redacted from a document which comprises both exempt and non-exempt environmental information, the authority will be acting unlawfully if it refuses to disclose the non-exempt information, unless the redaction would itself strip the document of any meaning or the remaining unredacted information does not fall within the ambit of the request.¹⁷⁷

EIR Purpose Blind

138 When deciding whether information is disclosable under the EIR, the authority may not take into account any motive which the applicant has for seeking disclosure of the information.¹⁷⁸ Thus, when applying the public interest test, what counts is not the reason why the applicant wants the information but whether there are general public interests in favour of disclosure. That being said, the reasons relied upon by the applicant as justifying the disclosure may constitute evidence that there are public interests which weigh either in favour of disclosure or in favour of the exception being maintained.¹⁷⁹ Thus, for example, in respect of a request for disclosure of information as to the location of sites where the testing of genetically modified crops is being undertaken, the fact that the request is made by an anti-GM group with known militant tendencies is not per se relevant to the analysis. However, if the application confirms that the request is being sought so that the group can target those sites and the people who work within them, this is bound to be a consideration relevant to whether the information may lawfully be withheld in the public interest, for example under regulation 12(5)(a) (public safety exception). Alternatively, the very fact that such groups exist may be a factor which needs to be taken into account when weighing the public interest.

¹⁷⁷ See further the following decisions under FOIA: *Benford v Information Commissioner and Department for Environment, Food and Rural Affairs* EA/2007/009 (14 November 2007), para. 57 and *Commission for Local Administration in England v Information Commissioner* EA/2007/0087 (11 March 2008), para. 11.

¹⁷⁸ See Recital (8) and Art 3.1 of the Directive and the Convention, Art 4.1.

¹⁷⁹ See further, under FOIA, *Husbands v Information Commissioner* EA/2006/0048 (16 February 2007), paras. 19 and 30.

Historical Records

139 In contrast with FOIA, information does not cease to be exempt information under the EIR merely because it has become an ‘historical record’.¹⁸⁰ However, the authority will be subject to strict consultation obligations whenever it receives a request under the EIR for information amounting to an historical record.¹⁸¹ It will frequently be harder for the authority to argue that an historical record should be withheld in the public interest. This is because the very age of the information will generally ensure that its disclosure is less likely to be injurious to the public interest.

Late Reliance on Exceptions

140 The Commissioner and the Tribunal both have powers to consider the application of exceptions which were not relied on by the authority in the first instance. However, it cannot automatically be assumed that late reliance on exceptions will be permitted. In particular, relevant to whether late reliance is permitted will be the length of any delay in confirming reliance on the exceptions, the costs and inconvenience which the applicant has experienced as a result of the delay, the impact on the private lives of any third party individuals and whether, if late reliance is not permitted, the authority may be exposed to criminal or other serious sanctions.¹⁸² Whilst the Tribunal has thus far been rather forgiving when authorities have delayed in relying on EIR exceptions because they mistakenly thought that FOIA applied,¹⁸³ it cannot be assumed that such leniency will continue to be shown in the future.¹⁸⁴

180 Regulation 17. A record becomes ‘historical’ for the purposes of the EIR at the end of 30 years beginning with the year following which it was created. Cf. section 63 FOIA which provides that some of the exemptions in FOIA are disapplied in respect of historical records.

181 See regulation 17.

182 See *Bowbrick v Information Commissioner EA/2005/06* (28 September 2006), *Archer v Information Commissioner EA/2006/0037* (9 May 2007), paras. 40-45, *Dainton v Information Commissioner and Lincolnshire County Council EA/2006/ 0020* (10 September 2007), para. 8, and *Office of Communications v Information Commissioner and T-Mobile Ltd EA/2006/0078* (4 September 2007), para. 18.

183 See *Kirkaldie v Information Commissioner EA/2006/001* (4 July 2006) and *Archer*, para. 45.

184 See *Archer*, para. 45.

Consultation with Third Parties

- 141 The authority is not subject to any duty under the EIR to consult with third parties when it is seeking to apply the exceptions provided for in regulation 12 EIR. However, there may be circumstances in which it would be unreasonable for the authority to fail to consult with a third party. Such a situation might arise, for example, where the regulation 12(5)(e) exception (in respect of confidential/commercial information) was in issue. Here, the authority may need to consult with a third party in order to ascertain whether disclosure would adversely affect the legitimate economic interests of the third party. For example, when deciding whether to apply the exception to confidential and commercial negotiations with respect to a wind power plant, it may be unreasonable to fail to consult with the plant operator as to any unfair advantage which the disclosure might yield to a competitor in the context of future competitive tenders. Alternatively, it may be unreasonable for an authority to refuse to consult where regulation 12(5)(f) is in issue, particularly where the authority is not able to assess whether disclosure would adversely affect the interests of a person who has provided information to the authority in the absence of consultation.
- 142 However, an authority which does consult should ensure that it does not in effect delegate the decision as to whether the information is exempt to the third party consultee.¹⁸⁵
- 143 Moreover, the authority cannot lawfully contract out of its obligations under the EIR, e.g. by stating in a contract with a third party contractor that it will not disclose information relevant to the contract in the absence of consent from the contractor.¹⁸⁶
- 144 Whilst potential third party consultees may have no rights under the EIR itself, they would be entitled, in appropriate circumstances, to commence judicial review proceedings against the authority in circumstances where there had been an unreasonable failure to consult or to take into account relevant considerations. However, save where ECHR rights are in issue, the authority will generally be able to defeat the claim provided that its actions were not *Wednesbury* unreasonable. Where ECHR rights are in issue, for example the Article 8 right to privacy, the authority will need to be able to demonstrate that its actions were not only reasonable in a *Wednesbury* sense but were also justified for the purposes of the ECHR.

¹⁸⁵ See further the Code of Practice, paras. 40-45.

¹⁸⁶ See the Code of Practice, para. 46.

7 Application of FOIA

145 In general, when a request is received for environmental information, the authority should in the first instance determine whether access to the information is permissible under the EIR. If access is permitted under the EIR then this may be an end to the matter. However, there are a number of circumstances in which an authority which receives a request for environmental information may need also to consider the application of FOIA. This will be the case particularly in the circumstances described below.

- (1) The authority which receives the request is not a 'public authority' for the purposes of regulation 2(2) EIR, and as such is not bound by the EIR, but is a 'public authority' for the purposes of section 3 FOIA. In these circumstances, the authority should ignore the provisions of the EIR and decide whether the information is disclosable under FOIA.
- (2) The authority is entitled to withhold the information under the EIR. In these circumstances, the authority will still need to consider whether the information is disclosable under FOIA – see further section 39 FOIA which makes clear that the mere fact that information may be withheld under the EIR does not automatically mean that the information is not disclosable under FOIA. Section 39 affords an exemption in respect of information which an authority is either obliged to make available under the EIR or would be obliged to make available if the information was not exempt from disclosure under the EIR. In effect, such information is subject to a 'qualified exemption' under section 39. This means that the information must still be disclosed under FOIA unless, on an application of the public interest test, the public interest weighs in favour of disclosure.¹⁸⁷ It follows that, where access to information is barred under the EIR, the information may yet be disclosable under FOIA on an application of the public interest test. Given that the EIR generally embodies a more permissive access regime than FOIA, it is hard to imagine circumstances in which environmental information which was lawfully withheld under the EIR would nonetheless be disclosable under FOIA. However, the presence of section 39 within FOIA indicates that such a result is at least theoretically possible.

¹⁸⁷ See section 2 FOIA.

