Updated environmental information guidance

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Environment analysis: The Information Commissioner's Office (IOC) has updated its guidance on the Environmental Information Regulations, 2004 SI to help local authorities achieve best practice and understand their obligations. Simon Tilling, senior associate at Burges Salmon, gives more clarity on what constitutes 'environmental information', what has changed and why.

What are the Environmental Information Regulations 2004? When do they apply compared to the Freedom of Information Act 2000 requests?

It is important to realise that, although similar in nature and form, the Environmental Information Regulations, SI 2004/3391 (EIR) and Freedom of Information Act (FIA 2000) have very different origins. FIA 2000 has its origins in the manifesto commitments of Tony Blair's New Labour, whereas the EIR can be traced back to the United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (often referred to as the Aarhus Convention), implemented into European law through the European Environmental Information Directive 2003/4/EC.

Both regimes aim to provide the public with information held by public bodies, but the two regimes have notable differences. In light of this, the second most important point to make is that the two regimes are mutually exclusive. If a request is for 'environmental information', then it is automatically governed by the EIR at the exclusion of FIA 2000.

What guidance currently exists on the EIR?

The ICO is proactive in issuing guidance on the operation of both FIA 2000 and the EIR. As such, there is a good body of guidance already available, for example the ICO's 'Guide to the Environmental Information Regulations'. However, it is always important to remember that the ICO guidance is simply the ICO's opinion—it is not law, and questions of interpretation are a matter for our courts and tribunals.

For the EIR, matters of interpretation are ultimately matters for the Court of Justice of the European Union (CJEU), and questions about the correct implementation of the Convention are a matter for the Aarhus Compliance Committee. This does make the job of determining disputes about interpretation potentially rather tortuous!

What is the background to the three new updated pieces of guidance and how do they fit with the ICO's general 'Guide to the Environmental Information Regulations'?

The ICO's general 'Guide to the Environmental Information Regulations' does what it says on the tin—it provides an overview of the main provisions of the EIR in a user-friendly, yet relatively high-level manner. The ICO also issues detailed guidance notes that go into more detail on particular topics, to help public authorities understand their obligations and promote good practice. It is these latter, more specific, guidance notes that the ICO has recently updated.

What does the updated guidance on 'what is environmental information?' cover and why was it updated?

The updated guidance on 'what is environmental information?' provides advice on the surprisingly difficult question of what constitutes 'environmental information' for the purposes of the EIR. The question is, of course, very important, because the answer dictates whether the EIR or FIA 2000 will govern the request and, as already explained, those regimes are different.

I say a surprisingly difficult question because, although one might think it should be clear whether something is environmental information or not, there have been some surprising results from the courts. The EIR regime adopts a broad approach to what falls within the definition of 'environmental information'—for example, the tribunal has held that the names of mobile network operators responsible for installing mobile phone masts constitute environmental information

because they are the legal bodies who are ultimately responsible for the emissions of electromagnetic waves, despite the fact that disclosing names of operators tells you nothing about the impact of the electromagnetic waves on the environment.

Another example is a financial viability assessment accompanying a redevelopment—because the redevelopment itself has an impact on the environment, therefore, information relating to it has been held to be environmental information, even if the financial viability assessment does not address environmental issues at all.

The recent update reflects some of these recent cases and decisions.

What does the updated guidance on 'public authorities under the EIR' cover and why was it updated?

Again, the issue of whether an organisation is subject to the EIR is far more uncertain than one may think. FIA 2000 has a well-defined list of organisations, but that is not the case under the EIR. Therefore, this is another area that has seen a number of legal challenges and subsequent court and tribunal decisions in recent times, and the updated guidance captures the outcomes of these.

For example, private utilities exercising powers and functions of a public nature can be caught by the EIR regime, and a recent tribunal decision confirmed that private water companies are indeed subject to the EIR.

The ICO acknowledges that this area of law is likely to develop further as a result of future challenges and the resulting court/tribunal decisions. I suspect this will remain a hotly contested area of the EIR for those private businesses and organisations who are on the fringes of the regime, but who do not want to be subject to the same scrutiny as public bodies.

What does the updated guidance on 'Charging for environmental information' cover and why was it updated?

Charges can be made for information provided under both the EIR and FIA 2000, but the regimes are different for each. The EIR is actually more generous, because it allows for the recovery of staff time engaged in responding to the request. However, there is a tension between charging for, and ensuring public access to, information—the latter being at the heart of the Aarhus Convention—and so the charges are subject to a reasonableness test. The guidance seeks to assist public bodies in deciding what is reasonable.

One major trigger for the revision of this guidance was the recent decision of the CJEU in Case C-71/14: *East Sussex County Council v Information Commissioner and others* [2015] All ER (D) 48 (Oct). In this case, the CJEU was asked to consider the reasonableness of a standard fixed charge for a property search in a conveyancing matter. The CJEU provided some guidance on what is and what is not reasonable, which has been incorporated into the ICO's guidance for the future.

What are the implications of the new guidance? Does it clarify any important issues?

The updated guidance is helpful because it ensures consistency between the guidance notes and the evolving case law, and for busy public authorities and environmental practitioners it captures the information in one place. It also provides an indication of how the ICO is interpreting court and tribunal decisions. For those who follow the law on environmental information closely, the content is not a great surprise, because it broadly follows court and tribunal decisions that are already in the public domain. However, there remain a number of grey areas not yet resolved by the courts or tribunals and, as I said earlier, the guidance is only the ICO's opinion, and so access to environmental information remains an area of law that is ripe for challenges in the future.

Simon Tilling is a senior associate in Burges Salmon's environmental law team and has a practice covering the full breadth of UK and European environmental law. He has significant experience of the EIR 2004—including advising public bodies on their EIR obligations and representing private businesses seeking to protect commercially sensitive environmental information from disclosure. Simon has also lectured at the Academy of European Law in Trier, Germany, on the tension between access to environmental information and the protection of commercially sensitive material, and has been published in the ERA Forum: the Journal of the Academy of European Law.

Interviewed by Duncan Wood.

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