LANDMARK CHAMBERS

Welcome to Landmark Chambers'

Access to Environmental Information: Update webinar

Your speakers today…

James Maurici KC (Chair)

Topic:

The role of the Aarhus Convention in EIR case-law

Jacqueline Lean

Topic:

Latest cases on the EIR disclosure exemptions

Nicholas Grant

Topic:

Disclosure of viability assessments

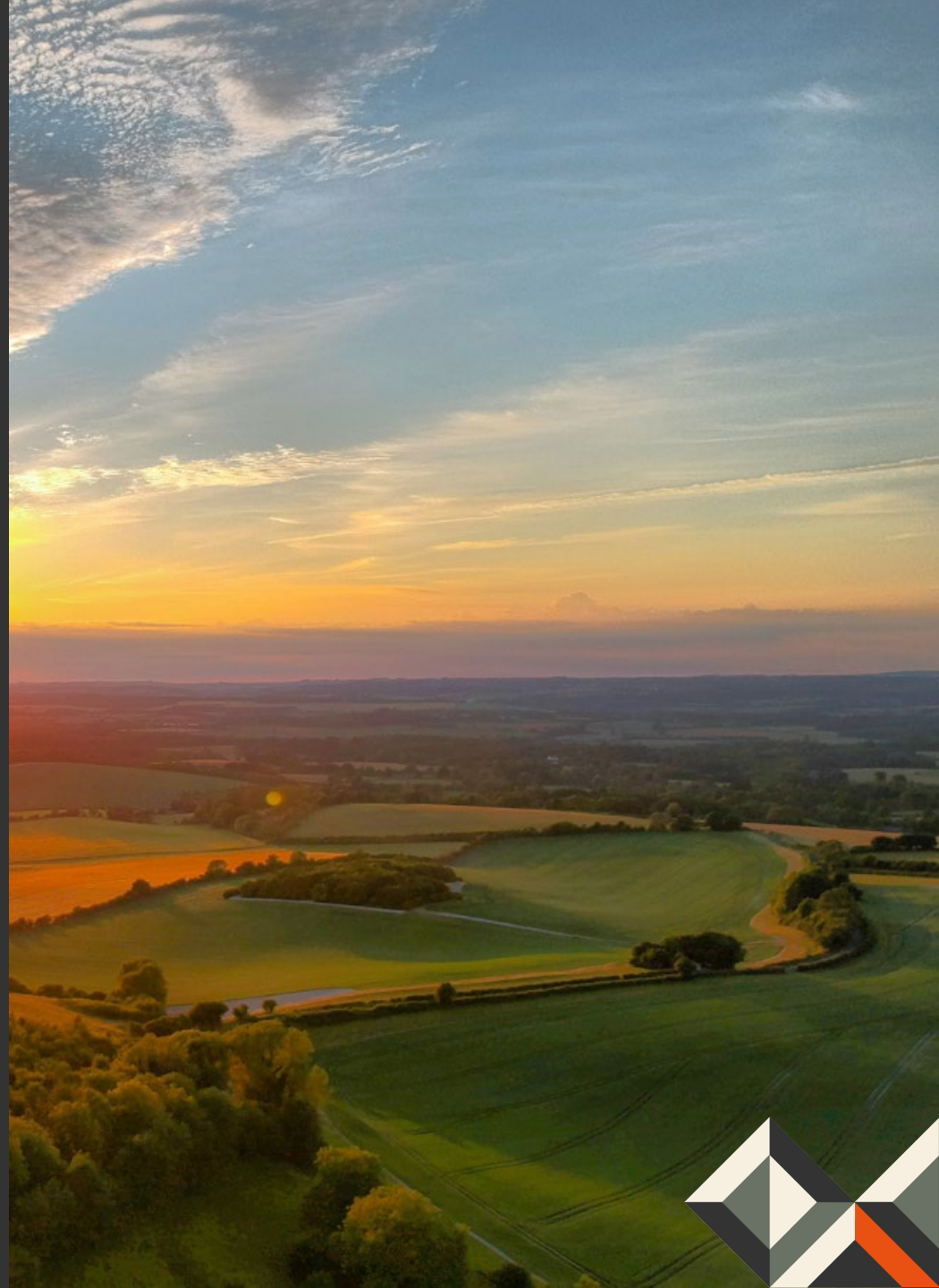
Alex Shattock

Topic:

Getting hold of documents for planning and environmental public law litigation: disclosure and using the EIR

Disclosure of viability assessments in planning cases: position under the EIR and under the law generally (see Holborn Studios)

Nick Grant



Outline

The law generally

EIRs

The general law

S. 100D Local Government Act 1972:

(1) background papers for meetings of principle council to be listed and open to inspection by the public.

(4) Nothing requires disclosure of document which discloses “exempt information"

(5) Background papers are those which disclose facts on which report based and have been relied on to a material extent in preparing report

S. 100L, Part 1 Sched 12A LGA 1972:

Exempt info is information relating to the financial or business affairs of any particular person “*if and so long, as in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”*

The general law

R (Joicey) v Northumberland CC [2014] EWHC 3657

- Windfarm noise assessment published 36 hours before committee meeting
- Right to know provisions require information to be published “in good time for members of the public to be able to digest it and make intelligent representations" [47].
- “timely" turns on factors such as character (easily digested/technical), audience (sophisticated / ordinary) and bearing on decision (tangential/central)

The general law

R (Perry) v Hackney LBC [2014] EWHC 3499 (Admin)

- Two applications for mixed use development.
- VA submitted confidentially. Never made public.
- Claim brought on (1) common law right for committee to see report (2) breach of LGA 1972. Dismissed:

  - No common law right for Committee to see report: [70].

  - Information was exempt information - the exemption was inserted to allow negotiation. Disclosure would frustrate statutory purpose. No breach of LGA 1972 for either Committee or Claimant not to see VA [78], [89].

The general law

2019: NPPF

- For developers to explain why they cannot make contributions; viability appraisals should (1) reflect PPG (2) include standardized inputs and (3) be made publicly available.

2019 PPG

- Outlines how viability exercise should be undertaken incl defining costof land

The general law

R (Holborn Studios) v LB Hackney [2020] EWHC 1509 (Admin)

- Leaseholder of site challenging IP's plans to redevelop.
- Two viability reports prepared, one with numbers blanked out, the other only summarized in public domain.
- JR on the basis of *inter alia* (1) non-compliance with LGA (2) material in public domain incomprehensible.

