Neutral citation number: [2024] UKFTT 00009 (GRC)

Case Reference: EA/2022/0455

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard by: Cloud Video Platform
Heard on: 13 September 2023
Decision given on: 08 January 2024

Before

TRIBUNAL JUDGE FOSS
TRIBUNAL JUDGE ROPER
TRIBUNAL MEMBER GASSTON

Between

HUGH CRADDOCK

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Representation:
For the Appellant: the Appellant appeared in person
For the Respondent: the Respondent did not appear at the hearing and was not represented

Decision: The appeal is Dismissed.

REASONS

Introduction to the Appeal

1. On 8 August 2021, the Appellant submitted this request ("the Request") to Kent County Council ("the Council"):

> "*I request under the Environmental Information Regulations 2004 or the INSPIRE Regulations 2009 (as amended), as may apply, a copy of all digitised tithe maps for the County of Kent, A1 Reference: IC-144241-S0K1 2 to be supplied in electronic form on a portable hard disk, or alternatively to be made available for download on a file transfer facility.*

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I will on request supply a portable hard disk for this purpose. I am content to receive the data for each tithe map as a number of individual components in image files."

2. The Council responded on 31 August 2021, informing the Appellant that:

   "The tithe maps deposited with the Kent Archives are all available to access at the Kent History and Library Centre. Facsimiles of the maps have been produced to make access easier as the maps are very large. If you would like to access these maps please contact the archives team on archives@kent.gov.uk, to arrange an appointment to view the documents. It is possible to purchase digital copies of the maps again by emailing archives@kent.gov.uk."

3. The Council clarified on 3 September 2021 that its refusal of the Request had been made by reference to Regulation 6(1) of the Environmental Information Regulations 2004 ("EIR") as follows:

   "*Where an applicant requests that the information be made available in a particular form or format, a public authority shall make it so available, unless —*

   (a) it is reasonable for it to make the information available in another form or format; or

   (b) the information is already publicly available and easily accessible to the applicant in another form or format."

4. The Council maintained its position upon internal review on 29 September 2021. The Appellant complained to the Information Commissioner ("the Commissioner"). This is an appeal against the Commissioner's Decision Notice dated 30 November 2022 (IC – 144241 – S0K1), wherein he concluded that the Council was entitled to rely on Regulation 6(1)(b) EIR to refuse disclosure.

5. The hearing of this appeal took place on 13 September 2023, via Cloud Video Platform. The Appellant appeared in person. The Commissioner did not appear at the hearing and was not represented, relying instead on his written response to the Notice of Appeal and the Decision Notice.

Background

6. The Appellant conducts rights of way research in relation to Kent on a voluntary basis on behalf of the British Horse Society. For this purpose, he needs high quality copies of individual tithe maps. As at September 2021, he had researched more than thirty ancient parishes in Kent and intended to research more. He says the research calls for frequent reference to the tithe maps prepared for parishes in Kent under the Tithe Act 1836; extracts from the maps may be required for inclusion in applications to record or upgrade rights of way made to the Council; the Council holds the vast majority of the maps in its records office; there are about 425 maps; with the benefit of a Heritage Lottery Fund grant of £310,000 in or around 1997, the Council has restored and digitised the maps. The Appellant told us in the hearing that he looks for various information in the maps which might indicate

an unrecorded right of way, for example a route coloured in sienna might, taken together with other information, indicate an unrecorded right of way.

7. Upon receipt of the Council's response of 31 August 2021, the Appellant emailed the Council, saying that its response, which appeared to be a refusal, was not in accordance with EIR as it did not explain the reason for refusal. He concluded that the refusal relied on Regulation 6(1) EIR and sought an explanation for that in writing.

8. By its clarificatory response to the Appellant dated 3 September 2021, the Council accepted that it should have explained the reason for its position, and confirmed that:

> "*...the decision* [to refuse] *was taken because the information is already publicly available direct from the Kent History and Library Centre in a format that reduces bandwidth pressures on KCC's network, as the maps are very large. Whilst access does need to be organised by contacting the Centre direct, the information is not being withheld and was already available to you outside of the provisions of the EIR.*"

9. The Appellant elaborated his position to the Council by email dated 6 September 2021 as follows:

> "...
>
> *i) I live in Epsom, Surrey, and a journey to Maidstone to view the requested information involves a two-and-a-quarter hour journey by train, and a peak-time fare of £38.20 (in order to arrive sooner than 11.45).*
>
> *ii) The Kent County Archives have been closed for much of the pandemic, and continue to be restricted in terms of number of readers able to book per session even now.*
>
> *iii) The Archives makes the information available to view on a computer screen. It is not possible to make copies (except, perhaps, photographing the screen, which would be wholly unsatisfactory and quite possibly contrary to rules of the Archives).*
>
> *The information therefore plainly is not 'easily accessible to the applicant'. It is not easy for me to obtain the information in terms of physical displacement from where I live, and even if a visit is made, I cannot obtain the information in a form which is suitable for research.*
>
> ...
>
> *However, if I visit the Archives to view the information, I can, at best, take photographic screen shots of the information on a single parish-by-parish basis, which is time-consuming, potentially in breach of rules and poor quality compared*

to the digital medium in which the information is stored. It is also singularly pointless, as the information which I wish to obtain has already been digitised, is then displayed in a visual medium, photographs, and then rendered back into a digital medium of greatly inferior quality.

Your refusal also states that viewing at the Archives, 'reduced bandwidth pressures on KCC's network'. But I made a request which would have no impact on bandwidth pressures. My request offered to supply a portable hard disk onto which the images might be uploaded which can be done on-site without any requirement for network or internet capacity. ..."

