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Free Access to Environmental Information

UK Report

Dr Eloise Scotford, King's College London

Constitutional frame, constitutionally guaranteed right of access to (environmental) information? Access to information as a fundamental (democratic) right?

In the United Kingdom, there is no such constitutional or fundamental right.

Other (national) legal acts providing access to information held by public authorities. Relationship with laws transposing Dir 2003/98 on re-use of public sector information

There is a range of UK laws and policies providing access to information. The main statutes are the Freedom of Information Act 2000 (FOIA) and the Environmental Information Regulations 2004 (EIRs). Both came into force in 2005. In addition to these bespoke regimes for accessing information, there are various other statutory and policy obligations for information disclosure by administrative decision-makers. This is partly due to the influence of the Aarhus Convention, including through disclosure requirements in other EU environmental laws, such as the IPPC and EIA regimes, but there are disclosure obligations throughout the laws and policies that regulate UK public administration. This can be seen in a recent case – *R (Joicey) v Northumberland County Council*[1] – in which the judge emphasises the importance of information that public authorities are required to provide. In the case, the Administrative Court quashed a decision on the basis that a local planning authority had not discharged their statutory obligations of information disclosure. Cranston J stated:[2]

> Right to know provisions relevant to the taking of a decision such as those in the [Local Government Act 1972] and the Council's Statement of Community Involvement require timely publication. Information must be published by the public authority in good time for members of the public to be able to digest it and make intelligent representations: cf. *R v North and East Devon Health Authority Ex p. Coughlan* [2001] Q.B. 213, [108]; *R (on the application of Moseley) (in substitution of Stirling Deceased) v Haringey LBC* [2014] UKSC 56, [25]. The very purpose of a legal obligation conferring a right to know is to put members of the public in a position where they can make sensible contributions to democratic decision-making. In practice whether the publication of the information is timely will turn on factors such as its character (easily digested/technical), the audience (sophisticated/ordinary members of the public) and its bearing on the decision (tangential/central).

Overall, it is difficult to catalogue all the laws that provide access to information held by public authorities, but the landscape has been said to give rise to an 'administrative law of transparency'.[3]

[1] [2014] EWHC 3657 (Admin).
[2] [47].
[3] Elizabeth Fisher, 'Transparency and Administrative Law: A Critical Evaluation' (2010) 63 Current Legal Problems 272.

As for Directive 2003/98 on the re-use of public sector information (PSI), there is no interlinked statutory implementation of this Directive with the EIRs or FOIA, and there have been no cases concerning the interaction of these regimes to date. Some commentary has criticised public authorities for relying on reuse of PSI obligations as a reason to delay the use by third parties of PSI obtained through an information request (by adding an extra process relating to granting permission and setting out any conditions and charges for re-use).[4] This practice should diminish as the UK government implements the amended Directive on re-use of PSI (Directive 2013/37/EU), and particularly as it makes the 'Open Government Licence' standard in most cases[5] (although higher than marginal charging will continue to apply in certain cases).

National legal situation before Dir 90/313/EC: has the EC/EU legislation had a major impact on the national law on access to information?

Yes. The Directive was first implemented in the UK[6] by the Environmental Information Regulations 1992 SI 1992/340, followed by the current Environmental Information Regulations 2004 SI 2004/3391 (introduced to implement Directive 2003/4/EC). Since 2005, the EIRs have led to hundreds of reported judgments and decisions resulting from challenges to decisions made under the Regulations. The EIRs have had a significant impact in increasing the transparency of government, due to both the wide definition of 'environmental information' (directly transposed from Article 2(1) of the Directive) and the complementary and strengthening role they play in relation to the UK's general freedom of information regime under the FOIA. In the latter respect, the EIRs are carved out from the FOI regime,[7] and contain a stronger duty of disclosure (or more restrictive exceptions to disclosure).[8] Together, the FOIA and EIRs are seen as the core framework of the UK's information disclosure law.

Statistical information about the use of the access-right including types of users if known (eg NGOs, competitive industry, general public, environmental consultants, etc). Difficulties of the administration handling the number and/or the scope of applications.

There are lots of statistics! There are separate sets of statistics regarding information requests for different public authorities – including for central government departments, for the Environment Agency, and for each UK local authority. Each set of statistics is lengthy and usually issued quarterly. As an example, some insights from the 2014 annual statistics for central UK government departments and related agencies are:[9]

[4] See e.g. http://www.foiman.com/archives/tag/re-use-of-public-sector-information-regulations.
[5] http://www.nationalarchives.gov.uk/doc/open-government-licence/version/2/.
[6] The EIRs apply throughout the UK except in Northern Ireland, which implemented separate regulations, and do not extend to Scottish public authorities (separate regulations being made by Scottish ministers).
[7] 'Environmental information' is exempt from the FOI Act 2000, s 39.
[8] See e.g. The Department for Business, Enterprise and Regulatory Reform v Information Commissioner and Friends of the Earth [2008] UKIT EA_2007_0072.
[9] See https://www.gov.uk/government/statistics/freedom-of-information-statistics-october-to-december-2014-and-annual.

