Case Reference: FT/EA/2024/0070
Neutral Citation Number: [2024] UKFTT 00912 (GRC)

First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Heard by Cloud Video Platform
Heard on: 23 September 2024
Decision given on 24 October 2024

Before

JUDGE SOPHIE BUCKLEY
MEMBER KATE GRIMLEY-EVANS
MEMBER NAOMI MATTHEWS

Between

THOMAS WHITE

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Representation:
For the Appellant: In person
For the Respondent: Did not appear

Decision: The appeal is Dismissed.

REASONS

Introduction

1. This is an appeal against the Commissioner's decision notice IC-176096-Y7H5 of 30 January 2024 which held that the Freedom of Information Act 2000 (FOIA) was the appropriate regime and that the Cabinet Office was entitled to rely on section 12(1) of the Freedom of Information Act 2000 (FOIA) to refuse to disclose the requested information. The Commissioner held that the Cabinet Office had failed to issue a refusal notice in accordance with its obligation under section 17 FOIA.

2. The Commissioner did not require the public authority to take any steps.

Background to the appeal

3. This request arises out of the 'All in. All Together' campaign'. This is described by the Cabinet Office as a UK Government partnership with the newspaper industry in order to deliver Government communications on the response to Covid-19. The Cabinet office describes this partnership as a 'unique collaboration between the Government and over 600 national, regional and local titles reaching communities throughout England, Scotland, Wales and Northern Ireland and includes over 25 multicultural titles.' The campaign ran for 23 months from April 2022 to March 2022.

The request

4. The appeal relates to the following request made by Mr. White on 16 May 2022 and submitted to the email address for the 'FOI team' at the Cabinet Office:

> "Pursuant to any and all of the Complex UK Environment legislation re UNECE Aarhus Convention & UNECE Aarhus Convention please forward to me **a list** of any and all correspondence and other information, including but not limited to reports, meetings both in-person and e-meetings, emails, minutes, WhatsApp and SMS messages, that in any way or in all ways concern the project known as *the All in, All Together campaign* between the 1st of February 2020 and 30th June 2020 inclusive. Please give a meaningful description of the information listed as required by the legislation which underpins the convention.
> …
> PLEASE NOTE:
>
> THIS IS NOT A FREEDOM OF INFORMATION REQUEST. DO NOT TREAT IT AS A FREEDOM OF INFORMATION REQUEST."

5. In his covering letter Mr. White stated, 'The attached is a request for information on the Environment'.

The Cabinet Office's reply and internal review

6. The Cabinet Office responded by a letter from the public correspondence team on 13 June 2022 as follows:

"Please note the letter you sent represents an FOI Request, therefore you need to submit it as an FOI request. Please also note that this request will need to be condensed in order for the FOI team to be able to help you."

7. Mr White responded on 14 June 2022, pointing out that his request had been sent to the FOI team, it had not been responded to properly and that, in any event, it should have been dealt with as a request under the Environmental Information Regulations 2004 (EIR).

8. Mr White referred the matter to the Commissioner on 14 June 2022.

9. The Cabinet Office undertook an internal review. In the internal review response on 18 August 2022 the Cabinet Office apologised that Mr. White's request had been mishandled, because his letter should have been treated as a request for recorded information. The Cabinet Office concluded that the correct regime was FOIA rather than the EIR and refused to comply with the request under section 12 FOIA on the grounds that it had estimated that it would take 3.5 working days to determine if the Cabinet Office held the information and to locate, retrieve and extract it.

10. Mr. White referred the matter again to the Commissioner on 31 August 2022.

The decision notice

11. In a decision notice dated 30 January 2024 the Commissioner decided that FOIA was the appropriate regime and that the Cabinet Office was entitled to rely on section 12(2) FOIA. The Commissioner found that the Cabinet Office had breached section 17 FOIA.

12. The Commissioner accepted that Covid-19 relates to human health and safety but stated that not every request for information relating to Covid-19 is necessarily a request for environmental information. He found that the is a generalised request for any and all correspondence and communications between the Government and the newspaper industry to deliver communications on the response to Covid-19.

