

Planning and access to information

In Part 2, continued from PiL 54, Greg Jones develops his consideration of the effect of the Freedom of Information Act on planning.



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The Environmental Information Regulations 2004 (“EIR”) cover only “environmental information” (Regulation 26). However, the definition of “environmental information” is extremely broad (See Table 3). Regulation 2 reproduces precisely the definition of “environmental information” given in article 2(1) of the Directive. The Directive’s definition is derived from article 2.3 of the Aarhus Convention.

Sub paragraphs (a) and (b) of regulation 2(2) are wider than the equivalent provisions under the 1992 Regulations. Regulation 2(2)(a) of the 1992 Regulations referred only to the “state of any water or air, the state of any flora or fauna, the state of any soil or the state of any natural site or other land.”

The definition of environmental information goes beyond information on green recycling and could also include underlying economic reports relating to transport policy or congestion charging.

The inclusions of cost-benefit and other economic analyses and assumptions that are used within the framework of policy, legislation, plans, programmes, agreements and activities affecting or likely to affect or designed to protect the environment. Environmental campaigners see this addition as “essential for members of the public and NGOs

wanting to influence policy and decision making, but is precisely the type of information which, in the past, has proved extremely difficult to obtain.”

The DEFRA Guidance to the Environmental Information Regulations 2004 (March 2005 update) explains that: “3.7 Environmental information does not, however, include non-existent information that could be created by manipulating existing information, though a digest or summary of this information may be created from existing data. Nor does it include information that does not exist until further research has been carried out. Similarly, it does not include information destroyed in accordance with established records management procedures (but see guidance on Regulation 19 below concerning the offence of altering records to avoid disclosure).”

Another new aspect is the definition of “State of human health and safety...in as much as they are or may be affected by” environmental matters.

Case law on the old 1992 regulations and the previous version of the directive does provide assistance in respect of the interpretation of “environmental information”. In *R v British Coal Corp ex p Ibstock Building Products Ltd* [1995] JPL 836 the court held that the name of an informant who had given British Coal information about by the state of the land was “environmental information” because such information was necessary in order to assess the credibility of other environmental information concerning the state of the land. In *R v Secretary of State for the Environment, Transport and the Regions and Midland Expressway Ltd ex p Alliance Against the Birmingham Northern Relief Road and Others* [1999] Env LR 447 it was held that that the content of a

concession agreement relating to the construction of a motorway consisted of environmental information. The court also held that whether particular information was “environmental information” was an objective question for determination by the court (on the obligation to disclose the contents of draft section 106 agreements, see also *R v Lichfield District Council ex parte Lichfield Securities Limited* (2003) *The Times* March 30). The European Court of Justice in *Case C-321/96 Wilhelm Mecklenburg v Kreis Pinneberg-Der Landrat* [1998] ECR I-3809 held that an expression of opinion from a countryside protection authority that might impact on the outcome of development consent proceedings was environmental information.

Public Authority

The disclosure obligation in respect of “environmental information” under the EIR is restricted to “public authorities”. But what is a “public authority”? It is not a new question. The courts have, for example, had to grapple with the meaning of “public authority” for the purposes of the Human Rights Act 1998. The results can be surprising. For a recent ruling of the House of Lords on this issue see *Aston Cantlow v Wallbank* [2003] UKHL 37.

The Two Limbs

“Public authority” is given a broad definition by the EIR (see Regulation 2(2) as reproduced at Table1).

The first limb of the definition is relatively straight forward and designates “government departments” and “other public authorities” as defined in section 3(1) of the Freedom of Information Act 2000 (“FOI”) – save that the definition under the EIR is slightly wider since it excludes of certain limiting words from that definition contained in the



Part 3 will address the exceptions to the general obligations, the public interest test, charging and the appeal procedure.

FOI and includes authorities excluded under section 5 of the FOI. It also adds some other bodies not included within the FOI definition.

Included as public authorities are every publicly owned company (section 6 of the FOI), local authorities and its emanations, the NHS and its accreditations, maintained schools and other educational institutions, and the police. Schedule 1 of the FOI also lists hundreds of agencies, commissions, council, boards etc which are subject to the definition. In particular, the Environment Agency, DEFRA, local authorities, the Greater London Authority, waste disposal authorities, national park authorities, the British Waterways Board, the Countryside Agency, English Nature are all amongst the bodies included.

The main area where debate is likely to arise is in respect of the second limb which includes certain-private companies carrying out public or semi public functions will be included. Guidance is contained in the DEFRA Guidance to the Environmental Information

Regulations 2004 (March 2005 update) (set out in Table 2).

Private contractors carrying out public authority functions will be caught by the EIR.

The Guidance suggests that case law decided in respect of what is emanation of the state for the purposes of the direct effect of EC law is likely to be relevant. Case law on the scope of s.6 of the HRA 1998 may also provide some more limited assistance. However, caution must be exercised in simply assuming that the same approach to public authority would be applied across the different legislative schemes, since the factors relevant to the process of interpretation may well be different (see *Kent County Council v Secretary of State for the Environment* [1997] JPL 1115).

When interpreting these limbs it will be necessary to have regard to the objectives of the Directive in amending the scope of public authority from that covered by the previous directive. The original European Commission proposal for the Directive noted that:

TABLE 1: "Public Authority" Regulation 2(2)

- (2) Subject to paragraph (3), "public authority" means -
- (a) government departments;
 - (b) any other public authority as defined in section 3(1) of the Act, disregarding for this purpose the exceptions in paragraph 6 of Schedule 1 to the Act, but excluding:
 - (i) any body or office-holder listed in Schedule 1 to the Act only in relation to information of a specified description; or
 - (ii) any person designated by Order under section 5 of the Act;
 - (c) any other body or other person, that carries out functions of public administration; or
 - (d) 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.
- (3) Except as provided by regulation 12(10) a Scottish public authority is not a "public authority" for the purpose of these Regulations.

