

Latest cases on the EIR disclosure exemptions



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Overview

- 3 categories of exemptions to the duty to disclose:
- Refusal on procedural grounds (request is vague, manifestly unreasonable, or the public authority does not hold the information requested: reg 12(4)(a) – (c));
- Class-based exemptions (information includes personal data and applicant is not the data subject (reg 12(3)&13), request relates to incomplete material (reg 12(4)(d)); request involves the disclosure of internal communications (reg 12(4)(e)); and
- Disclosure of the information would adversely affect any of the matters specified in reg 12(5)
- NB: Save for the personal data exemption, all of the 'exemptions' are subject to the public interest test.



Refusal on procedural grounds: “manifestly unreasonable”

- Vesco v Information Commissioner [2019] UKUT 447 (AAC)
- Kane v Information Commissioner [2020] UKFTT 2019_0251 (GRC)
- Watson v Information Commissioner [2022] UKFTT 2021_0106 (GRC)



Refusal on procedural grounds: “manifestly unreasonable”

- Vesco v Information Commissioner [2019] UKUT 447 (AAC)
- V made a request to the GLD for information relating to the Gas Safety (Installation and Use) Regulations 1998: (1) the name of the public authority responsible for enforcing the Regulations; and (2) whether BS 5440 (flue emissions) was enforceable when indicated within the Regulations;
- The request was refused on the grounds it was manifestly unreasonable (reg 12(4)(b))
- That decision was upheld by the ICO and FTT but overturned by the UT



Refusal on procedural grounds: “manifestly unreasonable”

- Vesco v Information Commissioner [2019] UKUT 447 (AAC)
- UT stressed the three stage test to be applied when considering whether information could be withheld under this exemption:
 1. Is the request manifestly unreasonable?
 2. If so, does the public interest in maintaining the exception outweigh the public interest in disclosing the information in all the circumstances of the case (reg 12(1)(b))?
 3. Does the presumption in favour of disclosure mean that the information should be disclosed (reg 12(2))?
- It acknowledged that matters such as previous requests and costs of compliance could be relevant matters for the decision-maker under Q1, and recognized the ‘considerable overlap’ between “manifestly unreasonable” and “vexatious” under the FOIA regime



Refusal on procedural grounds: “manifestly unreasonable”

- Vesco v Information Commissioner [2019] UKUT 447 (AAC)
- It was, however, critical of the FTT’s approach in the present case
- FTT was required to reach its own view on the relevant tests and be independent and impartial as between the parties. Its role was not that of review, or to merely ‘rubber stamp’ the ICO’s decision;
- The requirements of the manifestly unreasonable test had not been properly applied by the FTT, and there was ‘inadequate recognition’ that the manifestly unreasonable test was a high one;
- The FTT’s decision was also problematic because it did not demonstrate that the FTT had properly considered the second and third stages of the test;
- In particular, the UT emphasized that manifest unreasonableness (or vexatiousness) was different to the public interest test;
- The FTT had therefore erred in law and/or provided inadequate reasons.



Refusal on procedural grounds: “manifestly unreasonable”

- Kane v Information Commissioner [2020] UKFTT 2019_0251 (GRC)
- K requested information from Tamworth BC relating to Open Space contributions and monies spent on enhancing Open Space facilities between 2009-2018, with details of (i) the facilities enhanced (ii) description of the work carried out (iii) who carried out the work (iv) date(s) when the work was carried out and completed and (v) actual cost of the work carried out.
- Tamworth BC refused the request on the grounds it was “manifestly unreasonable” on the grounds that “the information was not held in the format requested, that to provide it in that way would take more than 18 hours and would require a manual trawl through many records and that that they were relying on regulation 12(4)(b) (manifestly unreasonable request) to refuse the request.”
- Decision upheld by ICO and FTT



Refusal on procedural grounds: “manifestly unreasonable”

- Kane v Information Commissioner EA/2019/0251
- FTT at para 10: “Bearing in mind that the request was for information covering ten years we are therefore confident that the work involved in providing it would be very substantial and that it could well take several weeks of full-time work for one officer to put it together. Taking into account that the relevant department has only five members of staff and responsibility for many other important areas of work including burial services and highway cleansing we are therefore quite satisfied that, notwithstanding our views on the Council's evidence, the request for this information was indeed “manifestly unreasonable””
- FTT also did not consider that the public interest in disclosure outweighed the public interest in maintaining the exception, noting (inter alia) that there was information on the Council's website which went some way towards answering the request.



