



**Tribunals Service**  
Information Tribunal

**IN THE MATTER OF AN APPEAL TO THE INFORMATION TRIBUNAL  
UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000**

**EA/2007/0022**

**BEFORE**

**INFORMATION TRIBUNAL DEPUTY CHAIRMAN**

**Chris Ryan**

**And**

**LAY MEMBERS**

**Michael Hake**

**Henry Fitzhugh**

**BETWEEN**

**MARK WATTS**

**Appellant**

**and**

**THE INFORMATION COMMISSIONER**

**Respondent**

**Preliminary Issue Decision**

**The Tribunal has decided that the subject matter of the Appeal, namely reports by environmental health officers in respect of premises that might have been the source of an outbreak of E. coli 0157, constitute environmental information within the definition set out in regulation 2(1) of the Environmental Information Regulations 2004.**

**Reasons for Decision**

**Background**

1. In late 2005 an outbreak of E.coli 0157 occurred in Wales. Both the National Assembly of Wales and the Bridgend County Borough Council (the Council) instigated investigations, the latter in co-operation with the police. The investigations included a meat supplier called John Tudor & Son. On 12 November 2005, while those investigations were being pursued, the Appellant

wrote to the Council asking for copies of certain reports prepared by its environmental health officers regarding John Tudor & Son.

2. The Council refused the request on the basis that the information sought fell within the scope of the Environmental Information Regulations 2004 (“EIR”) and was exempt under regulation 12(5)(b) because its disclosure would adversely affect its ability to conduct an inquiry of a criminal or disciplinary nature. The Council stated that it believed that the public interest in maintaining the exception outweighed the public interest in disclosing the information. The Appellant asked the Council to re consider its decision. In the Council’s reconsideration it relied, not only on EIR, but also on certain exemptions provided for in the Freedom of Information Act 2000 (“FOIA”), apparently considering that the information might fall within the scope of that statute and not the EIR. The FOIA exemptions relied on were section 22 FOIA (information intended for future publication), section 30 (investigation and proceedings conducted by public authorities) and section 31 (law enforcement).
3. The Appellant complained to the Information Commissioner who, having investigated the Complaint issued a Decision Notice dated 22 February 2007. This recorded that the Appellant and the Council had agreed that the matter should be considered under the terms of the FOIA, rather than EIR. The Information Commissioner concluded that the requested information fell within the exemption under FOIA section 30 as it was held for the purposes of an investigation which the Council was under a duty to undertake and that, in the particular circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosing the information at the relevant time. However, the Information Commissioner also expressed the view that, had EIR been applied, the outcome would have been the same.
4. On 19 March 2007 the Appellant appealed to this Tribunal and at a pre hearing review on 25 May 2007 a direction was made that the question of whether EIR or FOIA applied should be decided as a preliminary issue at a paper determination. The Appellant and the Information Commissioner lodged written submissions on this issue.

### The Preliminary Issue

5. Both FOIA and EIR set out a requirement for public authorities to disclose information which they hold unless certain exemptions apply. There are, however, significant differences in the exemptions that may apply and in the detailed language applying to exemptions which may appear at first sight to be similar in nature. Section 39(1) of FOIA is designed to avoid overlap between the two regimes. It does this by providing that if the information requested is “environmental information” then it is EIR and not the FOIA, which applies.
6. The definition of “environmental information” is to be found within the EIR themselves. It is at regulation 2(1) and provides that it is:

*“...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)...”*

7. The Information Commissioner submitted that the information requested did not fall within this definition and the Appellant argued that it did. It is common ground that the reports referred to in the request for information will have included information on the state of human health, including the contamination of the food chain. However, they did not agree on the meaning of the qualifying words at the end of sub paragraph (f) commencing with the words “inasmuch as they are or may be...”. The Appellant argued that the correct interpretation was that the qualifying words applied only to the last three items listed in sub paragraph (f) (conditions of human health, cultural sites and built structures) and not to the state of human health. He suggested that this was apparent by the use of the words “state of” before the first item in the list and the words “conditions of” prefacing the last three items. On that basis, he said, any information on the state of human health would fall within the definition of environmental information, without qualification. The Information Commissioner, on the other hand, argued that the qualifying words applied to all of the matters in the list that preceded them and that the information requested would therefore only fall within the definition to the extent that it could be shown to be likely to 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)”. Both sides argued that, for the other side’s preferred interpretation to apply, the word “and” would have needed to have been inserted before the word “conditions”.