- The overall number of information requests in 2014 was 46,806, with 1884 falling under the EIRs (4%).[10] This was the first year in which the number of requests had fallen since the introduction of the current FOI/EIR regime in 2005. This decline was partly attributed to the increase in the amount of data proactively published by government departments and the availability of previous FOI requests online.
- Exemptions were applied to approximately 25% of all information requests submitted. The most common exemption was due to the presence of personal data.
- The only statistic reflecting difficulty in handling the number of requests is the *time* taken to deal with them. Despite the large number of requests, 91% of requests were dealt with within the required 20-day time period, which includes permitted deadline extensions for cases in which the public interest balance needs to be considered.
- There are no official statistics included on types of users making requests although there are some anecdotal references. For example, one of the government departments that receives the highest number of FOI/EIR requests is the Health and Safety Executive, and a large percentage of requests it receives are from solicitors representing an injured party, seeking disclosure of information collected during an investigation of a workplace incident.

Significant national law and jurisprudence on the definition of "environmental information" (Art. 1 para 1 Dir 2003/4/EC)

The main reason for disputes about whether information constitutes environmental information (EI) is to determine which regime should apply – the FOI regime or the EIRs. Since the latter regime has a stronger presumption of disclosure in relation to exceptions that may be engaged, there is often a reason for public authorities to resist classification of information as environmental information. Following ECJ case law, UK tribunals and courts take a broad view of what constitutes environmental information.[11] Notably, the *context* in which information is to be found is relevant to determining whether it does fall within the definition. Interesting cases at the margins involve names, address, figures and financial information, which on their own are not obviously environmental information, but where the context can lead to them being classified as 'environmental information' due to their connection to, or effect on, aspects of the environment. Examples of such contextual findings include: names of individual operators of mobile phone cellular base stations held within a online database ('any information on radiation');[12] financial information on introducing a toll for a river crossing, which would have a significant impact on the environment;[13] and details of contracts relating to waste water, sewage treatment and sludge treatment operations that were requested by a workers' union in order to determine the full costs of the contracts (found to be 'measures and activities likely to

[10] This can be compared with the Environment Agency, which had 44,964 FOI+EIR requests in the year ending March 2015. By contrast with central government, the overwhelming majority of requests made to the EA are under the EIRs with perhaps as few as 500 falling into the FOI category.
[11] C-321/926 *Eva Glawischnig v Bundesmeister fur Soziale Sicherheit und Generationen* [1998] ECR I-3809.
[12] *OFCOM v IC and T-Mobile* (EA/2006/0078) (it would create unacceptable artificiality to interpret the language of the definition as referring to the nature and effect of radiation, but not its producer). This case was eventually appealed to the Supreme Court and referred to the ECJ on other grounds, as discussed below.
[13] *Mersey Tunnels User Association v IC* (EA/2009/0001) (tolling was an integral part of the river crossing project and its viability).

affect relevant elements and factors in paragraphs (a) and (b) of the definition of environmental information').[14]

However, the contextual approach has limits and 'simply because information had a slight or tangential association with the state of the elements of the environment, that will not necessarily bring it within the scope of the EIRs'.[15] Thus in *Nottinghamshire County Council v Information Commissioner*, the First-Tier Tribunal found that a contractual schedule, detailing the arrangements under which the Council had an option to lease land from UK Coal Mining Ltd on which an incinerator would be built and operated, was not environmental information. It came to this conclusion by applying the 'litmus test' that the information in the schedule, and the key financial indicators within it, could be adjusted over a broad commercial range of negotiations without having any effect on environmental issues.

Note also *Omagh District Council v IC* in the following section, where the Tribunal suggests that the real reason for a request ('contextual factors') could lead to a reconsideration of whether material constitutes environmental information when an applicant has no interest in the environmental aspects of the relevant information and it would make a material difference to the treatment of the request for it to fall outside the EIR regime.