10. The Council conducted an internal review, and emailed the Appellant on 29 September 2021, referring to Regulation 6(1)(a) and (b) EIR, saying that it was clear that "*these have been met, as the information you request is 'already publicly available and easily accessible to the applicant' also in the format you request which is 'in electronic form'.* The Council stated that they were entitled to charge the Appellant for copies of the maps pursuant to Regulation 8 EIR, as the documents were already freely available for access. The Appellant responded to the Council the same day, saying that he did "*not see any distinction such that r.6 applies to the disclosure of information and r. 8 applies to copies: they apply equally to both."* He asked for information about the charges. By email dated 8 November 2021, the Council informed him that the copying charge for one tithe map was £15, that a list of charges was on their website, and that if over 40 tithe maps were requested, the Council would offer a discount of 20%.

11. The Appellant complained to the Commissioner on 5 December 2021. He stated that the basis of his complaint was that the Council was wrong to refuse his request under Regulation 8 EIR in that, so far as the information requested was made available at a charge, the charge specified did not comply with Regulation 8(3) EIR because the charge was not a reasonable amount; no request had been made in accordance Regulation 8(4) EIR; and the charge was not published in its schedule of charges in accordance with Regulation 8(8) EIR. He said that he would be satisfied if the Council were to disclose the requested data in electronic form to him, subject to any reasonable charge to cover the actual costs of disclosure. He did not consider that a charge of £5,100 (being 425 (the number of tithe maps) x £15 x 80%) was reasonable.

12. In his investigation of the Appellant's complaint, on 31 August 2022, the Commissioner asked the Council the following in the context of the application of Regulation 6(1)(b) EIR:

"...

a. Please confirm what the information is, and how many individual documents fall within the request (I understand it is likely to be a large number of tithe maps).

b. Please specify in what form the information is available for public inspection (i.e. original hardcopies, facsimile hardcopies, digital copies viewable on the screen, etc).

c. Please explain how a member of the public could arrange to inspect the information (e.g. the address/es they would have to attend, the current opening times, any reader booking system).

d. Please explain why you consider the information to be easily accessible to the specific applicant in this case.

Please note: Whilst I understand the authority has also applied regulation 8 (charging), I am unsure whether this is compatible with its reliance on regulation 6(1)(b). At this stage I only pose the required questions for regulation 6(1)(b),but will contact you further if we need detail about regulation 8. …"

13. The Council responded on 21 October 2022 as follows (adopting the same paragraph lettering as the Commissioner had used):

"...

a. The tithe maps are historical documents dating to mid-19th century, and are large scale maps of all tithable lands in a parish. The maps show each piece of tithable land, identified by its tithe field number, which is linked to a written description in the apportionment. There are over 400 maps.

b. The tithe maps are extremely large documents, many 14 foot and over in length and width. There is a facsimile copy held in a digital format of each map, stored on an external hard drive which is an orderable item in the archive Searchroom. These images are not available online or on KCC networked storage because of the total size of the images.

c. The information is available for free access in the Searchroom at the Kent history and Library Centre in Maidstone, ME14, 1LQ. The archive Searchroom is open from 9-5 pm, 5 days a week, Tuesday – Saturday. We are open on Saturdays, to ensure access for those customers who may be unavailable during the week. Booking a seat is via email, though we also accept walk ins if we have enough space. It is advisable to book because then a customer can pre order documents they wish to view, and they will be waiting for them upon arrival. We can also answer any questions in advance of the visit. To view a document the customer can use the Kent Library card which is made archive enabled after a member of staff has sight of a document with a current address and a photograph. We no longer operate under any Covid restrictions.

d. The applicant has visited the Searchroom on several occasions. They hold a current library card which is archive enabled and have viewed many documents in the Searchroom including some of the documents they are asking access to in this request. It is very unusual for the Searchroom to be fully booked and we can generally accommodate customers on their preferred date. There are no restrictions to viewing the information, unless another customer has ordered the

hard drive, but this can be avoided by ordering in advance of the visit to the Searchroom."

14. By his Decision Notice, the Commissioner stated that although the Council had not specified the sub-section of Regulation 6(1) EIR on which it relied to refuse disclosure, he considered that it was relying on Regulation 6(1)(b) on the basis that the Council had stated that it considered the requested information was publicly available and easily accessible. He concluded that: any decision about whether information is easily accessible depends upon the circumstances; while he recognised that the Appellant would need to travel to the Archive centre, incurring both time and cost which would multiply depending upon the amount of separate visits needed, he also recognised that the information was made available for inspection at the centre, which is a local records office, whose purpose is to maintain historic records and allow their public inspection; he was satisfied that the information was publicly available and easily accessible to the Appellant at a facility established and maintained for the purpose of examination of the information, and that accordingly Regulation 6(1)(b) was engaged. He noted that he had not considered the Council's application of Regulation 8 EIR which appeared to have been based on a misunderstanding of the EIR, and that "*if information is publicly available and easily accessible for the purposes of the EIR, the Council is not required to make the information available in another form or format.*"

Notice of Appeal and the Commissioner's Response

15. By his Notice of Appeal dated 27 December 2022, the Appellant contended that:
    a. insofar as the information was available in other forms (i.e. for viewing at the Council's records office), it was neither publicly available nor easily accessible to the Appellant within the meaning of Regulation 6(1)(b) EIR, and the Commissioner was wrong to decide that the Request was correctly refused under that Regulation; the information was not publicly available by virtue of being available for inspection at the Council's records office, and it was not easily accessible because it was disclosed in a form remote from the Appellant, and incapable or impracticable of being captured in a satisfactory form for retention.
    b. The Commissioner failed to consider in the alternative whether, if the Request was correctly refused under Regulation 6(1)(b), the information should have been communicated under the Freedom of Information Act 2000 ("FOIA").
    c. If the Commissioner was wrong to decide that the Request was correctly refused under Regulation 6(1)(b) EIR, the fee proposed to be charged by the Council was not a reasonable amount for the purposes of Regulation 8(3) EIR, and was not contained within its schedule of charges for the purposes of Regulation 8(8); alternatively, if the information should have been communicated under FOIA, then the fee proposed to be charged by the Council was not within the powers conferred by section 9 FOIA.

