
**ACCESSTO ENVIRONMENTAL INFORMATION
IN THE UNITED KINGDOM
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1. *“You get a great deal more light by keeping your ears open among the rank and file of your fellow citizens than you do in any private conference whatever”* President Woodrow Wilson
 2. I speak as (for now) an EU citizen. It is a great honour to be invited to address a symposium in the country of origin of Advocate General Kokott—who has demonstrated in her Opinions not only a true understanding of the EU constitutional principles aiming to achieve a high standard of protection and enhancement of the environment, but also a firm commitment to the rule of law in a democratic Union².
 3. The public needs to know (a) which bodies are subject to the Environmental Information Directive 2003/4/EC (‘the Directive’) (b) what rules and procedures apply (c) how much it may cost (d) what they can do if there is an unjustified refusal and (e) whether the reality matches the theory. I shall seek to address some, but by no means all, of these questions in the UK context.
 4. There is, in my view, a general culture of sympathy for the principle of openness on the part of the principal bodies charged with supervision of the regime in the UK such as the Information Commissioner and specialist tribunal judges. However inevitably, perhaps, the bodies which are obliged to disclose information are often reluctant so to do. Also, perhaps inevitably, practising lawyers such as myself have a limited view of the overall operation of the regime.
 5. **UK DOMESTIC LAW REGIME**

² See her Opinion in C- 467/10 InterEnvironnement Wallonie v Bruxelles etc which respects the amendments made by the EU Parliament to the Strategic Environmental Assessment Directive 2001/42/EC and contrast it with the judgement of the Court of Justice

6. The Directive has been transposed into English law by the Environmental Information Regulations 2004³ ('EIR 2004'). This transposing legislation broadly follows the pattern, and simply copies out, much of the Directive. There is a general presumption in favour of disclosure⁴. It cross refers to, uses some of the concepts defined in, and procedures established by the purely domestic Freedom of Information Act 2000 ('FOIA 2000'). FOIA 2000 covers all non environmental information held by public bodies but has some significant differences particularly in relation to scope and exceptions. FOIA 2000 was progressive "New Labour"⁵ legislation intended to increase government transparency. Notably Tony Blair⁶ has expressed regrets about the passage of this legislation but not about the Iraq War.

"Freedom of Information. Three harmless words. I look at those words as I write them., and feel like shaking my head until it drops off my shoulders. You idiot. You naïve, foolish, irresponsible nincompoop⁷. There is really no description of stupidity, no matter how vivid, that is adequate. I quake at the imbecility of it"

7. It is important to note that the width of exemptions under the EIR is narrower than under FOIA 2000. Under the Directive and EIR the interest which engages the exemption must always be balanced against public interest in disclosure. The CJEU has held that the cumulative effect of a number of adversely affected exemption interests may be weighed against the public interest in disclosure⁸. But the First Tier Tribunal nonetheless held that there was 'no sensible or logical link' between public safety and intellectual property rights and therefore that the weight of the two together was no more able to outweigh the public interest in disclosure than either one alone.⁹ FOIA 2000, by contrast, has some absolute exemptions. One of the provisions of FOIA 2000 which the EIR incorporate by reference is the power of the Attorney

³ SI 2004 No. 3391 This paper is based on the law applicable to England. The laws applicable to Wales, Scotland and Northern Ireland are broadly the same.

⁴ EIR 12 (2)

⁵ The self styled description of the originally socialist, but at that time, business friendly Labour Party in control of Parliament when the FOIA 2000 was under consideration

⁶ Prime Minister of UK whose government proposed FOIA 2000

⁷ Fool, idiot

⁸ C-71/10 Office of Communications v Information Commissioner

⁹ EA/2006/0078

General under s 53 to override an order by the IC disclose environmental information. The High Court¹⁰ effectively held that there was a contrast between the apparent meaning of EIR 5 (6) and the reality:

EIR 5(6) “Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply”

It is not uncommon in the environmental field for domestic transposing legislation to be drafted in a way which is misleading to most people, especially non UK lawyers.¹¹ As, however, has often been the case in recent years the Supreme Court has been more receptive to EU law than lower courts. The Supreme Court held¹² that the power which the High Court had found to override Tribunal decisions would have been incompatible with the Directive.

