EIR Watch

Editor Tim Turner Winter 2010

1. YOU'VE GOT MAIL

As the effect of access to information laws continue to bite, recent environmental news demonstrates reassuringly that even the cleverest of people may not be "getting" FOI and EIR. We seemingly know what scientists at the UEA's climate change unit have been emailing each other, not because of an EIR request, but because of hackers. Nevertheless, now their emails have been splashed across the world's media, we can enjoy not only US TV pundits' attempts to pronounce East Anglia, but the scientists' apparently incautious attitude to transparency. Sceptical newspapers and bloggers have gleefully regurgitated the apparently genuine exchanges between scientists. When discussing incoming FOI requests from climate sceptics, they included such gems as:

> **"Think I've managed to persuade UEA to ignore all further FOIA requests if the people have anything to do with Climate Audit."**

And

> **"If they ever hear that there is a Freedom of Information Act now in the UK, I think I'll delete the file rather than send to anyone"**

There are problems in commenting on this story - the emails were obtained by dubious means, they are being quoted without context (we haven't read them in full), and their authenticity has never been fully established. However, leaving aside the climate debate, the emails suggest a lack of understanding of a relatively simple concept by some seriously clever people. It's one thing to forget about the implications of FOI when you're emailing about something else - it's an achievement to forget about the implications of FOI when you're emailing about FOI.

Read the media story - http://news.bbc.co.uk/1/hi/england/norfolk/8374721.stm

Rumours persist about the extent to which FOI & EIR stifles frankness, and nobody can assess whether public servants are not keeping notes any more. We think most would prefer an embarrassing disclosure to being mired in working practices reliant entirely on memory. The supposed triumph of being able to say "we shredded the notes" is hollow if it results in a headline more embarrassing than the one you were hoping to avoid. But one lesson we can perhaps learn from the boffins is that email is not the best place to be informal, offhand or subtle. To sum up, it's tempting to quote the words of Eliot Spitzer, former Attorney General of New York:

> **"Never write when you can talk. Never talk when you can nod. And never put anything in an email."**

Mr Spitzer ended his career mired in a prostitution scandal - so maybe we should be taking his advice with a truckload of rock salt.

2. COMMERCIAL CONTRACTS UP FOR GRABS

First up, Veolia vs Nottinghamshire County Council, a court decision made outside the EIR. The implications of the case can probably be exagerrated - Veolia sought an injunction against the Council, which intended to provide a local environmental activist with a copy of its contract with the French waste management giant under the Audit Commission Act 1998. Veolia argued that this was a breach of their expectations of confidentiality. At this point, we brace ourselves for a strong debate on the rights and wrongs of disclosing how public money is spent, but this is not what the case is about. The High Court's decision is narrow and specific - as it should be.

It turns on whether Nottinghamshire is correct in its decision that the contract is "related to" the accounts, and therefore up for grabs. The court decided in a decision published in October that the document is part of the accounts, and so orders its disclosure. While the legislation allows for information to be withheld if it is personal data, it makes no similar provision for commercial data.

The question for EIR watchers is not so much about the effect of the case itself – for local government, the audit inspection rights are specific but broad, and Nottinghamshire were right to interpret them as they did. The question might be what comes next. The case attracted the involvement of Friends of the Earth, and so it is likely that activists around the country with an interest in waste and other environmental contracts will use the audit window to get hold of information. If the details of contracts get out into the wild, it's at least possible that the Information Commissioner might take that into account when deciding on future EIR decisions. After all, if Nottinghamshire can provide the contract under the Audit rules and the world does not end - Veolia have chosen not to appeal - might this not create a precedent for other similar situations? If environmentalists successfully obtain contracts in the next audit period, they might also have better public interest arguments for obtaining similar contracts. Watch this space - it may get filled up.

3. ICO DECISIONS FOR YOUR CONSIDERATION

Chesterfield Borough Council: you have to cite an exception for not held, but no public interest test is required

One to watch procedurally: Chesterfield did not hold information about the layout and membership of an allotment site run by a local association. Quite rightly, they made clear that they did not hold the information - your author has also found the prospect of doing a formal EIR refusal somewhat overblown. Nevertheless, this decision makes clear that when you do not hold environmental data, you do have to do a formal refusal under Regulation 12 (4) (a) - but no public interest test is necessary, or indeed possible. **It is also evidence of the enduring appeal of allotments as a topic for information requests**.

Read the full decision
http://www.ico.gov.uk/upload/documents/decisionnotices/2009/fs_50260693.pdf

Liverpool City Council: verbal requests are valid

EIR Watch decided to take a vow of silence on personal search requests following issue 1, but one issue from this decision caught our eye: "*The complainant and public authority do not have a record of the original request for information*". The validity of verbal requests under the EIRs has been a training course standby for years now - it is interesting to see the Commissioner making a decision on a purely verbal request. An adequate procedure for capturing verbal requests is clearly a sensible issue if you haven't already looked at it.