Significant national law and jurisprudence on determining the access right holder ("without having to state an interest", Art. 3 para 1 Dir 2003/4/EC)

Standing to request information is broad and generally uncontentious, resulting in little case law. One interesting case of the First-Tier Tribunal is *Omagh District Council v Information Commissioner*,[16] in which the FTT considered whether the *motive* of the access right holder was relevant to whether they could make a valid request under the EIRs. In this case, the relevant applicant was a local resident of Northern Ireland seeking to access the identities of those who had drafted an 'Equality Impact Assessment' (EQIA) in relation to a Council policy on disposal of land for erecting memorials. The applicant complained to the Information Commissioner in relation to his request, who held that the proper regime for dealing with the applicant's information request was the EIRs. On appeal, the Council contested this point, arguing that the concerns of the applicant were in no way environmental; rather, his concerns were primarily cultural or political.[17] The Council contended that the case should have been dealt with under FOI legislation. Since the applicant had 'concerns about the appropriateness and visual impact of the memorial in its prominent site, and hence a concern about impact on landscape', the

[14] For example, the severity of financial penalty clauses for concessionaires who allow more than the defined parameters of sludge to escape into the waters (and the defined parameters themselves) are clearly intended to protect the environment and will affect or are likely to affect the level of duty of care exercised by those concessionaires in avoiding discharges into the environment. See *Unison and Scottish Water* [2011] ScotIC 166_2011.

[15] *Nottinghamshire County Council v IC* [2011] UKFTT EA_2010_0142.

[16] [2010] UKFTT EA_2010_0163.

[17] The background to the case was that a controversial memorial commemorating the deaths of IRA members in hunger strikes had been erected on Council owned land without permission, and the Council had subsequently recommended that the land be transferred to the local group who had built the memorial. In the political context of Northern Ireland, the Council's policy on such disposals of land was subject to an EQIA. The applicant was unhappy with the process of preparing the EQIA and sought information about this process, including the names of the Council officers involved in preparing the report.

FTT found that the case fell within the scope of the EIRs. However, note the Tribunal's reasoning:

> We accept that motive, in so far as it can be discerned, is not relevant to the determination of this case, although the phrase "motive-blind" can sometimes need closer consideration when it comes to deciding a balance of public interest test, and perhaps when considering whether it is appropriate to take an application for information under EIR or FOIA. However there is enough in the language and concerns cited above to persuade us that impact on landscape is not a remote or irrelevant consideration in this case.[18]

The Tribunal was also persuaded that other contextual factors in this case (i.e. recognising that the Council was really trying to manage a dispute about an acutely polarised issue in Northern Ireland politics) were not relevant. The case would have been different if there was no evidence of concern about landscape impact, or 'if the allocation of the issue to one framework rather than the other could have led to a material difference in treatment of the substantive issue'.[19]

Significant national law and jurisprudence on the realm and obligations of private persons as defined by Art. 2 No. 2 b and c Directive 2003/4/EC. (see ECJ 279/11 (Fish Legal))

Case C-279/12 *Fish Legal v Information Commissioner* (19 December 2013) in the CJEU was a reference from a UK case, essentially challenging the approach taken in a previous Upper Tribunal decision, *Smartsource v Information Commissioner*. In *Smartsource*, the appellant requested information from 16 privatised water companies, arguing that they were 'public authorities' for the purpose of Article 2(2)(b) or (c). The Tribunal applied a 'multi-factor approach' to find that the water companies were not public authorities for the purpose of Article 2(2)(b) (not 'performing public administrative functions'). Thus, on the one hand, the water companies ran major utility industries, operated under licences supervised by a regulator, and were subject to some price regulation. On the other hand, and decisively, they had institutional and private shareholders, received no public funding, and had no government nominees on their board of directors. The companies were also not providing a public service 'under the control of' government (under Article 2(2)(c)) since the relevant control related only to regulatory oversight.

The CJEU in *Fish Legal* again considered the status of privatised UK water companies under the Directive and suggested a different approach from the Upper Tribunal in *Smartsource*. In particular, its test for determining whether a public authority was performing administrative functions involves examining 'whether those entities are vested, under the national law, with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law'. As for Article 2(2)(c), the proper approach is to consider whether the companies determine in a genuinely autonomous manner the way in which they provide their services, or whether another public authority is in a position to exert decisive influence on their activities. Recently, the Upper Tribunal has reconsidered its findings about the UK water companies in light of the CJEU decision, finding that the water companies do in fact constitute public authorities for the purpose of the

[18] [44].
[19] Ibid.

EIRs (under Article 2(2)(b)). See the UK report on significant recent developments for discussion of the case (*Fish Legal and Shirley v Information Commissioner*).

National law and jurisprudence on the public authorities to be addressed ("information held by or for them") (Art. 3 para 1 Dir 2003/4/EC)

There appears to be no significant case law on this provision.