8. SCOPE: WHICH BODIES ARE SUBJECT TO THIS REGIME?

9. The Directive, which seeks to apply the Aarhus Convention¹³ to the European Union, applies to information held by or for public authorities. There is an extended definition of that term,

“Public authority” shall mean:

(a) government or other public administration, including advisory bodies, at national, regional or local level;

(b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment; and

(c) any natural or legal person having public responsibilities or functions, or providing public

¹⁰ R Evans v HM Attorney General [2013] EWHC 1960 (Admin)

¹¹ An egregious example is the misleading use of the terms “appropriate authority” to correspond to “competent authority” in the Conservation and Habitats Regulations 2017 3, 7 & 9 which give a domestic meaning to “competent authority” which substantively different from that in the Habitats Directive 92/43/EC

¹² [2015] UKSC 21

¹³ Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (UNECE Geneva),

services, relating to the environment under the control of a body or person falling within (a) or (b).

Member States may provide that this definition shall not include bodies or institutions when acting in a judicial or legislative capacity.....”

- 3 The Environmental Information Regulations 2004 defines “public authority” as—
 - (a) government departments;
 - (b) any other public authority.....
 - (c) (=Directive “b”) any other body or other person, that carries out functions of public administration; or
 - (d) (=Directive “c”) any other body or other person, that is under the control of a person falling within sub-paragraphs (a), (b) or (c) and—
 - (i) has public responsibilities relating to the environment;
 - (ii) exercises functions of a public nature relating to the environment; or
 - (iii) provides public services relating to the environment

4 The 2004 Regulations are readily available on line. Some of the leading EU cases come from UK references. The Regulations have not, however, been amended to make clear what has been decided by the Court of Justice. Nor has the Secretary of State provided clarification in the Code of Practice issued under EIR 16. However the Office of the Information Commissioner (“ICO”) established under FOIA 2000¹⁴ has issued helpful guidance. The Commissioner may overrule refusals by public bodies to disclose information and issue enforcement notices¹⁵. The effect of CJEU decisions is reflected in the ICO guidance. It would have been helpful, and in my view good practice, to have within the Regulations a non exhaustive¹⁶ list of bodies which were subject to the Regulations. That has not been done. Much uncertainty and non compliance has followed as to which bodies are within its scope.

5 There was a time when certain services were considered so important that they were provided by the state. Hence Ancient Rome had a network of aqueducts and sewers

¹⁴ FOIA 2000 Section 18

¹⁵ FOIA 2000 Sections 50 and 52

¹⁶ Ie a list, inclusion in which determined that a body was subject to the EIR 2000. Omission from such a list would not rule out *ad hoc* decisions that such bodies were public

constructed by state officials such as the magistrate Appius Claudius Caecus who was responsible for the first aqueduct (the Acqua Appia). Now in the UK commercial entities have been entrusted with the provision of such services. There has been much uncertainty about the effect of the definition of “public authority”. An important issue is the applicability of the Directive to such privatised utilities. The Upper Tribunal¹⁷ (‘UT’) (appellate administrative court) decided in Smartsources v Information Commissioner¹⁸ that private suppliers of water and sewerage services were not public authorities or subject to the Directive and Regulations. (Smartsources was a commercial organisation seeking information with the intention of using it as part of a commercial service—so the UT was perhaps unconsciously influenced by seeing the dispute as between two commercial entities) The UT later in Fish Legal/Shirley v Information Commissioner¹⁹ referred the matter to the CJEU (C 279/12).