8. In our view it is clear that the words at the end of sub clause (f) are intended to refer to all the preceding categories. We reach that conclusion from both the grammatical structure of the sub paragraph and on the basis that the alternative interpretation would result in all information on human health and safety being treated as environmental information, regardless of the matters influencing it. We do not believe that would reflect the intentions behind the EIR or the Directive that it is designed to implement at national level (Council Directive 2003/4/EC on public access to environmental information).
9. Accordingly we must consider whether the information on human health to which the information request referred is or may be affected by the matters set out in the earlier sub clauses in the manner mentioned. The effect of sub clause (f), interpreted in the way we have suggested, is that information on the state of human health only falls within EIR if it was, or might have been, affected by the elements of the environment set out in sub clause (a) or by any of the matters in (b) and (c) operating through those environmental elements. The Appellant argues that for these purposes the relevant element in sub paragraph (a) is “biological diversity and its components”. He argues, on that basis that as E.coli 0157 plainly falls within the meaning of that phrase the requested information falls within the definition of environmental information. On the other hand the Information Commissioner argues that strain 0157 of the E. coli bacteria may not properly be said to fall within the meaning of “biological diversity” because it should not be taken to extend to micro-organisms that, rather than being part of a rich and balanced ecosystem capable of supporting human life, are in fact sources of potentially fatal diseases.
10. It is common knowledge that many strains of E. coli are beneficial and even essential to good health and it is, we suspect, too sweeping a generalisation to exclude them all from the scope of the expression, as the Information Commissioner suggests. We believe that it would be difficult, in any event, to settle on a precise definition for the expression “biological diversity”. It appears to have a number of different meanings applied to it and we have not had the benefit of expert evidence on the point. However we believe that although the expression, as used in normal communications, may be restricted to changes occurring to the current state of living organisms, in particular the extinction of some of them, it is at least arguable that it could also be said to refer to the whole of the natural world. On that wider interpretation, E. coli 0157 could quite conceivably be regarded as a “component” of biological diversity. However, for the reasons set out below we do not have to form a concluded view on this issue as we believe that the information requested falls within the meaning of environmental information for other reasons.
11. The argument based on the expression “biological diversity” proceeds on the basis that the only way that the reports could be treated as information on the state of human health falling within the definition is if the state of human health, and in particular contamination of the food chain, was or might be affected directly by one of the elements of the environment listed in sub paragraph (a). We are doubtful whether contamination by E coli 0157 would be directly affected by the atmosphere, air or water and, as we have indicated,

it is uncertain whether it is directly affected by “biological diversity”. We do not think that any of the other elements listed in sub clause (a) could conceivably apply. However, we remind ourselves that it is not just the direct impact of the elements of the environment on human health that may be relevant for these purposes. Sub paragraph (f) requires us to consider the potential indirect impact of the “factors” listed in sub paragraph (b), operating through any of the sub paragraph (a) elements. We consider that the relevant factors for these purposes are “waste” and “discharge” and that they are each capable of operating through some of those environmental elements in a way that might affect the state of human health and, in particular, the possible contamination of the food chain. We understand that organisms such as E. coli 0157 are capable of being transmitted through water and that both temperature and humidity may affect the degree of risk of transfer by other means, such as direct contact between humans or between a human and a tangible object. On that basis it seems to us that reports about the premises used for processing food for human consumption do relate to the state of human health as it may be affected by at least one of the factors listed in subparagraph (b) operating through at least one of the elements listed in sub paragraph (a).

12. We also observe that sub clause (f) has the effect of including in the definition conditions of the built environment (which would clearly include the premises that were investigated) and that those premises might be affected by any waste or discharges (i.e. factors falling within sub paragraph (b)) present on the premises and operating through air, atmosphere or water (elements of the environment included in sub paragraph (a)).
13. We therefore conclude that the information requested, being information contained in reports about premises where food processing was undertaken and from which contamination of the food chain may have emanated, falls within the definition of “environmental information” and that this Appeal should accordingly be determined under the information regime established under EIR.

Signed

Deputy Chairman

Date 6 July 2007