16. By his Response to the appeal, the Commissioner submitted that: the information requested is environmental information within the meaning of the EIR and was not disclosable under

FOIA, which contains a specific exemption from disclosure for environmental information which falls to be considered under the EIR; he maintained that Regulation 6(1)(b) applied to the Request; the arrangements made by the Council for inspection of the information were such as to make it publicly available and easily accessible for the purposes of Regulation 6(1)(b); there is no geographical distance beyond which information is not easily accessible for inspection; a complaint that the information was not available in permanent form was irrelevant as the EIR concern access to information not documents; Regulation 8 EIR was irrelevant, given the Commissioner's finding as to the application of Regulation 6(1)(b).

17. By his Reply of 7 April 2023 to the Commissioner's Response, the Appellant supplied detailed submissions, which, while acknowledging their detail and erudite presentation, we summarise as follows:
    a. the information was not publicly available in another form or format; specifically, the keeping and disclosure of documents held in a records office does not make them publicly available for the purposes of Regulation 6(1)(b), which requires a clear intention to place the information in the public domain e.g. placing it on a website.
    b. the information was not easily accessible to the Appellant; the provision of information offered on a screen in an office is not the same as the opportunity to receive a copy of the information to review elsewhere; considerations of accessibility engage not just issues such as travel but whether the user is able to make use of the information with little difficulty i.e. whether the information is capable of being easily reviewed, captured and taken away for further study.
    c. Regulation 6(1)(b) EIR was not engaged. In that event it was not open to the Council to rely in the alternative on Regulation 6(1)(a) EIR, given that such arrangements as would be required to make the information available to the Appellant in another form or format (giving the Appellant access to, and assistance with the operation of, a hard-drive containing the information, or retrieving the original maps from storage) would result in an inferior and unsatisfactory medium for access to the information.
    d. If the Tribunal were to find that Regulation 6(1) EIR was engaged, the information requested should be disclosed under FOIA; and that the information was not exempt from disclosure pursuant to s39 FOIA.
    e. If the Tribunal were to find that the Request was not one to which Regulation 6(1) applied, the Council's proposed charge of £5,100 was not in accordance with Regulation 8 EIR as it was not a reasonable amount; such a sum would deter any requester from accessing the information and it would far exceed the actual costs of supplying the information.

18. By his final written submissions dated 6 September 2023, the Commissioner stated his position as follows: in making information publicly available, an authority is not required to provide permanent copies of it; any failure by an authority to disseminate information as widely as possible by electronic means has no bearing on whether the information is to be regarded as "*publicly available*" or "*easily accessible*" under Regulation 6(1)(b); the information is publicly available and easily accessible to the Appellant; as the information is environmental information, its disclosure falls to be considered under EIR, not FOIA; Regulation 8 EIR is not engaged on the facts of this case as the requested information is

already publicly available and easily accessible to the Appellant under Regulation 6(1)(b), and, in any event, the assessment of a reasonable charge is a matter for the Council to determine in the first instance.

Applicable law

19. The relevant provisions of EIR are as follows:

4 Dissemination of environmental information

(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.

(2) For the purposes of paragraph (1) the use of electronic means to make information available or to organize information shall not be required in relation to information collected before 1st January 2005 in non-electronic form.

(3) Paragraph (1) shall not extend to making available or disseminating information which a public authority would be entitled to refuse to disclose under regulation 12.

(4) The information under paragraph (1) shall include at least—
  (a) the information referred to in Article 7(2) of the Directive; and
  (b) facts and analyses of facts which the public authority considers relevant and important in framing major environmental policy proposals.

5 Duty to make available environmental information on request

(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.

…

6 Form and format of information

(1) Where an applicant requests that the information be made available in a particular form or format, a public authority shall make it so available, unless -

  (a) it is reasonable for it to make the information available in another form or format; or
  (b) the information is already publicly available and easily accessible to the applicant in another form or format.

8 Charging

(1) Subject to paragraphs (2) to (8), where a public authority makes environmental information available in accordance with regulation 5(1), the authority may charge the applicant for making the information available.

(2) A public authority shall not make any charge for allowing an applicant–

(a) to access any public registers or lists of environmental information held by the public authority; or

(b) to examine the information requested at the place which the public authority makes available for that examination.

(3) A charge under paragraph (1) shall not exceed an amount which the public authority is satisfied is a reasonable amount.

(4) A public authority may require advance payment of a charge for making environmental information available and if it does it shall, no later than 20 working days after the date of receipt of the request for the information, notify the applicant of this requirement and of the amount of the advance payment.

(5) Where a public authority has notified an applicant under paragraph (4) that advance payment is required, the public authority is not required–

(a) to make available the information requested; or

(b) to comply with regulations 6 or 14

unless the charge is paid no later than 60 working days after the date on which it gave the notification.

(6) The period beginning with the day on which the notification of a requirement for an advance payment is made and ending on the day on which that payment is received by the public authority is to be disregarded for the purposes of determining the period of 20 working days referred to in the provisions in paragraph (7), including any extension to those periods under regulation 7(1).

(7) The provisions referred to in paragraph (6) are–

(a) regulation 5(2);

(b) regulation 6(2)(a); and

(c) regulation 14(2).

(8) A public authority shall publish and make available to applicants–

(a) a schedule of its charges; and

(b) information on the circumstances in which a charge may be made or waived.

20. The relevant provisions of FOIA are as follows:

1 General right of access to information held by public authorities

(1) 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.

(2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.

