

EIR case law update

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Key issues in Tribunal jurisprudence

- What is “environmental information”?
- A public authority? See Jacqueline Lean’s slides
- Engagement of exceptions

What is environmental information?

“*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);

Department for Business, Energy and Industrial
Strategy v Information Commissioner [2017] PTSR 1644

- Focus is on the *relevant measure* rather than solely on the nature of the information itself
- “identifying the measure that the disputed information is “on” may require consideration of the wider context, and is not strictly limited to the precise issue with which the information is concerned... It may be relevant to consider the purpose for which the information was produced, how important the information is to that purpose, how it is to be used, and whether access to it would enable the public to be informed about, or to participate in, decision-making in a better way. None of these matters may be apparent on the face of the information itself”
- “Determining on which side of the line information falls will be fact and context-specific” based on purposive interpretation of the legislation

DfT, DVSA and Porsche Cars GB Ltd v Information Commissioner and John Cieslik

[2018] UKUT 127 (AAC)

- Information request from Vehicle and Operation Services Agency about Porsche Cayman cars
- Applied BEIS v IC [2017] PTSR 1644
- Main question was what was the “measure” in question
- Found that none of the safety measures related to the environment and accordingly not environmental information

Lancashire Fire and Rescue Service v IC

EA/2018/0084

- Requests for information relating to emergency procedures for the Preston New Road fracking site
- Preliminary issue whether the information was “environmental information” for the purposes of the regulation 2(1) EIR
- Applying BEIS v IC, FTT held that all the information sought was environmental information
- All of the information sought was “on” an “activity” which was likely to affect the environment, even if some of the information was not directly related to fracking activity

Engaging the exceptions: Regulation 12(4)

- (4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—
- (a) it does not hold that information when an applicant's request is received;
 - (b) the request for information is manifestly unreasonable;
 - (c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;
 - (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or
 - (e) the request involves the disclosure of internal communications.

Engaging the exceptions: Regulation 12(5)

(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect–

- (a) international relations, defence, national security or public safety;
- (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to 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 authority 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.

Ryan v IC

EA/2018/195

- Request related to information about negotiations on the disposal of land in Dartford by Kent County Council to Tesco
- Held that information was environmental information because “the measure in question is the Council’s approach to negotiations about land”
- Although there was a “significant public interest in understanding what happened with this deal”, the Tribunal found that the regulation 12(5)(e) exception applied

- Request for all impact assessments of badger culling on protected species and sites
- Withheld by NE on grounds of public safety (regulation 12(5)(a)) on the basis that it could be used (with other information) to identify participants and cull zones with a risk to private property and the health and safety of individuals from protest activity
- Evidence heard in closed session on public safety risks
- Evidence also given by an anti-cull activist as to the nature of protest activities

Natural England v IC EA/2017/0160 continued

- Tribunal satisfied that the information would assist in identifying cull zones, but not satisfied that disclosure of the information would have caused direct or actual harm to public safety or an increased risk of harm to such an extent that it could be said to affect public safety
- Found that the incidences of harassment were “at the low end of future risk” and that damage to property, whilst more likely, was of less consequence
- Note that NE maintain position with respect to disclosure of cull boundaries

Rickard v IC

EA/2017/0187

- Request relating to a waste management contract which included the procurement of a controversial energy from waste facility in Cornwall
- Withheld by local authority on grounds of commercial confidentiality (regulation 12(5)(e))
- Held to be environmental information, applying BEIS
- Summarised test:

“(i) the information has to be commercial or industrial in nature; (ii) it has to be subject to a duty of confidence provided by law; (iii) the confidentiality has to be required to protect an economic interest; and (iv) that economic interest, and therefore its confidentiality, has to be adversely affected by disclosure of information.”

Rickard v IC

EA/2017/0187 continued

- Noting conflicting principles:

“86. ... On the one hand is this imperative for some confidentiality. On the other is the imperative for transparency and accountability in public affairs so that, in the present context, residents and council taxpayers can assess on an informed basis whether their political representatives are spending wisely the money given to them in trust and ensuring the best interests of residents...

87. Finding accommodation for these conflicting principles is no easy task. There is no empirically correct answer and reasonable people may arrive at different conclusions...

89. The benchmark, in the Tribunal’s view, is that as much information should be publicly available as possible, without (short of compelling reasons) imperilling the very commercial sensitivities on which PFIs are founded...”

Carrabino v IC

EA/2017/0010

- Primary issue was whether the exception in regulation 12(5)(b) (adverse effect on the course of justice) was engaged
- Issue related to information held in respect of decision to serve noise abatement notice (i.e. before appeal proceedings had commenced in magistrates' court)
- Found that exception was engaged in respect of all of the information
- Considerable emphasis placed on ability of magistrates to control own procedure/evidence
- “Very limited” public interest in disclosure

Conclusions

- Broad approach to environmental information – but see *Porsche* as an example of information not falling within EIR
- Exceptions seem relatively easy to engage, but still a public interest/weighting test