- 6 The Grand Chamber held *inter alia* in C 279/12 Fish Legal as to the three categories of public authority:

First Category of Public Authority (“a”) (“organs of state”)

“51 Entities which, organically, are administrative authorities, namely those which form part of the public administration or the executive of the State at whatever level, are public authorities for the purposes of Article 2(2)(a) of Directive 2003/4. This first category includes all legal persons governed by public law which have been set up by the State and which it alone can decide to dissolve.

Second Category of Public Authority (“b”) (“special powers for services of public interest”)

52 The second category of public authorities, defined in Article 2(2)(b) of Directive 2003/4, concerns administrative authorities defined in functional terms, namely entities, be they legal persons governed by public law or by private law, which are entrusted, under the legal regime which is applicable to them, with *the performance of services of public*

¹⁷ The hierarchy of official review bodies in respect of access to information held by or for public bodies, in ascending order, England is (1) Information Commissioner, to whom complaints about non compliance may be made, and who has enforcement powers, and from whose decisions challenge may be made in the (2) First Tier Tribunal, from which appeals are to the (3) Upper Tribunal, from which appeals are to the (4) Court of Appeal from which appeals are to the (5) Supreme Court

¹⁸ Upper tribunal decision GI/2458/2010

¹⁹ [2014] 2 CMLR 36

interest, inter alia in the environmental field, and which are, for this purpose, vested with *special powers* beyond those which result from the normal rules applicable in relations between persons governed by private law. (my emphasis)

- 53 In the present instance, it is not in dispute that the water companies concerned are entrusted, under the applicable national law, in particular the WIA 1991, with services of public interest, namely the maintenance and development of water and sewerage infrastructure as well as water supply and sewage treatment, activities in relation to which, as the European Commission has observed, a number of environmental directives relating to water protection must indeed be complied with.
- 54 It is also clear from the information provided by the referring tribunal that, in order to perform those functions and provide those services, the water companies concerned have certain powers under the applicable national law, such as the power of **compulsory purchase**, the power to make **byelaws** relating to waterways and land in their ownership, the **power to discharge water** in certain circumstances, including into private watercourses, the **right to impose temporary hosepipe bans** and the **power to decide, in relation to certain customers and subject to strict conditions, to cut off the supply of water.**.....

Third Category of Public Authority (“c”) (“ control--environmental services without genuine autonomy”)

- 68 Those factors lead to the adoption of an interpretation of ‘control’, within the meaning of Article 2(2)(c) of Directive 2003/4, under which this third, residual, category of public authorities covers any entity which does not determine in a genuinely autonomous manner the way in which it performs the functions in the environmental field which are vested in it, since a public authority covered by Article 2(2)(a) or (b) of the directive is in a position to exert decisive influence on the entity’s action in that field.
- 69 The manner in which such a public authority may exert decisive influence pursuant to the powers which it has been allotted by the national legislature is irrelevant in this regard. It may take the form of, *inter alia*, a **power to issue directions** to the entities concerned, whether or not by exercising rights as a shareholder, the **power to suspend, annul after the event or require prior authorisation for decisions** taken by those entities, the **power to appoint or remove from office the members of their management bodies** or the majority of them, or the **power wholly or partly to deny the entities financing** to an extent that jeopardises their existence.
- 70 The mere fact that the entity in question is, like the water companies concerned, a commercial company subject to a specific system of regulation for the sector in question cannot exclude control within the meaning of Article 2(2)(c) of Directive 2003/4 in so far as the conditions

laid down in paragraph 68 of the present judgment are met in the case of that entity.