2 Effect of the exemptions in Part II

(1) Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either —

(a) the provision confers absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information, section 1(1)(a) does not apply.

(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

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

(3) For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption—

(a) section 21 …

9 Fees

(1) A public authority to whom a request for information is made may, within the period for complying with section 1(1), give the applicant a notice in writing (in this Act referred to as a "fees notice") stating that a fee of an amount specified in the notice is to be charged by the authority for complying with section 1(1).

(2) Where a fees notice has been given to the applicant, the public authority is not obliged to comply with section 1(1) unless the fee is paid within the period of three months beginning with the day on which the fees notice is given to the applicant.

(3) Subject to subsection (5), any fee under this section must be determined by the public authority in accordance with regulations made by the Minister for the Cabinet Office.

(4) Regulations under subsection (3) may, in particular, provide—

(a) that no fee is to be payable in prescribed cases,

(b) that any fee is not to exceed such maximum as may be specified in, or determined in accordance with, the regulations, and

(c) that any fee is to be calculated in such manner as may be prescribed by the regulations.

(5) Subsection (3) does not apply where provision is made by or under any enactment as to the fee that may be charged by the public authority for the disclosure of the information.

21 Information accessible to applicant by other means

(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.

(2) For the purposes of subsection (1)—

(a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and

(b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.

(3) For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.

39 Environmental information

(1) Information is exempt information if the public authority holding it—

(a) is obliged by environmental information regulations to make the information available to the public in accordance with the regulations, or

(b) would be so obliged but for any exemption contained in the regulations.

The hearing

21. For the purposes of determining this appeal, we have considered all the material contained in the Hearing Bundle, the Bundle of Authorities, final written submissions from the Commissioner, a Bundle of legislation filed by the Appellant, and the Appellant's oral submissions.

Discussion

Regulation 6(1) EIR

22. The parties agree, and the Tribunal finds that, the information requested is environmental information within the meaning of EIR.

23. Regulation 6(1) EIR provides that an applicant is entitled to relevant information in a particular form or format, if so requested, unless either of Regulation 6(1) (a) or (b) is engaged. In refusing to provide the information as requested by the Appellant, the Council has elected to rely on Regulation 6(1)(b).

24. The Appellant contends that the information is neither publicly available nor easily accessible. We deal with each of those propositions in turn

Is the information publicly available?

25. The Appellant submits that we should interpret the words "*publicly available*" in Regulation 6(1)(b) EIR by reference to (1) the European Council Directive 2003/4/CE on public access to environmental information ("the Directive"), transposed by EIR pursuant to paragraph 2(2) of Schedule 2 to the European Communities Act 1972; and (2) the United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, knowns as the Aarhus Convention ("the Convention"), to which the Directive was intended to give effect. The Convention entered into force on 30 October 2001, and was ratified by the United Kingdom on 23 February 2005. Provisions of the Convention have been reproduced in the Directive.

26. The EIR are retained EU law pursuant to s2 of the European Union (Withdrawal) Act 2018. Subject to an exception made for the Supreme Court and other specified appeal Courts, s6(3)(a) of the European Union (Withdrawal) Act requires that "*any question as to the validity, meaning or effect of any retained EU law is to be decided … in accordance with any retained case law and any retained general principles of EU law.*" This means that the interpretive approach applicable to EU law applies to retained EU law; legislative provisions should be interpreted in light of the objectives they are intended to achieve. By virtue of the Marleasing principle of consistent interpretation (pursuant to the CJEU ruling in **Case C-106/89, Marleasing SA v La Comercial Internacional de Alimentación SA,** EU:C:1990:395), domestic courts must interpret domestic legislation compatibly with EU law.

27. The Recital of the Directive provides as follows:

Recital

…

(1) 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.

…

(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 inclusion by the European Community.

…

(8) It is necessary to ensure that any natural and legal person has a right of access to environmental information held by or for public authorities without his having to state an interest.

…

(9) It is also necessary that public authorities make available and disseminate environmental information to the general public to the widest extent possible, in particular by using information and communication technologies. The future development of these technologies should be taken into account in the reporting on, and reviewing of, this Directive.

...

(14) Public authorities should make environmental information available in the form or format requested by an applicant unless it is already publicly available in another form or format or it is reasonable to make it available in another form or format. In addition, public authorities should be required to make all reasonable efforts to maintain the environmental information held by or for them in forms or formats that are readily reproducible and accessible by electronic means.

…

(15) Member States should determine the practical arrangements under which such information is effectively made available. These arrangements shall guarantee that the information is effectively and easily accessible and progressively becomes available to the public through public telecommunications networks, including publicly accessible lists of public authorities and registers or lists of environmental information held by or for public authorities.

...

(21) In order to increase public awareness in environmental matters and to improve environmental protection, public authorities should, as appropriate, make available and disseminate information on the environment which is relevant to their functions, in particular by means of computer telecommunication and/or electronic technology, where available.

...

28. Article 1 of the Directive provides as follows:

Article 1

Objectives

The objectives of this Directive are:

(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.

...

29. Article 3 of the Directive provides as follows:

Article 3

Access to environmental information upon request

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.
3. *If a request is formulated in too general a manner, the public authority shall as soon as possible, and at the latest within the timeframe laid down in paragraph 2(a), ask the applicant to specify the request and shall assist the applicant in doing so, e.g. by providing information on the use of the public registers referred to in paragraph 5(c). The public authorities may, where they deem it appropriate, refuse the request under Article 4(1)(c).*
4. *Where an applicant requests a public authority to make environmental information available in a specific form or format (including in the form of copies), the public authority shall make it so available unless:*
   (a) it is already publicly available in another form or format, in particular under Article 7, which is easily accessible by applicants; or
   (b) it is reasonable for the public authority to make it available in another form or format, in which case reasons shall be given for making it available in that form or format.