Significant national law and jurisprudence on practices on access conditions (terms, "practical arrangements" (see Art.3 paras 3 – 5 Dir 2003/4/EC)

One interesting case on access conditions is *East Riding of Yorkshire Council v Information Commissioner*,[20] one of a number of cases involving property search companies using the EIRs to obtain information for free from local authorities concerning individual properties (which they then use to charge for an information service for conveyancing solicitors, estate agents and the public).[21] In this case, the property search company requested a range of information relating to a particular property, concerning compliance with building regulations and existing and proposed highway/traffic schemes in the vicinity of the property. The Council refused to allow the company access to its IT systems to inspect this information as requested, citing concerns over personal data, and offered instead to provide redacted information in hard copy and to charge for this. The Tribunal found that it was 'unreasonable' to provide the information in another format (Art 3(4)(b)), since the Council had failed to explore other means of maintaining security during an inspection of the information and in light of the broad obligations of access imposed under the EIRs. It was unsatisfactory that the Council had 'adduced no evidence of the steps that it had taken at the time to explore the possibility of using technology to facilitate public access to environmental information'.[22]

Law and practices/jurisprudence on charges for access (copying? administrative time?)

As indicated in the previous answer, there has been a series of cases concerning the terms on which local authorities give access to property search information. Local authorities have been reluctant to give access to such information for free or a minimal photocopying charge, since the provision of property search information has been a predictable source of revenue in the past that contributed to covering overhead and general staffing costs, and Councils are required to collect and keep this information. In the cases, two main issues have predominated relating to charges: (1) whether charges can be avoided through inspection of Council records by property search company employees; and (2) what are 'reasonable' charges when they can be imposed. As to the first issue, in *Kirklees Council v Information Commissioner*,[23] the Upper Tribunal confirmed the decision in *East Riding* (above) that local authorities cannot choose to provide information for local property searches in a different format in order to charge for the information. Where information can reasonably be made available for inspection, no charge can be made for this.

[20] [2010] UKFTT EA_2009_0069.
[21] Councils also provide a charging service for completing 'local searches' in relation to properties, by which they answer standard conveyancing queries in relation to properties.
[22] [42].
[23] [2011] UKUT 104 (AAC).

As to when charges (when they can be levied) are 'reasonable' under Article 5(2), the FTT has recently made a reference to the CJEU on the issue. In *East Sussex County Council v IC & Property Search Company & the Local Government Association*,[24] the Council had imposed a fixed charged for providing property search information and, whilst this charge was 'cost neutral' for the Council, it was made up of the following: disbursement costs, staff time, office overhead costs, and costs for maintaining the IT system which held the information.[25] The Information Commissioner had agreed that disbursement costs and staff costs (relating to the time that staff spent gathering the information) could be reasonably charged but the other elements of the charge were not reasonable for the purposes of Directive 2003/4.[26] However, in light of uncertainty concerning the interpretation of this aspect of the Directive, this conclusion is now the subject of a preliminary reference to the European courts.

Do any public authorities claim copyright in the material supplied, and impose conditions relating to use of information under copyright law (such as due acknowledgement and user fees in case of re-publication)?

There have been examples of public authorities claiming that material requested was subject to copyright, and thus refusing to communicate it directly. In some cases, this does not impact on the ability to make this information available and thus satisfies the requirements of the EIRs. In *Rhondda Cynon Taff County Borough Council v Information Commissioner*,[27] the Council refused to provide a copy of the Land Drainage Act as it was a copyright document, but indicated that the Act was available to the requester for free over the internet or at his local library. This was sufficient to meet the request for a 'copy' of the Act under the EIRs.

Note also the impact of the Re-use of Public Sector Information Regulations above, which indicates that public authorities are charging for use of copyright documents once they are 'freely' accessed (at least where the use is for commercial purposes).[28]

Other cases involving public authorities claiming adverse effects on intellectual property rights are concerned with relying on the exception in Article 4(2)(e) in order to prevent the disclosure of information at all.[29]

[24] [2014] UKFTT EA/2013/0037.
[25] In so charging, the Council was following its usual practice, which is allowed under the Local Authorities (England) (Charges for Property Searches) Regulations 2008.
[26] See also *Leeds City Council v IC & APPS Claimants* (EA/2012/0020-21); [2013] 1 Info LR 406, a case just before the *East Sussex* litigation in which the FTT held that the Council could charge only disbursement costs.
[27] [2007] UKIT EA_2007_0065.
[28] Richard Macrory can tell you of his experiences on this issue first hand, having been sent an invoice by the Environment Agency after he requested a copy of a permit on the Agency's register to use in teaching. The invoice was for a copyright licence charge (not a charge for supplying the data). After Richard challenged this, the Agency agreed that they should charge such fees for commercial uses only.
[29] E.g. *Office of Communications v Information Commissioner and T Mobile* [2007] UKIT EA_2006_0078 (considering disclosure of information about mobile phone base stations in the public interest despite infringing the database rights and copyright of mobile network operators and OFCOM, which maintained a 'Sitefinder' website concerning such base stations, constructed from datasets provided by the network operators); *University of East Anglia (Decision Notice)* [2011] UKICO FER0282488 (requiring the University of East Anglia to release a digital copy of a weather station dataset sent from the University's Climatic Research Unit).