(3) The authority has granted access to the information under regulation 5(1) EIR, for example the applicant has been allowed access to the information by using one of the authority's computers in the authority's offices. However, the applicant considers that merely being granted access to the information under the EIR is insufficient as he or she wants to receive documentary copies of the requested information. In this situation, FOIA comes into play because, in contrast with the EIR which only obliges authorities to make information 'available' to applicants, section 1 FOIA imposes an obligation on authorities to 'communicate' disclosable information to applicants. Thus, where an authority has made information available to an applicant under the EIR but the applicant continues to request that the information be 'communicated to him', the authority must go on to consider whether the information is exempt from disclosure under Part II FOIA. Only if the information is exempt under one of the exemptions provided for in Part II FOIA will the authority be entitled to refuse the request for disclosure of the information. This approach was specifically approved in the case of *Rhondda Cynon Taff County Borough Council v Information Commissioner*.¹⁸⁸

146 In *Rhondda Cynon*, a request was made for disclosure of a particular land drainage Act. The authority invited the applicant to review the requested information by using one of the computers at the council's library to access the relevant OPSI link to the Act. However, the authority refused to send the applicant a copy of the Act on the grounds that: (a) it was subject to copyright and (b) the Act was reasonably accessible to the applicant via the OPSI link and was accordingly exempt from disclosure under section 21 FOIA. The Commissioner decided that the requested information was environmental information and that the authority had erred by not providing the applicant with a copy of the Act. The Commissioner reached this conclusion on the basis that the EIR contained no exemption in respect of information which was reasonably accessible to the applicant. The Tribunal held that the authority had not erred in refusing to provide the applicant with a copy of the Act. In particular, it concluded that:

- (1) the authority had made the information 'available' to the applicant under the EIR by inviting him to access the relevant website link via one of its computers. It had thus discharged its obligations under the EIR;
- (2) however, at that stage FOIA had become relevant to the request. This was because the applicant wanted the information to be 'communicated to him' as opposed to it merely being made 'available to him';
- (3) applying FOIA to the request, it was clear that the information was exempt from disclosure under FOIA because that information was 'reasonably accessible' to the applicant via the OPSI link and, hence, was exempt from disclosure under section 21 FOIA.

147 The decision in *Rhondda Cynon* is not a particularly easy decision to navigate. Not least, this is because it does not analyse in any depth the difference between making information 'available' for the purposes of regulation 5(1) EIR and 'communicating' information under section 1 FOIA. However, it does set a precedent which requires authorities to consider the application of FOIA where an applicant is not satisfied merely with having information made 'available' to him or her.¹⁸⁹ That being said it is hard to imagine circumstances in which an authority which has made particular information 'available' under the EIR will not also be able to claim that that information is 'reasonably accessible' to the applicant and, hence, exempt from disclosure on an application of section 21 FOIA.

¹⁸⁹ Query whether such an approach should have been adopted in *Markinson v Information Commissioner EA/2005/0014* (28 March 2006). In that case, the information was made available for inspection at the council's offices. However, the council refused to provide copies of the relevant documents other than by charging a very high fee. The Tribunal found that the fee was excessive for the purposes of regulation 8 EIR. If FOIA had been applied to the case on the basis that the applicant was not satisfied merely with the information being made 'available', then the authority would have been obliged to apply the

fees provisions contained in section 9 FOIA and the Freedom of Information Act and Data Protection (Appropriate Limit and Fees) Regulations 2004 rather than the fees provisions in the EIR.

8 Fees

148 In contrast with FOIA, an authority cannot refuse to respond to a request on grounds of expense.¹⁹⁰ However, under regulation 8(1), the authority may, in certain circumstances, charge a fee for making the requested information available. It is not entirely clear from regulation 8 itself whether the authority may charge a fee in respect of any search it undertakes to locate the information or any refusal notice it issues. However, *Markinson v Information Commissioner* confirms that such charges would not be lawful.¹⁹¹

149 The fee may be charged in advance (regulation 8(4)). Moreover, the authority may refuse to disclose the requested information unless the advance fee is paid within 60 working days after the date on which the authority notified the applicant of the need to pay a fee in advance (regulation 8(5)). The authority is obliged to publish and make available to applicants: (a) a schedule of its charges; and (b) information on the circumstances in which a charge may be made or waived (regulation 8(8)).

150 The fee itself must not exceed an amount which the 'authority is satisfied is a reasonable amount' (regulation 8(3)). The test for whether a fee is 'a reasonable amount' is subjective in the sense that it is the authority which must be satisfied that the fee is reasonable. However, the authority's subjective assessment is itself constrained by general public law principles. Thus, for example, it will not be a lawful fee if it was adopted in circumstances where no reasonable authority properly directed on the law could have adopted the fee in question or if it was adopted on the basis of irrelevant considerations.¹⁹² An applicant may complain to the Commissioner about the amount of any fees imposed on him.¹⁹³

151 Regulation 8(2) prohibits the charging of fees in respect of allowing an applicant to access public registers or lists of information held by the authority or allowing him or her to examine the information 'at the place which the authority makes available for the examination'.

¹⁹⁰ See section 12 FOIA which provides that the duty to provide information under FOIA does not oblige an authority to comply with a request for information where the authority estimates that the cost of complying with the request would exceed the appropriate limit.

¹⁹¹ EA/2005/0014 (28 March 2006). See further Art. 5 of the Directive and *Commission v Germany* [1999] CMLR 277, at 300 (decided by the ECJ under the previous incarnation of the Directive, 90/313/EEC).

¹⁹² See further *Markinson v Information Commissioner* EA/2005/0014 (28 March 2006): paras. 22-30. Council required to permit applicant to inspect planning information at its office free of charge but could charge for photocopying, para. 4.

¹⁹³ Regulation 18 and section 50(1) FOIA.

152 In *Markinson v Information Commissioner*,¹⁹⁴ the Tribunal concluded that charges of £6.50 for a copy of a decision notice relating to a planning application and 50p for every additional page copied from the planning file were excessive in that it was not a fee which the authority could lawfully have been satisfied was reasonable. In reaching this conclusion, the Tribunal took into account, in particular, that: the authority had largely relied on the fact that the fees it charged were close to the fees charged by other authorities; this comparative analysis was three years out of date; the authority had impermissibly taken into account officer time locating and retrieving the information; the authority had impermissibly taken into account irrelevant factors including a possible drop in revenue and possible increase in workload if the charges were decreased (the Directive made clear that fees should not create a profit by exceeding actual costs); the authority failed to take into account that it was not entitled to pass on the entire cost of responding to a request; the legal significance of the document in question was not a relevant consideration; the DCA guidance on FOIA and other guidance on the planning system had confirmed that, in most cases, a reasonable charge for photocopying costs would be 10p per page.¹⁹⁵ The Tribunal concluded that the authority should reassess the charges it makes for providing copies, using 10p per A4 sheet as a 'guide price' and that the guide price could only be departed from if the authority could demonstrate that there was a 'good reason' for the departure.¹⁹⁶

153 In *Rhondda Cynon Taff v Information Commissioner*,¹⁹⁷ the Tribunal concluded that where an applicant was not satisfied with mere inspection but wanted the information to be communicated to him, FOIA would apply to the request. If this decision is to be followed then it may suggest that, in *Markinson*, the authority should not have been applying regulation 8 at all but should instead have been applying the fees provisions contained in section 9 FOIA and the Freedom of Information Act and Data Protection (Appropriate Limit and Fees) Regulations 2004.

194 EA/2006/0014 (28 March 2006).

195 Paras. 34-36. See also para. 3.4.5 of the DCA guidance and also para. 5.19 of the booklet published by the Office of Deputy Prime Minister on 'Making the Planning System Accessible to Everyone'.

196 Para. 44.

197 EA/2007/0065 (5 December 2007).

9 Advice and Assistance

154 As with FOIA, the authority is subject to a general duty under the EIR to provide advice and assistance to a person who has requested environmental information (regulation 9(1)). Compliance with the guidance set out in the Code of Practice issued under regulation 16¹⁹⁸ is deemed to constitute due compliance with the duty to advise and assist (regulation 9(3) EIR). The duty to provide advice and assistance under regulation 9(1) may, for example, require the authority to provide access to relevant catalogues and indexes where they are available or to outline the nature and extent of information related to the request held by the authority. The Code also requires authorities to publish their procedures for dealing with requests.

155 Under regulation 9(2), where an authority decides that a request is formulated in too general a manner, it must *‘as soon as possible and in any event no later than 20 working days after the date of receipt of the request’*: (a) ask the applicant to provide more particulars in relation to the request; and (b) assist the applicant in providing those particulars.

10 Transferring Requests

156 Where an authority does not hold the requested information but it believes that the information is held by another authority, in addition to its duties under regulation 9, the authority is subject to an express obligation either to transfer the request to that other public authority or, at the very least, to supply the applicant with the name and address of that authority (regulation 10(1)).¹⁹⁹ The DEFRA guidance indicates that all transfers of requests should occur *‘as soon as possible’*.²⁰⁰ Where the request is transferred it is deemed to be a fresh request received by the authority with the time to respond running from the date of transfer (regulation 10(2)).

¹⁹⁸ <http://www.defra.gov.uk/corporate/opengov/eir/pdf/cop-eir.pdf>.