13. The Commissioner noted that regulation 2(1)(f) of the EIR includes the state of human health and safety but only inasmuch as it is, or may be, affected by the state of the elements of the environment referred to in regulation 2(1)(a), or, through those elements, by any of the matters referred to in regulations 2(1)(b) and (c).

14. The Commissioner noted that information requested by the complainant relates to a collaboration between the government and the newspaper industry about Covid-19 communications. The Commissioner's opinion was that it would not necessarily show how the state of human health and safety in respect of Covid-19 is or may be affected by the state of the elements referred to in regulation 2(1)(a) or, that through those elements, human health may be affected by the factors in regulation 2(1)(b) or measures or activities in regulation 2(1)(c).

15. The Commissioner acknowledged the complainant's position surrounding the Covid-19 virus but considered that the information requested by the complainant lacked the required specificity. Given that the complainant argued that Covid-19 was a biohazard and therefore fell within the definition of regulation 2(1)(b) then the Commissioner held that the requested information would need to be about the hazardous nature of the virus within the environment or to public health. The Commissioner concluded that the complainant's request was broader in scope and would potentially cover a much wider range of information.

16. The Commissioner considered that the Cabinet Office was correct to find that the information requested did not constitute environmental information.

17. In relation to section 12 FOIA, the Commissioner concluded that the request was extremely broad in scope. He accepted that the Cabinet Office had provided a reasoned and appropriate estimate of the time required to comply with the request and found that section 12(1) was engaged.

Notice of appeal

18. The grounds of appeal are, in summary, that:

    18.1. The Commissioner was wrong to conclude that FOIA was the appropriate regime because:
        18.1.1. The appellant cannot be prevented by the Cabinet Office or the Commissioner from invoking a particular law.
        18.1.2. Forcing the appellant to use FOIA negates his rights under the Aarhus Convention.
        18.1.3. The request was for environmental information

    18.2. Under EIR the Cabinet Office is obliged to categorise and store information in a reliable indexed manner, and so much of the argument about section 12 limits does not apply.

    18.3. The Cabinet Office did not handle the request properly.

    18.4. The Commissioner did not conduct its investigation properly.

    18.5. The Commissioner has misrepresented the request in the Decision Notice. The request was for a list of information.

The Commissioner's response

19. The Commissioner submitted that he was correct to conclude that the requested information was not environmental information. In the Commissioner's view the requested information would not necessarily show how the state of human health

and safety in respect of Covid-19 is or may be affected by the state of the elements referred to in regulation 2(1)(a) or, that through those elements, human health may be affected by the factors in regulation 2(1)(b) or measures or activities in regulation 2(1)(c).

20. The Commissioner submitted that any rights under the Aarhus Convention only apply to requests for environmental information.

21. The Commissioner submitted that criticisms of the Commissioner's handling of the complaint are not a valid ground of appeal. The right to a full rehearing on the merits cures any alleged procedural defect of breach of natural justice in the Commissioner's investigation.

22. The Commissioner asserts that the request was not misrepresented in the decision notice which directly quotes the request for a list at paragraph 4.

Mr. White's reply

23. Mr. White submits that all the points he has raised are justiciable. He submits if the tribunal is unable to rule on some points it must have the power to refer them to a place where they are justiciable.

24. Mr. White sets out that as a minimum he needs a decision notice to make a ruling on:

    24.1. Whether the Cabinet Office is within its rights to deny him the ability to invoke a specific law
    24.2. The nature of the information requested and
    24.3. Any exception or reason why the request should not be complied with.

The application of EIR

25. Mr. White submits that a requestor should be able to determine which access regime they want to be treated under. He submits that if his request was not for information on the environment it should simply have been refused. He submits that by saying 'do not treat as a Freedom of Information request' he has absolved the public authority of any obligations under FOIA.

26. Mr. White submits that the request was for environmental information. He submits that Covid-19 is an element of the environment within regulation 2(1)(a) EIR. He notes that regulation 2(1)(a) only gives examples of elements of the environment ('such as') and they are not limited to those listed.