The general law

R (Holborn Studios) v LB Hackney [2020] EWHC 1509 (Admin)

- JR allowed [71].
- Non-compliance with s.100D LGA 1972. Significant quantities of information obviously important for Committee Report's section on viability [61].
- D argued “substantial compliance" as what was in public domain sufficient and large quantities of the material “exempt". Rejected:
    - Need to show public interest in maintaining exemption, NPPF/PPG indicate expectation in public domain (*Perry* distinguished) [65];
    - info in public domain opaque, unexplained, irreconcilable, and prevented objectors engaging in viability discussions [66]-[69].

The general law

R (Worcestershire Acute Hospitals NHS Trust) v Malvern Hills DC [2023] EWHC 1995 (Admin)

- Challenge to grant of PP for South Worcester Urban Extension
- Hospital had sought s. 106 contributions of £millions.
- OR advised viability indicated s. 106 contribs come at expense of highways or AH.
- Decisions taken in 2018
- Ground 2: breach of s. 100D LGA 1972 by vailing to make viability appraisal public

The general law

R (Worcestershire Acute Hospitals NHS Trust) v Malvern Hills DC [2023] EWHC 1995 (Admin)

- Ground 2: breach of s. 100D LGA 1972 by vailing to make viability appraisal public
- Accepted materials were background papers unless they included exempt info [119]
- No real dispute it contained confidential information so issue was para 10 balance [122]
- Decisions taken pre NPPF (2019). Perry followed, not disclosed.

The general law

R (Worcestershire Acute Hospitals NHS Trust) v Malvern Hills DC [2023] EWHC 1995 (Admin)

- Where the balancing exercise should be struck – i.e. whether public interest in confidentiality more important than public having access – a judgment for officers on rationality basis [127].
- S100D (4) does not provide for redaction of confidential info or part disclosure [128].
- Proper officer to review disclosure if circumstances change [130]
- Consequences of breach:
    - decision not automatically unlawful [142]
    - quashing depends on (1) substantial compliance and (2) material prejudice [140]

The general law

In summary:

- Highly likely that, if developer using VA to avoid s. 106 obligations, VAs will be “background documents”
- They cannot be “part disclosed”
- Pre-2019: likely to contain exempt information and balance to be struck a matter for officers.
- Post-2019: they should be containing standardized inputs and highly likely public interest will favour disclosure.
- As non-compliance does not automatically mean quashing, engage early and ask for the VA before the decision is made.

EIRs SI 2004/3391

Implement Dir 2003/4/EC which in turn implements Aarhus Convention information pillars.

Broad outline

- Public authority must proactively make environmental information that it holds available to the public (unless covered by reg. 12) (reg. 4); and
- Make environmental information available "on request" (reg. 5)
- Public authority may refuse to disclose if (1) exception applies and (2) public interest in maintaining exception outweighs duty to disclose (reg. 12(1))
    - Public interest in all exceptions must outweigh public interest in disclosure:

      Ofcom v IC (C-71/10) [2011] PTSR 1676 [21]
- Presumption in favour of disclosure (reg. 12(2))

EIRs SI 2004/3391

Exceptions include

- Reg 12(5)(c): to the extent disclosure would adversely affect IP rights
- reg. 12(5)(e): to the extent disclosure would adversely affect confidentiality of commercial or industrial information where confidentiality is provided by law
- Reg 12(5)(f): to extent disclosure would adversely affect the interests of a person who (i) was not (and could not be put) under a legal obligation to supply the information (ii) did not supply in circumstances that any person would be entitled to disclose it and (iii) that person does not consent.

EIRs SI 2004/3391

Environmental information: reg 2(1)

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on—

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

EIRs SI 2004/3391

Environmental information: reg 2(1)

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on—

…(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);

ICO: includes information informing the public about matters affecting the environment or enable them to participate in decision-making.

EIRs SI 2004/3391

- Is it environmental information?
- LB Southwark v Information Commissioner (EA/2013/0162) ("*Lend Lease*")
    - Request for viability assessment in connection with planning application by Lend Lease to redevelop large area of Elephant and Castle.
    - VA submitted to LPA on private and confidential basis
    - Was environmental information:
        - regeneration programme was "enormous", and so likely to affect the state of the landscape as an element of the environment: reg 2(1)(c)
        - VA was an economic analysis within the framework of that measure and activity: reg 2(1)(e)

EIRs SI 2004/3391

- Is it environmental information?
- See too:
    - Shepway DC v IC EA/2017/0240 (viability assessment)
    - Darlington BC v IC EA/2018/0005 (Subscription and shareholder agreement between LPAs and Peel Group for ownership of Durham Tees Valley Airport)
    - South Gloucestershire Council v IC EA/2009/0032 (developer sought internal appraisal produced by Council to inform s. 106 negotiations)
    - Greenwich v IC EA/2014/0122 (viability assessment)

EIRs SI 2004/3391

- If it is Environmental Information, what exceptions are engaged?
- Normally 12(5)(e) and possibly (f). See e.g. *Lend Lease*;
- Occasionally 12(5)(c) (IP rights): see e.g. *Lend Lease* (appendix to the VA was a financial model developed by LL as a tool to assess large projects, allowing scenarios to be run and tested).