National law and jurisprudence on the role of affected third parties in access procedures esp. concerning trade secrets and personal data (designation of trade secrets, consultation prior to release of information, etc)

There is a complex interaction with Data Protection Act 1988 (DPA) in determining how the personal data disclosure exception in the EIRs operates.[30] The EIRs have a separate regulation 13 for the personal data exception to information disclosure, which refers to the DPA for the operation of the exception and notably contains some stronger protections for personal data. In particular, there is no separate public interest balancing exercise to be conducted for personal data held in databases or filing systems where their release would breach relevant 'data protection principles' (as defined in the DPA). The law that applies in relation to these data protection principles involves another body of jurisprudence that must be applied to the interpretation of the EIRs. An example can be seen in *GM Freeze v Information Commissioner & DEFRA*.[31] In this case, the Campaign Director of GM Freeze (an alliance of UK-based voluntary and private sector bodies concerned about the introduction of GM crops and foods) had sought disclosure from the Department of the Environment, Food and Rural Affairs of the National Grid reference of the farm on which a trial crop of a variety of oilseed rape had been planted in Somerset in 2008. The crop was found to be contaminated, to a very slight extent, by GM seed. The First-Tier Tribunal found that the requested information constituted personal data, which prevented its disclosure. This was because, applying data protection principles, the FTT found that the disclosure was not 'necessary' for the 'legitimate interests' the campaign director was pursuing (particularly in light of the very low levels of GM contamination and no realistic likelihood of adverse consequences to neighbouring farms and beekeepers).

Another exemplary case concerning the operation of the data protection principles is *De Mello v Information Commissioner*.[32] In this case, the appellant had requested to know the identity of person who had complained about the operation of his septic tank. The Agency refused to release this information, arguing that to do so would be a breach of the first data protection principle in the DPA, which requires personal data to be processed 'fairly', taking into account legitimate expectations of the person to whom the personal data relates. The Tribunal confirmed this as a proper application of the applicable data protection principles and supported the proposition that 'when considering disclosure of personal information under EIR, the provisions of the DPA were the operative ones and there was no additional public interest test other than any balancing test required by the DPA itself'.

Tribunal decisions have considered trade secrets and sensitive confidential information of third parties in relation to the confidentiality exception below.

Significant national law and jurisprudence on exceptions (Art. 4 Dir 2003/4/EC)

The overall approach to exceptions is that there are no general rules:[33]

[30] Note that the DPA was introduced to bring UK law into line with Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31.
[31] [2011] UKFTT EA_2010_0112.
[32] *R de Mello v IC & EA* [2008] UKIT EA_2008_0054.
[33] *Department for Education and Skills v Information Commissioner and the Evening Standard* # para 75(i).

> The central question in every case is the content of the particular information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case.

Accordingly the cases below are examples of how the exceptions are applied, rather than a comprehensive or decisive statement of the law.

Confidentiality of commercial or industrial information

The First-Tier Tribunal has considered the application of this exception in a range of cases, many of which involve commercially sensitive costs and business models in relation to controversial developments. Examples include a large-scale housing development within a UNESCO World Heritage site,[34] demolition of a building within a conservation area,[35] and a new toll imposed on a river crossing.[36] Individuals who opposed these developments or were otherwise concerned about the process for their approval made EIR requests in relation to, inter alia, the costs and viability models used by consenting authorities to evaluate them. In each case, the Article 4(2)(d) exception was raised. The case law establishes that, to apply the exception in UK law, four things need to be shown:

1. the information is 'commercial or industrial';
2. the information is subject to confidentiality provided by *law*;
3. such confidentiality is provided protect a 'legitimate economic interest';
4. disclosure would adversely affect the confidentiality.

The trickiest aspect of satisfying this test is determining whether information is subject to confidentiality protection 'by law'. In UK law, such legal protection can arise in three ways – where it is provided by statute, contract or equity. An equitable obligation of confidence arises when information is of a confidential nature, and is imparted in circumstances importing an obligation of confidence (objectively assessed). There is extensive case law on this doctrine of the law of equity, on which Tribunal cases have drawn. Such an equitable obligation has been found to arise in the context of the EIRs in relation to commercially sensitive viability reports, business models and costs estimates submitted by a developer to a local planning authority along with general planning application documents.[37] Furthermore, confidentiality obligations can be owed *to* a public authority as well as by it to third parties who submit documents, such as where a public authority has obtained financial projections and models for a public building project in preparation for a procurement exercise.[38]

Whether the confidentiality exception then applies to prevent disclosure generally comes down to the public interest balance, which can go either way. Thus in *Bristol City Council v Information Commissioner*, the overall public interest was found to