¹⁹⁹ FOIA does not provide expressly for any such duty, although the section 45 FOIA Code of Practice stipulates that authorities should adopt a similar approach under FOIA to the transfer of request, see paras. 16-24.

²⁰⁰ Para. 38.

11 Representation and Reconsideration

157 Where an applicant is dissatisfied with the authority's response to the request, he or she may make written representations to the authority (regulation 11(1)). Provided that the representations are made no later than 40 working days after the date on which the applicant believes that the public authority failed to comply with the relevant EIR requirement, the authority must consider those representations and any supporting evidence and go on to decide if the relevant requirement has been met (regulation 11(2)). It is a curious feature of this provision that the time limit for submitting representations under regulation 11 runs from the date when the applicant 'believes' that the authority failed to comply with its obligations under FOIA. Not least, it is curious because it will be hard for an authority to test when the applicant had the relevant belief. In practice, time is likely to run from the date when the applicant ought reasonably to have received the notification of any decision taken by the authority under the EIR. The applicant must be notified of the response to his representations no later than 40 working days after the date of receipt of the representations.²⁰¹

12 Complaints and Appeals

The information Commissioner

158 The enforcement and appeals provisions enacted in Part IV FOIA are specifically imported into the EIR by regulation 18(1).²⁰² Thus, applicants who are dissatisfied with an authority's response to their request may complain to the Information Commissioner. Save where, for example, the complainant has failed to exhaust internal complaints procedure (this would include the procedure afforded under regulation 11 EIR) or the complaint is vexatious, the Commissioner will make a decision on the complaint.²⁰³ If the complaint is upheld, the Commissioner may require the relevant information to be disclosed and may serve an enforcement notice to that effect.²⁰⁴

159 In the course of considering the complaint, the Commissioner may serve an information notice on the authority requiring it to furnish him with information relevant to the complaint.²⁰⁵ The notice must contain particulars of the right to appeal.

²⁰¹ Ibid. This mandatory obligation to consider and respond to representations is to be contrasted with the voluntary adoption of review procedures under FOIA. Such procedures are recommended under the section 45 FOIA Code of Practice, paras. 36-46.

²⁰² See *Markinson v Information Commissioner EA/2005/0014* (28 March 2006), para. 5.

²⁰³ Section 50 FOIA.

²⁰⁴ Section 52.

²⁰⁵ Section 51.

- 160 Failure to comply with an information notice, an enforcement notice or ‘so much of a decision notice as requires steps to be taken’ may lead to the Commissioner applying to the court and the court dealing with the authority as if it had committed a contempt of court.²⁰⁶
- 161 The Commissioner also has powers to issue a practice recommendation where he considers that the practice of the authority generally is not in conformity with its obligations under the EIR as proposed by the regulation 16 Code of Practice.²⁰⁷ The recommendation will specify particular steps which must be taken by the authority to bring its practices in line with its obligations under the EIR. Failure to comply with a recommendation may result in the authority being found to be in breach of the EIR. In more serious cases, it may result in the Commissioner making adverse comments on the authority in his report to Parliament.²⁰⁸
- 162 By section 55 and schedule 3 FOIA, the Commissioner may apply for a warrant to enter, search and seize material if it appears that a public authority has not been complying with any of the requirements of the EIR. A warrant will not be granted unless the judge is satisfied that the Commissioner has given seven days’ notice in writing to the occupier of the premises demanding access to the premises.²⁰⁹
- 163 Where a request for environmental information has been received by the authority and the applicant would have been entitled to the requested information, regulation 19 EIR makes it an offence for a person to alter, deface, block, destroy or conceal any record held by the authority with the intention of preventing the applicant obtaining the information.

²⁰⁶ Section 54. Cf. section 53 which provides for exceptions in respect of the duty to comply with a decision notice or enforcement notice.

²⁰⁷ Section 48 FOIA.

²⁰⁸ Section 49 obliges the Commissioner to lay a report before the House of Parliament on an annual basis.

²⁰⁹ Para. 2 of Schedule 3 FOIA.

Appeals to and from the Tribunal

164 If either the authority or the complainant is dissatisfied with the Commissioner's decision, an appeal may be brought to the Information Tribunal.²¹⁰ The Tribunal has powers not merely to review the Commissioner's decision but also to consider the matter afresh on the merits.²¹¹ From the Tribunal, an appeal lies to the High Court.²¹²

Costs

165 The Tribunal has powers under rule 29 of the Information Tribunal (Enforcement Appeals) Rules 2005 to award costs against a party where it has been responsible for *'frivolous, vexatious, improper or unreasonable action or for any failure to comply with a direction or any delay which with diligence could have been avoided'*.

166 In *Milford Haven Port Authority v Information Commissioner and Richard Buxton*,²¹³ the Tribunal declined to exercise this power so as to award costs against an authority in favour of an additional party where, after a directions hearing before the Tribunal, the authority decided to disclose the disputed information.²¹⁴ In reaching this conclusion, the Tribunal rejected arguments that costs should be awarded in light of a confidential internal email from the authority's Chief Executive which was written after the Commissioner issued his decision and which alluded to 'buying more time'. The Tribunal concluded that the email constituted a consultation document setting out the position as the Chief Executive saw it following the decision notice and that it embodied an entirely reasonable approach considering the position of a party who has just lost a case and is deciding that to do next.²¹⁵ The Tribunal further concluded that the authority had not acted unreasonably either in bringing the appeal (as the grounds of appeal were proper grounds) or by deciding upon reflection that the appeal should be withdrawn and the information disclosed.²¹⁶

210 Section 57 FOIA.

211 Section 58(1).

212 Section 59. However, it should be noted that the Leggatt Review is currently looking at reforming the way in which the Tribunal works. The Information Tribunal has confirmed in its January 2008 response to consultations on the review that it considers that the Tribunal should be classified as an 'upper tribunal' (equivalent to the High Court) with appeals lying direct to the Court of Appeal.

213 EA/2007/0036 (6 November 2006).

214 Cf. *Bowbrick v Information Commissioner and Nottingham City Council*, EA/2005/006 for a case where costs were awarded against the authority.

215 Para. 25.

216 Para. 34.

Relevant Appeals to the High Court

167 To date (23 April 2008), the High Court has decided two appeals under the EIR, *Export Credits Guarantee Department v Friends of the Earth*²¹⁷ and *Office of Communications v Information Commissioner*.²¹⁸ In both cases, the High Court rejected appeals brought by the relevant public authorities.

168 In March 2008, the High Court heard an important appeal on the application of section 35 FOIA (policy exemption) in the case of *Office of Government Communications v Information Commissioner*.²¹⁹ It was thought by some that this appeal would constitute an important test of the Government's oft repeated assertion that disclosure of internal communications relating to the formulation of government policy would have a generally deleterious effect on the quality and efficacy of government decision-making processes. As it happens, the High Court said very little on this issue because it had already decided that the Tribunal's decision should be quashed on the basis that the Tribunal had breached Parliamentary privilege by relying on the content of a report of a Parliamentary select committee in the course of its deliberations. However, it worth noting that, in his judgment, Stanley Burnton J did conclude that the Tribunal had been entitled to find that the OGC had overstated the prejudice which would result from the disclosure of the requested information, although he was obviously also troubled by the quality of the Tribunal's reasoning on this issue.²²⁰

13 Dissemination of Information Under the EIR

169 Quite apart from the rights of access afforded under regulation 5(1) EIR, the EIR opens up public access to environmental information by imposing general obligations on public authorities to disseminate to the public the environmental information which they hold. In particular, regulation 4(1) EIR imposes a specific obligations on public authorities:

- (1) progressively to make available to the public the environmental information which they hold by electronic means; and
- (2) to take reasonable steps to organise the information relevant to its functions with a view to the active and systematic dissemination to the public.

217 [2008] EWHC 638 (Admin). Appeal against the Tribunal decision in *Friends of the Earth v Information Commissioner and Export Credits Guarantee Department EA/2006/0073* (20 August 2007).

218 Appeal decided on 8 April 2008, transcript of the judgement awaited. Appeal against the Tribunal decision in *Office of Communications v Information Commissioner and T-Mobile EA/2006/0078* (4 September 2007).

219 [2008] EWHC 737.

220 See paras. 84-91.

170 The regulation 4(1) obligations:

- (1) do not require the authority to use electronic means to make information available or to organise information where the information in issue was collected before 1 January 2005 and is in non electronic form (regulation 4(2)); and
- (2) do not extend to requiring the authority to make available or disseminate information which it may lawfully withhold under regulation 12 (regulation 4(3)).