TABLE 2: Guidance on "public authorities"

"2.2 In addition some bodies outside the scope of FOIA must comply. The EIR also covers:

- any other body or person that carries out functions of public administration (other than a Scottish public authority)
- any other body or person (except a Scottish Public authority) under the control of any of the above bodies and organisations that has public responsibilities, exercises functions of a public nature, or provides public services in relation to the environment

2.3 Functions is taken to include the provision of services.

2.4 Control is taken to mean a relationship constituted by statute, regulations, rights, licence, contracts or other means which either separately or jointly confer the possibility of directly or indirectly exercising a decisive influence on a body. In accordance with this definition any private company that is sufficiently associated with the activities of the government that they owe similar obligations with regard to the environment have responsibilities under the EIR. Control may relate not only to the body but also to control of the services provided by the body. It covers financial, regulatory and administrative control. Examples of bodies covered by EIR are private companies or Public Private Partnerships with obvious environmental functions such as waste disposal, water, energy, transport companies (such as the Civil Aviation Authority and port authorities), and environmental consultants. Public utilities, for example, are involved in the supply of essential public services such as water, sewerage, electricity and gas and fall within the scope of the EIRs. Other bodies covered include the Ambulance Service, which carries out a public service and collects. See *Griffin v South West Water Services Ltd*, [1995] IRLR, and *Foster v British Gas plc* Case C-188/89, [1990] 2 CMLR 833."

"Increasingly, through privatisation and new methods of service delivery, services of general interest in relation to the environment traditionally performed by public authorities are being carried out by bodies which do not form part of the public sector. These services include those such as gas, electricity, water and transport...Provision to ensure that bodies now in the private sector grant access to environmental information on the same basis as public authorities carrying out similar services is justified."

Private companies that carry out local authority work may well be covered, such as those carrying out refuse disposal on behalf of the local authority or the privatised water, gas and electricity utilities. It

has been suggested by some that these means that such companies would be bound by the EIR in respect of all environmental information they hold. Such an extreme view is unlikely to find favour with the courts. It is more likely that the obligation would be restricted to environmental information held in connection with the carrying out of the actual public function which initially triggered the obligation.

The Holding Requirement

A public authority is obliged only to disclose environmental information that it "holds" (Regulations 4(1) and 5(1) see also articles 1(a) and 3.1 of the Directive). Information held by a public authority is defined to extend to information held by third parties of that public authority

(Regulation 2(3), see also, recital (12) and articles 2.3, 2.4 and 3.1 of the Directive). It has been suggested that the term “hold” means that information that neither is, nor has been created, sought, used or, consciously retained, by a public authority will not be information held by it and also a public authority is not obliged to assemble what it knows or is capable of finding out so as to produce information that answers a request. This may be so, but this view should, nonetheless, be treated with caution given the broad purposive approach in favour of disclosure that is to be adopted.

Requests for Environmental Information

Requests under the FOI must be in writing. By contrast, although a request is required under the EIR it need not be in writing. The Information Commissioner wisely advises that if the request is not made in writing a written note of the request should be made.

Save to the extent that it may be relevant to a consideration of public interest in the case of one of the exceptions to the general obligation to disclose, the motives of the person for making a request are irrelevant to the decision to disclose (see recital (8) of the directive and article 4.1 of the Aarhus Convention).

The EIR refer to an applicant

being a “person” (Regulation 2(1)). This will no doubt also include legal persons. Views differ upon whether a person living outwith the jurisdiction could make a request. The Aarhus Convention at article 3.9 suggests that the right may be exercisable by any person, irrespective of citizenship, nationality or domicile. This wording does not appear in the Directive or the EIR. Some say that reading the right as extending to a person outside the jurisdiction would be “inconsistent with normal cannons of construction”, others state that precisely because the Directive “does not distinguish on the basis of nationality, citizenship, or place of residence in relation to granting public rights to access information” it may be used by those outside the EU, in particular those living in developing countries concerned about a development in their country financed by an EU based Export Credit Agency. The

latter view is probably correct given that the Directive does not restrict the location of the applicant and given also that the Directive is intended to implement the Aarhus Convention which is expressed so as not to restrict in this way. Moreover, the point is likely in most cases to be arid, since in most cases a person would be able to travel or else get a friend to make the request within the EU in any event.

Quality of Information

Regulation 5(4) imposes an obligation on the public authority to ensure that where the information to be released has been compiled either by or for the public authority then, so far as it is reasonably believes it is “up to date, accurate and comparable”. This obligation did not exist under the 1992 Regulations. It does not exist under the FOI.

Time Limits

Requested information must be

provided “as soon as possible” (Regulation 5(2)). The backstop requirement is within 20 working days of the request. In cases where it is justified by complexity and volume, it is possible to extend the “backstop” period from 20 to 40 working days (Regulation 7). In contrast to the FOI, it is never permissible to extend time for responding to a request beyond 40 days.

Form and Content of Information Provided

Pursuant to Regulation 6, a public authority must make the information requested available in the particular form or format requested, unless either:

- “(a) it is reasonable for it to make the information available in another form or format; or
- (b) the information is already publicly available and easily accessible to the applicant in another form or format.”

Whether it is reasonable to make it available in another format is a matter of fact depending upon the circumstances. It should be noted that the obligation also appears to require the public authority to have regard to the applicant’s circumstances when considering whether to rely upon the provision permitting release in another format.

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| <p>TABLE 3: Definition of Environmental Information (Regulation 2) “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 -</p> <ul style="list-style-type: none"> (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); |
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