[34] *Bath and North East Somerset Council v IC* [2010] UKFTT EA_2010_0045.
[35] *Bristol City Council v IC* [2010] UKFTT EA_2010_0012.
[36] *Mersey Tunnels Users Association v IC* [2010] UKFTT EA_2009_0001.
[37] E.g. *Bristol City Council* (n 35).
[38] *Mersey Tunnels* (n 36). See also *Chichester DC v Information Commissioner* [2012] UKUT 491 (AAC) (involving internally generated information relating to a planning application by the Council, to itself, to turn a Council-owned football club into residential units)

support disclosure of financial information concerning the viability of demolishing a building in a conservation area (submitted by a developer in the course of a planning application), particularly in light of the role of the public in decisions to allow demolition of protected buildings and the hypothetical nature of the costs in the viability report (which showed that restoring the building was not viable). By contrast, in *Bath and North East Somerset Council v Information Commissioner,* considerations of commercial sensitivity weighed more heavily and on balance most of the information was kept confidential, in light of the disadvantage that the developer would suffer in having its business models revealed to competitors and landowners and the fact that private not public money was at risk in this large scale building project. In many of the cases where confidentiality is raised, the public interest impacts differently on different parts of the requested information, and that the public interest balance is often struck by disclosing documents with commercially sensitive information redacted.[39]

Note that developers and other commercial entities have begun avoiding sending sensitive commercial information to local authorities, in light of the EIRs, relying instead on third party consultants to evaluate the information and send relevant assessment to local authorities under strict terms of confidence.[40]

Confidentiality of the proceedings of public authorities / internal communications

This year has seen a landmark UK case relating to the disclosure of documents held by government departments. In *R (Evans) v Attorney General* [2015] UKSC 21 (the 'Prince Charles case'), the UK Supreme Court considered whether a Minister of Government could overrule the decision of the Upper Tribunal requiring the disclosure of letters sent between HRH The Prince of Wales and Ministers in various government departments. The letters concerned various matters of public policy, including environmental issues, and the Government was concerned to keep them confidential, particularly in light of Prince Charles' future role as King. Evans, a journalist at the Guardian newspaper, sought to access the letters. To the extent that the letters related to environmental issues, Evans' request fell within the scope of the EIRs (the whole case also fell within the scope of the FOIA). The UK Attorney General could overrule disclosure of the letters by relying on a provision in the FOIA that empowered a government department to resist a decision of the Upper Tribunal requiring disclosure on 'reasonable grounds'. As set out below, the enforcement and appeals provisions of the FOIA apply to the EIRs. Having found that the Attorney General's actions breached fundamental constitutional principles, Lord Neuberger went on to find that the EIRs would have also prevented the executive override:

> [I]t is inconsistent with the provisions of article 6 [of Directive 2003/4] for there to be a right in the executive to override the judicial decision provided for in article 6.2. (It also appears to me to be inappropriate for there to be an additional procedural hurdle given that it would inevitably increase the delay and potentially increase the expense for any applicant seeking environmental information.)

[39] See *Mersey Tunnels* (n 36).
[40] *Bath and North East Somerset Council v IC* (n 34) [67].

This is thus another case in which EU (environmental) law has significant constitutional implications in UK law.[41]

Without the Attorney General's certificate, the Upper Tribunal's decision stands, which held that the communications between government departments and Prince Charles should be disclosed where they amounted to 'advocacy correspondence', since it was 'in the overall public interest for there to be transparency as to how and when Prince Charles "sought" to influence government'.[42] Notably, the position would have been different in relation to: purely social or personal correspondence; correspondence falling within the constitutional convention that the heir to the throne is to be instructed in the business of government; correspondence amounting to 'preparation for kingship'; or correspondence that concerned an aspect of policy which is 'fresh and time needs to be allowed for a "protected space" before disclosure would be in the public interest'.[43]

On the disclosure of internal communications between government departments, *Export Credits Guarantee Department v Friends of the Earth* makes clear that:[44]

> [t]here is a legitimate public interest in maintaining the confidentiality of advice within and between government departments on matters that will ultimately result, or are expected ultimately to result, in a ministerial decision. The weight to be given to those considerations will vary from case to case.

Every case will turn on its own facts, and in this case it was found that disclosure was highly unlikely to result in a prejudicial impact on collective responsibility or candour. The case concerned requests by FoE for correspondence between government departments about supporting a major offshore Russian oil and gas field. The High Court upheld the Tribunal's view that the requested information should be disclosed, since it was fairly innocuous and its disclosure 'if anything, [was] likely to improve the quality of the deliberative process'. Mr Justice Mitting also noted that the 'internal communications' exception was a class-based exception rather than one that relies on proof that any specific harm or prejudice would be caused by the disclosure.

Approach to the disclosure of:

- *"raw data' (Aarhus Compliance Committee case ACC/53/ Uk – see AC Implementation Guide 2014 p 85)*

This is no significant case law on this point.