171 The duties imposed under regulation 4(1) must include at least: (a) the information referred to in Article 7(2) of the Directive (regulation 4(4)(a)) and (b) facts and analyses of facts which the public authority considers relevant and important in framing major environmental policy proposals (regulation 4(4)).

172 Notably, no equivalent dissemination provisions have been enacted under FOIA.²²¹

173 Article 3(5)(c) of the Directive requires Member States to ensure that practical arrangements are defined for ensuring that the right of access to information can be exercised, including, for example, through the maintenance of registers or lists of the environmental information held by public authorities. The Environmental Information Unit of DEFRA has created a central register seeing out where these registers can be found, generally by internet link.

14 Power to Disclose

174 Finally, it is worth noting that the fact that an authority may be entitled to withhold environmental information under the EIR, does not mean that they have no power to effect disclosure. Depending on the circumstances of the case, the authority may retain residual powers to disclose the information to the applicant either on a confidential basis or to the world at large. However, in exercising any such powers, the authority should be mindful of the risk that such discretionary disclosures may, depending on the facts, invite claims for breach of confidence, breach of the data protection principles or breach of copyright or may otherwise invite judicial review claims.

²²¹ Although compare the obligations to adopt and maintain a publication scheme and publish information in accordance with that scheme imposed by section 19 FOIA.

Part II

EIR Case-law Summaries

Case references include the appeal number and the date of the Tribunal's decision. The latter should be used in particular when seeking to access information on the Tribunal's website.²²² The summaries are provided in date order.

Appeals – To date (23 April 2008), the High Court has decided only two appeals under the EIR: *Export Credits Guarantee Department v Friends of the Earth* [2008] EWHC 638 (Admin) and *Office of Communications v Information Commissioner* (transcript awaited). In both cases, the High Court rejected appeals which had been brought by the relevant public authority.



Markinson v Information Commissioner

EA/2005/0014 (28 March 2006)

Summary – Requested information (information on planning application decision) was ‘environmental information’. Fees charged by authority under regulation 8 EIR unlawfully excessive. Authority required to reassess fees using 10p per A4 page as a ‘guide price’

Mr Markinson (M) was permitted to attend the offices of Kings Lynn and West Norfolk Borough Council (K) to inspect certain papers relating to the original planning application for his house. When he requested copies of the documents, K sought to charge him £6.00 (subsequently increased to £6.50) for the decision notice and 50p for every additional page copied from the planning file. Both K and the Commissioner treated the matter as one which fell within the ambit of FOIA rather than the EIR. The Commissioner accepted that the fees were reasonable on the basis that K had satisfied itself that they were reasonable. By the time the appeal was

determined it was not in dispute that the information was environmental information and that the request fell under the auspices of the EIR.

The Tribunal held that: (1) the test for whether fees were lawful under regulation 8 EIR was the subjective test of whether the authority was satisfied that the fees were legal. However, the authority’s subjective assessment was itself subject to the application of general public law principles;²²³ (2) the fees charged by K were unlawful in that, from a public law perspective, they took into account irrelevant considerations and ignored relevant considerations;²²⁴ (3) the authority should reassess the fees charged using 10p per A4 page as a ‘guide price’. The guide price should only be departed from if K can demonstrate a good reason for the departure.²²⁵

222 <http://www.informationtribunal.gov.uk/Decisions/eir.htm>.

223 Paras. 22-30.

224 Paras. 34-35.

225 Para. 44.



Kirkaldie v Information Commissioner and Thanet District Council

EA/2006/001 (4 July 2006)

Summary – Requested information (legal advice on night-flying) was ‘environmental information’ for the purposes of regulation 2(1)(c) EIR. Legally privileged information, such as legal advice, falls within the ambit of the regulation 12(5)(b) (course of justice exception). However, privilege had been waived by authority by the time the request was made. Accordingly, regulation 12(5)(b) not engaged in respect of advice. Authority erred in not disclosing information under regulation 5(1) EIR.

Mr Kirkaldie requested a copy of legal advice provided to Thanet DC (T). The advice related to an existing agreement under s. 106 of the Town and Country Planning Act 1990 in respect of Kent International Airport and, in particular, to a proposal to amend that agreement to allow for additional night-time flights. The agreement was still in force at the time the request was made. The request was refused even though a summary of the advice had been provided by a councillor at a public meeting convened by T. T and the Commissioner both treated the advice as information falling to be considered under FOIA.

The Tribunal held that: (1) the advice amounted to ‘environmental information’ as it was information on an ‘environmental agreement’ for the purposes of regulation 2(1)(c) EIR;²²⁶ (2) the advice when given had been legally privileged and, as such, implicitly fell within the ‘course of justice’ exception provided for by regulation 12(5)(b) EIR;²²⁷ (3) however, the privilege had subsequently been waived as a result of the fact that a councillor had summarised the advice in a public meeting held by T;²²⁸ (4) in the circumstances, the advice had ceased to fall within the ambit of regulation 12(5)(b) by the time the request was made;²²⁹ (5) accordingly, the information was not subject to any exception, there was no need to apply the regulation 12(5)(b) public interest test and the information had to be disclosed under regulation 5(1).²³⁰

²²⁶ Para. 14.

²²⁷ Para. 21.

²²⁸ Paras. 24-42.

²²⁹ Para. 43.

²³⁰ Para. 43



**Perrins v Information Commissioner
and Wolverhampton City Council**

EA/2006/0038 (9 January 2007).

Summary – Requested information (information as to erection of boundary fences) was ‘environmental information’. Authority could not refuse to disclose information under regulation 6(1)(b) EIR (information already publicly available and easily accessible to applicant in another form or format) because applicant had not requested information in particular form or format. Remaining information not held by authority.

Mr Perrins (P) requested information from Wolverhampton City Council (W) relating to the erection of boundary fences around residential properties, including the fences around P’s property. The request was made because P considered that one of his neighbours had been given favourable treatment by W in the erection of the fences. W denied that it held the requested information. The Commissioner decided that he had no basis for disputing W’s assertions that it did not hold the requested information and, accordingly, he dismissed P’s complaint. Subsequently, P himself located some of the information in W’s archives.

The Tribunal held that: (1) the mere fact that P had located some of the information in W’s archives did not mean that W could rely on regulation 6(1)(b) EIR to refuse disclosure; (2) this was because regulation 6(1)(b) EIR only applied where the applicant requested information in a particular form or format and that information was already publicly available and easily accessible to the applicant in another form or format and P had not requested the information in any particular form or format;²³¹ (3) whilst P may consider that W ought to hold the remaining information, there was in sufficient evidence to show that such information was in fact held.²³²

²³¹ Para. 13.

²³² Paras. 14-20



Archer v Information Commissioner

EA/2006/0037 (9 May 2007)

Summary – Requested information (report on planning enforcement process) ‘environmental information’. Part of report engaged regulation 12(4)(e) and 12(5)(b) exceptions as: report amounted to internal communication; the information was legally privileged and disclosure would have prejudiced criminal inquiry. Public interest weighed in favour of exceptions being maintained, particularly because of strong interest in protecting legal privilege. Regulation 12(5)(d) exception (confidential proceedings) did not apply to report as evidence did not show it was not prepared for purposes of or discussed at council meeting.

Major Archer (A) requested information relating to the minutes of a particular meeting convened by Salisbury District Council (S). The background to the request was that S had commenced a number of enforcement actions with respect to a property owned by A’s wife, ‘the Footes’, which had been largely destroyed in a fire. S had since withdrawn certain of the enforcement notices and was subsequently ordered to pay the costs incurred by A’s wife in appealing the enforcement notices. The request resulted from the fact that A considered S had been systematically issuing unlawful enforcement notices at considerable public expense and in a manner which had been damaging to his wife’s health. By the time the matter

came on for hearing before the Tribunal, the request was deemed to embrace in particular a joint report prepared by the Principal Solicitor and Principal Planning Officer. S refused the request on the basis that the information in the report was exempt under FOIA. The Commissioner decided that the information could amount to ‘environmental information’ under the EIR. However, he decided that the information could lawfully be withheld, whether under FOIA or the EIR.

