



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2014/0103

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS550495646

Dated: 31 March 2014

Appellants: Department of Energy and Climate Change (DECC) and Mr Alex Henney

Respondent: Information Commissioner

Heard at: Anchorage House, London

Date of hearing: 4 and 5 November 2014

Date of decision: 24 December 2014

Before

Angus Hamilton

Judge

and

Melanie Howard

and

Paul Taylor

Date of Promulgation: 30 December 2014

Subject matter: Regulation 2(1) of the Environmental Information Regulations 2004 and Freedom of Information Act 2000 ss 35(1)(a) and 43(2)

Cases considered:

Uttlesford DC v IC EA/2011/0269&0285

Department for Education and Skills v IC and Evening Standard, IT, 19 Feb 2007

Secretary for State for Work & Pensions v IC IT 5 March 2007

Friends of the Earth v IC and Export Credits Guarantee Dept. [2008] EWHC 638

Eva Glawischnig v Bundesminister fur soziale Sicherheit und Generationen C-316/01 [2003] ECR I-05995

Kirkaldie v IC and Thanet DC EA 2006/0001

Mersey Tunnel Users Association v IC and Halton BC EA/2009/0001

Nottinghamshire CC v IC & Veolia & UK Coal Mining Ltd EA/2010/0142

LB Southwark v IC, Lend Lease and Glasspool EA/2013/0162

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal by Mr. Henney in relation to whether his request was governed by FOIA or the EIR and invites the parties to propose further directions in relation to this matter by 30 January 2015.

REASONS FOR DECISION

Introduction

1 Regulation 2(1) of the EIR 2004 provides that:

‘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);

2 s.1(1) of the Freedom of Information Act provides that:

Any person making a request for information to a public authority is entitled

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

3 s.35 of the Freedom of Information Act provides that:

Information held by a government department .. is exempt information if it relates to -

(a) the formulation or development of government policy

4 s.43 of the Freedom of Information Act provides that:

(2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

- 5 ss 35 and 43 provide qualified exemptions and it is also necessary to consider whether:

in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information (S.2 FOIA).

The Tribunal refers to this as the ‘public interest balancing test’.

Request by Mr Henney

- 6 On 9 November 2012 Mr Henney requested the following information from the appellant:

I have been told that there was some form of ‘independent review’ of the roll-out [of smart meters] which endorsed the Department’s opinion of the viability of the roll-out. I would be obliged if you would provide me with the key papers.

- 7 On 6 February 2013 DECC confirmed that there had been an independent review in the form of a project assessment review (PAR) carried out by the Major Projects Authority (MPA) DECC provided a copy of the review subject to substantial redactions. DECC stated that the redacted information was withheld under section 35(1)(a) and 36(2)(b)(ii) FOIA and that names and contact details of individuals were redacted

under s 40(2) FOIA.

- 8 The complainant wrote to DECC on 26 February 2013 and challenged its basis for withholding information. DECC subsequently carried out an internal review the outcome of which was provided on 25th of April 2013. This agreed that further information in the report should be disclosed. However for the rest of the information contained in the report DECC maintained its reliance on the original exemptions cited and also introduced section 43(2) FOIA as another ground for withholding elements of the report

- 9 The complainant complained to the Commissioner on 26 April 2013. The complainant however clarified that he did not seek the disclosure of personal data under s.40(2) FOIA. That complaint resulted in the Decision Notice (DN) FS50495646. That DN contained a number of conclusions. First the Commissioner concluded that the applicable access regime was FOIA and not the EIR. The Commissioner also concluded that although s35(1)(a) was engaged the public interest balancing test favoured disclosure of the information withheld by the DFE under that provision. Furthermore the Commissioner concluded that sections 35 and 36 of FOIA are mutually exclusive. Finally the Commissioner concluded that s43(2) FOIA was not engaged.

The Appeal to the Tribunal

- 10 On 25 April 2014 DECC submitted an appeal to the Tribunal (IRT) challenging the conclusions in relation to ss35(1)(a) and 43(2) but not any other conclusion.
- 11 Mr Henney subsequently (it was not altogether clear to the Tribunal when but no party disputed that the issue was properly before the Tribunal) appealed the Commissioner's conclusion that the applicable access regime was FOIA and not the EIR.
- 12 At the start of the hearing the Tribunal was also invited by the Commissioner to consider whether too much information had been redacted in accordance with Rule 14 of the Tribunal Procedure (FTT) (GRC) Rules 2009 from documents presented by DECC and contained within the 'open' bundle which was available to Mr. Henney. The Tribunal were concerned by this application since the matter appeared to have been considered by the Registrar to the IRT in some detail and adjudicated upon. The Commissioner claimed to have been excluded from this process. The Tribunal doubted whether they were obliged to reconsider the Registrar's decision. The Tribunal did however allow the Commissioner and DECC to reach an agreement over further disclosures which was then endorsed by the Tribunal.

