Are the EIRs too broad, and is it time to revisit the concept of 'remoteness'?

Damien Welfare, Cornerstone Barristers, ***examines to what extent there has been an unpalatable widening of the EIRs regime, at the expense of FOIA and to what extent the definition of 'remoteness' needs clarifying***

Many practitioners and lawyers dealing with information law would agree that the Environmental Information Regulations 2004 ('EIRs') have been applied to a much wider range of information than was envisaged at their inception. One consequence of the widening application of the EIRs is that the scope of the Freedom of Information Act ('FOIA') has been progressively eroded since it came into force in 2005.

For a while, the erosion of FOIA seemed to be encouraged by FOI campaigners, perhaps in the belief that the EIRs contained fewer and narrower exceptions than FOIA. That assumption is now open to question, for two reasons. Firstly, in recent years we have seen the emergence of a very strong exception for commercially confidential information under Regulation 12(5) EIRs; and secondly, because of the decision of the European Court of Justice ('ECJ') in *OFCOM v Information Commissioner* (Case C-71/10) that the public interest factors against disclosure should be aggregated under the EIRs. Both factors may significantly reduce levels of disclosure under the EIRs.

The question remains as to why the EIRs have been applied so widely, when the effect is, but is rarely acknowledged to be, a 'zero sum game' between the EIRs and FOIA. Why do we apparently think that the scope of FOIA should be limited to this extent? This question also arises in relation to the issue of 'remoteness' of information from the environment derived from the *Glawischnig* case (discussed below.)

Basic problem with the EIRs

The basic problem with the scope of the EIRs arises from interpretation of the Directive to which they give effect (Directive 2003/4/EC).

'Environmental information' is defined in Regulation 2(1) EIRs in identical terms to those in Article 2 of the Directive — i.e. as any information about: elements of the environment (for example, land); factors affecting those elements (for example, noise); and, most critically, measures and activities affecting, or likely to affect, the elements and factors, measures and activities designed to protect those elements.

Potential wide interpretation of 'measures'

The difficulty with the definition above is that a very wide range of 'measures' are likely to have an effect to some degree on elements or factors of the environment.

Like the Directive, the EIRs refer to 'policies, legislation, plans, programmes, environmental agreements'. In many cases, the likely or intended consequences of such measures will be apparent in environmental terms. Thus, as would be expected, the EIRs have been applied to the land use planning regime, transport, and waste management activities in many cases.

However, in other cases, the wider application of the term 'policies, legislation, plans, programmes' to 'measures' and 'activities', without limiting them either by their purpose or by their effect, draws in a much wider range of undertakings with environmental consequences that are incidental or minor, rather than central to their purpose, or a significant consequence of carrying them out. For example, the construction of a building or a road involves excavation of ground, affecting an element. For that reason alone, at least the substance of the project will be regarded as a measure affecting the environment. Clearly, such a project does affect the environment in many ways, some of which are significant, such as the size, location and manner of construction (although, in the case of a building, the consequences appear likely to be greater during its construction than afterwards). Information on the environmental consequences of those aspects should quite properly fall under the EIRs. However, other aspects of such projects have no necessary environmental aspects, for example: the cost (except perhaps where one option may have a greater environmental

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consequence than another, and cost is driving the outcome); legal advice on the contract; clauses governing the incentives or penalties linked to performance; sub-contracting arrangements; and agreements on staffing or security levels. Yet, according to the current approach (discussed below), most, if not all, of them seem likely to be treated as environmental information (with the pure cost being a possible exception).

Other examples from past decisions of the Commissioner include:

- the installation of a pedestrian crossing (Plymouth City Council, FER 0069925);
- a draft report on links between transport and the economy (Department of Transport, FS 50156849, or as it is more commonly known, the 'Eddington case');
- an agreement with a local educational partnership to manage delivery of a school building programme, including core costs, rates for design and the annual value of the project agreement (Bristol City Council, FS 50164262); and
- a list of possible sites for so-called 'Titan' prisons (Ministry of Justice, FS 50224851).