- 71 If the system concerned involves a particularly precise legal framework which lays down a set of rules determining the way in which such companies must perform the public functions related to environmental management with which they are entrusted, and which, as the case may be, includes administrative supervision intended to ensure that those rules are in fact complied with, where appropriate by means of the issuing of orders or the imposition of fines, it may follow that those entities **do not have genuine autonomy vis-à-vis the State, even if the latter is no longer in a position, following privatisation of the sector in question, to determine their day-to-day management.....**

Note: Exclusion of non environmental information under Third Category “c”

- 83 Commercial companies, such as the water companies concerned, which are capable of being a public authority by virtue of Article 2(2)(c) of the directive only in so far as, when they provide public services in the environmental field, they are under the control of a body or person falling within Article 2(2)(a) or (b) of the directive are not required to provide environmental information **if it is not disputed** that the information does **not** relate to the provision of such services. “

7 UK DOMESTIC RESPONSE TO THE CJEU RULING:

- 8 Thereafter the Upper Tribunal in Fish Legal/Shirley²⁰ accepted that, as to the Third Category of public bodies and the special powers test (Directive “b”/ Regulations “c”), issue was whether the powers gave the body an ability that conferred on it a practical advantage relative to the rules of private law. The water companies held powers regarding compulsory purchase, the making of byelaws, of entry into and taking action on land, the imposition of prohibitions on water usage and the exercise of a monopoly. Such powers were sufficient, collectively in themselves and as examples of powers of the same type, to satisfy the special powers test and the companies were public authorities for the purposes of the Aarhus Convention and the Directive and the EIR 2004²¹.
- 9 By contrast the Upper Tribunal held that the control test was a demanding one and (questionably) that few privatised utilities would satisfy. The companies’ functions might be fixed by law and by their Licences, but the test was concerned with the way in which they exercised those functions. They were subject to stringent regulation and

²⁰ [2015] UKUT 52 (AAC)

²¹ See paragraphs 102 to 130 of the judgement;

oversight and there was the potential for extensive involvement and influence over the way in which they performed their services. But the Upper Tribunal surprisingly, and disappointingly, held that the evidence fell far short of showing that the Secretary of State, the Water Services Regulation Authority and the Environment Agency influenced their performance, individually or collectively, whether by actual intervention or by more subtle forms of influence, to such an extent that the companies had no genuine autonomy of action²²

10 Many privatised utilities clearly have special powers which ordinarily private commercial entities do not have—such as the power of non consensual interference with the private property of others, interference with public highways or the making of bye laws. Members of the public, of course, do not know that. Some but not all such utilities make clear on their web sites that they are subject to the Regulations, and provide helpful information about the relevant procedures. There are also useful web sites with information about which entities accept that they are, or have been held by the Information Commissioner to be, public bodies such as “What do they know?” It is still not always clear with some private utilities. The subdivision of services and multiplication of entities may mean that some can argue that they do not have special powers and that they are “public authorities” only if they are subject to public control under (b)/(c). I give some examples of different approaches by private utilities.

11 SOME UNCERTAINTY REMAINS IN ENGLAND:

12 **Electricity network: National grid:** this body responsible for coordination of supply, and transmission of, electricity has a helpful web site.

“A wide range of environmental information can be found on our website – but if you cannot find what you are looking for, we will be able to advise and assist you in locating that information or we will respond to a request made in accordance with the **Environmental Information Regulations 2004**. We aim to deal with any such request as soon as possible but in any event within 20 working days. It may be your request is straight forwards and our response will be swift. However there are circumstances where the gathering of information will take a little time. On occasion the information may take more

²² paragraph 155).

than 20 days to assimilate in which case we will contact you to inform you that we are extending the deadline to one of 40 working days.”

13 **Gas: British Gas and Transco**—the web sites of these bodies are silently unhelpful

Gas and Electricity Regulator: Ofgem accepts on its web site that it (the regulator) is subject to the Directive. Unhelpfully it does not say whether the entities which it regulates are so subject.

“The Freedom of Information (FOI) Act 2000 and the Environmental Information Regulations 2004 (EIR) both came into force on January 1st 2005. They give people the right to request recorded information held by public authorities. As a government department, we qualify as a public authority”.

