First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2016/0310

Heard at Coventry Magistrates Court
On 28 April 2017

Before
JUDGE
CHRIS RYAN

TRIBUNAL MEMBERS
MICHAEL HAKE
GARETH JONES

Between

DR PAUL THORNTON

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION AND REASONS

Attendances:

The Appellant appeared in person.
The Information Commissioner did not attend and was not represented.

Subject matter: Environmental Information Regulations 2004

Request manifestly unreasonable - Reg 12(4)(b)
Obligation to publish – Reg 4

IN THE FIRST-TIER TRIBUNAL Case No. EA/2016/0310

GENERAL REGULATORY CHAMBER

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is allowed in respect of the Information Commissioner's decision, recorded in Decision Notice FER0618624, to the extent that the National Infrastructure Commission was not entitled to rely on regulation 12(4)(b) of the Environmental Information Regulations 2004 as a basis for its rejection of the Appellant's information request, as communicated to the Appellant in the National Infrastructure Commission's letter to the Appellant dated 31 March 2017.

To the extent that the Appeal raises issues arising from the obligation of a public authority to publish environmental information under regulation 4, and to the extent, if any, that this Tribunal has jurisdiction to entertain those issues, the appeal would be allowed, save that the Appellant's complaint as to the format in which information was disclosed to the public would be dismissed.

REASONS FOR DECISION

Introduction

1. This Appeal arises out of a Decision Notice (FER0618624, dated 17 November 2016) by which the Information Commissioner decided that the National Infrastructure Commission ("the NIC") had been entitled to refuse a request for the disclosure of the submissions it received in respect of three reports it was preparing in early 2016, relying on regulation 12(4)(b) of the Environmental Information Regulations 2000 ("EIR"). The Information Commissioner also decided that the NIC had not breached its obligations under EIR regulation 4 by failing to publish the submissions voluntarily.

Background information

2. The NIC was established, on an interim basis, on 5 October 2015 and is now a permanent Executive Agency of HM Treasury. Its role is to provide the Government with expert advice on major long-term projects and challenges.

3. On 13 November 2015, the NIC issued a Call for Evidence in respect of three reports, which were to cover:

    i. electricity interconnection and storage;

ii. the extension of the planned high-speed train project to the North of England; and
iii. the future development of London's transport infrastructure.

We will refer to these pieces of work collectively as "the Reports".

4. The Call for Evidence included this statement:

> *"We may publish any submissions made: if you believe there is a reason why your submission or any part of your submission should be considered confidential please provide details.*
>
> *The* [NIC] *is subject to legal duties which may require the release of information under the Freedom of Information Act 2000 or any other applicable legislation or codes of practice governing access to information."*

5. It was also made clear at that stage that the NIC had committed to publish all three of the Reports before 16 March 2016, the day on which the Government of the day planned to publish its budget.

6. The closing date for responses to the Call for Evidence was 8 January 2016.

7. By that date the NIC had received a total of 400 responses.

The Appellant's request for information and the NIC response

8. On 22 January 2016, the Appellant sent the NIC the following request for information ("the Request")

> *"I note that the closing date for submissions* [in response to the Call for Evidence] *has recently passed.*
>
> *It is clearly in the interests of both the Public and the Commission that all the submissions that have been made to this consultation can be subject to public review from the earliest opportunity. This would include expert scrutiny so that errors can be identified, and corrected.*
>
> *Such publication on your website is already obliged under Regulation 4 of the Environmental Information Regulations, so you should already have this in hand.*
>
> *But otherwise, and for the avoidance of doubt, I would be grateful if you would now publish the information on your website or provide me with electronic copies of all the submissions that have been provided to the Commission. That request now additionally engages the provisions of Section 5 of the same regulations."*

9. The NIC did not provide a substantive response to the Request until 31 March 2016. The delay was found by the Information Commissioner to have been a breach of the requirement, under EIR regulation 5(2), under which a response should have been provided within 20 working days i.e. by 19 February 2016. That part of the Decision Notice has not been appealed.