In each case, while the reasoning can be followed within the framework outlined above (and the MoJ case is similar to the buildings example above), whether it is desirable to stretch the scope of the EIRs by such a literal approach, without some limiting factor linking the information concerned to the environment, is questionable.

The problem of the wide potential scope of the EIRs is not new and even preceded the enactment of the present EIRs. In *R v Secretary of State for Environment, Transport and Regions, and Midland Expressway Ltd ex parte Alliance against Birmingham Northern Relief Road and others* (Case No CO/4553/98) decided under the 1990 EIRs, the High Court treated the whole of a concession agreement to build a toll road as environmental information. The 1990 EIRs were derived from the previous Directive (90/313/EC) which applied to 'information relating to the environment'. This was defined to mean 'any available information on the state of land and natural sites, and on activities or measures adversely affecting, or likely so to affect these, and on activities or measures designed to protect them'.

Glawischnig case and 'remoteness'

The ECJ provided an answer to the potential breadth of the definition in 2003 in *Eva Glawischnig v Bundesminister für soziale Sicherheit und Generationen* (C-316/01) ('the *Glawischnig* case'). In this case, information as to which products had been examined by the Austrian authorities for compliance with EU labelling requirements on genetically modified organisms, the frequency and scale of penalties being imposed, and which producers were penalised, were held not to be environmental information.

The Court's reasoning was that, while the concept of 'information relating to the environment' was a broad one, Directive 90/313 was not intended to give an unlimited right of access to 'all information held by public authorities which has a connection, however minimal, with one of the environmental factors mentioned in Article 2(a)'. The information had to fall within the terms of that provision to count as environmental information.

The Court said that information concerning controls on the labelling of products was not information on the state of the elements (water, land, etc). Nor was it information on measures affecting those environmental elements "even if those controls concern activities or measures which for their part affect or are likely to affect one or more of the environmental factors" (paragraph 27 of the judgment). Such information could be information on activities or measures designed to protect the environment (and thus fall within the latter part of the definition) where the controls were intended to provide such protection (paragraph 29). However, the purpose of the controls was to specify requirements as to the content of consumer information in labelling and advertising, not to protect the environment (paragraph 33). In consequence, the information was not environmental information.

It was this case from which the concept of the 'remoteness' of the information from (or its 'proximity' to) the environment was derived, although the words are not used in the judgment. The concept was set out in Chapter 3 of the detailed guidance from the Department for Environment Food and Rural Affairs, the lead government department on the EIRs, issued in the early stages of the legislation, in addition to the more recent 'guidance on the boundaries between environmental and other information,' revised in February 2009. (Both are now archived on the DEFRA website). In the latter document, case studies show different circumstances in which the EIRs or FOIA apply. Although the commentary in the revised version of the second document is less explicit than in the former document, a number of the case studies use the concept of remoteness to distinguish circumstances in which the FOIA rather than the EIRs apply.

Commissioner's Lines to Take

The Commissioner has taken a different view on remoteness to the DEFRA guidance, as set out in two 'Lines to Take' ('LTTs'), published on his website: 'Defining Environmental Information', LTT 80; and 'Any information on', LTT 82.

The LTTs form the Commissioner's internal guidance to his Investigating Officers and a number of them take a noticeably robust policy line. In relation to the scope of the EIRs and whether the test of remoteness should be applied, the Commissioner criticises the approach formerly taken by DEFRA and puts forward his own approach, on which he intends to rely.

As the Commissioner states, the original DEFRA formulation was that the test should be whether the information itself would have a direct effect on the environment. This was somewhat opaque, since it was unclear how the information (as opposed

to the activity or matter to which it referred) could itself affect the environment.

The Commissioner rejects the *Glawischnig* case as not binding in relation to the current Directive, since it was decided under the previous one, and (as recognised in the judgment) the 2003 Directive contained a "wider and more detailed" definition of environmental information than in the 1990 Directive.