Rail: Network Rail : this body responsible for railway infrastructure has a helpful website:

“Since June 2015, we have been subject to the Freedom of Information Act 2000 (FOI) and the Environmental Information Regulations 2004 (EIR). The legislation covers our public functions as well as our commercial activities, and applies to our subsidiary companies incorporated in the UK. This is an opportunity for us to be even more open and accountable, as part of our wider transparency work, which began in 2012”.

14 **High Speed Two (HS2) Limited**: The Information Commissioner has held²³ that HS2 was wrong to have dealt with a request for environmental information under FoI 2000 and refused it. The ICO held that it should have been dealt with under EIR and that exemption did not apply. Importantly the ICO held at [26] that communications between a Government department and a non departmental public body (“NDPB”) or a wholly owned company were not potentially exempt as internal communications as²⁴

“such entities were set up precisely to act independently from the Government”

15 **Telecommunications: British Telecommunications plc (BT)/Talk Talk and Vodafone**, who supply telephone networks, and have special powers are, according to

²³ ICO decision FER0536325HS2

²⁴ See also DEFRA v Information Commissioner EA/2012/0105

website “What do they know” not subject to the Freedom of Information Act. The web site says

“The company is included on this site as it is believed that the company is subject to the Environmental Information Regulations 2004. The company has special powers under the Electronic Communications Code to construct infrastructure on public land and to take rights over private land, either with the agreement with the owner or by applying to the courts.^{[1][2]} In Fish Legal v IC & Ors, the Upper Tribunal found that utility companies with special statutory powers to enter land are subject to EIR. (see paragraphs 118 to 126).”

16 SCOPE: WHAT INFORMATION IS COVERED?

17 The Court of Appeal in Department of Business, Energy and Industrial Strategy v Information Commissioner & Henney²⁵ took a broad purposive approach to the scope of the concept of environmental information. They held that it extended to studies of programmes for the installation of domestic “smart meters”. They distinguished it from the more limited concept of information about emissions –in respect of access to which information there are fewer exceptions.

51 “the Case C-673/13 P, European Commission v Stichting Greenpeace Nederland (23 November 2016) was concerned with a very different legislative context. It is not appropriate to take the wording or reasoning of the CJEU in a different legislative context, and to apply it strictly to the present case. The CJEU was particularly concerned with avoiding an over-broad definition of “information on emissions” because Article 6(1) created an irrebuttable presumption that information “on” emissions had to be disclosed, and the confidentiality exception could not apply. In other cases, Article 4(2) of Regulation 1049/2001 enabled the institutions to refuse access to a document where disclosure would undermine the protection of commercial interests including intellectual property “unless there is an overriding public interest in disclosure”. That provision required a weighing up of the interests referred to. While not giving Article 6(1) a restrictive interpretation, the CJEU (at [81]) considered that the approach taken by the General Court “jeopardise[d] the balance which the EU legislature intended to maintain between the objective of transparency and the protection of those interests”. Those concerns are not relevant in the present case. There is no irrebuttable presumption that environmental information within regulation 2(1)

²⁵ [2017] EWCA Civ 844

of the EIR must be disclosed. Part 3 of the EIR contains exceptions to the duty to disclose such information.”

18 By contrast the Upper Tribunal (surprisingly) allowed an appeal from the First Tier Tribunal in Porsche v Information Commissioner & Cielisk [2018] UKUT 127 (AAT) on the basis that information about misleading vehicle emission tests was not environmental information and therefore not subject to the EI regime

“The [First Tier Tribunal] reasoning confuses the steps involved in carrying out an activity and the activity itself. Although running a car engine was a necessary element of carrying out the safety test, that did not of itself mean that, on a purposive approach to the EIR, the test affected environmental elements or factors. It fails to reflect the principle established by the Court of Appeal in Henney and in Glawischnig that information which has only a minimal connection with the environment is not environmental information. That principle must apply not only in deciding whether information is *on* an environmental matter but whether a measure or activity has the requisite environmental effect. According to the FTT’s argument information about any activity which involves running an engine would be environmental information. Moreover, as Mr Cross said, virtually anything done by any person or thing has some level of effect on or interaction with the environment. On the FTT’s reasoning, information on virtually all human activity would fall within the EIR. That plainly extends the regulations along way beyond their intended scope.”