- *"material in the course of completion" vs "unfinished documents" see AC Implementation Guide 2014 p 85*

Draft documents are 'unfinished documents' to which the exception in Art 4(1)(d) applies. Notably the public interest in disclosure might be easy to overcome in relation to this exception if a draft is an unfinished document and a final version is to be made public.[45]

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[41] See also *R (HS2 Action Alliance Limited) v The Secretary of State for Transport* [2014] UKSC 3 and the SEA Directive.
[42] [2012] UKUT 313 (AAC) [4].
[43] Ibid [7].
[44] [2008] EWHC 638 (Admin) #.
[45] *Mersey Tunnels* (n 31); cf *Secretary of State for Transport v IC* [2009] UKIT EA_2008_0052.

'Material in the course of completion' covers documents that are in a preparatory state, that are having work done on them and still have stages to go through before publication. It does not cover 'working notes',[46] or material that, although unfinished, is no longer being worked on.

"Information on emissions into the environment" (Art. 4 para 2 subpara 2 Dir 2003/4/EC, see T-545/11

One interesting decision on this point is *Office of Communications v Information Commissioner*, which held that the confidentiality exception could not apply in this case since it involved electromagnetic emissions (from mobile phone base stations).[47]

Another notable case is the *GM Freeze case*, discussed above. One argument made by the appellant seeking disclosure was that the sowing of crop seed (in this case slightly contaminated with GM seed) amounted to an 'emission' into the environment, so that disclosing the requested information was inevitably in the public interest. The FTT rejected this argument on two grounds. First, in light of the drafting of the EIRs, it construed the final two paragraphs of Article 4(2) as removing personal data from the requirement to exclude from the exception where emissions information was involved (although it noted the 'apparent tensions between these two paragraphs of the Directive'). Second, in any case, sowing seeds did not come within the scope of 'emissions', since it involved a deliberate act rather than a release into the environment of the type listed in para (b) of the definition of environmental information (in Article 2(1)(b)).

International relations, public security, national defence (see T-301/10 Sophie t' Veldt)

The different elements of this exception provision are read as separate exceptions.[48]

An interesting case involving the *international relations* exception is *Sinclair v Information Commissioner*.[49] In this case, Mr Sinclair (research director of the TaxPayers' Alliance) made an information request in relation to the costs of the UK's planned carbon reduction commitments at the Copenhagen COP of the UN Framework Convention on Climate Change. In relation to this environmental information, the international relations exceptions was engaged, with the FTT noting that:[50]

> the exception is not limited to disclosure which would harm international relations by annoying other states. The phrase 'would adversely affect international relations' seems to us to encompass the principal type of harm described by the witnesses, namely, the adverse effect on the UK's relations with other states by weakening the UK's bargaining position. We do not consider that the term 'international relations' can properly be confined to how favourably or otherwise other states view the UK;

[46] *Messrs McIntosh and Aberdeen City Council* [2006] ScotIC 230_2006.
[47] *Office of Communications v Information Commissioner and T Mobile* [2007] UKIT EA_2006_0078 (note this conclusion of the FTT was not challenged on appeal).
[48] *Office of Communications v IC* [2009] EWCA Civ 90 [38].
[49] [2011] UKFTT EA_2011_0052.
[50] Ibid [20].

rather, it covers all aspects of relations between the UK and other states or international organisations.

A prominent case involving the *public security* exception is *Office of Communications v IC*, discussed briefly above.[51] At the Tribunal stage of this litigation, the FTT found that the exception was engaged since the release of a whole database of mobile phone base station data, as requested, would provide some assistance to criminals who might be minded to plan an attacks on the mobile phone network, and so the disclosure of the requested information would increase the risk of attacks and might thus adversely affect public safety. The Tribunal also found that the public interest in the release of the information for epidemiological research outweighed this public safety risk, in light of the public health concerns around the radiation emitted by mobile phone towers. This public interest balancing was the issue that went on appeal to the UK Supreme Court and ECJ, discussed further below.

There has been at least one case in which *national defence* has been successfully raised to prevent disclosure, where the information requested concerned the government's counter-terrorism policy.[52] Unsurprisingly, the decision upholding the Government's refusal to release the information in the case has no substantive detail as to its nature.

Weighing of interests in every particular case (Art. 4 para 2 subpara 2 Dir 2003/4/EC)

The main precedent on the Article 4(2) balancing exercise in UK law is Case C-71/10 *Office of Communications v Information Commissioner*,[53] which was a reference from the UK case outlined above. In short, the CJEU found that a public authority, when determining the public interest balance in relation to disclosure, may take into account all the exceptional grounds for refusal that apply and weigh these cumulatively against the public interest in disclosure. Since this decision, there has been at least one Upper Tribunal appeal where the public interest balance had to be reconsidered in light of the cumulative impact of more than one disclosure exception applying.[54]

Otherwise, there are interesting cases in which the presumption of disclosure restricts the application of Article 4 exceptions through the public interest balancing exercise. See, for example, *Bristol City Council v IC* and *Bath and North East Somerset Council v IC*, discussed above. The latter case makes clear that the balancing exercise will be conducted for each piece of information requested, and that redaction of material of documents should be considered in disclosing information whilst protecting sensitive commercial information.