   For the purposes of this paragraph, public authorities shall make all reasonable efforts to maintain environmental information held by or for them in forms or formats that are readily reproducible and accessible by computer telecommunications or by other electronic means.
   The reasons for a refusal to make information available, in full or in part, in the form or format requested shall be provided to the applicant within the time limit referred to in paragraph 2(a).

5. *For the purposes of this Article, Member States shall ensure that:*

(a) officials are required to support the public in seeking access to information;

(b) lists of public authorities are publicly accessible; and

(c) the practical arrangements are defined for ensuring that the right of access to environmental information can be effectively exercised, such as:

— the designation of information officers;

— the establishment and maintenance of facilities for the examination of the information required,

— registers or lists of the environmental information held by public authorities or information points, with clear indications of where such information can be found.

Member States shall ensure that public authorities inform the public adequately of the rights they enjoy as a result of this Directive and to an appropriate extent provide information, guidance and advice to this end."

30. Article 5 of the Directive provides as follows:

Article 5

Charges

1. Access to any public registers or lists established and maintained as mentioned in Article 3(5) and examination in situ of the information requested shall be free of charge.
2. Public authorities may make a charge for supplying any environmental information but such charge shall not exceed a reasonable amount.
3. Where charges are made, public authorities shall publish and make available to applicants a schedule of such charges as well as information on the circumstances in which a charge may be levied or waived.

31. Article 7 of the Directive provides as follows:

Article 7

Dissemination of environmental information

1. Member States shall take the necessary measures to ensure that public authorities organise the environmental information which is relevant to their functions and which is held by or for them, with a view to its active and systematic dissemination to the public, in particular by means of computer telecommunication and/or electronic technology, where available.

The information made available by means of computer telecommunication and/or electronic technology need not include information collected before the entry into force of this Directive unless it is already available in electronic form.

Member States shall ensure that environmental information progressively becomes available in electronic databases which are easily accessible to the public through public telecommunication networks.

...

32. Article 1 of the Convention provides as follows:

Article 1

OBJECTIVE

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.

…

33. Article 4 of the Convention provides as follows:

Article 4

ACCESS TO ENVIRONMENTAL INFORMATION

1. *Each Party shall ensure that, subject to the following paragraphs of this article, public authorities, in response to a request for environmental information, make such information available to the public, within the framework of national legislation, including, where requested and subject to subparagraph (b) below, copies of the actual documentation containing or comprising such information:*

    (a) Without an interest having to be stated;

    (b) In the form requested unless:

        (i) It is reasonable for the public authority to make it available in another form, in which case reasons shall be given for making it available in that form; or

        (ii) The information is already publicly available in another form.

…

34. Article 5 of the Convention provides as follows:

Article 5

COLLECTION AND DISSEMINATION OF ENVIRONMENTAL INFORMATION

…

2. *Each Party shall ensure that, within the framework of national legislation, the way in which public authorities make environmental information available to the public is transparent, and that environmental is effectively accessible, inter alia, by:*

    (a) providing sufficient information to the public about the type and scope of environmental information held by the relevant public authorities, the basic terms and conditions under which such information is made available and accessible, and the process by which it can be obtained;

    (b) Establishing and maintaining practical arrangements, such as:

    (i) Publicly accessible lists, registers or files;

    (ii) Requiring officials to support the public in seeking access to information under this Convention; and

    (iii) The identification of points of contact; and

    (c) Providing access to the environmental information contained in lists, registers or files as referred to in subparagraph (b) (i) above free of charge.

3. *Each Party shall ensure that environmental information progressively becomes available in electronic databases which are easily accessible to the public through public telecommunications networks.*

…

35. We do not record the Appellant's full analysis of the provisions of the Convention or the Directive in our decision although we have given it full consideration. In summary, he submitted that: making information publicly available requires a clear intention to place information in the public domain, for example, on a website, in a reference book or in a publication scheme; this interpretation is supported by Article 3(4)(a) of the Directive, which provides that where an applicant requests a public authority to make environmental information available in a specific form or format (including in the form of copies), the public authority shall make it so available unless it is already publicly available in another form or format, in particular under Article 7, which is easily accessible by applicants; Article 7(1) requires public authorities to take steps to ensure the "*active and systematic dissemination to the public, in particular by means of computer telecommunication and/or electronic technology.";* Article 7(1) also requires member states to "*ensure that environmental information progressively becomes available in electronic databases which are easily accessible to the public through public telecommunication networks.*"; Article 7(1) is replicated in Regulation 4(1) EIR.

36. The Appellant noted also the objectives of the Directive. He submitted that the words "*publicly available*" must be interpreted in line with the objectives, and what he described as the "gloss" provided by Article 3(4)(a) of the Directive; and that making information available, particularly electronic information, in a council's records office was not making information publicly available for the purpose of Regulation 6(1)(b) EIR. While he acknowledged that Article 3(5)(a) of the Directive required, inter alia, "*the establishment and maintenance of facilities for the examination of the information required",* he submitted that merely maintaining such facilities does not render the information publicly available, rather that the maintenance of such facilities is one of a number of practical arrangements intended to promote the exercise of an applicant's right to the information, and the discharge of such measures does not in itself cause such information to become "*publicly available*".

37. The Appellant further submitted that we should have regard to Article 5(2) of the Convention requiring the State to ensure that environmental information is effectively accessible, and Article 5(3) requiring the State to ensure that environmental information progressively becomes available in electronic databases which are easily accessible to the public through public telecommunications networks. He submitted that it is notable that while Article 4(1) of the Convention provides for an exception from the information being made available upon request in the form requested by an applicant if "*the information is already publicly available in another form*.", it does not contain the additional condition that the information should also be "*easily accessible*"; those words have been included in Article 3(4)(a) of the Directive, and replicated in Regulation 6(1)(b) EIR. He suggested that the Convention does not include a requirement that publicly available information should also be easily accessible because "*publicly available*" was intended to have a restrictive meaning, namely to convey that the information should be placed in the public domain e.g. on a website, in a reference book or in a publication scheme. He submitted that by this means, a public authority must act in accordance with Article 4(1) of the Convention, whereunder an applicant may request "*copies of the actual documentation containing or comprising*" the information, unless the information is, as the Appellant puts it, "genuinely" publicly available in the manners described by him.