10. The response, when it arrived, explained that the large number of responses received had made publication impractical at that time. It then read:

> *"The National Infrastructure Commission (NIC) is a new organisation established in October 2015. We are still putting systems in place and, while recruitment is ongoing, we are still running at around a 1/3 vacancy rate.*
>
> *Each piece of evidences needs to be analysed to consider and clarify whether any of the information would be exempt from publication due to 'commercial sensitivity', the Data Protection Act or any other factor. After consideration and in consultation with the Treasury's FOI/EIR team, we have concluded that we unfortunately have to refuse your request under 12(4)(b) of the EIR. Your request is 'manifestly unreasonable' on the grounds of diversion of resources.*
>
> *Whilst we recognise the public interest in the information being released, given the current size of the task and limited resources of the NIC it is too large a piece of work to deliver at this time.*
>
> *In the future, we hope to be in a position to publish this evidence or at least a summary of the evidence we receive, but this is a work in progress.*
>
> *We have however attached a list of all the companies that did respond to our request. If you would like to refine your request to a subset of these responses, we will be happy to reconsider."*

11. All of the submissions were subsequently published on the Government's website on 10 May 2016. That was approximately two months after the Reports had been published and four months after the closing date for submissions.

12. On 19 May 2016 the Information Rights Unit of HM Treasury informed the Appellant that it had carried out an internal review of the original refusal. The letter then read:

> *"HMT internal review has carefully considered your request and has found that EIR 12(4)(b) was correctly applied to the information in scope at the time of your request. Given the resource constraints faced by NIC and the considerable work involved in preparing the information for publication, it would not have been practical to release any information at the time of your request as it would have involved a significant diversion of resources.*
>
> *The review however notes that due to work undertaken since then to prepare the documents for publication, the NIC has now published the submissions to the call for evidence, which are available at* [link to Government website]"

The Information Commissioner's investigation and Decision Notice

13. On 3 June 2016, the Appellant complained to the Information Commissioner about a number of aspects of the NIC's behaviour in respect of the submissions. The ones that remain relevant for the purposes of this appeal were, first, that the NIC had not been entitled to rely on EIR regulation 12(4)(b). The Appellant argued that the Request was not "manifestly unreasonable". It was:

"…wholly moderate in scale and indeed predicted in the Commission's information for those submitting evidence. If the Infrastructure Commission had insufficient human or other resources to implement that responsibility then that is a failing of the organisation. It does not make the request even marginally unreasonable."

14. The second relevant ground of complaint was the failure of the NIC to publish the submissions "spontaneously without a requirement for request and without the delay that has now occurred". The Appellant suggested that:

> *"To fulfil the requirements of* [EIR regulation 4] *the material should have been published on receipt by the Infrastructure Commission. Had they incorporated such publication into the processing of the incoming submissions the administrative burden would have been negligible."*

15. The Information Commissioner, having completed her investigation of those complaints, issued the Decision Notice on 17 November 2016 in which she rejected both grounds of complaint. In considering whether the Request was manifestly unreasonable she took into account the timing of the Request, NIC's capacity at that time, the 16 March 2016 deadline for completing the Reports, the volume of information covered by the Request and NIC's stated intention to publish the submissions in due course. Having taken all those factors into consideration she concluded:

> *"… the Commissioner is satisfied that, at the time it was submitted, the request could be categorised as manifestly unreasonable under regulation 12(4)(b). The Commissioner considers that to review and prepare the requested information in order to release it would have distracted officers from preparing the three main reports for publication, the deadline for which was 12 weeks after the close of the Call for Evidence. Such a distraction would have been unreasonable as NIC already intended to publish the responses following publication of the main reports. That NIC's resources may have been stretched at the time of the request does not equate with a failing of that organisation. It seems to the Commissioner simply to be the reality of a newly created and small authority being required to undertake a complex piece of work to a challenging deadline."*

The Information Commissioner then went on to consider whether the requested information should still have been disclosed, as requested, because the public interest in maintaining the exception relied on did not outweigh the public interest in disclosure. She acknowledged the public interest in having the submissions published, but concluded that there was a greater public interest in NIC focussing its resources on preparing the Reports and only turning its attention to preparing the submissions for publication once that had been done.

16. On the issue of voluntary publication, the Information Commissioner did not think that a delay in publication between the closing date for submissions on 8 January 2016 and the date of publication on 10 May 2016 was unreasonable, given NIC's circumstances and the priority it gave to completing the Reports.

<u>The appeal to this Tribunal</u>

17. The Appellant lodged an appeal to this Tribunal on 16 December 2016. He opted for a determination following a hearing, rather than one made on the basis of the papers alone. However, the Information Commissioner decided not to attend a hearing and invited us to reach a decision in her favour on the basis of her written submissions.

18. Appeals to this Tribunal are governed by FOIA section 58, adapted for the purpose of EIR. Under that section we are required to consider whether a Decision Notice issued by the Information Commissioner is in accordance with the law. We may also consider whether, to the extent that the Decision Notice involved an exercise of discretion by the Information Commissioner, he ought to have exercised his discretion differently. We may, in the process, review any finding of fact on which the notice in question was based.