EIRs SI 2004/3391

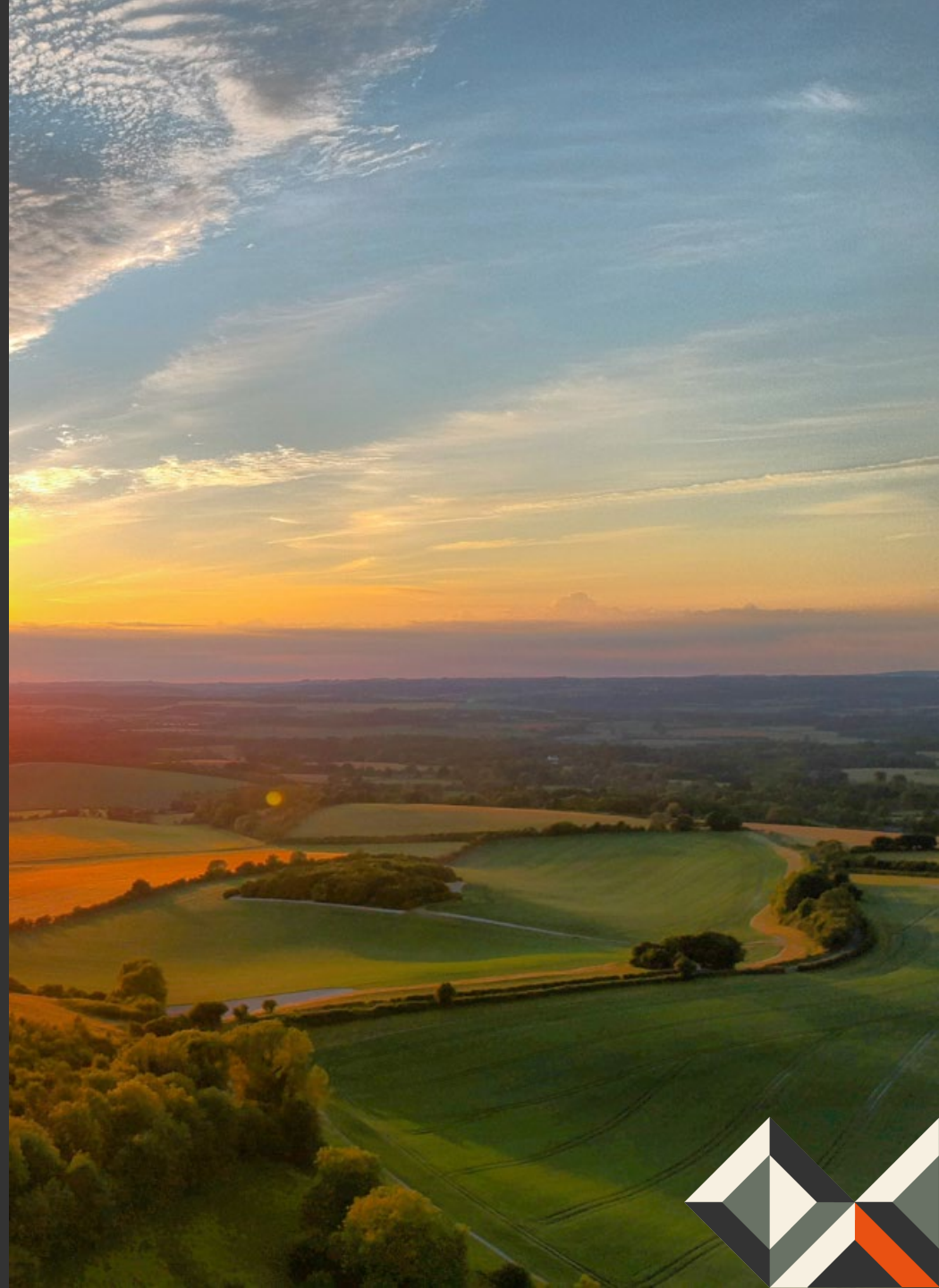
- Public interest test. Always v fact specific. Common examples/themes
    - In disclosing:
        - Transparency and accountability, especially if unclear bargain
        - Public participation
        - Local importance of issues
    - In maintaining exception
        - Harm to economic interests
        - It would undercut viability of scheme or “social” elements
        - It contains trade secrets or similar
        - Key info or summary already in public domain
        - Maintaining commercial confidences

EIRs SI 2004/3391

- Public interest test: can impact differently on different parts of VA:
- *Lend Lease*
    - Appendix 22 a commercial secret. Harm outweighs disclosure [55]
    - LL projections of commercial sales and rentals of great sensitivity, if disclosed would be used by future commercial customers damaging delivery of project or its social content. Not disclosed [56].
    - Reasoning does not apply to private purchasers (influenced by market) and social housing providers [57]
    - Rest less sensitive [58]
- Can lead to disclosure of parts: *Lend Lease* [59]

Getting hold of documents for planning and environmental public law litigation: disclosure and using the EIR

Alex Shattock



This talk

- EIR
- Duty of candour
- Specific disclosure in JR

EIR requests to assist JR proceedings

- Some public bodies are very helpful and open with disclosure: others less so
- EIRs can be useful for drawing out internal guidance that could form the basis of a JR
- Also good for statistics the media will be interested in e.g. regarding enforcement/ regulation
- Compared to duty of candour, no relevance test
- Compared to duty of candour, no restrictions on subsequent use
- Burden is on the authority to justify non-disclosure
- EIR team in a big government department often not coordinated with the litigation team, so you can get some helpful answers….

Tips for a good EIR/FOIA request

- Be as specific as you can
- Ask “in the alternative" questions to try and capture all possible outcomes: otherwise public body might give you a literal but unhelpful answer
- But: delicate balance between covering all bases and asking for information that will take too long to compile
- Consider a time limit to reduce effort on their part e.g. only information covering the past 1/2 years
- Consider splitting the request between different persons/groups if you are seeking a lot of information
- Remind the public body of their duties to assist you
- And don't be afraid to appeal…

However…

- EIRs/FOIs not the best tool for a time sensitive judicial review
- Decisions under the planning acts must be challenged within 6 weeks
- JRs must in any event be brought promptly, and in some cases promptness will be judged with reference to the six week period: Finn-Kelcey v Milton Keynes BC [2009] Env. L.R. 17 (though query how relevant this case is now that JRs have been brought within the six week period: see Packham v SST [2020] EWCA Civ 1004, [45])
- If authority is expecting a JR they may seek to extend the response period from 20 days (EIR reg 5(2)) by another 20 days (EIR Reg 7(1)):
- And, a refusal will mean any JR will likely be out of time following an internal review (EIR reg 11) and a subsequent successful appeal

Disclosure under the duty of candour

- In prospective and current JR proceedings, Defendants are subject to the duty of candour (DoC)
- Hence CPR PD54A provides “disclosure not required unless the court orders otherwise”
- So in theory if they hold documents that will help your JR, they should give them to you once they become aware of the prospective JR
- ….

R (Police Superintendent's Association) v Police Remuneration Review Body [2023] EWHC 1838 (Admin)

- A useful decision as puts all the DoC authorities in one place. Emphasises the following:
- Full and fair disclosure of all relevant material including identifying relevant documents
- Candid disclosure is required of (a) those materials reasonably required for the court to arrive at an accurate decision(b) full and accurate explanations of all the facts relevant to the issue that the court must and (c) a true and comprehensive account of the way in which relevant decisions in the case were arrived at
- Candid disclosure must not be selective but must include the unwelcome along with the helpful

R (Police Superintendent's Association) v Police Remuneration Review Body [2023] EWHC 1838 (Admin)