51 The EIR exclusions for bodies acting in a judicial or legislative capacity are drafted (probably too) widely. There is for example no time limit on the absolute exclusion of legislative bodies even after the legislation has been finalised²⁶.”

EIR 3 (3) “These Regulations shall not apply to any public authority to the extent that it is acting in a judicial or legislative capacity.

EIR 3 (4) “These Regulations shall not apply to either House of Parliament to the extent required for the purpose of avoiding an infringement of the privileges of either House.”

²⁶ The CJEU decision C-204/09 Flachglas Torgau that the legislative exclusion should be time limited is surprising: as (i) those involved in the legislative process will be aware that the exemption is time limited and contributions may be inhibited and (ii) the information might usefully contribute to the public debate which is a feature of healthy participatory democracy (see Rio Declaration X “Environmental issues are best handled with participation of all concerned citizens, at the relevant level”)

52 IS INFORMATION HELD BY A PUBLIC AUTHORITY ?

53 The Regulations overcome the potential problem of public authorities keeping information inaccessible by providing for it to be held by another body. This has sometimes been a practice of regulators in England (eg condition: “Record emissions and make the records available to the regulator if required”) EIR 3 (2) provides that:

“environmental information is held by a public authority if the information—

(a) is in the authority’s possession and has been produced or received by the authority; or

(b) is held by another person on behalf of the authority

54 The First Tier and Upper Tribunals have been willing to adopt a somewhat restrictive approach to the circumstances in which information is held on behalf of a public authority²⁷.

55 EXPRESS OR IMPLIED OBLIGATIONS OF CONFIDENTIALITY

56 These are a potential problem The Government’s Code of practice is helpfully discouraging about the acceptability of confidentiality obligations whether or not in the context of contracts.

[46] “.....When entering into contracts public authorities should refuse to include contractual terms that purport to restrict the disclosure of environmental information held by the authority and relating to the contract beyond the restrictions permitted by the EIR....”

[53] “A public authority should only accept information from third parties in confidence if it is essential to obtain that information in connection with the exercise of any of the authority’s functions and it would not otherwise be provided. Even in these circumstances it will be necessary to explain the relevance of the public interest test and the

²⁷ Chagos Refugees Group v FCO EA/2011/0300, Newcastle U v IC & British Union for the Abolition of Vivisection [2011] UKUT 185 (AAC), Holland v IC & East Anglia U EA/2012/ 98

fact that there could be circumstances in which the public interest in disclosure equals or outweighs the adverse effects of disclosure on a third party.”

51 DUTY PROACTIVELY TO WARN OF IMMINENT THREATS:

52 One notable omission in the Regulations relates to the duty proactively to disseminate information about urgent risks. There is no duty on public authorities as required by Art 7(4) of the Directive to ensure that where there is an imminent threat to human health or the environment all information capable of enabling those affected to take action to prevent or mitigate the harm is disseminated without delay.