The relevant law

19. The relevant part of EIR regulation 4 reads:

> ***"(****1) Subject to paragraph (3), a public authority shall in respect of environmental information that it holds—*
>
> *(a)progressively make the information available to the public by electronic means which are easily accessible; and*
>
> *(b)take reasonable steps to organize the information relevant to its functions with a view to the active and systematic dissemination to the public of the information.*

20. The relevant part of EIR regulation 5 reads:

> *"(1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.*
>
> *(2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request."*

21. The relevant part of EIR regulation 12 reads:

> *"(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if—*
>
> *(a)an exception to disclosure applies under paragraphs (4) or (5); and*
>
> *(b)in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.*
>
> *(2) A public authority shall apply a presumption in favour of disclosure.*
>
> *(3) …*

(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—

(a)…

(b)the request for information is manifestly unreasonable …"

22. The EIR implement the terms of Council Directive 2003/4/EC on public access to environmental information ("the Directive"). We are therefore required to interpret EIR in a way that achieves the purpose of the Directive and is consistent with it.

23. The first recital to the Directive reads:

"Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment."

The fifth recital reads:

"(5) On 25 June 1998 the European Community signed the UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ('the Aarhus Convention'). Provisions of Community law must be consistent with that Convention with a view to its conclusion by the European Community"

24. Article 1 of the Directive then sets out the objectives of the Directive in these terms:

"(a) to guarantee the right of access to environmental information held by or for public authorities and to set out the basic terms and conditions of, and practical arrangements for, its exercise; and

(b) to ensure that, as a matter of course, environmental information is progressively made available and disseminated to the public in order to achieve the widest possible systematic availability and dissemination to the public of environmental information. To this end the use, in particular, of computer telecommunication and/or electronic technology, where available, shall be promoted."

25. The relevant part of Article 3 reads:

"1. Member States shall ensure that public authorities are required, in accordance with the provisions of this Directive, to make available environmental information held by or for them to any applicant at his request and without his having to state an interest.

2. Subject to Article 4 and having regard to any timescale specified by the applicant, environmental information shall be made available to an applicant:

(a) as soon as possible or, at the latest, within one month after the receipt by the public authority referred to in paragraph 1 of the applicant's request; or
(b) within two months after the receipt of the request by the public authority if the volume and the complexity of the information is such that the one-month period referred to in (a) cannot be complied with. In such cases, the applicant

shall be informed as soon as possible, and in any case before the end of that one-month period, of any such extension and of the reasons for it."

26. The Aarhus Convention itself sets out the obligation to provide information on request, in Article 4 paragraph 1, in substantially the same language as the Directive. It then reads:

> *"2. The environmental information referred to in paragraph 1 above shall be made available as soon as possible and at the latest within one month after the request has been submitted, unless the volume and the complexity of the information justify an extension of this period up to two months after the request. The applicant shall be informed of any extension and of the reasons justifying it."*

The debate on the issues and our conclusions on each

27. We set out below the parties' arguments on each of the issues that arise together with the conclusion we have reached.

Disclosure in response to the Request – EIR regulations 5 and 12(4)(b)

28. The Information Commissioner relied on the reasons for finding in NIC's favour set out in the Decision Notice. She argued that each submission needed to be checked before publication to ensure that NIC complied with its duties to third parties under the Data Protection Act 1998 as well as its other obligations to withhold information that should be excepted from disclosure because it was confidential and/or possibly commercially sensitive. It would be manifestly unreasonable to require the NIC to have completed the process of assessment and redaction on such a large volume of material by the date when the Request was refused, as this would have required its limited resources to be diverted away from preparing the Reports within the timetable which had been set.

29. The Appellant challenged the ICO's decision that complying with the Request would have resulted in an unreasonable diversion of resources. He argued that the need to publish the Reports before 16 March 2016 should have been abandoned or at least not have been given priority over preparing the submissions for publication. In his view, the purpose of the EIR was thwarted by not making the submissions available for public scrutiny before the Reports were finalised. Had this been done, those preparing the Reports would have had the benefit of public comments on the content of the submissions.

30. The Appellant did concede that some work would be needed to redact information that ought not to be published, but argued that the government's failure to provide NIC with the resources needed to carry out, in parallel, both that task and the preparation of the Reports, should not be allowed to override the public's ability to participate effectively in the decision-making process to the fullest extent possible. He also argued that it was not relevant to say, as the Information Commissioner did in her Decision Notice, that the NIC's plan to publish the requested information was a relevant consideration.