27. Mr. White draws the tribunal's attention to the Cartagena Protocol on Biosafety[1] which defines, for the purposes of the Protocol, a 'living organism' as 'any biological entity capable of transferring or replicating genetic material, including sterile organisms, viruses and viroids'. On this basis he submits that Covid-19 would come under 'biodiversity' in regulation 2(1)(a).

28. Mr. White submits that the scientific theories of the origin of Covid-19 are that it was presented in bats before jumping species or that it was an escaped virus from a laboratory.

29. The Commissioner's guidance on regulation 2(1)(a) and why both air and atmosphere are used states:

> "The use of both words in this definition indicates that it encompasses air that is confined in some way, as well as the air outside. Since the air and atmosphere are made of various gases and contain solid particles, they are included in the definition."

30. Mr. White submits that given Covid-19 is spread via droplet or aerosol then the Commissioner's definition in the guidance is met.

31. Mr. White submits that Covid-19 falls within regulation 2(1)(b) because it is a biohazard through emission into the environment from people infected with the virus or because of its 'infectiousness' either of which would be a 'factor' similar to those examples listed in regulation 2(1)(b) such as radioactivity.

32. Mr White submits that the collaboration between the government and the newspaper industry about Covid-19 communications was an activity which affected the elements in regulation 2(1)(a) or the factors in regulation 2(1)(b) because the collaboration affected the spread of Covid in the environment. Therefore, he submits that every communication around this measure becomes environmental information.

33. Mr. White submits that the collaboration could be viewed as a measure or activity in this own right or as part of the main measures, policies, and activities the Government implemented to stop the spread of Covid-19. Either way Mr. White submits that the *All In. All Together* Campaign communications come under the umbrella of environmental information as they affect an element of the environment or refer to factors such as a biohazard.

34. Mr. White submits that the fact the Government decided to implement the measure as part of its plan to limit the spread of Covid puts the request within scope of regulation 2(1)(e) (cost-benefit and other economic analyses) because he is sure

[1] An international treaty governing the movements of living modified organisms (LMOs) resulting from modern biotechnology from one country to another. It was adopted on 29 January 2000 as a supplementary agreement to the Convention on Biological Diversity and entered into force on 11 September 2003. The United Kingdom is a party to the Cartogena Protocol.

there were discussions about how much the plan would cost and how best it could benefit stopping the spread of Covid-19.

35. Mr. White refers to the linkage between health and the environment in regulation 2(1)(f) EIR. He relies on the Aarhus Convention Implementation Guide, which quotes at page 25 the definition of 'environmental health' as used by the World Health Organisation (WHO) Regional Office for Europe which includes "both the direct pathological effects of chemicals, radiation and some biological agents, and the effects (often indirect) on health and well-being of the broad physical, psychological, social and aesthetic environment, which includes housing, urban development, land use and transport." He submits that there can be no argument that Environmental Health includes the effects of Covid-19.

36. Mr White submits that the news industry believed this to be a public health campaign. He relies on the following description by the Hook Strategy:

> "The UK's news publishers came together to create an unprecedented partnership with Government to get across the most important public health messages under a unified creative umbrella 'All In. All Together.'

37. Mr. White submits that the public interest favours full disclosure if in fact it was merely an attempt to support the newspaper industry with taxpayer money

38. Mr. White submits that if one views the whole Covid-19 measures as public health protection measures, then it is arguable that those public health measures become pursuant to the principles of the Aarhus Convention itself - namely access to information, meaningful public participation and access to justice not prohibitively expensive. He submits that one could view the All in All Together Campaign as providing for meaningful public participation in decision-making via ensuring that everyone has access to information.

39. Finally, Mr. White submits that there is a requirement on the public authority to try and distinguish the environmental information from the non-environmental where it can, without the information losing its meaning.

The nature of information requested

40. Mr White submits that by specifying where the Cabinet Office should look (WhatsApp, SMS etc.) this has the effect that the request looks more onerous than if he had simply made the equivalent request 'please forward me a list of all information concerning the project known as the All in All Together Campaign between the 1st February 2020 and 30th June 2020 inclusive'.