The Tribunal held that: (1) it was ‘plainly right’ that the information in the report amounted to ‘environmental information’ as it related to possible prosecution or enforcement action for breaches of planning legislation and, thus, was information on ‘measures’ affecting land and landscape under regulations 2(1)(a) and (c);²³³ (2) disclosure of the second part of the report would, at the time of the request, have adversely affected a criminal inquiry for the purposes of regulation 12(5)(b). This was because it would have revealed S’s strategy in dealing with potentially criminal breaches of planning law;²³⁴ (3) moreover, the second part of the report was covered by legal professional privilege and, as such, again engaged regulation 12(5)(b);²³⁵ (4) the report was also an ‘internal communication’ for the purposes of regulation 12(4)(e) EIR; (5) in accordance with *Bellamy v Information Commissioner*, there will always be strong public interest considerations in favour of protecting legally privileged information from disclosure;²³⁶ (6) in the instant case, whilst there were strong public interests in disclosure of the report (i.e. promoting accountability and transparency in respect of local authority enforcement actions),²³⁷ those public interest were outweighed by the strong public interest in protecting legal privilege, particularly as disclosure of the

report was not the only means to achieve transparency and accountability in respect of S’s enforcement procedures. Accordingly, the public interest weighed in favour of the second part of the report being withheld under regulations 12(4)(e), 12(5)(b) and 12(1);²³⁸ (7) the remainder of the report should be disclosed; (8) the report did not fall within the regulation 12(5)(d) exception (in respect of confidential proceedings) as it was not discussed or prepared exclusively for discussions at council meeting.²³⁹

²³³ Para. 32.

²³⁴ Para. 56.

²³⁵ Para. 11.

²³⁶ Para. 62.

²³⁷ Para. 60.

²³⁸ Para. 64 and 74.

²³⁹ Para. 70.



Port of London Authority v Information Commissioner and John Hibbert

EA/2006/0083 (31 May 2007)

Summary – Requested information (river works licence) was ‘environmental information’. Information not held by authority as it had never existed. EIR embraces general duty to confirm or deny whether information held. Duty subject to regulation 12(4)(a) exception (information not held at time of request). Authority should have issued regulation 14 refusal notice confirming information not held.

Mr Hibbert (H) requested information under the EIR from the Port of London Authority (P) about works which had he asserted had been carried out on Temple Pier under a particular River Works Licence. P considered that it was not an authority to which the EIR applied. It went on however to provide H with certain information falling within the ambit of the request. P asserted that the disclosed information constituted all the information which it held which would be disclosable under the EIR. The Commissioner concluded that P was a public authority and that it should have disclosed the river works licence in respect of the works.

The Tribunal held: (1) that P was a public authority for the purposes of the EIR, having regard to the broad definition of ‘public authority’ contained in regulation 2(2) EIR;²⁴⁰ (2) that the river works licence had never been held by P as it had never existed;²⁴¹ (3) that the requested information, accordingly, fell within the regulation 12(4)(a) exception (in respect of information not held at time of request);²⁴² (4) that P should, in the circumstances, have issued a refusal notice under regulation 14 confirming that the requested information did not exist, was not held and, hence, was subject to the regulation 12(4)(a) exception;²⁴³ (5) it was unnecessary, following the appeal, for P to issue a refusal notice.²⁴⁴

²⁴⁰ Paras. 22-58.

²⁴¹ Paras. 59-66.

²⁴² Paras. 79-82.

²⁴³ Paras. 83-90.

²⁴⁴ Para. 90.



Lord Baker of Dorking v Information Commissioner and Department for Communities and Local Government
EA/2006/0043 (1 June 2007)

Summary – Requested information (civil servants’ advice to Minister on granting of planning permission) was ‘environmental information’. Regulation 12(4)(e) engaged as information part of ‘internal communication’. Public interest weighed in favour of disclosure of information.

In July 2005, the Deputy Prime Minister (D) decided to reject a planning inspector’s decision to refuse planning permission for the construction of a 50 storey residential tower near Vauxhall Bridge. Planning permission was thereafter granted by D. Prior to taking his decision to refuse planning permission, D received advice from officials in the form of two submissions. Lord Baker (B) requested disclosure of those submissions. D withheld the submissions on an application of regulation 12(4)(e) (internal communications exception). The Commissioner decided that the submissions as a whole should have been disclosed but that advice of the officials and any opinions expressed by them should be redacted. It was not in dispute that: the withheld information amounted to environmental information; that it fell within the regulation 12(4)(e) exception; and that disclosure of the submissions would not have been in the public interest prior to D’s having made his decision to grant planning permission. The

issue for the Tribunal was whether, given that D had now decided to grant planning permission, the public interest favoured disclosure of the withheld information.²⁴⁵ D’s case on appeal was not that disclosure of the withheld information would cause any specific harm but rather it would result in civil servants generally being less frank and impartial in their advice and that this would, in turn, damage the quality of government decision-making.²⁴⁶

The Tribunal concluded that the public interest weighed in favour of disclosure of the withheld information. In particular, it held that: (1) the general principles relevant to the disclosure of information relating to the formulation of policy adopted by the Tribunal in *Department for Education and Skills v Information Commissioner and the Evening Standard EA/2006/0006* (a FOIA case)²⁴⁷ provided ‘broad guidance’ which was applicable under the EIR;²⁴⁸ (2) D’s assertion that disclosure would have a generally deleterious effect on the quality of advice given by officials could not be accepted. This was particularly because: it could be assumed that civil servants would continue to adopt a responsible and positive approach despite the application of freedom of information legislation; any tendency to prefer giving oral rather than written advice would be regarded as bad practice and could be met by effective management guidance; and material discussions would in any event be minuted by the Minister’s private office

²⁴⁵ Para. 9.

²⁴⁶ Para. 12.

²⁴⁷ Summarised in para. 15.

²⁴⁸ Para. 18.

thus minimising the significance of civil servants opting to give their advice orally;²⁴⁹ (3) relevant to the application of the public interest test was the fact that advice given by planning officers at the local authority level will usually be made public. There was no reason why publicity given in respect of the planning process at the local authority level should not be given equally in respect of a planning process being undertaken at a higher level. Indeed, the fact that D's decision represented the final stage in the process increased rather than decreased the desirability of full disclosure. The fact that the matter became more complex once it reached Ministerial level arguably also increased the interest in disclosure;²⁵⁰ (4) it was irrelevant to the assessment under regulation 12 that D's decision to grant permission was 'comprehensible' to the general public. The general public still had an interest in receiving information which illuminated the reasoning which resulted in the decision;²⁵¹ (5) similarly, it was irrelevant that there was no suggestion that the decision to grant permission had been at odds with civil service advice: 'one reason for having a freedom of information regime is to protect Ministers and their advisers from suspicion or innuendo' and to demonstrate that the outcome has not been 'spun';²⁵² (6) the fact that, in contrast with elected officials, civil servants are not able to answer any criticisms in the course of public

debate and are not accountable in the same way that elected officials are, was 'a factor to be given appropriate weight in favour of maintaining the exemption';²⁵³ (7) however, particularly given the regulation 12(2) presumption in favour of disclosure, once the decision had been promulgated, any interest in withholding the information was insufficient to outweigh the public interest in receiving the information.²⁵⁴ The Tribunal warned that it may take a more restrictive approach to disclosure in future if the media did not respond sensibly to the disclosure and sought to target servants rather than elected officials.²⁵⁵

249 Paras. 18-19.

250 Para. 22.

251 Para. 23.

252 Para. 24.

253 Para. 26.

254 Para. 30.

255 Para. 29.

Burgess v Information Commissioner and Stafford Borough Council

EA/2006/0091 (7 June 2007)

Summary – Requested information (counsel’s advice on planning appeal decision) was ‘environmental information’. Information subject to legal professional privilege. Regulation 12(5)(b) engaged as disclosure of privileged advice would prejudice course of justice. Public interest weighed in favour of advice being withheld.

A developer erected a fence in respect of a particular property. Mr Burgess (B) was resident in a neighbouring property. Stafford Borough Council (S) subsequently took enforcement action against the developer. The developer appealed against the enforcement action. The appeal was dismissed by a planning inspector. S took advice from counsel on the implications of the appeal decision. The fence was subsequently lowered by the developer. B requested a copy of counsel’s advice at a time when any enforcement action against the developer had come to an end. S withheld the advice under FOIA on the ground that it was legally privileged. The Commissioner upheld that decision, albeit on the basis that the information was exempt from disclosure under regulation 12(5)(b) EIR rather than under FOIA. B contended that privilege had been waived as the advice has been provided to a councillor and that councillor had offered to provide it to his (B’s) wife.