Refusal on procedural grounds: “manifestly unreasonable”

- Watson v Information Commissioner [2022] UKFTT 2021_0106 (GRC)
- W requested information from Lancashire CC broadly comprising the raw data on which a Noise and Vibration Report in respect of a proposed new bypass was based
- Lancashire CC had refused to disclose on the grounds that the request was manifestly unreasonable
- ICO upheld that decision, highlighting that reg 12 permits authorities to refuse a request for information where the cost of compliance would be ‘too great a burden for the authority’s resources’
- FTT held that for the purposes of the EIR, the question of whether dealing with a request would take more than 18 hrs is “not determinative” and it was “entitled to take other factors into account”.
- FTT substituted its own Decision Notice, requiring disclosure.



Class-based exemptions: data protection

- Millar v Information Commissioner [2023] UKFTT 00268 (GRC)
- M requested all information including internal memos and borough solicitor notes relating to TPOs on certain land
- The Council (Wigan MBC) provided information within the scope of the request, but with some information redacted under reg 13 as it comprised personal data relating to third parties
- ICO decided that the Council had been entitled to redact the information, having determined that there was insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms



Class-based exemptions: data protection

- Millar v Information Commissioner [2023] UKFTT 00268 (GRC)
- FTT upheld the ICO's decision
- FTT did not accept M's submission that the Council should have inquired if any of the data subjects was still living (information dated back to 2006). "If it was incumbent on any public authority, on receiving a request for information under the EIR or FOIA, to take steps to identify whether or not any individuals who may be identifiable in the requested information were living or dead then this is likely to create a disproportionate burden on the public authority in dealing with that request".
- No evidence in any event that any of the individuals were in fact deceased



Class-based exemptions: data protection

- Millar v Information Commissioner [2023] UKFTT 00268 (GRC)
- FTT agreed with the ICO that the first data principle was the relevant principle for the purposes of reg 13(2)(a) and that there were only two relevant bases of processing on which it would be lawful for the Council to disclose the information: (1) with consent of the data subject (N/A here) or (2) the Legitimate Interests Basis
- The LI test involved considered of the 7 propositions set out in *Goldsmith International Business School v Information Commissioner* [2014] UKAT 563 by way of guidance:
- Proposition 1 – (3 stage test in *South Lanarkshire Council v Scottish IC* [2013] UKSC 55)
- (a) Is the data controller or third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?
- (b) Is the processing involved necessary for the purposes of those interests?
- (c) Are those interests overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data?



Class-based exemptions: data protection

- Millar v Information Commissioner [2023] UKFTT 00268 (GRC)
- Proposition 2 – The test of ‘necessity’ must be met before the third of those questions can be considered
- Proposition 3 – “Necessity” carries its ordinary English meaning, being more than desirable but less than indispensable or absolutely necessary
- Proposition 4 – It follows that the test is one of “reasonable necessity”, reflecting the European jurisprudence on proportionality (albeit this may not add much to the ordinary English meaning)
- Proposition 5 – The test of reasonable necessity itself involves the consideration of alternative measures, and so “a measure would not be necessary if the legitimate aim could be achieved by something less”; accordingly, the measure must be the “least restrictive” means of achieving the legitimate aim in question
- Proposition 6 – Where there are no issues regarding an individual’s privacy rights, the question posed under Proposition 1 can be resolved at stage (ii) of the test;
- Proposition 7 – Where there are such issues, the question posed under Proposition 1 can only be considered after stage (iii) (the balancing test) has been undertaken.



Class-based exemptions: Materials in the course of completion / internal communications

- Thornton v Information Commissioner [2020] UKFTT 2018_0111
- T requested information from HS2 Ltd arising out of an appearance before a Select Committee by a senior official at DfT and then (then) Chief Executive of HS2 Ltd in which they referred to a request from DfT to HS2 Ltd for proposals/advice on whether to extend the programme for Phase One by up to 12 months, any advice provided by HS2 Ltd following that request, and information in any subsequent communications regarding the same
- HS2 Ltd refused to disclose the information, relying on reg 12(4)(d) (material in the course of completion) and, on T's appeal to the FTT (the ICO having upheld HS2 Ltd's decision to withhold the information) argued that reg 12(4)(e) (internal communications) was also engaged.