Judicial control of access-decisions

[51] [2007] UKIT EA_2006_0078.
[52] *Mr Rob Edwards and Scottish Ministers* [2008] ScotIC 140_2008.
[53] [2011] ECR I-07205.
[54] *Chichester DC v IC* (n 38).

Have specialised administrative appeal bodies (information officer etc) been set up? How do they work? Are their opinions respected?

Yes. The EIRs adopt the enforcement and appeals provisions under the FOIA. Firstly, an applicant (who has requested information from a public authority) may apply to the Information Commissioner (IC)[55] for a determination as to whether the information request has been dealt with according to the requirements of the relevant statutory disclosure regime (the FOIA or EIRs).[56] Either the applicant or the relevant public authority can then appeal any decision of the IC to the First Tier Tribunal (General Regulatory Chamber) (Information Rights). The FTT can review and decide questions of law as well as any findings of fact. Decisions of the FTT are those of a hybrid judicial/administrative body rather than a court,[57] and are not strictly binding precedent. However, they are 'judgment-like', publicly available, and treated as helpful guidance as to the proper application and interpretation of the EIR (and FOI) regime (including by the tribunal itself).

Note also that the disputed information does not need be disclosed to all parties, or to the tribunal judge, in cases where disclosure of the information to everyone in the proceedings would defeat the purpose of the hearing. However, the general principle is that hearings are in public and the parties should disclose all relevant material, and any deviation from this principle must be authorised by a judge.[58]

Court review: "in-camera"-control? Standing of parties affected by decisions denying or granting access?

Appeals from FTT decisions can be made to the Upper Tribunal (by either party to proceedings in the FTT) on points of law only. Unlike the FTT, the Upper Tribunal is a superior court of record as well as an expert tribunal, having the same status as the High Court of Justice. Beyond this, either party, with permission, can make an appeal from a decision of the UT, on a point of law only, to the Court of Appeal (in England and Wales). Note that the requirements of Article 6 of Directive 2003/4 give these judicial appeal avenues an important and final role (see *Evans* above).

As for the standing of parties affected by decisions, they can be involved in litigation concerning EIR requests in three ways. First, affected parties might bring judicial review proceedings to challenge decisions where there is an alleged error of law.[59] Second, appeals in relation to a decision following an EIR request can involve 'additional parties', particularly those whose information is at issue, as in the case of the mobile phone operators in the *OFCOM* litigation discussed above. Third, in appeals that progress through the court system, 'interveners' might be included in litigation, where their 'fund of knowledge or particular point of view [would' enable them to provide the [court] with a more rounded picture than it would otherwise

[55] For the general functions of the IC, see FOIA 2000, part III.
[56] Note that any such appeal would be after an application for internal review of the request by the public authority itself.
[57] The UK tribunal system was unified and reformed by the Tribunals, Courts and Enforcement Act 2007.
[58] See Tribunals Judiciary, 'Practice Note Closed Material in Information Rights Cases': https://www.judiciary.gov.uk/publications/practice-note-closed-material-in-information-rights-cases/.
[59] E.g. *Evans* and *Joicey* above.

obtain'.[60] Interveners are not given permission to appear if they will simply advocate for one or other of the parties.

How do states fulfil the duty to make information actively available?

The duties in Article 7(2) and 7(3) are mainly fulfilled by the extensive dissemination of environmental laws, policies, reports and data via government websites. Much information is held on the central Government's new website gov.uk, although it sometimes proves difficult to navigate the website to find specific information. Information held by the English Environment Agency can also be accessed through gov.uk, including an 'access the public register for environmental information', which includes data on permits issued, waste producers and exemptions, and enforcement actions. There is also an online 'datashare' facility, which contains freely available environmental datasets from the Department of the Environment, Food and Rurual Affairs and its agencies. UK legislative texts are available at legislation.gov.uk.

Note the EIRs both limit and extend the Article 7 duties of dissemination. Regulation 4(1) requires public authorities 'progressively' to make EI available to the public by easily accessible electronic means, and to 'take reasonable steps' to organise the information with a view to its active and systematic dissemination. At the same time, regulation 4(b) requires the dissemination of 'facts and analyses of facts which the public authority considers relevant and important in framing major environmental policy proposals' as well as the information referred to in Art 7(2) of the Directive.

[60] *E v The Chief Constable of the Royal Ulster Constabulary* (Northern Ireland Human Rights Commission intervening) [2008] UKHL 66 [2]-[3].