The Questions for the Tribunal

- 13 The Tribunal judged that the principal questions for them to consider were: first, whether the applicable access regime was FOIA or the EIR;

secondly whether ss 35 and 43 of FOIA were 'engaged' and then thirdly, to consider whether in relation to each of the claimed exemptions whether the public interest balancing exercise favoured maintaining the exemption or disclosure.

Evidence & Submissions

- 14 This matter was considered by the Tribunal by way of an oral hearing on 4 and 5 November 2014 with four live witness – Mr David Blackall – from the Major Projects Authority (MPA), Dr Daron Walker from DECC, Mr Alex Henney and Mr Nick Hunn (for Mr Henney). The Tribunal also received and heard oral and written submissions from the parties. The Tribunal received evidence and submissions in both open and closed sessions.

- 15 The issue as to whether the applicable access regime was FOIA or the EIR was dealt with by way of submissions at the start of the hearing. Both the Commissioner and DECC submitted that the applicable regime was FOIA. Both parties accepted that in principle information which was directly about the rollout of the smart meters scheme had the potential for being information on a policy likely to affect the environment and thus within the EIR regime – given that the smart meter programme (SMP) was designed in part to reduce energy usage. In both parties submissions this would be information within 2(1)(c) of EIR - 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). However both parties

submitted that the disputed information was specifically about the communication and data components of the smart meters project and thus was effectively 'one remove' from information on a policy likely to affect the environment. The choice of communications and data model was very unlikely by itself to have an impact on energy usage or the environment. The Tribunal were referred to the case of *Uttlesford District Council v IC* which, the Tribunal was told, provides authority for the principle that information that which is a 'step further away from the primary focus' and which does not in itself affect the state of the natural environment is governed by the FOIA access regime and not that of the EIR.

- 16 Mr Henney was understandably hampered in his ability to make submissions on this point since he was not aware what the withheld information contained – at least not in any detail. Mr Henney did however submit that the chosen model for data and communications for the smart meter system may result in delays in the full roll-out of the system and that in turn would have an environmental impact since the claimed environmental benefits of smart metering would be delayed. Mr Henney made it clear that a major concern for him over the choice of the applicable access regime was the inability of the government to veto a disclosure decision under EIR – a power which only existed under FOIA.
- 17 On retiring to consider its decisions the Tribunal felt that the issue of the applicable access regime had not been very thoroughly considered by either DECC or the Commissioner. Both parties seemed to be operating

on the basis that it was a 'given' that the appropriate access regime was indisputably FOIA. The Tribunal did not consider that the issue was so clear cut and the parties were consequently written to in the following terms:

- 18 Following preliminary deliberations by the Tribunal, the Tribunal Judge has directed that all parties should provide additional written submissions within 14 days of the receipt of this direction to address the following points:

In relation to the preliminary point as to whether the Environmental Information Regulations or the Freedom of Information Act applied to the withheld information the Tribunal has noted that none of the parties in the case addressed the Tribunal on the relevance of Regulation 2(1)(e) of the EIR –

cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c)

Paragraph (c) reading –

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.

The Tribunal also on its own initiative considered the Aarhus Convention, which is the precursor to the 2003/4/EC directive,

Article 2, 2b says:

*(b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, **and cost-benefit and other economic analyses and assumptions used in environmental decision-making;***

The Tribunal noted that there appeared to be no dispute between the parties that the smart meter programme is a 'policy' within 2(1)(c) of the EIR. The Tribunal considers that there is quite a compelling argument that the PAR is an analysis 'used within the framework' of this policy and the fact that it is focused only on data and communications for the smart meter programme is not particularly pertinent.

Alternatively looking at the Convention there is a compelling argument that the PAR has been 'used in environmental decision-making'.

The Tribunal acknowledges that there may be a counter-argument that paragraph (e) should be read restrictively to include only analyses that bear directly on the items in paragraph (c) of EIR 2(1) although the phrase 'within the framework of' would appear to be a fairly open term rather than a restrictive one. Similarly the term 'used in' in the Convention appears to be a fairly open rather than restrictive phrase.

The Tribunal could not find any direct authority on the point. The Tribunal was not particularly assisted by the Uttlesford case. In that case the information sought (the Council's code of conduct) was very remote from any environmental concern and the decision that it was not with the EIR hardly surprising – although the Tribunal noted that in that case the Commissioner advocated that the code of conduct was covered by the EIR.

The Tribunal felt that the parties did not deal with the issue of the applicability of FOIA/EIR very well (although Mr. Henney's difficulties were entirely understandable). The Tribunal therefore seeks further written submissions on this point bearing in mind the issues outlines above.