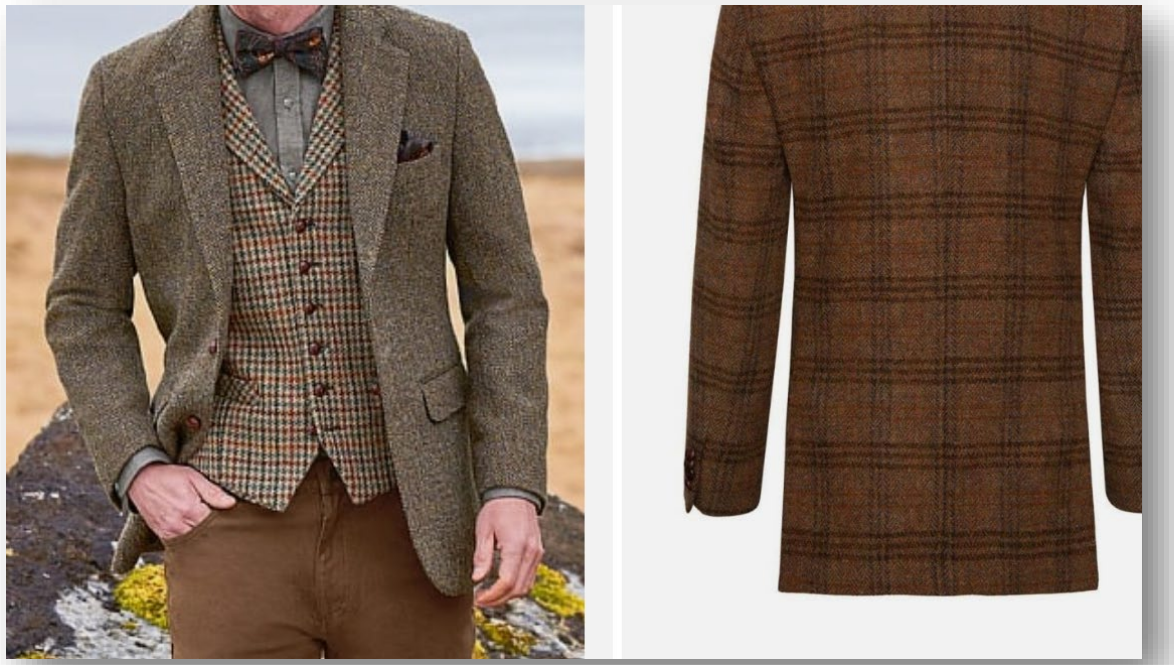
- Documents should usually be produced, not gisted or a secondary account given, since the document is the best evidence of what it says
- Documents can be redacted
- DoC applies at permission stage principle, although duty more extensive once permission granted
- The duty of candour extends to documents and information which will assist the claimant's case or may give rise to further grounds of challenge which might not otherwise occur to the claimant

R (Police Superintendent's Association) v Police Remuneration Review Body [2023] EWHC 1838 (Admin)

- Though note- arguably different approach taken by Sir Duncan Ouseley to planning statutory reviews in Friends of the Earth v SSLUHC [2023] EWHC 3255 (KB), in refusing disclosure of ministerial submission on the Cumbria coal mine: his point was all the information is summarised in the Inspector's decision so no need to see the additional advice to the SoS.
- Application made to Court of Appeal which may look at this issue in more detail

Tips for getting disclosure under the duty of candour

- Ask for information early i.e. at pre-action letter stage
- Remind authority that the DoC applies at the pre-action stage: cite *Police Superintendent's Association*
- Be very clear your information request is under the DoC and NOT under EIR
- Be focused in the request
- Renew your request after permission granted
- Consider a Part 18 request for further information
- And if all else fails, you can apply for specific disclosure…



TWEED

Tweed v Parades Commission [2007] 1 AC 650

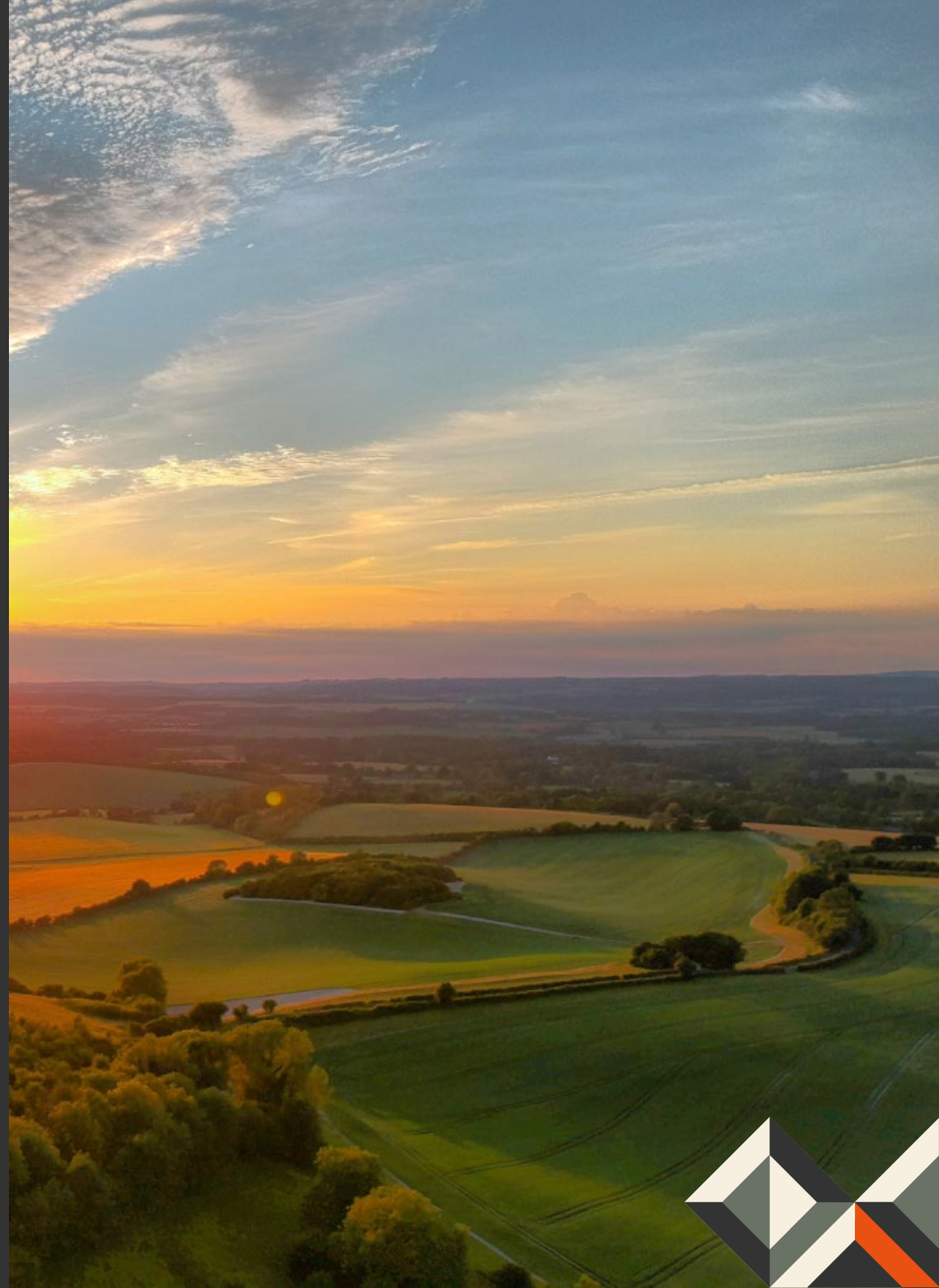
- Leading case on specific disclosure under JR
- If D refuses to disclose you can apply for specific disclosure
- Specific disclosure reasonably rare given DoC, but can be successful
- The test is whether in the given case, disclosure appears to be necessary in order to resolve the matter fairly and justly- and no “fishing expeditions" for additional grounds of challenge (NB: “fishing expedition" point often misused- only applies to new grounds of challenge)
- Key thing is you need to link what you are asking for to the grounds pleaded/ defence advance

