EIR watch

Editor Tim Turner Autumn 2009

EIR - A bridesmaid no more?

The silent progress of the Environmental Information Regulations continues. Introduced at the same time as FOI, but often spurned by public authorities at the altar in favour of her taller and more glamorous sister, she has now caught a huge bouquet thrown by the Information Commissioner. The ICO has not always been a faithful suitor, but his recent guidance on personal searches http://tinyurl.com/ydn3hrs was the icing on a pretty big wedding cake.

Tired of this metaphor yet? Me too, but just consider how far the EIRs have come. The ICO spent years being corrected by the Tribunal over EIR, seemingly ignoring the Regulations' very existence, but if you overlook the more obvious grenade hurled into the battle between councils and personal searchers (see below), the July guidance confirms that big chunks of data have been swept under the EIRs' skirts. Entire local council departments may need to know nothing about FOI as a result, while everyone is covered for their buildings, waste management, carbon footprint, and a lot more besides.

This newsletter is aimed at public authorities, and its purpose is to keep you up to speed with where the EIRs may be heading next.

In this issue

1 ICO PERSONAL SEARCH GUIDANCE: CAN YOU IGNORE IT?

You probably can, but you probably shouldn't.

In July, the Information Commissioner issued guidance about the application of the EIRs to personal search requests for information about properties, and their proximity to various road schemes, land issues and other things. Many Councils find the guidance highly inconvenient, and some believe it to be wrong. But what effect will it really have, and is it relevant for other sectors?

The most important point about any IC guidance is that it is not legally binding – Parliament and the Courts make the rules, not the IC. It's also worth noting that the Commissioner's Office sometimes disagrees with itself – it happened in a decision http://tinyurl.com/yeb9tsk (see paragraph 41) – and the Information Tribunal does it all the time. Nevertheless, the IC will be the first port of call for your aggrieved personal searcher unless they take you to court, so you have to know what they think.

They have backed up the guidance with a number of decisions involving Stoke and East Riding, so they obviously think their guidance will withstand the Tribunal's scrutiny (and we have no doubt one of these Councils will be giving them that opportunity).

To summarise the guidance:

- the "majority" of the information sought by personal searchers is covered by the EIRs (we'll return to that)
- the Local Authorities (England)(Charges for Property Searches) Regulations 2008 do not apply to the EIRs
- applicants are entitled to inspect any environmental data for free if no reasonable alternative exists
- applicants can ask to inspect anything that exists in a reasonable format

There is one issue to settle before we go on. The IC has received a lot of stick for not bearing in mind the financial impact of its guidance on local councils. It would have been extraordinary if they had. The EIRs, and the Directive that sits behind them, doesn't provide the Commissioner with a "protecting the public purse" clause. The EIRs are an efficient mechanism for squeezing as much environmental data out of the public sector as possible. Unlike FOI, which was the result of weeks of detailed scrutiny in Parliament, the EIRs had to be shaped in the Directive's image, and as Regulations they were passed on the nod by MPs. The FOI Act might be a triumph of the law of unintended consequences, but the EIRs are an unseen stink-bomb dropped in a lift. It's arguable that even if the Commissioner had wanted to give different advice, it would have been impossible for him to do so.

Five issues to consider

1. Consider that first bullet point above. Most IC guidance hedges its bets left, right and centre, and this one is no exception – it's "may", "probably" and "should" instead of "must" and "have to". There is room for manoeuvre and challenge if you are so inclined. Any information you decide is outside the EIRs can clearly be charged for under FOI Section 21.

2. Some Councils are already romancing another of Information Rights' EU-inspired eternal bridesmaids – the Re-Use Regulations. These regulations allow public bodies to licence and control the way in which information is used. If information must be inspected for free, the Re-Use regulations may allow some control about how information is used.

3. EIR requests have to be responded to in 20 working days, and a pattern of requests must not be "manifestly unreasonable".

4. The EIRs do not oblige authorities to create new information; a brace of Tribunal decisions make clear that merely counting, collating or extracting data is the same as finding it, but any data that requires skill or judgement to be created is new data, which public authorities are not obliged to provide.

5. One obvious response to the guidance is to put as much data into the public domain – if a Council has to find information for free, why find it at all? Put copies of data sources on your website or in your reception areas.

Personal searchers can then find their own data, while members of the public, who have been bystanders in this debate so far, will benefit into the bargain by having access to newly available data about their area. Greater availability of information about adopted highways, contaminated land and road schemes is unquestionably in the public interest.

And if you are not a council?

The guidance makes very clear that a wide range of property information ought routinely to be dealt with under the EIRs:

- Planning - applications, permissions and development
- Land acquisition
- Road construction
- Demolition of buildings

And finally

This issue is far from over. The Commissioner's guidance may be challenged - at least one council is already on the Tribunal list challenging an individual decision notice which implements the guidance's approach. On the other hand personal searchers, dealing with harsh economic conditions, will understandably not stop trying to get hold of information as quickly and cheaply as possible. It's hard to imagine a resolution that does not involve some measure of compromise.

2 ICO DECISIONS FOR YOUR CONSIDERATION

Legal advice can be given out!

Two stand-out Commissioner decisions containing a mixed picture have recently been issued. Most striking is the one involving Nottingham City Council http://tinyurl.com/yedpvvt The Council have legal advice about a piece of "inclosure land" - Victorian legislation limits the use of such land to the provision of "public walks and/or "public baths and outbuildings and gardens".