However, the Commissioner's reasoning on this point is questionable. It could be that the ECJ was laying down a general principle in *Glawischnig,* rather than merely interpreting the then current wording. On the definition itself, while it is the case that the 2003 version is wider, this was principally because it added in other categories including: 'factors' (e.g. energy and noise); reports on the implementation of environmental legislation; cost-benefit analyses; the state of human health and safety; and the condition of buildings, as affected by the environment. The definitions of 'measures' or 'activities', and of what (in the 2003 text) are called 'elements', were substantially similar in the later Directive.

Some marginal differences between the old and new Directive in relation to the definition of 'measures' are: an arguable extension of the scope to include those affecting the environment beneficially, other than where they have been designed to do so (by removing the earlier reference to adverse effects); the inclusion of measures likely to affect 'factors' as well as 'elements'; and the inclusion of a descriptive list (e.g. policies, legislation or plans) —though this last might be thought to limit rather than to expand the scope of the Directive. In substance, the concept of a 'measure' or 'activity' remains as before; and the reasoning of the Court remains relevant to the extent that the wording and structure of the legislation are similar.

"If a suitable appeal occurs, guidance from the Tribunal (or a higher court) as to whether the approach in the Glawischnig decision and the DEFRA guidance should still be applied and, more generally, over the appropriate breadth of the EIR, would be helpful. In answering the latter question, the rationale for a wide application of the EIRs should be examined critically; particularly since the ECJ, on the only occasion on which it was asked, concluded the opposite."

The Commissioner does not abandon the term 'remoteness'; however, he does reformulate it (the basis for which is not stated) in a way that significantly narrows the approach from that taken by the ECJ. He states that he considers that there is a 'proximity/ remoteness style test', but that it is a test of the proximity/ remoteness of the information itself to the relevant element, factor, measure or activity etc., under Regulation 2(1)(a) to (f). (The Commissioner then suggests the familiar second test of linking the factor, measure, etc. back to the elements of the environment under Regulation 2(1)(a)).

The first of these two tests almost removes the meaning of 'remoteness', at least in relation to 'measures'. If the sole test of remoteness is whether the information requested is sufficiently close to the measure or activity (or effectively, whether the information is 'on' that measure or activity), it seems to add very little to the determination of whether the information should fall under the EIRs or FOIA. If the measure or activity is likely to have an effect on the environment, then information that is sufficiently close to that measure or activity (i.e. apparently, that is 'on' it) will fall under the EIRs.

The Commissioner's analysis of remoteness comes close to restating the wording of the Regulation, and no examples are given of information that would be insufficiently close to qualify. Applying it to one of the examples above, all the terms for the construction of a road, even if they concerned cost or penalty payments and had no environmental consequences or connection, would appear likely to fall within the EIRs. According to the Commissioner's formulation, if the main measure has an environmental effect, however limited, it appears to be difficult to see what information 'on' that project would be too remote from the project to constitute environmental information, however unconnected the information may be with environmental matters. This also seems questionable, particularly as such an analysis does not arise as a necessary consequence of the terms of the Directive, and the ECJ has pointed to a different approach.

The Commissioner has applied his present approach to remoteness in his Decision Notice in Department of Transport, FS 50156849, but this was not contested. The Commissioner has also applied his approach in other Decisions, such as Chemicals Regulation Directorate, FS 50248660 and, albeit using slightly different reasoning, in City of Westminster Council, FER 0276297 and Ealing Council, FS50255080.

Approach of the Tribunal

Though the Tribunal has heard arguments on 'remoteness', no decision appears to be definitive.

In *DBERR v ICO and FOE* (EA/2007/0072), the Commissioner (expressing his earlier view) concurred with the government department that there must be a 'sufficiently close connection between the information and a probable impact on the environment' in order for the infor-

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mation to be environmental information (at paragraph 26 of that judgment). The Tribunal found that certain information (on demand and supply in relation to the pricing of energy) fell within the definition of environmental information.