And finally

- Note that ongoing litigation may be used to justify refusing EIR requests outside of that litigation: EIR reg 12(5)(b)
- However, hard to see why this exception should apply to otherwise EIRable information on the basis of ongoing JR proceedings
- facts in JR are uncontroversial, often already in the public domain
- Position may be different for information specific to the JR i.e. W/Ss
- Position may be different for an ongoing regulatory investigation- but a long investigation should not be used as a blanket reason to disclose generic information

Latest cases on the EIR disclosure exemptions

Jacqueline Lean



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 competed 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

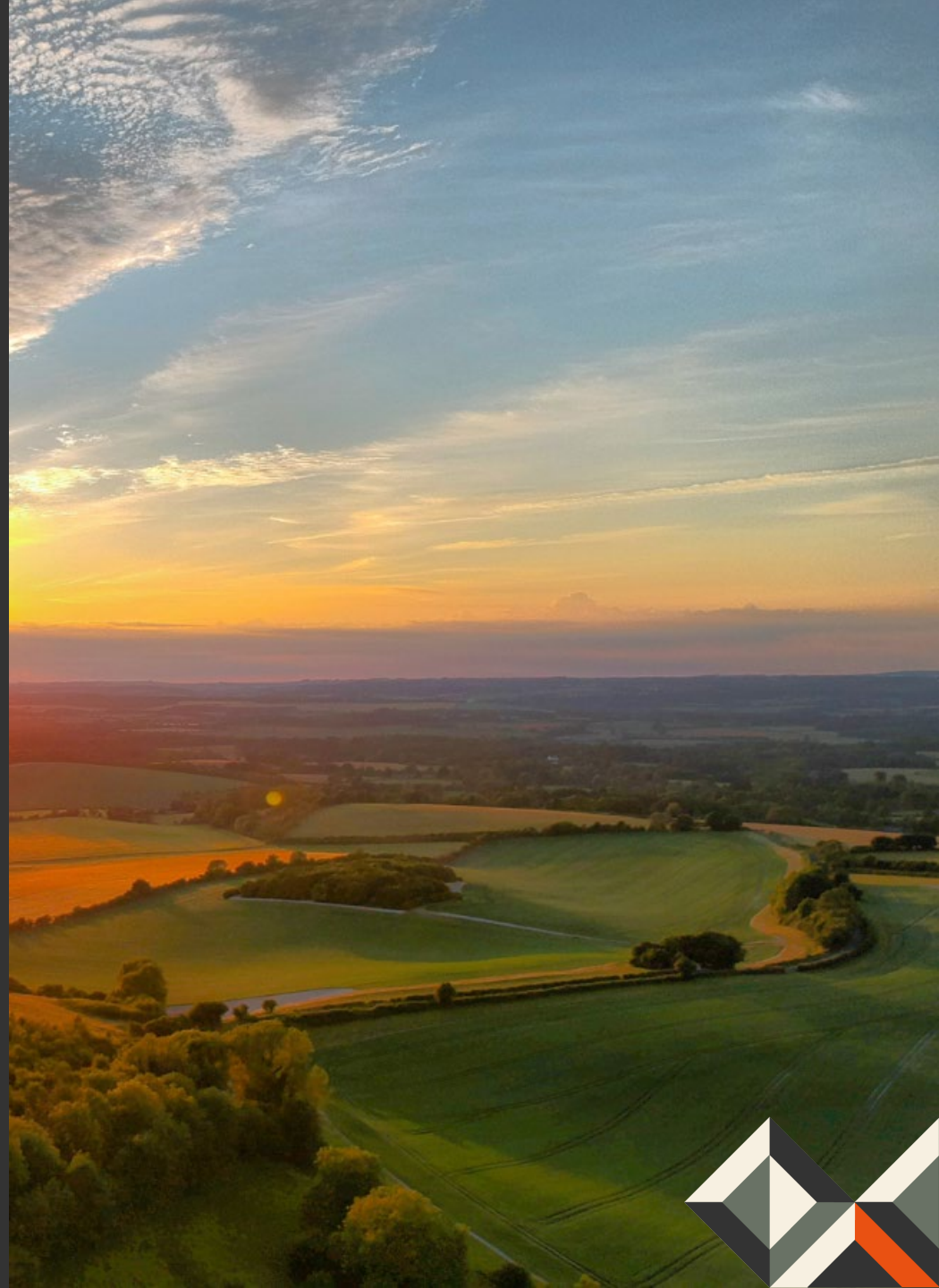
- National Highways Ltd v Information Commissioner [2023] UKFTT 00895(GRC)
- 1 – Failure to attach sufficient weight to the “crucial role which LPP plays in our justice system and the consequential need for a compelling reason to be shown to justify denying any public body the right to rely on its protection 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".

The role of the Aarhus Convention in EIR case-law

James Maurici KC



Contents

Will cover:

(1) The status of the Aarhus Convention in domestic law;

(2) The role of the Aarhus Convention in EIR case-law to date;

(3) Ask whether given the likely diminishing future role for EU law if that could mean an increasingly important role for the Aarhus Convention instead?

Start by looking at perhaps the leading case – and certainly the most oft cited - on the Aarhus Convention and its role in relation to the interpretation of the EIR

Introduction (1)

Department for Business, Energy and Industrial Strategy v Henney [2017] P.T.S.R. 1644, per Beatson LJ

"4 … The EIR gave effect in domestic United Kingdom law to Parliament and Council Directive 2003/4/EC of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (OJ 2003, L41, p 26). That Directive in turn gave effect to international obligations under the 1998 UN/ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, the "Aarhus Convention".