41. Mr White submits that it is important to note that he asked for a list. He submits that if the regulations have been adhered to with regards to indexing and storage to make it retrievable a list is not onerous to produce. Mr White does not believe

that it will take the Cabinet Office as long as they are claiming to get the requested information. He submits that he could retrieve the lists in a few hours.

42. Mr. White refers the tribunal to the recitals in 2003/4 EC on making environmental information easily available and accessible.

The conduct of the Commissioner and the Cabinet Office

43. Mr. White submits that he was forced down the FOIA route. He submits that his rights under the Aarhus convention are not dependent on the EIR.

44. Mr. White makes a number of criticisms of the approach of the Cabinet Office and the Commissioner.

45. Mr. White submits that it is very likely that the information requested is environmental information and that which is not is likely to be a small amount of wat was request and arguably should be returned under public interest tests and general transparency rules in any case.

Oral submissions by Mr. White

46. We heard and took full account of oral submissions from Mr. White. Mr. White primarily reiterated the points made in his notice of appeal and reply and therefore it is not necessary to set out the content of his oral submissions in this judgment.

Issues

47. The issues for the tribunal to determine are:

47.1. Should the request have been handled under EIR?

47.2. If not, should the request have been handled under FOIA?

47.3. If so, is the Cabinet Office entitled to rely on section 12?

Legal framework

Environmental information

48. The **UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters** (the Aarhus Convention) was signed by the first parties (including the UK) in 1998 and came into force in October 2001. It was ratified by the UK in February 2005, at the same time as its ratification by the European Community.

49. The definition of "environmental information" in the Aarhus Convention of 1998 (the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters) appears in Article 2(3) and has three categories which are reflected in the six categories in the EIR:

> '"Environmental information" means any information in written, visual, aural, electronic or any other material form on:
> (a) The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
> (b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;
> (c) The state of human health and safety, 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 or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above;'.

50. The status of the Aarhus Convention is set out in the Court of Appeal's decision in **Morgan v Hinton Organics** [2009] EWCA 107 Civ as follows at [22]:

> "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 (see Halsbury's Laws Vol 44(1) Statutes para 1439)). 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 I09325 paras 25-31)."

51. The Aarhus Convention is given effect in EU law by Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information (the Directive), which replaced Directive 90/313/EEC of 30 June 1990.

52. The EIR gave effect in UK law to the EU Directive. Under the European (Withdrawal) Act 2018 the EIR are retained EU law. The tribunal agrees with and adopts the following passage from Coppel, Information Rights Vol 1 at [17-005] as a correct statement of the relevance of the Directive post- Brexit:

"(1) The Marleasing duty of consistent interpretation remains post-Brexit, requiring that EU derived domestic law be read consistently with the EU Directives it implements. The duty remains in at least three respects:

(a) EU-derived domestic legislation continues to have effect as it had effect immediately before 31 December 2020, i.e. EU-derived domestic legislation should be read in the same way.

(b) The case law of the CJEU including Marleasing applies when considering the 'meaning or effect' of retained EU law.

(c) Continuation of the principle of supremacy of EU law so far as is relevant to 'the interpretation disapplication or quashing of any enactment or rule of law passed or made before IP completion day,' and the duty of consistent interpretation is one of the manifestations of the supremacy of EU law.

(2) The limited continuity of the direct effectiveness of directives, in that any rights…arising under a directive continue to be recognised and available in UK law to the extent that they are 'of a kind recognised by the European Court or any court or tribunal in the United Kingdom in a case decided before [31 December 2020] …

(3) With some limited exceptions, decisions of domestic courts and the CJEU before 31 December 2020 generally remain binding in relation to retained EU law."