The use of this particular land has been much disputed, and the Council had obtained legal advice about its status, and what can be done with it.

Concerned about the damage to their ability to defend themselves in any litigation, the Council successfully identified the exception in regulation 12 (5) (b), which prevents adverse effects on the course of justice. The Commissioner's decision makes clear, as do many before it, that 12 (5) (b) is a clear match for the Section 42 exemption in FOI that protects legal professional privilege.

And here's the rub: Nottingham mount a stout and convincing defence of their position, arguing successfully that disclosure of the advice will prejudice their position. Should any future litigation be launched on the matter of this or other similar land, Nottingham will be at a disadvantage. The strengths and weaknesses of their case will be laid bare. This is not one of those decisions where the public authority put their case without the requisite spadework, or where legal privilege has clumsily been dispensed with. The Council's case looks sound.

But the Commissioner finds against them on the basis of the public interest, despite acknowledging the huge public interest in favour of protecting legal privilege. The Council wants a level playing field in possible litigation that could only arise – the IC says – if it seeks to change the restrictions on the land. The public should therefore see the advice.

This is not one of those decisions that opens the floodgates – it was made on the specifics. But it is a game-changer – previous decisions that force disclosure of legal advice have turned on lost privilege or the remoteness of litigation. The Council's case looks solid, and is based on live issues, and still the IC decided against them. When rehearsing your arguments for refusal of legal advice in future, it makes clear that a well-made defence of legal privilege may not be bulletproof.

Internal correspondence

Another less recent decision is still eye-catching. South Gloucestershire Council are challenging a decision http://tinyurl.com/yeb9tsk in March at the Information Tribunal, so the specific issues are way up in the air. Nevertheless, a couple of nuggets in the original decision already have wider application.

Regulation 12 (4) (e) is possibly the most unusual of all the EIR exceptions, and certainly the one that veers most obviously away from FOI. Whereas FOI protects internal discussions with Section 36, an exemption with more hurdles than an Olympic steeplechase, 12 (4) (e) covers internal communications without so much as a harm test.

Reluctantly, Commissioner decisions acknowledge this lack of a prejudice test, and so come down to two tests – is it really internal, and is disclosure in the public interest? That second question is clearly a big one – the great majority of internal communications are probably outside the exception as a result.

But the Regs already make clear that communications between government departments – otherwise considered separate public authorities – are considered to be 'internal'. Now the Commissioner has accepted that where an organisation contracts out advice to an expert third party because it does not have the expertise in-house, the advice can be considered to be "internal".

Perhaps unfairly, the IC did not find in South Gloucestershire's favour via this line of thinking because "the Council did not advance arguments of this nature" – in other words, we think the exemption might apply because of this, but you didn't say so.

So, while we await the outcome of the Tribunal with interest, two factors spring to out: your consultants might be internal correspondents, but you have to think of this first!

Other recent decisions about scope:

- FS50207670: licences about vehicular access are covered by the EIRs!
  http://83.137.214.19/upload/documents/decisionnotices/2009/fs_50207670.pdf

- FS50190964: noise coming from a pub is covered by the EIRs!
  http://www.ico.gov.uk/upload/documents/decisionnotices/2009/fs_50190964.pdf

- FS50187166: Data about allotments is covered by the EIRs! (not really a surprise)
  http://www.ico.gov.uk/upload/documents/decisionnotices/2009/fs_50187166.pdf

3 EIRs: REMIND ME AGAIN WHAT THEY ARE

To end this first EIR newsletter, on the final page is a brief reminder of why the EIRs exist, why they are different, and who needs to worry about them:

TEN THINGS YOU NEED TO KNOW ABOUT THE EIRs

1 All member states of the EU have to implement Directive 2004/4/EC, which creates a requirement for legislation requiring access to environmental information. Unlike FOI, the UK Government is obliged to submit reports to the European Commission about progress implementing the EIR.

2 Like FOI, the EIRs are regulated by the Information Commissioner, and appeals go to the Information Tribunal

3 While the mechanics of the EIRs are very similar to FOI, the Regs do not mention a requirement to make requests in writing, which means that verbal requests are valid.

4 The definition of environmental information is extremely broad and subject to interpretation – guidance on interpreting the definition has been issued by DEFRA, the Commissioner and also by the United Nations, who are responsible for the international convention which inspired the Directive.

5 None of the EIR exemptions are absolute.

6 The EIRs have no fee regulations – costly requests must be refused under a catch-all exception of "manifestly unreasonable".

7 There is no exception for prohibitions on disclosure or commercial prejudice – the latter issues are covered by adverse effects on intellectual property, and a highly specific exception for commercial confidentiality.

8 The definition includes planning, construction, waste, recycling, noise, pollution, water and air quality outside and inside, plus many other issues.

9 Bodies with an official role in managing or administering environmental work on behalf of the public can be subject to the Regulations even if they are not subject to the FOI Act.

10 Act Now Training has been offering courses and in-house training on the EIRs since 2005 - ask us for more information!

EIR updates from Act Now

Belfast 12th November, Wellington Park Hotel http://www.actnow.org.uk/courses/230

London 4th December, Thistle Marble Arch http://www.actnow.org.uk/courses/232

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