"14. The starting point is that the EIR must be interpreted, as far as possible, in the light of the wording and the purpose of the Directive, which itself gives effect to international obligations arising under the Aarhus Convention …."

"15. The importance of the obligation to provide access to environmental information is seen from the recitals to the Directive and the Aarhus Convention … The recitals to the Aarhus Convention include: "citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters …" And: "improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns."

Introduction (2)

The case was about whether information concerning a project assessment review of the communications and data component of the Government's smart meter programme was *"environmental information"* under the EIR. Defined as "*any information . . . on . . . measures . . . affecting or likely to affect*" the state of the elements of the environment or factors affecting those elements.

43 *"It was not in dispute that, when identifying the measure, a tribunal should apply the definition in the EIR purposively, bearing in mind the modern approach to the interpretation of legislation, and particularly to international and European measures such as the Aarhus Convention and the Directive. It is then necessary to consider whether the measure so identified has the requisite environmental impact for the purposes of regulation 2(1)."*

47. *"In my judgment, the way the line will be drawn is by reference to the general principle that the Regulations, the Directive, and the Aarhus Convention are to be construed purposively. Determining on which side of the line information falls will be fact and context-specific. But it is possible to provide some general guidance as to the circumstances in which information relating to a project will not be information "on" the project for the purposes of section 2(1)(c) because it is not consistent with or does not advance the purpose of those instruments."*

Introduction (3)

48. My starting point is the recitals to the Aarhus Convention and the Directive, in particular those set out at para 15 above. They refer to the requirement that citizens have access to information to enable them to participate in environmental decision-making more effectively, and the contribution of access to a greater awareness of environmental matters, and eventually, to a better environment. They give an indication of how the very broad language of the text of the provisions may have to be assessed and provide a framework for determining the question of whether in a particular case information can properly be described as "on" a given measure."

54. "As I have stated, the application of the definition in regulation 2(1) of the EIR is informed by the purpose of the Aarhus Convention and the Directive. In the present case, since the objectives of the Project Assessment Review include assessing the progress of the communications and data component, it is clear the public may be better informed and better able to contribute to environmental decision-making if they are able to have access to the Project Assessment Review. The evidence before the FtT made clear that the Project Assessment Review considered a choice between two models. Those with experience of the electricity industry such as Mr Henney may be well placed to comment on the conclusion as to which model is most appropriate, or most likely to achieve the smart meter programme's environmental objectives."

Introduction (4)

- So the Aarhus Convention, along with the EID, have played an important role in interpreting the EIR in domestic law.
- But the role of the EID in this regard, while preserved, by the EU Withdrawal Act 2018 ("the EUWL") is likely to be reduced by the Retained EU Law (Revocation and Reform) Act 2023 ("the REUL Act").
- While as a result of REUL the EIR remains what is now called "*assimilated law*":
- **EU supremacy – retained by the EUWL – is ended;**
- **The *Marleasing* principle also said to be gone according to the Explanatory Notes, para. 84;**
- **Very wide powers introduced to restate/reproduce/revoke or replace assimilated law (powers expire on 23 June 2026);**
- **Under EUWL the Courts not bound by post-Brexit CJEU case-law – with an ability for Higher Courts to depart from pre-Brexit case-law;**
- **Under the REUL Act made easier to depart from both CJEU and domestic retained case-law – see sections 6(2) –(7):**

(1) New test for departing from pre-Brexit case-law;

(2) Lower courts can make a reference to higher level court on whether to depart; test of general public importance; initiated by court or parties;

(3) Attorney General and other Law Officers in the UK and devolved governments the power to intervene in and refer cases to the courts, so that they may be invited to exercise their new discretion to depart from retained EU.

- **NB s.6 subject to commencement provisions**

Introduction (5)

Marleasing important in this context - if gone re purposive interpretation see e.g. *Vesco v Information Commissioner and another* [2020] P.T.S.R. 179 at [13]:

> "*Another aspect of public participation is that the public should have access to information, so they can be informed about matters relevant to the environment and be able to take decisions accordingly. These public participation obligations arise under the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (1998) ("Aarhus"), which led to adoption of the Directive. The EIRs are part of the United Kingdom's implementation of its obligations under the Directive. The EIRs fall to be interpreted purposively in accordance with the Directive: Marleasing SA v La Comercial Internacional de Alimentación SA (Case C-106/89) [1990] ECR I-4135 , para 8; Attorney General for the Prince of Wales v Information Comr [2016] UKUT 154 (AAC) at [15]. In turn, although not material to this particular case, account is taken of Aarhus when interpreting the Directive: Fish Legal v Information Comr (Case C-279/12) [2014] QB 521 , paras 35–38.*"

Note under REUL new s. 5(A2) EUWA 2018 new priority rule: requiring RDEUL to be read and given effect in a way which is compatible with standard domestic legislation and, where the two conflict, for domestic legislation to take priority over RDEUL (reverse *Marleasing*?)

Status (1)

The Aarhus Convention is an international treaty. It entered into force 30 October 2001. The UK ratified it on 23 February 2005.

International treaties have traditionally had restricted use in domestic law *unless* they have been *incorporated* into domestic law.

This, of course, is a consequence of our strictly dualist system of law

And is a result of two principles of "*constitutional orthodoxy*", namely:

(i) Domestic courts have no jurisdiction to construe or apply treaties which have not been incorporated into national law; that they are effectively non-justiciable; and

(ii) Such treaties, unless incorporated into domestic law, are not part of that law and therefore cannot be given direct effect to create rights and obligations under national or municipal law.

> **See e.g. *R (SG) v Secretary of State for Work and Pensions* [2015] 1 WLR 1449 (SC) and *R (Spurrier) v SST* [2020] PTSR 240 para 606.**

In relation to (i) above where it is nonetheless necessary to consider the proper construction of an unincorporated treaty the test to be applied by the Court is whether the view taken by the decision-maker is a tenable one: see R. (Friends of the Earth Ltd) v Secretary of State for International Trade [2023] EWCA Civ 14.

Status (2)

In Morgan v Hinton Organics (Wessex) Ltd [2009] C.P. Rep. 26, per Carnwath LJ on the Aarhus Convention:

> *"For the purposes of domestic law, the Convention has the status of an international treaty, not directly incorporated. Thus 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 ... 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 I-09325 [25]–[31])"*

Carnwath LJ also noted that the provisions of the Convention had been reproduced in various EU Directives, giving the examples of Environmental Assessment and Integrated Pollution Control.