The Tribunal held that: (1) the advice incorporated privileged legal advice on general enforcement matters and specific advice in relation to enforcement action against the developers;²⁵⁶ (2) the privilege was not waived as a result of S having disclosed the advice to an elected councillor (W). This is because councillors need to see legal advice provided to the council in order to discharge their duties on behalf of the council;²⁵⁷ (3) there was insufficient evidence to establish that W had offered to disclose the advice to B’s wife; (4) in any event, even if such offer had been made, privilege was not waived as the offer was not accepted by B’s wife;²⁵⁸ (5) privilege was not lost merely as a result of the fact that the enforcement action to which the advice related had come to an end. The advice would remain privileged unless and until the privilege was waived;²⁵⁹ (6) privileged legal advice was subject to regulation 12(5) (b) exception as disclosure would adversely affect the course of justice, *Kirkaldie v Information Commissioner* applied;²⁶⁰ (7) there was a strong public interest in maintaining privilege built into the exception, *Bellamy v Information Commissioner* applied;²⁶¹ (8) the strong public interest in maintaining the exception outweighed the public interests in disclosure.²⁶² This was particularly because: whilst the specific enforcement action considered in the advice had come to an end, disclosure of the advice would prejudice S’s ability to maintain the position in takes in future similar enforcement actions; S had already provided B with a summary of its reasons for its decision to take no further enforcement action; and there was no evidence that S had acted other than in good faith and honestly.²⁶³

256 Para. 18.

257 Para. 24.

258 Para. 24.

259 Paras. 25-28.

260 Paras. 32-38.

261 Para. 44.

262 Para. 48.

263 Para. 48.



**Network Rail Ltd v Information
Commissioner and Friends of the Earth**
EA/2006/0061 and 0062 (17 July 2007)

Summary – Requested information (information re flooding proximate to railway line and use of railway junction) was ‘environmental information’. However, recipients of requests were limited companies which did not discharge public administrative functions which were public in nature and did not discharge public functions. Accordingly, Appellants not ‘public authorities’ for the purposes of regulation 2(2) EIR and EIR not engaged in respect of requests.

Network Rail Ltd (N) received a number of requests for information. In particular, a request was made by Mr Fisher for information regarding flooding of his home, which was near the Carlisle Railway Line, and a request was made by Mr Chambers for information relating to work carried out at Dudding Hill junction in 2003 and the future use of the junction. N considered that, if the requested information was held, it was held by Network Rail Infrastructure Limited (NRIL). N responded to the requests by confirming that it was not a public authority for the purposes. Before the Commissioner, N disputed that it was a ‘public authority’ for the purposes of the EIR.²⁶⁴ The Commissioner found that N was a public authority for the purposes of regulation 2(2) EIR.

The Tribunal held that: (1) neither N nor NRIL were public authorities for the purposes of regulation 2(2) as their functions are not functions of administration, whether public or private, and their functions are not public functions; (2) the EIR accordingly did not apply to these companies.²⁶⁵ The Tribunal stated obiter that it was a matter of concern that NRIL was not subject to the EIR given that it is a major landowner whose estate is visited intensively by the public, has a significant impact on the daily lives of many people and includes many sites of environmental, geological and architectural importance and given, further, the practical realities of its stewardship functions.²⁶⁶

²⁶⁴ Para. 54.

²⁶⁵ Para. 54.

²⁶⁶ Para. 56.



**Friends of the Earth v Information
Commissioner and Export Credits
Guarantee Department**

EA/2006/0073 (20 August 2007)

*THE HIGH COURT REJECTED
AN APPEAL AGAINST THE TRIBUNAL'S
DECISION BROUGHT BY THE EXPORT
CREDITS GUARANTEE DEPARTMENT
ON 17 March 2008: [2008] EWHC 638

Summary - Requested information (inter-departmental government correspondence on major overseas oil and gas project) was 'environmental information'. Under regulation 12(8), information deemed to constitute 'internal communication' for the purposes of the regulation 12(4)(e) exception. Regulation 12(8) compatible with Directive 2003/4/EC. Public interest in withholding information did not outweigh public interest in disclosure. Accordingly, correspondence disclosable under the EIR.

The Export Credits Guarantee Department (E) is a public authority responsible for facilitating the export of goods from the UK. It provides and underwrites financial guarantees to banks and export insurance policies to exporters in order to achieve this aim. E entered into correspondence with a number of Government departments, including No. 10 Downing Street and the Department for International Development, in relation to the Sakhalin II protect, a major overseas oil and gas project. The correspondence resulted in particular from a notification sent by E to these departments.

The notification confirmed that the Sakhalin II protect was a 'potentially sensitive case' in that it was a large Greenfield protect with significant and diverse environmental and social impact and may conflict with wider Government policies. It went on to invite the notified departments to be involved in the assessment of that project. Friends of the Earth (F) requested disclosure of the notification and the ensuing inter-departmental correspondence. At the time of the request, E was already supporting 'preliminary contracts' in respect of the project but had taken no final decision on whether to support the project. E refused to disclose the correspondence on the basis that: (a) it constituted 'internal communications' for the purposes of the regulation 12(4)(e) exception; and (b) the public interest weighed in favour of the information being withheld, particularly because of the adverse impact which disclosure would have on the candour of interdepartmental discussions and advice.

The Tribunal held that: (1) regulation 12(8) EIR (which deems communications between government departments to be 'internal communications') did properly implement the requirements of Directive 2003/4/EC. This was because that Directive envisioned that Governments should be afforded a 'safe space' in which to deliberate and that objective would be emasculated if a distinction were drawn between communications within government departments and communications between such departments.²⁶⁷ Accordingly,

the regulation 12(4)(e) exception was engaged;²⁶⁸ (2) in the context of an application of the public interest test, general considerations, for example, as to the need to preserve collective ministerial responsibility and the need to promote candour and frankness in the context of official deliberations did not constitute 'trump cards' in favour of maintaining the exception.²⁶⁹ At most such considerations constituted factors which were relevant to rather than determinative of the public interest test;²⁷⁰ (3) the fact that Government deliberations on the project were well advanced was a factor which weighed in favour of disclosure;²⁷¹ (4) the evidence did not show that disclosure of the correspondence would result any real, as opposed to imagined, harm in terms of Government decision-making.²⁷² Indeed, the evidence indicated that the resulting public debate would be likely to improve the quality of that decision-making;²⁷³ (5) the public

had an interest in receiving information relating to this project which was significant both in financial and environmental terms;²⁷⁴ (6) in the circumstances, there was no public interest in maintaining the exception which would outweigh the public interest in disclosure;²⁷⁵ (7) it was irrelevant that there was substantial information relating to the government's involvement in the project already in the public domain. This was because the EIR did not embrace an exemption in respect of information which was publicly available and because the information in the correspondence was in any event not in the public domain.²⁷⁶

²⁶⁸ Para. 48.

²⁶⁹ Para. 56.

²⁷⁰ Para. 60.

²⁷¹ Paras. 60 and 63.

²⁷² Paras. 70-74.

²⁷³ Para. 76.

²⁷⁴ Para. 67 and see para. 29.

²⁷⁵ Paras. 70-76.

²⁷⁶ Para. 77.



**Linda Bromley & Ors v Information
Commissioner and the Environment Agency**

EA/2006/0072 (31 August 2007)

Summary – Requested information (information as to informal flood barrier) was ‘environmental information’. Test of whether information ‘held’ for purposes of regulation 5(1) not certainty but whether information held ‘on balance of probabilities’. Quality of searches undertaken by authority relevant to application of test. Evidence as to searches conducted by authority confirmed that information not held.

Ms Bromley and others (B) were concerned that, as a result of a local development, an informal flood barrier had been weakened and that this might expose their properties to flooding by the River Avon. B requested information from the Environment Agency (E) relating to the flood barrier. The request was refused by E on the basis that the requested information was not held. The Commissioner upheld the decision. Thereafter various relevant documents were discovered by E and disclosed to B. B appealed on the basis that they considered that E held more relevant information than they had admitted to.