Read the full decision
http://www.ico.gov.uk/upload/documents/decisionnotices/2009/fer_0255346.pdf

Department of Energy & Climate Change: drafts can be protected when the final version is out

The Department of Energy & Climate Change sought to withhold drafts of a report about wind farm noise produced by a consultancy, the final version of which was in the public domain. The drafts and the final version are recognised as being separate distinct document - the finished status of the final draft **does not** cancel out the unfinished status of the previous versions. However, the public interest test favours disclosure, though not after a titanic clash of damaging factors, but a puny thumb-wrestle - paragraph 103 of the decision reveals that this is "*a case where although there is not an overwhelming case for disclosing the information, the case for withholding is even weaker*".

Read the full decision
http://www.ico.gov.uk/upload/documents/decisionnotices/2009/fs_50229639.pdf

London Development Agency: effect of information not relevant to whether it is environmental

The LDA argued that information about the amount of compensation paid to a person in receipt of a compulsory purchase order was not environmental - it was simply a sum of money paid as part of a transaction, and in itself had no effect on the environment. The Commissioner disagreed - the EIRs do contain a proximity test i.e. is the information genuinely remote from an environmental issue. However, the environmental effect of the order is undisputed, and the compensation paid for it is not remote from the issue.

The LDA also came slightly unstuck by not making a sufficiently strong case for the EIR exception once FOI had been jilted by the Commissioner. The Commissioner quoted the Tribunal, underlining the fact that FOI and EIR are two separate disciplines, with factors that do not necessarily leap across the divide: "*if a party wishes to rely on an exemption, it is up to them to establish that this is valid*". **The lesson here? A working assumption that any issue involving building or development is dealt with under the EIRs is clearly sensible.**

Read the full decision
http://www.ico.gov.uk/upload/documents/decisionnotices/2009/fs_50222273.pdf

DEFRA: internal communications does not cover the whole of the state

One of the best resources available to the EIR practitioner is the body of guidance produced by DEFRA - the document about the definition of environmental information should be required reading for any FOI officer or advisor. However, one aspect of the guidance was repudiated by the Information Commissioner in November. The Regulations clearly specify that the whole of Central Government should be considered as one organisation for the purposes of the "internal communications" exception - one government department is explicitly entitled to use the exemption to protect contacts with another, subject to the public interest test.

However, the DEFRA guidance extends this to "the whole area of the state", on the basis that the EIR Directive applies to government structures across the EU. DEFRA relied on this interpretation to withhold communications between itself and the Mayor of London, but this was thrown out by the ICO. Though this was probably a step too far, the rest of DEFRA's exceptions guidance is still very useful - and the sheer volume of EIR guidance produced by DEFRA dwarfs the output of a certain FOI regulator we could mention…

Read the full decision
http://www.ico.gov.uk/upload/documents/decisionnotices/2009/fer_0272686.pdf

4. INFORMATION TRIBUNAL DECISIONS

South Gloucestershire v Bovis Homes: As you were

In our first issue, EIR Watch was impressed by the prospect that specialist outside consultants could be considered to be providing "internal communications". However, this position was not upheld by the Tribunal, who made clear that only consultants who are embedded in an organisation can be covered by the exception. However, the Tribunal supported South Gloucestershire's case under the commercial confidentiality exception - agreeing that the duty of confidence owed by the Council's contractors to it was grounds to use the EIR's convoluted commercial prejudice exception.

Moreover, the council offered a detailed approach - they scored particularly by looking not at a general need to protect their hand in negotiations, but at the specific situation. The Tribunal recognised that the "*asymmetry of power in the negotiations was a very real concern*" - Bovis could request any information from the Council and exploit their superior knowledge, while the Council could not do the same for Bovis. Practitioners looking for a good example of how to protect information in negotiations should read this decision with care.

Read the full decision at http://tinyurl.com/yzv23js

5. EIR NEWS IN BRIEF

Wider Coverage…

Bodies not subject to FOI can be captured by the EIRs wider scope. PhonePayPlus - the premium rate regulator - have been obliged by a December ICO decision to accept that they are covered by the EIRs.

Read the full decision
http://www.ico.gov.uk/upload/documents/decisionnotices/2009/fer_0265609.pdf

Spooks go public…

Remarkably, MI5 has identified itself as being covered by the EIRs and started to publish environmental information on its website. Given that MI5 are not covered by FOI, and any information they give to anyone else directly or indirectly is absolutely exempt, we can only applaud their precise understanding of the Regs.

See the shocking details
https://www.mi5.gov.uk/output/environmental-information.html

Traffic crossings data is environmental..

But it's not reasonable to ask for such data a quarter of a century after it was created.

Read the full decision
http://www.ico.gov.uk/upload/documents/decisionnotices/2009/fs_50193203.pdf

A good way of arguing that an applicant is manifestly unreasonable….

Stockport Council has succeeded in labelling a series of requests as vexatious and manifestly unreasonable. The decision reports the applicant sending a volume of correspondence sufficient to close down their inbox over a weekend. EIR Watch does not know whether to admire the sheer persistence of this applicant, or to quit the EIR business before it happens in our day job….

Read the full decision
http://www.ico.gov.uk/upload/documents/decisionnotices/2009/fs_50232537.pdf

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