53. Regulation 2(1) of the EIR faithfully adopts the definition of environmental information in the Directive and defines it as information 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;
>
> (d) reports on the implementation of environmental legislation;
>
> (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)"

54. In **BEIS v IC and Henney** [2017] EWCA Civ 844 ('**Henney'**) the Court of Appeal held that:

> "35. …an approach that assesses whether information is "on" a measure by reference to whether it "relates to" or has a "connection to" one of the environmental factors mentioned, however minimal…is not permissible because, contrary to the intention of the Directive, it would lead to a general and unlimited right of access to all such information.
>
> …
>
> 37. …It is therefore first necessary to identify the relevant measure. Information is "on" a measure if it is about, relates to or concerns the measure in question. Accordingly, the Upper Tribunal was correct first to identify the measure that the disputed information is "on".
>
> …
>
> 42. Furthermore, Mr Choudhury accepted that it is possible for information to be "on" more than one measure. He was right to do so. Nothing in the EIR suggests that an artificially restrictive approach should be taken to regulation 2(1) or that there is only a single answer to the question "what measure or activity is the requested information about?". Understood in its proper context, information may correctly be characterised as being about a specific measure, about more than one measure, or about both a measure which is a sub-component of a broader measure and the broader measure as a whole. In my view, it therefore cannot be said that it was impermissible for the Judge to conclude that the Smart Meter Programme was "a" or "the" relevant measure.
>
> 43. It follows that identifying the measure that the disputed information is "on" may require consideration of the wider context and is not strictly limited to the precise issue with which the information is concerned, here the communications and data component, or the document containing the information, here the Project Assessment Review. It may be relevant to consider the purpose for which the information was produced, how important the information is to that purpose, how it is to be used, and whether access to it would enable the public to be informed about, or to participate in, decision-making in a better way. None of these matters may be apparent on the face of the information itself. 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)."

55. The UNECE has published an Implementation Guide to the Aarhus Convention. That Guide is not legally binding. The ECJ has stated that 'it may 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 [but with] no binding force'. (**Fish Legal and Shirley v Information Commissioner & Others** [2014] QB 521).

56. In interpreting the definition of environmental information in the EIR, the tribunal adopts a purposive approach, interpreting the EIR, as far as possible, in the light of the wording and purpose of the Directive, which itself gives effect to the international obligations arising under the Aarhus convention.

57. The Court of Appeal in **Henney** stated as follows:

> "14. … In Case C-297/12 *Fish Legal v Information Commissioner* [2014] QB 521, [2014] 2 CMLR 36 the CJEU stated:
>
> > "35. First of all, it should be recalled that, by becoming a party to the Aarhus Convention , the European Union undertook to ensure, within the scope of EU law, a general principle of access to environmental information held by or for public authorities: see *Ville de Lyon v Caisse des dépôts et consignations* (Case C-524/09) [2010] ECR I-14115 , para 36 and *Flachglas Torgau GmbH v Federal Republic of Germany* (Case C-204/09) [2013] QB 212, para 30.
> >
> > 36. As recital (5) in the Preamble to Directive 2003/4 confirms, in adopting that Directive the EU legislature intended to ensure the consistency of EU law with the Aarhus Convention with a view to its conclusion by the Community, by providing for a general scheme to ensure that any natural or legal person in a member state has a right of access to environmental information held by or on behalf of public authorities, without that person having to state an interest: see the *Flachglas Torgau* case, para 31.
> >
> > 37. It follows that, for the purposes of interpreting Directive 2003/4, account is to be taken of the wording and aim of the Aarhus

> Convention, which that Directive is designed to implement in EU law: see the *Flachglas Torgau* case, para 40."

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 first recital to the Directive states that:

> "increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment."

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".

16. It is well established that the term "environmental information" in the Directive is to be given a broad meaning and that the intention of the Community's legislature was to avoid giving that concept a definition which could have had the effect of excluding from the scope of that directive any of the activities engaged in by the public authorities: see Case C-316/01 *Glawischnig v Bundesminister für Sicherieit und Generationen*, (13 June 2003) at [24]. That decision concerned Directive 90/313/EEC but it was common ground that the same approach applies to Directive 2003/4/EC, which replaced it, and with which this case is concerned. That a broad meaning is to be given to the term is also seen from the decisions of this court in *Secretary of State for Communities and Local Government v Venn* [2014] EWCA Civ 1539 at [10]- [12] per Sullivan LJ (referring to the decision of the CJEU in Case C-240/*09 Lesoochranarskezoskupenie VLK v Ministerstvo ivotneho prosterdia Slovenskej Republiky* [2012] QB 606) and in *Austin v Miller Argent* [2014] EWCA Civ 1012 at [17] and [30] per Elias and Pitchford LJJ.