38. As we have already observed, the Tribunal must interpret EIR, so far as possible, in the light of the meaning and purpose of the Directive to achieve the result pursued by the Directive. For this purpose, we must interpret, first, the relevant parts of the Directive, and, second, the EIR in the light of the meaning of the Directive, thus interpreted: see **HMRC v IDT Card Services [2006] EWCA Civ 29**. At the second stage, our interpretation of EIR is to be undertaken in accordance with the following principles (see: **Vodafone 2 v JMRC [2009] EWCA Civ 446 [37]**): it is not constrained by conventional rules of construction; it does not require ambiguity in the legislative language; it is not an exercise in semantics or linguistics; it permits departure from the strict and literal application of the words which the legislature has elected to use; it permits the implication of words necessary to comply with Community law obligations; and the precise form of the words to be implied does not matter. However, it is not for us to interpret the legislation in such a way as to cross the boundary between

interpretation and amendment or to make a decision which gives rise to practical or policy repercussions which we are not equipped to evaluate.

39. We interpret the Directive as follows: its objective is to guarantee a right of access to environmental information, and to set out the basic principles of, and practical arrangements for, exercise of that right, and to ensure that the information is progressively made available and disseminated to the public, to which end the use of computer telecommunication and/or electronic technology, where available, shall be promoted. Where an applicant requests environmental information to be made available in a specific form or format (including in the form of copies), it shall be made so available unless it is already publicly available in another form or format, which is easily accessible by applicants or it is reasonable for it to be made available in another form or format, and for these purposes, all reasonable efforts shall be made to maintain environmental information in forms or formats which are readily reproducible and accessible by computer telecommunications or by other electronic means.

40. We may take the Convention into account in resolving ambiguities in legislation intended to give it effect (see **Morgan v Hinton Organics (Wessex) Limited 2009 EWCA Civ 107**, per Carnworth LJ [22]: "*For the purposes of domestic law, the Convention has the status of an international treaty, not directly incorporated. Its provisions cannot be directly applied by domestic courts, but may be taken into account in resolving ambiguities in legislation intended to give it effect (see Halsbury's Laws Vol 44(1) Statutes para 1439)). Ratification by the European Community itself gives the European Commission the right to ensure that Member States comply with the Aarhus obligations in areas within Community competence (see Commission v France Case C-239/03 (2004) ECR I09325 paras 25-31). …*"

41. The Appellant submitted that, having regard to the Convention, the Directive and the EIR, the Council has fallen short of its obligations to disseminate the information more pro-actively than by provision of a digital copy of it in its Searchroom. Specifically, he submitted that Article 7(1) of the Directive requires public authorities to take steps to ensure the "*active and systematic dissemination to the public, in particular by means of computer telecommunication and/or electronic technology.*" We have noted that, in fact, Article 7(1) of the Directive provides for public authorities to organise the information "*with a view to*" dissemination by such means, "*where available*".

42. The Appellant further submitted that Article 4(1) of the Convention provides that, in response to a request for information, public authorities shall make available copies of the actual documentation containing or comprising the information. However, that requirement is expressly subject to a provision that the authority need not provide copies, if so requested, if it is reasonable for the public authority to make the information available in another form, or the information is already publicly available in another form. The Appellant's submission was that for that provision to apply, the information must be, as he put it, "genuinely" publicly available, by which he means on a website, in a public library or in a publication scheme.

43. We are conscious that the close analysis of the Convention and the Directive invited by the Appellant, may tend to conflate the issue of the Council's fundamental compliance with Regulation 4 EIR (and behind EIR, the Directive), which is not an issue before us, with the interpretation of the words "*publicly available*" within Regulation 6(1)(b) EIR for the purposes of considering the lawfulness of the Decision Notice, which is an issue before us. The question before us is whether the access currently afforded by the Council is such as to enable the information properly to be characterised as "*publicly available*" (and "*easily accessible*", with which separate concept we deal below) so as to engage the application of Regulation 6(1)(b).

44. We do not consider that there is any ambiguity in the words "*publicly available"* which requires us to draw on the Directive or the Convention behind it to understand them, nor any words we need to imply or read in to give effect to the Directive's intention - which is, in summary, that such information should be publicly available, promoting the use of electronic technology, including telecommunication networks, where available. We consider that "*publicly available*" means "a*vailable to the public*". We consider that the information which is subject of the Request is available to the public in the ordinary sense of those words: the information is not restricted from any person in principle. Both the Convention and the Directive set out non-exclusive methods by which that should be achieved, with an exhortation for the use of electronic methods where possible. In this case, the method by which the relevant information is made available to the public is as set out in the Council's letter of 21 October 2022, to which we have already referred. The progressive dissemination of information by electronic means is a separate, ancillary issue (as the means by which the Directive and Convention would prefer information to be made available); the primary consideration is whether information is publicly available.

45. The Appellant has submitted that for information to be properly characterised as publicly available, it must be "genuinely" publicly available, which means published in a library or on a website or in a publication scheme. We do not consider that the availability to the public of the digital maps in the Council's Searchroom is any less "genuine" than that which might be achieved by publication of the types identified by the Appellant, and is consonant with the requirements of Article 3(5)(c) of the Directive. Such publications are some, but not the only, methods of making the information available to the public. Moreover, the information has been made available using electronic technology, even though not published online. We accept that, were the information to be published online, that may be more convenient to the Appellant himself (even if not to someone who did not have internet access and for whom the information would only be available by a visit to the Searchroom), but we consider that that raises an issue of access rather than 'availability' in principle.