The Tribunal held: (1) the test for whether information was ‘held’ for the purposes of regulation 5(1) was not one of certainty but rather whether the balance of probabilities indicated that the information was held;²⁷⁷ (2) relevant to the application of test was the scope, quality, thoroughness and results of any searches conducted by the authority;²⁷⁸ (3) evidence given by E, including statistics on time spent on conducting searches and the level of care which was applied to many elements of the search, indicated that the late disclosure of information resulted from a mistake rather than any bad faith on the part of E and, moreover, that no further information was held by E.²⁷⁹

²⁷⁷ Para. 12.

²⁷⁸ Ibid.

²⁷⁹ Para. 31.



Office of Communications v Information Commissioner and T-Mobile (UK) Ltd

EA/2006/0078 (4 September 2007)

*THE HIGH COURT REJECTED AN APPEAL AGAINST THE TRIBUNAL'S DECISION BROUGHT BY THE OFFICE OF COMMUNICATIONS ON 8 April 2008 (transcript awaited)

Summary – Requested information (information on mobile telephone base stations) was ‘environmental information’ as information on ‘emissions’ and otherwise a ‘factor’ likely to affect the state of the elements under regulation 2(1)(b). Disclosure of information would increase risk to public safety. Accordingly regulation 12(5)(a) exception engaged. Disclosure would also breach intellectual property rights so as to cause commercial harm. Accordingly regulation 12(5)(c) exception engaged. However, public interest weighed in favour of disclosure. Regulation 12(5)(e) (exception in respect of confidential/commercial information) not engaged as information related to emissions and in any event was not confidential.

The Office of Communications, also known as Ofcom, (O) operates a website which enables members of the public to locate mobile phone base stations. It also provides information as to relevant mobile phone operator operates it and the basic technical features of the base stations. The website was set up in response to a report commissioned by the Department of Health Report on the health implications of

base stations and mobile phone handsets (the Stewart Report). The information on the website is drawn from information provided to O by the various companies which operate UK mobile phone services, including T-Mobile UK Ltd (T). Not all of that information provided by the operators to O is accessible to the public via the website, although it is used within the website system. In particular, the public cannot access the complete record of the national network of a particular operator or an indication of patterns and trends within such a network. A request was made by a Mr Henton (H) for information falling within the database which underpinned O's website system. O initially relied on regulation 6(1)(b) to argue that the information was already available to H on the website such it did not need to be separately disclosed. H responded by confirming that the information was not in a suitable format for his needs and that he needed a complete dataset on all base stations. O then sought to refuse disclosure on an application of regulations 12(5)(a) (risk to public safety) and 12(5)(c) (intellectual property rights). The Commissioner held that regulation 12(5)(c) was engaged as the operators enjoyed intellectual property rights in respect of the information (database right and copyright). However, he concluded that the information was nonetheless disclosable because the disclosure would not have any adverse effect. By the time the matter came in for appeal before the Tribunal, a number of operators had ceased to co-operate with O with respect to the website.

The Tribunal upheld the Commissioner's decision that the information was disclosable under the EIR. In particular, it held that: (1) the requested information was environmental information. In particular, it was environmental information because it was information on radio frequency waves (i.e. energy and radiation) which were 'emitted' from base stations and, as such, it was information on 'emissions' for the purposes of regulation 2(1)(b) and was otherwise a factor likely to affect the state of the elements;²⁸⁰ (2) disclosure would increase the risk to public safety such that regulation 12(5)(a) was engaged. However, the public interest in maintaining that exception did not outweigh the public interest in disclosure;²⁸¹ (3) disclosure would have an adverse effect on the operator's intellectual property rights such that regulation 12(5)(c) was engaged. However, again, the public interest in maintaining that exception did not outweigh the public interest in disclosure;²⁸² (4) regulation 12(5)(e) (exception in respect of confidential commercial information) was not engaged because the information was about 'emissions' such that that regulation does not apply (regulation 12(9) applied). However, the information in any case did not fall within this regulation as it was not confidential;²⁸³ (5) the information did not fall within the exception provided under regulation 6(1)(b) because information in the format requested by H was not readily accessible to H through use of the website.²⁸⁴

²⁸⁰ Paras. 25.

²⁸¹ Paras. 36-42.

²⁸² Paras. 43-62.

²⁸³ Paras. 64-66.

²⁸⁴ Para. 69.



Dainton v Information Commissioner and Lincolnshire County Council

EA/2007/0020 (10 September 2007)

Summary – Requested information (statements provided by members of public in response to application to establish right of way) was ‘environmental information’ under regulation 2(1)(a) EIR. Information did embrace third party personal data and, hence, engaged regulation 13(1) EIR. Disclosure of information would breach first data protection principle as it would be ‘unfair’. Hence, information exempt from disclosure. Discussion of regulation 12(5)(f) (disclosure prejudicial to interests of person supplying information).

Lincolnshire County Council (L) is responsible for keeping a definitive map of all rights of way in its area. An application was made to L to modify the map so as to record an alleged right of way. The alleged right of way crossed property belonging to Mrs Dainton (D). Prior to determining the application, L received a number of statements from members of the public on the application. Under the Wildlife and Countryside Act 1981 (the Act), once a modification order has been made, any person is entitled to receive inspect any documents in the authority’s possession which was taken into account when preparing the modification order; thereafter, a person is entitled to object to the modification order; a modification order does not become final until it is confirmed

by the Secretary of State and the Secretary of State must take into account relevant objections when deciding whether to confirm the order. D requested copies of the statements received by L. She did so before any decision had been taken by L whether to allow the applicant and make a modification order. L refused to disclose the information on the basis that it was exempt under section 40 FOIA (personal data exemption). The Commissioner decided that the EIR not FOIA applied and that the information was exempt from disclosure under regulation 12(5)(f) EIR (exception in respect of information supplied by individuals). On appeal before the Tribunal, L relied on regulation 12(5)(f) and regulation 13 (the personal data exception).

The Tribunal held: (1) that the information was ‘environmental information’ under regulation 2(1)(a) as it related to the landscape;²⁸⁵ (2) the statements did include ‘personal data’ relating to third parties as they included information names and addresses and other personal data including the extent to which the individual who provided the statement used the relevant footpath and their opinions on the status of the footpath. Accordingly, regulation 13(1) was engaged;²⁸⁶ (3) disclosure of the statements would breach the first data protection principle (DPP1) because disclosure of the information in advance of any decision as to whether to make the modification order would be ‘unfair’ for the purposes of that principle. In particular, it

would be unfair because individuals who had provided the statements would not expect them to be disclosed in advance of the making of a modification order, particularly given that the disclosure of the information could be prejudicial to their relationships with their neighbours;²⁸⁷ (4) the fact that the statements were provided within council forms which confirmed that any evidence given 'could not be treated as confidential and may be made available for inspection of produced in court' would not prevent the disclosure being unfair;²⁸⁸ (5) regulation 12(5)(f) was not engaged in respect of that part of the information which related to the description of the pathway as disclosure of this particular information would not prejudice the interests of any person. Concerns that disclosure of this information would reveal the identity of the person making the statement by showing their handwriting could be met by the authority providing a transcript of the information.²⁸⁹ The Tribunal did not decide the question of whether the disclosure would be 'unlawful' for the purposes of DPP1 because it was at odds with the statutory scheme embodied in the Act.²⁹⁰

285 Para. 13.

286 Para. 19.

287 Paras. 30 and 31.

288 See para. 29.

289 Paras. 34-36.

290 Para. 32.



**Robinson v Information Commissioner
and East Ridings of Yorkshire Council**

EA/2007/0012 (9 October 2007)

Summary – Requested information (information as to Tesco’s development) was ‘environmental information’ under regulation 2(1)(c). No breach of disclosure duty under regulation 5(1) as requested information not held.

The request made by Mr Robinson (R) concerned a particular development which had been undertaken by Tesco. He requested information from the relevant local authority (E) with respect to that development. The requested information included: a council letter on the development; drawings and costings for a traffic lane, documents plans and estimates with respect to a development redesign, account files relating to E’s calculation of Tesco’s contribution to transport systems and a letter from Tesco’s consultants detailing the works and costs. The Commissioner dealt with R’s request under FOIA. He was satisfied that the requested information was not held.

The Tribunal held that: (1) the requested information amounted to environmental information under regulation 2(1)(c). Accordingly, the EIR applied;²⁹¹ (2) however, the duty to disclose information only applied where the information was ‘held’ and here the information was not held;²⁹² (3) the Tribunal had no jurisdiction to determine R’s substantive complaints that the development was unlawful.²⁹³

291 Para. 17.
292 Para. 33.
293 Para. 34.



**Milford Haven Port Authority v
Information Commissioner and Richard
Buxton Environmental and Public Law**

EA/2007/0036 (6 November 2006)

Summary – Costs application. Application refused as authority’s actions in bringing and then withdrawing appeal not unreasonable.