31. The Information Commissioner's reliance on the quantity of material was challenged by the Appellant on the basis that the volume and complexity of the information should not be taken into consideration when assessing whether an information request was manifestly unreasonable. He argued that, as the EIR are to be interpreted in a manner that is consistent with the Directive and the Aarhus Convention, the terms of Article 3(2)(b) of the former and Article 4(2) of the latter (both quoted above) make it clear that volume and complexity are only relevant to determine whether a public authority may be entitled to an additional 20 working days in which to comply with an information request. In this respect the Appellant relied on the Implementation Guide to the Aarhus Convention, a document which, while not binding on us may be referred to for assistance in interpretation. At page 84 it states that:

> *"Under article 4, paragraph 2, the volume and complexity of an information request may justify an extension of the one-month time limit to two months. This implies that volume and complexity alone do not make a request 'manifestly unreasonable' …"*

32. The reference in the Grounds of Appeal to "spontaneous" publication was clarified during the hearing. The Appellant conceded that, having regard to the accepted need to consider redactions before publication, it would have been manifestly unreasonable to have expected the NIC to publish the submissions at the time of the Request or within a short time afterwards. However, he did insist that the requirement, under EIR regulation 4, to "*progressively make the information available…"* imposed an obligation to prepare materials for publication at the same time as work was being undertaken on finalising the Reports. If the NIC had complied with that obligation, he argued, the task of complying with the Request should have been straightforward and capable of being carried out within a short time after the Request had been submitted.

33. We are aware, in addressing the competing arguments, that the facts of this case differ from many in which the issue of manifest unreasonableness arises. The exception is usually relied on where a public authority refuses to disclose the information at all, frequently because it would take a disproportionate effort to locate information falling within the scope of a request and make it available for disclosure. However, in this case the information was easy to locate and was in fact made available to the public, by being published on the Government website, within weeks of the Request having been refused and before the internal review of that refusal had been completed. In those circumstances the question we have to address is at what date did it cease to be manifestly unreasonable to have expected the NIC to have completed the process of reviewing the submissions, carrying out any necessary redactions and formatting the material for publication.

34. Expressed in those terms, the issue for determination is consistent with the statement in the Implementation Guide that the quantity and complexity of the requested information may affect the time allowed for compliance, but not the question of whether the request is manifestly unreasonable.

35. Selecting the date at which the Request must be assessed is not straightforward and neither of the parties addressed the issue in the written materials filed with the Tribunal, although the Appellant did suggest during the hearing that it should be 40 working days from the date of the Request. That, he said, was in accordance with

Article 3 of the Directive, when read in context with the recitals and the Aarhus convention, including the Implementation Guide. The date for complying with the Request would then have been 18 March 2016. That, of course, was 13 days before the NIC had even written to the Appellant with its response to the Request and almost simultaneous with the date when the Reports were published.

36. The Appellant was, in our view, correct in saying that the NIC should have been preparing the submissions for publication between the closing date of 8 January 2016 and the date when the Reports were published. Although that requirement flows from the obligation under regulation 4 to publish voluntarily, its existence inevitably influences any judgment as to the time permitted to comply with a request for information under regulation 5. Had it been complied with, NIC would not have faced the difficulty it did in complying with the Request promptly.

37. Having said that, we do not think that the NIC should have been required to delay the publication date for the Reports, as the Appellant argued. It was entitled to assess the task it faced in preparing the submissions for disclosure, in the context of the deadline it faced, irrespective of whether or not the deadline had been self-imposed.

38. The Directive and the Aarhus Convention do not impose a rigid timetable for disclosure to a requester under the EIR regulation 5. They provide guidance. But they do assist us in our interpretation of the, slightly different, language of the EIR. They suggest to us that compliance with the Request could reasonably be considered to have ceased to be manifestly unreasonable at around 40 days from the date of the Request i.e. by the middle of March 2016. That, of course, is the same time as the Reports were published. However, we think that it would be harsh to expect a public authority, which has asked for evidence in advance of preparing a report, to then be obliged to disclose that evidence before the report has been finalised. That, in our view, would lead to endless delays as comments, and then responses to those comments, continued to be received up to the moment when the report was published. Those writing documents of that kind are entitled to have a period to reflect on the evidence received and to finalise their deliberations, without the distractions likely to result from a constant stream of new material and opinions. On the facts of this case it would, in our view, have been manifestly unreasonable to require the evidence to have been disclosed, (in circumstances where disclosure to an individual requester under the EIR amounts to disclosure to the world), before the report for which it was sought had been finalised.