Is the information easily accessible in another form or format?

46. The Appellant submitted that "*accessible*" connotes not only the ability to access information but to make use of it, engaging consideration not only of issues such as the distance an applicant may need to travel to the Searchroom, and the associated costs, but the ease with which an applicant may review, capture and take away the information to study.

47. He invited us to consider the Oxford English Dictionary definition of "*accessible*" as "*able to be received, acquired, or made use of; open or available (to a particular class of person)*" He also referred to that Dictionary's definition of "*easily*" as meaning "*with little exertion, labour, or difficulty*". He fairly noted in both cases that he had selected the most appropriate definition of several for his purpose.

48. He explained to us the challenges of trying to capture the information viewed on a screen in the Searchroom: there are 425 tithe maps of which digital copies have been made, each containing information relating to features such as fields, buildings and roads across each parish of Kent; were it even possible to photograph the screen or print copies, that would effectively dissect each map into fragments, and make relevant detail difficult to discern.

49. He submitted that the exceptions to the requested form of disclosure provided for by Regulation 6(1) (a) and (b) are drafted with the applicant's interests foremost, and the applicant's preferred form of disclosure is only to be overridden because the alternative (in either case) is almost equally acceptable.

50. We consider that that is to overstate consideration of the applicant's convenience. The exceptions from disclosure afforded by Regulation 6(1)(a) and (b) are intended, in our view, to balance against the rights of the applicant the burden on a public authority. On the facts of this case, we consider that the information is easily accessible to the Appellant. We accept that he must make a journey, at cost, to the Searchroom but we do not consider his journey times or costs to be material for the purposes of EIR. Some kind of travel is inevitable for any applicant where the information, albeit in electronic form, is held in a specific, physical location. Travel distances and travel costs will necessarily vary for individuals, and consequently achieving access, in that sense, will inevitably take longer or be more expensive or arduous for some than for others.

51. As it is, we do not consider that accessibility to information is properly determined by considerations of travel for the purposes of EIR. We consider that accessibility connotes, more immediately, the ability to "get at" (our own, inelegant phrase) the information in its entirety. In our view, access to the information is afforded directly to the Appellant at the point of the screen. He has not suggested that any of the information is not readily accessible by him at the point of the screen. The practical arrangements around that access which are offered by the Council afford every reasonable accommodation.

52. The Appellant's construction of "*accessible*" entails not just the ability to access the information, but the ability to capture and retain the information in a particular way for a specific use by him outside the Searchroom, achieved by receipt of electronic copies of the maps. We consider that that is to strain the meaning of the words "*easily accessible to the applicant*" in the context of Regulation 6(1)(b), and we find no support for that in the

Directive or the Convention. In this case, the Appellant has two challenges : (1) the nature of the information and the original medium in which it was collected (large maps) and from which it has been transposed to digital format, and (2) the use which he wishes to make of the information. The former precedes, and the latter succeeds, the point of access itself. We do not construe a requirement that the information be "*easily accessible"* as having to accommodate either of those challenges.

53. The Appellant referred us to **Office of Communications v Information Commissioner EA/2006/0078**, in which the First-tier Tribunal found [69] that whether the information sought by the applicant in a particular form or format was easily accessible to the applicant should be assessed by reference to the particular format which had been requested. In that case, the applicant sought information relating to the location, ownership and technical attributes of mobile phone cellular base stations in the United Kingdom contained in localised maps published on a website operated by Ofcom. He requested for every mobile phone base listed on the website, various categories of information, including a grid reference number. He noted that there was no facility to download the information on all the base stations. He asked for the information to be supplied as either a text file, csv file, Access database, or Excel spreadsheet. The Tribunal found that while access to the website was easy and that it would have been possible, once on the website, to extract the relevant information, base station by base station, and to assemble it into a text listing of some form containing the whole of the network, the second of those steps would have been time consuming, could not be described as an easy process, and it would not have yielded the grid number, which was not, in any event, disclosed on the site. On that basis the Tribunal did not consider that that part of the information could properly be described as easily accessible.

54. The Tribunal is not bound by the previous decisions of the First-tier Tribunal. It seems to us in this case that determining whether the information requested is to be regarded as easily accessible by reference to the particular format requested, would be the wrong approach. By that means, there is a risk that assessment of accessibility is viewed only, or overly, through the lens of the applicant's convenience and purpose. Possible difficulties in recording and using information, once accessed, do not make information any less accessible. Moreover, there is no suggestion before us that any information in the original tithe maps has not been included in the digitised versions so that it is not accessible at all through that medium.

55. We are satisfied that the information requested is both publicly available and easily accessible to the Appellant in another form or format, and that the Council was entitled to refuse the Request, pursuant to Regulation 6(1)(b) EIR.

Application of Regulation 6(1)(a) EIR

56. The Appellant suggested that if the Tribunal were to find that Regulation 6(1)(b) did not apply, the Respondent may wish to argue that Regulation 6(1)(a) may apply in the alternative, and the Appellant sought to anticipate such an argument in his written submissions. The Commissioner (the only Respondent) has not offered such an argument,

and the Council's (and the Commissioner's) position has rested on Regulation 6(1)(b) alone. We do not therefore address the Appellant's points in relation to Regulation 6(1)(a); nor do we think any analysis of that part of the Regulation is required, given our findings on Regulation 6(1)(b).