Milford Haven Port Authority (M) withdrew an appeal against a decision notice requiring it to disclose environmental information. It did so after a directions hearing in the appeal had taken place and a number of orders entailing a significant amount of preparation time had been complied with. Richard Buxton Environmental and Public Law (B) had been named as an additional party in the appeal by M. Upon withdrawal of the appeal, B applied for its costs in respect of the appeal. B relied in particular on a confidential email inadvertently disclosed by M which followed the decision notice and in which the authority Chief Executive referred to ‘buying more time’.

The Tribunal held: (1) the email constituted a consultation document setting out the position as the Chief Executive saw it following the decision notice. It embodied an ‘entirely reasonable’ approach, considering the position of a party who has just lost a case and is deciding that to do next;²⁹⁴ (2) M had not acted unreasonably either in bringing the appeal (as the grounds of appeal were proper grounds) or by deciding upon reflection that the appeal should be withdrawn and the information disclosed;²⁹⁵ (3) accordingly, no costs would be ordered against M.

294 Para. 25.
295 Para. 34.



Watts and Information Commissioner

EA/2007/0022 (20 November 2007)

Summary – Requested information (environmental health reports on meat supplier) was ‘environmental information’. Report was not exempt from disclosure under regulation 12(5)(b) (course of justice exception) as disclosure would not prejudice fair trial of defendant in criminal proceedings and related public inquiry not of a ‘criminal or disciplinary nature’. Obiter: if disclosure would have adversely affected fair trial, public interest would have favoured information being withheld.

Mr Watts (W) requested from Bridgend County Borough Council (B) copies of environmental health reports regarding a particular meat supplier. B refused to disclose the reports on the basis that a relevant police investigation was in hand at the time, a public inquiry had been instigated by the National Assembly for Wales and, accordingly, the information was exempt from disclosure under the regulation 12(5)(b) EIR (exception in respect of disclosure adverse to course of justice) EIR. The Commissioner upheld this decision on the basis that the reports were likely to be relied upon as documentary evidence in the prosecution and the interests of justice did not require that they be subject to public scrutiny prior to the conclusions of the criminal investigations. The prosecution, which related to an outbreak of E. Coli and which had caused widespread suffering including the death of a child, resulted in the owner of the premises receiving a suspended sentence.

The Tribunal held that the reports were disclosable under the EIR. In particular, it held that: (1) at the time the information was requested, criminal proceedings were pending against the owner of the premises in question;²⁹⁶ (2) the fact that criminal proceedings were not actually pending when the reports were prepared, as opposed to at the time of the request, was irrelevant for the purposes of applying the regulation 12(5)(b) exception;²⁹⁷ (3) having regard to their content, disclosure would not have prejudiced the ability of the defendant in the criminal proceedings to receive a fair trial;²⁹⁸ (4) the inquiry was irrelevant for the purposes of regulation 12(5)(b) as it was not an inquiry ‘of a criminal or disciplinary nature’;²⁹⁹ (5) accordingly, the reports were disclosable under the EIR; (6) (obiter), if regulation 12(5)(b) had been engaged because of the risk of prejudice to the defendant’s right to a fair trial, the public interest would have weighed in favour of the reports being withheld. This was because, despite the public interest in receiving information relating to the authority’s health and safety enforcement functions and the serious results of the E. coli outbreak, there was a stronger public interest in ensuring that defendants in criminal proceedings receive a fair trial.³⁰⁰

²⁹⁶ Para. 5.

²⁹⁷ Para. 6.

²⁹⁸ Para. 7.

²⁹⁹ Para. 9.

³⁰⁰ Para. 10.



**Rhondda Cynon Taff County Borough
Council v Information Commissioner**

EA/2007/0065 (5 December 2007)

Summary – Information requested (copy of Land Drainage Act) was ‘environmental information’. The information had been made ‘available’ under the EIR as a result of the authority providing the applicant with access to council computer and details of the link to a website containing the Act. However, FOIA also applied to the request as the applicant wanted the information to be ‘communicated to him’ and the duty to communicate information was a duty imposed under FOIA not the EIR. No FOIA duty to communicate the information as it was reasonably accessible to applicant by other means and, hence, exempt under section 21 FOIA.

Rhondda Cynon Taff CBC (R) received a request for disclosure of ‘your current working order of the Land Drainage Act’. R concluded that the request was for a copy of the Land Drainage Act 1991 (“LDA”). R invited the applicant to use one of the computers in the council’s library to access the OPSI website link to the Act. It refused to provide the applicant with a copy of the LDA on grounds of copyright and on the basis that the information was already readily available to the applicant via the OPSI website. The Commissioner concluded that the information fell under the EIR and a copy should be provided by R as there was no exception in the EIR which applied where information was otherwise reasonably accessible to an applicant.

The Tribunal upheld R’s appeal. It did so on the following basis: (1) where environmental information can be made ‘available’ to an applicant under the EIR (e.g. through inspection at the authority’s offices) but the applicant wishes to have the information in question ‘communicated to him’, the provisions of FOIA are engaged; (2) this is because section 1 FOIA provides for the authority to ‘communicate information’ to an applicant (cf. the EIR where the duty is merely to make the information ‘available’); (3) in this case, the applicant wished the LDA to be communicated to him by the authority and, hence, section 1 FOIA was potentially engaged; (4) however, on the facts of the case, the information was exempt from disclosure because it was readily accessible to the applicant through other means (i.e. by accessing the OPSI website via R’s computer) and hence was exempt from disclosure under section 21 FOIA.³⁰¹



Young v Information Commissioner and Department of the Environment for Northern Ireland EA/2007/0048 (12 December 2007)

Summary – Requested information (planning enforcement file) was ‘environmental information’. Personal data relating to individuals who had complained to the authority about breaches of planning law exempt from disclosure under regulation 13(1) (personal data exception). Legal advice exempt from disclosure under regulation 12(5)(b) (course of justice exception).

Mr Young (Y) requested information from the Planning Service, an agency of the Department for Environment for Northern Ireland (D). In particular, he requested access to the enforcement file generated in connection with a planning application Y had made. The application related to a property which Y had been developing in County Down and in respect of which D had received complaints. The requested file contained correspondence between D and its legal advisers on the enforcement action and also personal data in the form of the names, addresses and particulars of those individuals who had complained about the development. At the time the request was made, enforcement action in respect of the development was still in issue as D was appealing a decision of the Magistrate’s Court that the action should not be proceeded with. According to D, the only circumstances in which complaints resulting in enforcement action would be made publicly available is where the relevant data subject had consented to the disclosure. The information was withheld by D under FOIA. The Commissioner concluded that the information was environmental in nature and

was lawfully withheld under regulation 13 EIR (personal data exception). On appeal, Y asserted that he needed to see the personal data and the correspondence because the complaints had been incorrect and malicious and he needed the information in order properly to defend the enforcement proceedings.

The Tribunal held that: (1) disclosure of the personal data would breach the first data protection principle (DPP1) as data will only be processed in accordance with DPP1 if one of the requirements contained in Schedule 2 to the Data Protection Act 1998 is met and, on the facts, of the case no such requirement was met; (2) in particular, the requirements of paragraph 6 of Schedule 2 were not met as Y did not have a legitimate interest which would be served by the disclosure of the data³⁰² and, even if Y had such a legitimate interest, disclosure was unwarranted for the purposes of paragraph 6 in view of the prejudice to the rights and freedoms of the complainants. Such individuals had a ‘strong legitimate interest in continued anonymity’;³⁰³ (3) that Y may have guessed the identity of one or more of the complainants was irrelevant to the analysis under paragraph 6 and DPP1;³⁰⁴ (4) accordingly, D had been entitled to withhold the personal data under regulation 13(1); (5) disclosure of the legal advice provided to D would risk undermining D’s position in relation to the outstanding enforcement proceedings as well as being likely to interfere with the course of justice generally; (6) accordingly, the advice fell within the ambit of the exception afforded under regulation 12(5)(b) EIR;³⁰⁵ (7) the public interest weighed in favour of the advice being withheld in all the circumstances.³⁰⁶

302 Para. 31.

303 Para. 32.

304 Para. 33.

305 Paras. 35-37.

306 Para. 38.

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