This was, of course, the pre-Brexit position.

Plus, Carnwath LJ was not considering position under EIR. Case was about costs.

Status (3)

There is a presumption of compatibility of domestic legislation with international law: see e.g. Assange v Swedish Prosecution Authority [2012] AC 471 (SC) where, at para 122, Lord Dyson said: "*there is no doubt that there is a 'strong presumption' in favour of interpreting an English statute in a way which does not place the United Kingdom in breach of its international obligations*".

That especially powerful where - as here with the EIR - the domestic legislation in question is introduced to give effect to international law.

But where legislation is clear and unambiguous it must be given effect to irrespective of any international treaty obligations: see Salomon v Commissioners for Customs & Excise [1967] 2 QB 116 (CA).

Seen above that in Morgan v Hinton Organics per Carnwath LJ at para. 22 in respect of the Aarhus Convention itself that "*For the purposes of domestic law, the convention has the status of an international treaty, not directly incorporated. Thus its provisions cannot be directly applied by domestic courts*" albeit that it could (see further below) "*be taken into account in resolving ambiguities in legislation intended to give it effect*".

The Convention in EIR case-law

There are a number of things to cover re Aarhus and the EIR:

(1) Cases on the scope of environmental information such as *Henney*;

(2) Cases on public authorities under the EIR;

(3) Cases on the exemptions under the EIR;

(4) Cases on territorial application;

(5) Reliance on the Aarhus Implementation Guide;

(6) Reliance on ACCC decisions;

(7) Article 9 cases;

(8) EIA case-law.

The Convention in EIR case-law – scope of environmental information cases

Looked at *Henney* already;

See also:

***Department of Transport v Information Commissioner* [2202] 1 P&CR 19;**

***Department for Business, Energy and Industrial Strategy v Information Commissioner* [2017] P.T.S.R. 1644;**

Case C-71/14 *East Sussex CC v Information Commissioner* [2016] P.T.S.R. 179

The Convention in EIR case-law – public authorities

Largest number of cases:

Leading case is *Fish Legal* [2015] UKUT 52 (AAC), following the reference to the CJEU in Case C-279/12 [2014] QB 521 (which itself referred to the Aarhus Convention and the Guide, see e.g. the AG at [3]-[5], [51]-[52], [68] and the CJEU at [3]- [5], [25], [35] – [38], [41], [44], [46], [48] – [50], [60] – [61] and [76] – [78]). The UT refers to the Aarhus Convention at [3]–[4], [21], [56], [88], [89], [92] – [94], [130], [139] and the Implementation Guide at [57]

But extensive reference to and discussion of the Convention, and the Implementation Guide, in this context also in:

(i) *Information Commissioner v Poplar Housing Association and Regeneration Community Association* [2020] P.T.S.R. 2081 (UT);

(ii) *Cross v Information Commissioner* [2016] UKUT 153 (UT) – also housing association case;

(iii) *Heathrow Airport Ltd v Information Commissioner* [2021] 6 WLUK 373 at [43];

(iv) *Bruton v Information Commissioner* [2011] 11 WLUK 119 – re Duchy of Cornwall – see [11], [17], [18], [58], [86], [91] -[92], [102], [109];

(v) *Smartsource* J.P.L. 2011, 4, 455-477 overturned by *Fish Legal:* see [23]-[27], [30]-[31], [36]-[42], [49], [83], [87], [94], [99], [107]-[108];

(vi) *Network Rail v Information Commissioner* [2007] 7 WLUK 464 at [21], [24] and [27].

The Convention in EIR case-law – exemptions

See e.g.:

Breckland DC v Information Commissioner **[2023] UKFTT 103 (GRC): concerned reg. 12(5)(e) "*confidentiality of commercial and industrial information*". FTT referred to Article 4.4 (d) of the Aarhus Convention on which exemption based.**

South Gloucestershire DC v Information Commissioner **[2022] UKFTT 445 (GRC): concerned 12(4)(d) "*the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data*" and 12(5)(e) (see above). Refers to the Aarhus Implementation Guide and the guidance it gives on following guidance on legitimate economic interests: [40].**

Pinkerton v Information Commissioner **EA/2020/0071(P) (GRC) "*52. We turn now to the public interest balance. We take account of the fact that disclosure is to the world, not to this individual and that this information is environmental. Taking into account the backdrop of the Directive and Aarhus discussed above, and the policy behind the recovery of environmental information, we find that there is a general public interest in transparency in relation to environmental information held by public authorities …"***

NB though *Department of Transport v Information Commissioner* [2020] 1 P. & C.R. 19, CA, saying at [15] "*The judge also added, as an additional reason (by reference to the recitals to the Aarhus Convention) that: "Greater public access to environmental information is thus an end in itself." (With respect, I think Mr Dunlop was correct in his submission before us that this last reason involves some circularity of reasoning.)"*

The Convention in EIR case-law – exemptions

Dransfield & Craven v Information Commissioner and another **[2015] 1 W.L.R. 5316 on manifestly unreasonable and reg. 12(4)(b):**

"54. Mr Cross took the court to the published guidance on section 14 FOIA and regulation 12 EIR. In the end, he accepted that none of it assisted. Mr Cross also referred us to a provision in The Aarhus Convention : An Implementation Guide , 2nd ed (2013), which Mr Cross submits may be taken into account in interpreting the Aarhus Convention. It must, therefore, also be relevant to the interpretation of regulation 12 (which is ultimately derived from that Convention). The Implementation Guide states that an extension of time for a reply to an authority's reply to a request may be appropriate where the volume and complexity of the information sought justifies it, stating that the volume and complexity alone could not justify withholding information on the grounds that the request is "manifestly unreasonable". The same point can be made on the basis of regulation 7 EIR : see the Annex to this judgment.

84. I would add the point, not made by the UT, that the Aarhus Convention : an Implementation Guide referred to in para 54 above, states that "the volume and complexity alone could not justify withholding information on the grounds that the request is 'manifestly unreasonable'." There is no equivalent guidance in relation to section 14 . This may mean that a higher hurdle has to be passed before a decision maker can conclude that a request should be rejected on the grounds of the costs of compliance under the EIR than under FOIA . That in turn may depend on the precise status of the Implementation Guide . These points were not fully argued and so I express no concluded opinion on them."