17. *Glawischnig* and *Fish Legal*, however, also show the limits of the broad approach. In *Glawischnig's* case it was stated (at [25]) that the fact that the Directive is to be given a broad meaning does not mean that it intended;

> "to give a general and unlimited right of access to all information held by public authorities which has a connection, however minimal, with one of the environmental factors mentioned … . To be covered by the right of access it establishes, such information must fall within one or more of the … categories set out in that provision".

In *Fish Legal* it was stated (at [39]):

> "… [It] should also be noted that the right of access guaranteed by Directive 2003/4 applies only to the extent that the information requested satisfies the requirements for public access laid down by that directive, which means inter alia that the information must be 'environmental information' within the meaning of Article 2(1) of the directive, a matter which is for the referring tribunal to determine in the main proceedings (*Flachglas Torgau*, paragraph 32)."

Section 12 Costs Limit

58. Under section 12(1) FOIA a public authority is not obliged to comply with a request for information where:

> "the authority estimates that the costs of complying with the request would exceed the appropriate limit. "

59. Subsection (1) does not exempt the public authority from its obligation to inform the requestor whether it holds the requested information unless the estimated cost of complying with that obligation alone would exceed the appropriate limit.

60. The relevant appropriate limit, prescribed by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Regulations') is £600.

61. In making its estimate, a public authority may only take account the costs it reasonably expects to incur in relation to the request in–
    (a) determining whether it holds the information,
    (b) locating it, or a document which may contain the information,
    (c) retrieving it, or a document which may contain the information, and
    (d) extracting it from a document containing it. (See Regulation 3).

62. The 2004 Regulations specify that where costs are attributable to the time which persons are expected to spend on the above activities the costs are to be estimated at a rate of £25 per person per hour.

63. The estimate must be sensible, realistic, and supported by cogent evidence (**McInerny v IC and Department for Education** [2015] UKUT 0047 (AAT) para 39-41).

64. The test is not a purely objective one of what costs it would be reasonable to incur or reasonable to expect to incur. It is a test that is subjective to the authority but qualified by an objective element. It allows the Commissioner and the tribunal to remove from the estimate any amount that the authority could not reasonably expect to incur either on account of the nature of the activity to which the cost relates or its amount. (**Reuben Kirkham v Information Commissioner** [2018] UKUT 126 (AAC)).

The role of the tribunal

65. The tribunal's remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether he should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Evidence

66. We read and took account of an open bundle, and we heard oral submissions from Mr. White.

Discussion and conclusions

Criticism of the Commissioner's approach

67. These are outside our remit. In any event, we undertake a full merits review and look at the matter afresh such that any defects in the way the Commissioner approached the matter will be cured.

Has Mr. White been denied his right to rely on the EIR or the Aarhus Convention?

68. Mr. White has no rights arising out of the Aarhus Convention that are directly enforceable in the UK courts. It has the status of an international treaty, not directly incorporated. 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.

69. There is no doubt that Mr. White made 'a request for information' as defined in section 8 FOIA. The request was made in writing, it gave the name and address of

the applicant and described the information requested. When an individual makes a request for information this automatically triggers the public authority's legal obligations under FOIA.

70. These obligations are set out in section 1 and are, in essence, to inform the requestor if it holds the requested information and, if so to communicate it to the requestor. Those obligations are subject only to sections 1, 2, 9, 21 and 14 of FOIA. If those provisions do not relieve the public authority of its obligations, then the public authority must comply. The public authority is not relieved of its legal obligations to comply with FOIA by the requestor stating that the request should not be dealt with under FOIA.