In *Mersey Tunnel Users Association v ICO and Halton BC* (EA/2009/0001), the Commissioner submitted that information relating to the building of a bridge and to tolling was information on a measure likely to affect the elements of the environment. Halton BC submitted that the tolling information fell within FOIA, since the link between the information and the likely effect on the environmental elements was 'not sufficiently strong and direct' to be environmental information. The Tribunal conceded that if there was an effect on traffic flows from tolling, this could affect the elements of the environment, but argued that the request was for any documents relating to tolling, and that this would include information with no connection to environmental consequences. The Tribunal's attention was drawn to the finding of the ECJ in *Glawischnig*, and to the DEFRA guidance. On the facts, the Tribunal found that, because the project could only be delivered if tolling were introduced, the tolling was an integral part of the project and its viability. For that reason, the Tribunal agreed with the Commissioner that the information requested was environmental information.

The Tribunal was not asked to rule on the approach to remoteness now taken by the Commissioner and the Tribunal did not rule on remoteness in general.

In *Ofcom v ICO and T-Mobile* (EA/2006/0078), the Tribunal considered whether the names of those responsible for installations emitting electro-magnetic waves fell within the meaning of information on an element or factor (radiation). It concluded that to separate the nature and effect of radiation from its producer would create 'unacceptable artificiality'. However, the decision did not deal with the wider issue of remoteness, especially in relation to information about 'measures'.

It is interesting to note that in a very recent decision taken by the Scottish Information Commissioner, *Tony Kane and Scottish Water, (*Decision 012/2012, 19th January 2012), while rejecting that there was an insufficient connection between the information in issue and the environment, the Scottish Commissioner acknowledged that "information will not necessarily be environmental simply because it had a slight or tangential association with the state of the elements of the environment".

Conclusion

Too wide an application of the EIRs limits the scope of FOIA. This deserves to be acknowledged, and the question addressed as to whether this is a necessary consequence of the 2003 Directive, or whether the ECJ's reasoning should be re-examined.

If a suitable appeal occurs, guidance from the Tribunal (or a higher court) as to whether the approach in the *Glawischnig* decision and the DEFRA guidance should still be applied and, more generally, over the appropriate breadth of the EIR, would be helpful for public authorities tasked with navigating this difficult area. In answering the latter question, the rationale for a wide application of the EIRs should be examined critically; particularly since the ECJ, on the only occasion on which it was asked, concluded the opposite.

Practitioners, and the public, are entitled to know which information regime should be applied. At present, practitioners in public authorities too often find themselves on the wrong side of a decision, with time and resources having been wasted because of the differences between the two regimes; and how they affect (for example) the scope of the exemptions/exceptions, whether a cost limit applies, or how to apply the public interest test.

A sensible division between the two regimes would see building projects, for example, coming under the EIRs for most of the construction phase, while all of the contractual arrangements would fall under the FOIA unless they had a direct environmental consequence (such as the clause dealing with installing the solar panels). Once a building project is complete, the EIRs would apply only to aspects of the building that continued to affect the environment, such as the heat produced by it. A report on transport would be considered under FOIA, except for the parts about vehicle pollution, or the effect of roadbuilding on the landscape. Disclosure of a planned list of large-scale prisons would be sought in the context of prison policy, rather than via their potential effect on green field sites. The FOI officer would know which regime to apply, public understanding of the information law system would be improved, and the ICO's case officers could deal with cases more quickly.

Given the unforeseen strength of EIRs commercial confidentiality exemption, and moreover the aggregation of public interest factors weighing against disclosure, adjusting the focus back in favour of FOIA could bring some benefits for requesters too.

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Damien Welfare leads the training course 'Understanding the EIRs', with dates in London and Belfast.

See the website www.pdptraining.com for further information.