The Convention in EIR case-law – exemptions

Department for the Environment, Food and Rural Affairs v Information Commissioner and Birkett [2012] P.T.S.R. 1299

CA holding that where a public authority refused a request to release environmental information on the basis of a particular exception to its duty to disclose in reg. 12 of the EIR did not preclude the authority from relying on different or additional exceptions in proceedings regarding the request before the Information Commissioner or in a subsequent appeal to the FTT; that a public authority was entitled as of right to rely on such new exceptions in appeal proceedings in the FTT, provided that they were identified in the grounds of appeal or in the grounds of opposition in response to an appeal within the time scale prescribed by the tribunal's procedure rules

See on Aarhus: [10], [12] and [13] – holding that this did not compel a different result.

Case C-71/10 *Office of Communications v Information Commissioner* [2011] PTSR 1676 relying on Aarhus in rejecting view that under the EID there could be additional exemptions to those provided: see AG at [6], [8], [20] – [21], [33], [47] *("[a]dditional exceptions would also conflict with the Aarhus Convention , which in article 4(3) and (4) similarly makes provision for certain expressly stated exceptions only*")

And same case in the SC at [2010] Env LR 20 at [2], [13].

The Convention in EIR case-law – territorial scope

Maurizi v Information Commissioner EA/2020/0087 (GRC)

Scope of FOIA regime when a person seeking information outside the UK

"30. There are other good reasons not to imply a territorial limitation into section 1(1). First, we see force in Mr Kosmin's submission that to do so would bring inconsistency with associated legal regimes, in particular the EIR, which implement Council Directive 2003/4/EC on public access to environmental information, which in turn gives effect to the Aarhus Convention (i.e. The United Nations Economic Commission for Europe Convention on Access to Information , Public Participation in Decision-making and Access to Justice in Environmental Matters – to which the United Kingdom remains a party).

31. In summary, and we intend no injustice to Mr Kosmin's comprehensive submissions on this point, it is submitted that although the EIR does not have express provision relating to its territorial reach, the applicable construction tools to be deployed where its terms are reasonably capable of bearing more than one meaning include the premise that, if one of the meanings which can reasonably be ascribed to the legislation is consonant with the United Kingdom's international obligations and the others are not, the meaning which is consonant is to be preferred. Attention is subsequently drawn to Article 3(9) of the Aarhus Convention which provides that: "the public shall have access to information…without discrimination as to citizenship, nationality or domicile, and in the case of a legal person, without discrimination as to where it has its registered seat or its effective centre of its activities" . The point is thereafter made that, should there be a dispute as to the territorial reach of the EIR of the type which we are now considering in relation to FOIA, the outcome, consistently with Article 3(9) of the Aarhus Convention, would be that the EIR did not have any territorial limitation."

The Convention in EIR case-law – The Implementation Guide

What is it?

The United Nations Economic Commission for Europe ("UNESC") has published an Implementation Guide to the Aarhus Convention which seeks to explain the meaning and purpose of the Convention

It is an explanatory document, capable of being taken into consideration if appropriate among other relevant material for the purpose of interpreting the Convention.

However, the observations in the implementation guide have no binding force and they do not have the normative effect of the provisions of the Convention.

Therefore, the implementation guide is a relevant aid to interpretation of the Convention and hence the EIR in implementing it, albeit it is not binding on the courts.

See CJEU approach: Case C-71/14 ***East Sussex County Council v Information Commissioner*** [2016] P.T.S.R. 179; Case C-182/10 ***Solvay v Region Wallonne*** [2012] 2 C.M.L.R. 19 ([27] and [28]"*While the Aarhus Convention Implementation Guide may thus be regarded as an explanatory document, capable of being taken into consideration if appropriate among other relevant material for the purpose of interpreting the Convention, the observations in the Guide have no binding force and do not have the normative effect of the provisions of the Aarhus Convention*") and Case C-204/09 ***Flachglas Torgau GmbH v Germany*** [2013] Q.B. 212 (where the A-G said that "*while not entirely valueless, therefore, the evidence derived from the Implementation Guide should not be viewed as in any way decisive.*")

The Convention in EIR case-law – The Implementation Guide

Domestic EIR cases citing the Guide, extensive see:

South Gloucestershire [40]

Heathrow Airport [43]- [44]

Poplar UT [13] – [14], [75] and FTT [29]-[31], [36], [45], [67]-[69], [103], [106]-[107], [117]-[118] and [124]

Evans Div Crt at [123] and [131] and CA at [71]

Fish Legal in the UT at [57]

Dransfield [54] and [84] and [109]

Bruton [17], [86]

Elmbridge v Information Commissioner [2011] 1 WLUK 11 [6], [19], [37]

Smartsource [30]-[31], [39], [83], [94] and [107]

Network Rail [24] and [27]

Henney in UT [34] an [37]

The Convention in EIR case-law – ACCC decisions

Not binding;

Lord Carnwath in ***Walton v Scottish Ministers*** [2013] P.T.S.R. 51 at [100] decisions entitled to *"great respect"* – context public participation not information

See further https://www.landmarkchambers.co.uk/news-and-cases/15-the-status-of-decisions-of-the-aarhus-compliance-committee-in-english-law-respect

Not many ACCC cases from UK on information – most on costs

And so not many domestic cases in information context citing ACCC decisions, only ones I could find:

Evans **in Divisional Court [123] and [132];**

Royal Society for the Protection of Birds v Scottish Ministers **[2017] CSIH 31 at [171].**

The Convention in EIR case-law – Article 9 cases

Article 9(1) and (3) of the Convention and the *"substantive legality"* requirement:

> **"1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law. In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law. Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph**
>
> **…**
>
> *3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment."*

R (Evans) v Attorney General the Prince Charles letters case.

Concerned a certificate under section 53(2) of FOIA seeking to override UT decision re breach of FOIA/EIR.

SC: [2015] A.C. 1787 Lord Neuberger's judgment considers Aarhus Convention at [21] - [22];

CA: [2014] QB 855 at [9] –[12], [49, [69], [71] and [73].

Div Court: [2014] QB 855 at [33], [121] – [123], [130] – [133], [135] and [138].

UT: [2012] UKUT 313 (AAC) at [17] and [133].

EIA case-law

See *R (Corbett) v Cornwall Council* [2014] PTSR 7272 relying on the Convention in interpreting the meaning of *"other information"* under the EIA Regulations.

Cites ad relies on the Convention at [52] and [74] interpretation *"fully in accordance with the policy underlying both the regime governing access to environmental information, broadly defined, and the regime governing assessment of the environmental impacts of particular projects. The aim, broadly, of the former regime is to ensure access to information and public participation in decision-making as appears from the recitals to the Aarhus Convention and the recitals to the Information Directive . The recitals to the Amending Directive similarly refer, amongst other things, to the importance of effective public participation in decisions taken which may have a significant effect on the environment".*

Thank you

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