

EIR Caselaw Review 2010

As always, 2010 was a busy year for the EIRs, and we have selected some major cases we think you need to know about. Overall, EIR should always be on your mind – the IC has several times made decisions about requests that were made verbally (including when made to his own office), the public interest test must always be applied, and commercial exemptions are nowhere near as wide as the one in FOI. But our highlights are as follows:

1 The UEA Climategate “Scandal”

As the year began, the shockwaves from the hacking of emails sent between University of East Anglia academics, featuring the staggering revelations that FOI requests from people who don't agree with them made them a bit cross. It is still not entirely clear with Phil Jones and other boffins actually discussed deleting information that had been requested (which might be a crime), or information that could be requested (which definitely isn't a crime). Despite the media storm in January, UEA's formal internal enquiries clearly demonstrated a willingness to improve FOI and EIR: 2010 closed with the Commissioner's formal action against UEA came in the form of their least explosive weapon. UEA signed an undertaking, and did not receive the practice recommendation or enforcement notice they may have expected.

There are several lessons to be learned here:

- The media (with a few honourable exceptions like the BBC's Martin Rosenbaum) don't know what the EIRs are
- It's never a good idea to put things in emails unless you can back them up
- As the House of Commons learned before, and as governments around the world are learning now through Wikileaks, EIR and FOI are only one part of the way that information will be disclosed in future

2 CON29 and all that jazz

A positive flood (apologies to EIR-loving Queenslanders) of decisions in 2010 emphasized a point that every council should know, and every EIR public authority should pay attention to: EIR applicants can ask for and get free inspection of any kind of data that you hold. If you want to say no, say no, but trying to charge for access increasingly looks like a hiding to nothing, even if you think some other piece of legislation gives you the power. Inspection is free, you should be organising your environmental data in such a way that disclosable information is also freely accessible data, and it doesn't matter what the applicant intends to do with it.

Our advice is the same as it always has been – if someone wants to access property data, make sure you actually hold it, rather than have the ability to create it. You have 20 working days to provide data, fitting it in with all your other work. And there is nothing to stop you publishing sources of data, and asking people to look for themselves. If they want a tailored service with a quick turnaround and a guarantee, that's not EIR and they have to pay for it.

3 Manifestly unreasonable

Regulation 12(4)(b) prevents manifestly unreasonable requests, and the ICO and Tribunal have a helpful track record of using similar criteria to allow what would be vexatious under FOI to be unreasonable under EIR. Even the apparently tricky EIR public interest test, according to the Tribunal, is weighted against disclosure when you're dealing with someone who can fairly be characterised as vexatious.

It's tempting to see 12(4)(b) as also being a handy parallel for the fees limit provisions in FOI. And while it's about the only equivalent, take a look at a recent decision involving the Department of Transport (FS50279691 from October 2010). As both the Commissioner and Tribunal have previously noted, Section 12 and Regulation 12(4)(b) are not interchangeable. Even though the Department of Transport successfully argue that the request is manifestly unreasonable, a detailed public interest test is required. Remember, the EIRs allow you to extend the time limit by an additional 20 working days – which is time you're supposed to spend doing more work. **We strongly advise you to take a look at 12(4)(c), the exception that prevents requests which are too general.**

4 Legal privilege and the public interest

We are still inundated by EIR decisions involving legal advice, and a good recent example involving Bexley Council at the Tribunal. Despite expressing some scepticism about the exact parallels between the legal privilege exemption in FOI and the 12(5)(b) equivalent covering the course of justice, the decision (EA/2010/0120) gives some very useful advice about the kind of information you will be able to protect. Apart from anything else, the Tribunal acknowledges the “strong built-in public interest in upholding legal professional privilege generally”. Further upholding the adverse affect to the course of justice, the Tribunal notes that the advice is fresh and relates to a live dispute which has not yet been resolved. EIR exceptions like 12(5)(c) are like jumping through a series of hoops – is the information relevant to the course of justice? Is there any adverse effect? What does the public interest determine? As Bexley are able to do here, you need to be certain that you have cleared each hoop before you approach the next.

5 Who is covered?

Finally, an issue which will continue to cause confusion into 2011. Who is actually covered by the EIRs?

In one of the first decisions of the upper half of the two-tier replacement for the Information Tribunal, the Upper Tribunal has ruled that water companies are not covered by the EIRs. The decision covers a lot of ground, ranging from very close scrutiny of the Aarhus convention and implementation guide, through a delightful analysis of whether functions that are public in nature are in fact “functions of public administration”, all the way to the first reference to the plays of Henrik Ibsen we have seen in a Tribunal decision.

The detailed testing of what the EIRs mean by ‘functions of public administration’ is important. Firstly, they definitively take the water companies out of EIR unless the case goes to court or the Government steps in (don't hold your breath for option 2). Secondly,

they provide detailed advice for anyone trying to work out whether their outsourced service or arms-length trust is captured by the EIRs even if they evade FOI.

There are many tests for whether an organisation is subject to the EIRs – crucial among those which decided the water companies' fate was that they are private sector organisations which can be bought and sold, and foreign owned. While licensed and appointed by the state to do certain things, they are not created by statute and do not carry out tasks that government (in its broadest sense) would have to carry out in their absence. Even if a water company fails, the legal duty to provide a universal service is taken over by another company, and not by the state. The Upper Tribunal also found that the fact that an organisation is regulated by the state is not the same as it being under its “control “ (a factor in identifying an EIR public authority).

So where does this leave those who may be in EIR limbo? Our answer is it leaves you with a series of questions:

- Does the organisation have a statutory basis?
- Is the organisation controlled by a state organisation, perhaps with government or official nominees on its board?
- Does it carry out functions which would otherwise have to be carried out by a government or official body?
- Is the organisation accountable to government or parliament, rather than to members or shareholders?

The more times you answer “yes”, the more likely it is that the organisation in question is covered.

ActNow is publishing a series of guides on the EIRs, including one for non-FOI public authorities, and sector specific guides for local authorities, parish councils, the NHS and Universities. We also run regular courses on the EIRs, and can arrange an in-house day on the EIRs or EIR & FOI joint training days. Contact us for more information and to register your interest.