39. On the basis of those two factors, we consider that, on the particular facts of this case, the NIC was entitled to some further time, beyond the bare 40 days, in which to comply with the Request, but not much. Our conclusion is that disclosure of the submissions ceased to be manifestly unreasonable by the end of March 2016, approximately two weeks after the Reports were published. The NIC was not therefore entitled to rely on EIR regulation 12(4)(b) when, on the last day of that month, it wrote its belated rejection of the Request.

40. We should add that, in making this assessment, we have taken account of both the number of submissions received and the work likely to have been required to prepare them for disclosure. However, we have not attributed any weight to the argument that the NIC had only been in existence for a few months and was short staffed. It seems to us that the question we should ask ourselves is whether an appropriately

resourced public authority would find an information request manifestly unreasonable, by reason of the burden compliance would impose on its staff. Any departure from an objective assessment of that kind could lead to unfairness for those requesting information, who might find that understaffing, by accident or deliberate policy, could bring regulation 12(4)(b) into play in circumstances where it would not have traction in the case of a properly resourced organisation.

41. If, contrary to our view, it was manifestly unreasonable to expect disclosure before 31 March 2016, the public interest in the public having access to the submissions at that time would have been outweighed by the public interest in the NIC being permitted to organise its resources in an effective manner. Indeed, it is difficult to envisage circumstances where a finding of manifest unreasonableness could lead to any other conclusion on the public interest balance.

Voluntary publication – EIR regulation 4

42. We should start by saying that we are not convinced that the Information Commissioner had jurisdiction to determine this issue. And if that is the case then clearly this Tribunal has no jurisdiction to consider the correctness of that determination.

43. FOIA section 50 (as applied to the EIR by regulation 18) provides that a complaint may be made to the Information Commissioner if an information request is thought to have been dealt with in a manner that is inconsistent with the requester's right to have information disclosed on request. Clearly a complaint that voluntary publication has not been effected cannot, by definition, arise from an information request. It is of course open to the Information Commissioner to consider, under FOIA section 52, whether a public authority has complied with any of the requirements of Parts 2 and 3 of the EIR (which will include obligations to publish environmental information under regulation 4). And if that leads to the conclusion that the public authority is in default, an enforcement notice may be issued. Although a public authority on which an information notice has been served may appeal to this Tribunal under section 57(2), there appears to be no provision enabling an appeal to be made by a third party, even the person who may have been responsible for alerting the Information Commissioner to the breach in the first place.

44. We are therefore faced with a decision notice, which includes matters that appear only to be appropriate for intervention by the Information Commissioner through the enforcement notice procedure and an appeal instigated by an individual who would not, in any event, have had standing to challenge such an enforcement notice. However, the issue was not raised by either of the parties to the appeal and it is, accordingly, not appropriate for us to make a ruling on it. And, in case our concerns about lack of jurisdiction prove to be unfounded, we will address the question of whether the NIC complied with its obligations under EIR regulation 4.

45. We have referred above to those obligations when considering NIC's response to the Request. On the basis that it ceased to be manifestly unreasonable to expect the NIC to have prepared the submissions for disclosure by 31 March 2016, it must follow that publication should have occurred by the same date. It may be possible to argue that, just because a request for information is not manifestly unreasonable, it does not follow that a failure to publish the same information voluntarily represents a failure to

take "*reasonable steps*" to that end. However, bearing in mind the nature of the information in this case and the time line of relevant events we have described, there is no discernible difference for the purpose of this appeal. If, as we have decided, the requested information should, by the end of March 2016, have been put into a form where it could be released into the public domain (by being disclosed in response to the Request) it should also, at that stage, have been in a form which was appropriate for publication on the government website.

Format in which the information was published

46. The Appellant complained about the fact that the submissions, when published, appeared on the government website in "zipped" files, which he said led to the contents being more difficult to find using normal search engine technology and more difficult to access when they had been found. The same issue of jurisdiction arises in respect of this complaint as with the previous one. Subject to that point, we do not think that presenting the information in zipped files can be said to represent a failure to use "*electronic means which are easily accessible*" for the purposes of EIR regulation 4(1)(a).

47. Our decision is unanimous

Chris Ryan

Tribunal Judge
17th May 2017

Promulgated 22nd May 2017