Application of the Freedom of Information Act 2000 ("FOIA")

57. The Appellant submitted that, if we were to find that the Council was entitled to rely on Regulation 6(1)(b) EIR to refuse the Request, the information ought to be disclosed under FOIA. This was on the basis that if the Council is not required to make the information available under EIR because of the application of Regulation 6(1)(b), the information nevertheless satisfies section 39(1)(a) FOIA because the information must be made available under EIR, and is not therefore exempt under section 39(1)(b).

58. The Commissioner's position is that the information requested is environmental information which falls to be considered by EIR not by FOIA; section 39(1)(a) FOIA provides that information is exempt information if the public authority holding it is obliged by environmental information regulations to make the information available to the public in accordance with those regulations.

59. As was noted by the Tribunal in **Rhondda Cynon Taff CBC v IC, IT, 5 December 2007**, EIR is legislation derived from the Directive and is enacted in pursuant of paragraph 2(2) of Schedule 2 to the European Communities Act 1972. FOIA, by contrast, is primary domestic legislation. In that case, the Tribunal viewed it as better to describe the two regimes as running in parallel. Each legislation imposes distinct obligations on public authorities, most notably section 1(1)(b) FOIA provides that an applicant has a right to have the information communicated to him, whereas Regulation 5 EIR provides that the public authority is obliged to make environmental information it holds available to the applicant upon request i.e. there is no obligation to communicate it to the applicant; inspection at the authority's records office may be sufficient.

60. We do not accept the Commissioner's submission (as we understood it) that disclosure of environmental information does not fall to be considered under FOIA, only under EIR. We read section 39 FOIA as acknowledging EIR as the paramount but not exclusive regime governing the disclosure of environmental information. The legislation is effectively linked in that section 39(1) FOIA gives an exemption under FOIA for information which the public authority (a) is obliged by EIR to make available, or (b) would be obliged by EIR to make available were it not for an exemption in EIR. However, the FOIA exemption is a qualified exemption so that the public interest in maintaining the exemption must outweigh the public interest in disclosure.

61. The Appellant speculated in his Reply to the Commissioner's Response to his Notice of Appeal as to what public interest might justify withholding the information in the form

sought, even though this was not an issue which the Commissioner addressed in his Response, or in the Decision Notice). The Appellant noted that in the Commissioner's published guidance "Charging for information under the Environmental Information Regulations (EIR)", the ICO has stated "*Section 39 of FOIA states that information is exempt from disclosure under the Act if the public authority is obliged to disclose the information under the EIR. The exemption is subject to a public interest test. Although there is a public interest in making information freely available under FOIA, the ICO considers that there is an overriding public interest in implementing the EIR as intended by the Directive. Therefore, the ICO would not accept the argument that it would be in the public interest for requests chargeable under the EIR to be handled under FOIA instead*." The Commissioner also did not address the issue of the public interest in his final written submissions.

62. The Appellant inferred that perhaps the Council did not wish its intellectual property rights in the map data to be prejudiced by proliferation of the data in the public domain e.g. if it were to place the data on a website. He submitted that the placing of the data in the public domain would indirectly achieve the objectives of the Directive; that the Council had received a substantial grant to digitise the maps so that the public might have access to the data; the Convention recognises that public authorities hold environmental information in the public interest; and the Convention Guidance refers to the requirement of public authorities to serve the needs of the public, including individual members of the public.

63. It may be that it was implicit in the Commissioner's position that there is a public interest in upholding EIR as the exclusive regime to govern disclosure of environmental information. It is not obvious to us, however, that there is a public interest in upholding EIR as the exclusive regime, and, absent submission from the Commissioner on the public interest point in any event, we are not satisfied, in all the circumstances of the case, that the public interest in maintaining the exemption can be said to outweigh the public interest in disclosing the information. On that basis, we do not find that the information is exempt from disclosure under FOIA.

Section 21 FOIA

64. Accordingly, it is necessary for us to consider section 21 FOIA, which provides that information which is reasonably accessible to the applicant otherwise than under s1 FOIA is exempt from disclosure under FOIA. Information is to be regarded as reasonably accessible to the applicant even though it is accessible only on payment (section 21(2)(a)), and if it is information which the public authority is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment (section 21(2)(b)).

65. We read section 21(2) as identifying non-exclusive circumstances in which information might be characterised as reasonably accessible. Section 21(2)(a) is of no relevance as the Council is not making the information available to the Appellant under the EIR on condition

of payment. We do not consider that the information falls to be characterised as reasonably accessible under section 21(2)(b) as the Council is not obliged to communicate the information in the maps to the Appellant (as distinct from making it available to him).

66. Section 21(1)(3) provides that information which does not fall within section 21(2)(b) is not to be regarded as reasonably accessible to an applicant merely because it is available from the public authority on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme. Although the tithe maps are not available in accordance with the Council's publication scheme, in our view, it is not right to characterise the information in the maps as being available on request. The Council has made the information publicly available. The request which an applicant must make is only to enable practical arrangements for inspection to be made.

67. We consider that the information is to be regarded as reasonably accessible to the Appellant within the meaning of section 21 FOIA. We accept that he must travel, at a cost and with expenditure of time, to the Searchroom but we do not consider that this means the information is not reasonably accessible by him. The Searchroom opening hours are generous. He has not suggested that any of the information is not readily accessible at the point of the screen in the Council's Searchroom. We remind ourselves of the Appellant's position that accessibility of information entails the ability to capture, retain and take it away for study. As we have already observed, we do not consider that such matters properly inform a determination of accessibility per se. We conclude, therefore, that the information is exempt from disclosure pursuant to section 21 FOIA.

68. In circumstances where we find that the information is exempt from disclosure pursuant to Regulation 6(1)(b), it is not necessary for us to address the Appellant's submissions as to the reasonableness of the Council's proposed charges for copies of the maps under Regulation 8 EIR.

69. The Tribunal upholds the Decision Notice and dismisses the appeal.

Signed: *Judge Foss* Date: 1 December 2023