53 Chernobyl comes to my mind in this context. Some people considered using an umbrella to keep potentially radioactive rain off their heads—but accepted the reassurances of the Government that there was no risk of any significant radioactivity reaching us. Ironically it was only a couple of years ago that the Government lifted a prohibition on eating lamb from flocks in Cumbria which had been contaminated by Chernobyl pollution. (Some cynically think that radioactive fallout from Sellafield nuclear re processing facility might be the true cause of sheep contamination)

54 COSTS:

55 The Directive, EIR and CJEU decisions limit the costs which public authorities can charge. The CJEU has considered English charging schemes in C-71/14 East Sussex CC v Information Commissioner. It held that there were both objective and subjective upper limits to what was lawful. First costs were limited to the actual costs of *supplying* information, including overheads associated with that supply, not assembling or storing that information. Second it held that costs should not exceed the financial capacity of the person seeking the information as that would amount to an inadmissible deterrent to seeking that information²⁸. The First Tier Tribunal has held that the cost of supply should be construed narrowly.²⁹ It held that where an authority had to organise material in response to

²⁸ See C-217/97 Commission v Germany [47]

²⁹ Markinson v IC EA/2005/0014

make it available in response to a request it could not charge for that organisation³⁰.

56 The Aarhus Convention Article 9 prevents the costs of enforcement from being “prohibitively expensive”. This is fortunate as the expense of litigation in England is notorious³¹

57 . Lawyers charge their clients high fees. Losing litigants are generally ordered to pay the winning parties’ costs – over which they have no control. It might be said:

“the law in England is open to both rich and poor – like the Adlon Hotel in Berlin”

Happily the enforcement of the EIR is an exception. There is no cost risk in making a complaint to the Information Commissioner. There is no need to use a lawyer, and no risk of an order to pay the costs of the party against whom the complaint is made. It is unusual for any order for costs to be made against a party in the FTT or UT. Even appeals to the Court of Appeal are relatively (by English standards) risk free as Aarhus Convention costs protection (preventing “prohibitively expensive costs”) limiting the exposure of a party to costs of the opponent is available. Broadly speaking, it would be reasonable today to advise an environmental litigant that his or her exposure to an order for their opponent’s costs would not be set at more than £5,000³². An intrusive and potentially humiliating statement of means must however be produced.

FORENSICALLY DEFENSIVE DRAFTING (“JUDGE PROOFING”)

58 There are some characteristic forms of drafting intended to make it more difficult for people to enforce the law. Thus although Reg 8 limits the power to make charges to situations where information is being provided its wording makes it difficult for anyone to challenge the level of charges:

³⁰ Leeds City Council v ICO EA/2012/0020

³¹ See for example McCracken and Jones “The Aarhus Convention” [2003] JPEL 802-811

³² See Civil Procedure Rules (“CPR”) 45.43 52.19/19A and C-260/11 Edwards where the CJEU at [42] in its judgement sets out as relevant 5 factors in addition to means: 1. “the situation of the parties concerned,” 2. “whether the claimant has a reasonable prospect of success” 3 “the importance of what is at stake for the claimant and for the protection of the environment” 4 “the complexity of the relevant law and procedure” and 5. “the potentially frivolous nature of the claim at its various stages”

8.—(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.

59 Thus unless the approach of the authority to the level of charges is irrational or otherwise unlawful it cannot be challenged³³—unless the complainant successfully argues that the canon of convergent construction *C-106/89 Marleasing*, or the doctrine of direct effect, applies. English courts and tribunals are reluctant so to hold in environmental matters.

60 INFORMAL REVIEW OF DECISIONS BY PUBLIC BODIES THEMSELVES

61 Public bodies have a duty to offer an informal internal review³⁴ of a decision to refuse information. This is something of a false friend. Many public authorities appoint to the role of undertaking such reviews staff who see their task as justifying the original refusal and providing more secure grounds for resisting a complaint to the Information Commissioner than were to be found in the original decision.

62 MISCELLANEOUS ISSUES:

63 Campaigners express concern about (i) delay (which may be critical to effective response to time limited consultations) (ii) omission of key information on spurious exemption grounds (iii) complexity and unhelpful manner of presentation of material in opaque form—with some suggesting that non technical summaries (albeit, no doubt, themselves as misleading!) would be useful (iv) failure of ICO to show or invite comments on the response to a complaint.

³³ There is a very high bar preventing successful challenges to administrative decisions

³⁴ EIR 11

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