Class-based exemptions: Materials in the course of completion / internal communications

- Thornton v Information Commissioner [2020] UKFTT 2018_0111
- The FTT “ ... was satisfied that the provision which allows for the possibility of non-disclosure on the basis of information becoming part of the internal communications of a government department should, given the neutrality of the Convention with respect to Governmental structures, apply to a wholly-owned and controlled entity such as HS2. Similarly, the structure of the decision-making means that the DfT asks questions of HS2, which in turn carries out analysis and provides answers to the Department. That material leads to decision-making within the Department which results in a decision to change the procurement activities to be carried out. These documents are therefore part of material in the course of completion.”
- The FTT was therefore satisfied that both exceptions were engaged and also that the considerations which weighed against disclosure of the information were “weighty and far out weigh the interest in disclosure”.



Adverse affect on matters specified in reg 12(5): public safety

- High Speed 2 (HS2) Ltd v Information Commissioner [2023]UKFTT 00115(GRC)
- Information requested from HS2 Ltd as to the number and location of saplings it intended to plant in the winter of 2020/21
- HS2 Ltd refused to disclose the information, relying on reg 12(5)(a) (and subsequently also reg 12(5)(b) and (e))
- ICO held that none of the exceptions were engaged
- Scope of the request had narrowed by the time of the FTT appeal
- FTT agreed with IC that in respect of the reduced number of sites falling within the reduced scope of the request that the location and timing of planting had been put into the public domain by HS2 and they could not see that information as to the number of saplings intended to be planted at each of those sites should be withheld.



Adverse affect on matters specified in reg 12(5): the course of justice

- National Highways Ltd v Information Commissioner [2023] UKFTT 00895(GRC)
- NHL had received a request for disclosure of a QC's Advice which had been referred to in a 'briefing note' from NHL to DfT explaining why it had selected one preferred option for the route of the A27 Arundel Bypass project over the option it had initially referred.
- NHL refused to disclose the Advice, relying on reg 12(5)(b) [NB: there is no provision directly equivalent to FOIA s.42 (legal professional privilege) in the EIR]
- ICO agreed exception was engaged but held public interest was in favour of disclosure
- FTT overturned the ICO. "In our view, the Commissioner's decision was surprising and clearly wrong, for nine reasons".



Adverse affect on matters specified in reg 12(5): the course of justice

- National Highways Ltd v Information Commissioner [2023] UKFTT 00895(GRC)
- 1 – Failure to attach sufficient weight to the “crucial role which LPP plays in our justice system and the consequential need for a compelling reason to be shown to justify denying any public body the right to rely on its protection in any particular case”
- 2 – Central flaw was “also evident” in the factors the ICO relied on in favour of disclosure
- 3 – Factors or circumstances relating to the QC’s Advice weighed against rather than in favour of disclosure, including (1) the Advice was recent (2) the issues to which the Advice was directed were ‘live’ and ‘current’ (3) given the history of the matter, there was a strong chance of it attracting a legal challenge and (4) there was no suggestion the Advice had been manipulated or misinterpreted by NHL.
- 4 – FTT also saw “some force” in the point made in other cases that it might be seen as unfair, where matter remained live, in only one party seeing the other’s Advice.



Adverse affect on matters specified in reg 12(5): the course of justice





- National Highways Ltd v Information Commissioner [2023]UKFTT 00895(GRC)
- 5 – ICO's point that decision would not affect public confidence because it did not set a precedent was "a poor one"
- 6 - FTT saw "no force" in ICO's position of the Advice having been "instrumental" in bringing about or justifying a change in NHL's position
- 7 – There was noting in the requester's point about NHL not specifying or explaining the advice in the briefing note (or another document)
- 8 – The requester's other points added nothing of substance, being really focused on her sense of grievance about matters such as consultation
- 9 – ICO had attached "disproportionate importance" to the presumption in favour of disclosure under reg 12(2). "The presumption is certainly important ... But all things being said, the presumption is only that. By itself if it no counterweight to the powerful imperative for LPP to be upheld unless a compelling reason to the contrary is made out".



Thank you

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