- 19 All parties duly responded with further submissions. In their submissions both DECC and the Commissioner contended that the PAR could not be properly categorised as an economic analysis used within the framework of environmental measures and activities. The Commissioner did however concede that the matter was finely balanced, The Commissioner also helpfully referred the Tribunal to relevant First Tier Tribunal decisions whilst conceding that these were not binding. Mr Henney was again hampered by the fact that he did know the contents of the PAR although he asserted that as a matter of common sense the PAR must contain some form of economic analysis. DECC additionally submitted that the Tribunal should be considering only whether the data and communications component of the SMP as opposed to the whole SMP

was a measure within Reg 2(1)(a) or (b) EIR but the Tribunal were unanimous in rejecting this as the correct approach.

- 20 The Tribunal noted in particular the decision in the *Southwark v ICO and Lend Lease* case ([EA/2013/0162](#)). Here the Tribunal ruled that a viability assessment in connection with a housing development fell to be considered under the EIRs. Of particular note are the following paragraphs:

29. We are inclined to agree with Mr. Pitt-Payne QC that there may be a tendency to overuse EIR; almost an assumption that, for example, anything to do with land or anything to do with the planning process in England and Wales is outside the scope of FOIA.

30. The answer to this tendency, it seems to us, is not the development of the vague notion of “remoteness”. Rather it lies in a purposive application to the facts of a case of the definition of “environmental information” in Reg 2(1) EIR. It may be for example that the phrase “the state of the elements of the environment” is not always given sufficient weight.

33. In our judgment the project is so large that it is likely to affect the state of the landscape as an element of the environment. The activity or programme, call it what you will, is therefore a measure

which falls within subparagraph (c).

34. In our judgment it also cannot be doubted that the viability assessment including Appendix 22 is an economic analysis used within the framework of that measure and activity. By virtue of subparagraph (e) therefore, the information requested falls within EIR and not within FOIA.

- 21 The Tribunal noted the approach of the FTT in the Land Lease case - firstly it looked at the programme as a whole and whether that fell within the definition (para.33), even though that was not in itself the focus of the request. Secondly it decided that the viability assessment (which was the focus of the request) is a form of economic analysis used within the framework of that measure and activity and thus falls within part (e) of the definition.
- 22 The present Tribunal adopted a similar analysis in the DECC case. The Tribunal looked first at the smart meter project as a whole, and noted that it was agreed amongst the parties that this would have environmental benefits through things such as reduced carbon emissions. Therefore it can rightly be said to be a measure which is likely to affect the elements and factors of the environment. Following the Southwark approach, the PAR, being itself a form of viability report against policy objectives, is used within the framework of that measure. Consequently it has the potential to be covered by 2(1)(e) of the EIR.

23 DECC (and to a certain extent the Commissioner) contend that the PAR here is not within 2(1)(e) because PARs *in general* are not designed to be a form of economic analyses. However, in the Tribunal's view, whether or not a PAR *in general* is not a form of economic analysis is irrelevant. In this case the PAR discusses two options, both of which have differing financial consequences. The government is already committed to expenditure on one option (the DCC model - £200m according to Mr. Walker's open evidence); however through this PAR the government is examining whether an alternative approach (the Decentralised Model, "DM") will have preferential benefits. The DM would not cost the same as the DCC given that there would be no need to procure either a data or communications provider. So even if there is no explicit mention of costs or benefits within the PAR, the exercise is itself an economic assessment given that the two possible outcomes have differing financial implications.

24 In response to DECC's particular submissions – the Tribunal considered that the PAR was unquestionably used "*within the framework*" of the SMP. DECC contended that PARs in general are not designed to be used as part of such projects, (para.14(d) of their recent submissions). But the Tribunal considered that this PAR had a direct bearing on a fundamental element of the SMP and its overall cost. Therefore it must be right to say that the PAR has been used within the SMP policy "framework".

25 The Tribunal also considered an additional approach or analysis: The Tribunal noted that DECC contends at para.9 of their latest submissions that even if the PAR can be regarded as a measure under EIR 2(1)(c), it does not or is unlikely to affect the state of the elements of the environment. The Tribunal noted that the PAR deals with the communications and data models, an essential and integral part of which is a 2G network. Such a network will produce emissions. Emissions from mobile telecommunications constitute environmental information, as per the findings in *Office of Communications v IC & T-Mobile (EA/2006/0078)*:

27. ...The definition is not intended to set out a scientific test and its words should be given their plain and natural meaning. On that basis we believe that radio wave emissions that pass through the atmosphere from a base station to any solid component of the natural world are likely to affect one or more of the elements listed in subparagraph (a) or the interaction between some of them. Accordingly we conclude that the radiation from a base station falls within the meaning of the expression “environmental information”.

26 Consequently the Tribunal unanimously concluded that the applicable access regime is the EIR and not FOIA.

27 The parties are now requested to submit their proposals for the future conduct of this matter to the Registrar by 30 January 2015. The Tribunal considers that there are two possible options – that the current ruling on

the applicability of the EIR is subject to appeal to the Upper Tribunal or that the ruling is accepted and the matter relisted for hearing based on the applicable exemptions within the EIR.

Signed:

Angus Hamilton DJ(MC)

Tribunal Judge

Date: 24 December 2014