71. One of the provisions that might relieve the public authority of its obligation to comply with FOIA is section 2. That provision states, in summary, that if the information is exempt information by virtue of the provisions of part II FOIA the public authority does not have to comply with its obligation to communicate that information (subject in some cases to a public interest test) and, where a provision in part II states that the duty to confirm or deny does not apply, the obligation to inform the requestor that it holds the requested information does not apply (subject in some cases to a public interest test).

72. One of the provisions in part II that makes certain information 'exempt information' and that provides that the duty to confirm or deny does not apply is section 39 on environmental information.

73. Under section 39(1), information is exempt information if the public authority holding the information is obliged by the EIR to make the information available to the public in accordance with the EIR or would be so obliged but for any exemption contained in the EIR.

74. In addition, section 39 provides that the duty to confirm or deny does not arise in relation to information which is (or would be) exempt information by virtue of section 39(1).

75. Under regulation 5(1) EIR, subject to other provisions of the EIR, a public authority that holds environmental information shall make it available on request.

76. The combined effect of section 39 FOIA and regulation 5(1) EIR is that where are request for information is made to a public authority, it must comply with its obligations under FOIA unless the requested information is, or would be if held, environmental information as defined in the EIR.

77. Who decides if the information is or would be environmental information? It cannot be the requestor that decides, because there is no right of appeal from a decision by the requestor. In the first instance the public authority must decide if the information is environmental information. If they decide it is a request for environmental

information they must deal with the request under the EIR. If not, they must comply with their obligations under FOIA.

78. The public authority does not have the final word on whether a request is for environmental information. A complaint can be made to the Information Commissioner, and his decision appealed to the First-tier Tribunal and, in appropriate cases, onwards.

79. That is how the relevant regime is determined. The requestor cannot and does not determine the regime. It is determined by whether or not the information that they have requested is environmental information. This does not have the effect of denying Mr. White any of his legal rights. If the request is not for environmental information Mr. White is not able to 'invoke' the EIR. Neither does he have the power to disapply the obligations of a public authority under FOIA.

Was the request for environmental information?

80. In essence, Mr. White argues that information about public messaging on the response to Covid-19 is necessarily environmental information because Covid-19 is an airborne disease, i.e. a disease caused by microorganisms transmitted through the air from person to person. The microorganisms that cause these diseases are, fleetingly, in the air. A virus is a living organism. Mr. White argues that by dint of these two features, information on public health measures to stop the spread of Covid-19 (and, logically, any information on public health measures to stop the spread of any other airborne disease) is environmental information.

81. If information about airborne diseases is necessarily environmental information, then the extensive obligations that apply to environmental information would apply not only to information about Covid-19 but also to any information held about any other airborne diseases such as flu, measles, the common cold, SARS, tuberculosis etc.

82. We have carefully considered the text of the Directive, the Aarhus Convention and the Implementation Guide to ascertain whether there is any indication that it was intended that the extensive obligations on public authorities in relation to environmental information would apply to all information about airborne diseases. We have concluded that there is no indication that either the Convention or the Directive was intended to apply to all information about airborne diseases.

83. The preamble of the Aarhus Convention refers to the introduction to the European Charter on Environment and Health. The Implementation Guide quotes from the introduction to that Charter which states:

> "Environmental health comprises those aspects of human health and disease that are determined by factors in the environment. It also refers to

> the theory and practice of assessing and controlling factors in the environment that can potentially affect health.
>
> Environmental health, as used by the WHO Regional Office for Europe, includes both the direct pathological effects of chemicals, radiation and some biological agents, and the effects (often indirect) on health and well-being of the broad physical, psychological, social and aesthetic environment, which includes housing, urban development, land use and transport"

84. This is not the definition adopted in the Convention (as explicitly acknowledged in the Implementation Guide at page 55).

85. The preamble and article 1 state of the Convention state that 'every person has the right to live in an environment adequate to his or her health and well-being'.

86. As the Implementation Guide makes clear, environmental information is defined to include a 'qualified but explicit reference to human health and safety and the conditions of human life' (the tribunal's emphasis).

87. The commentary to article 2 paragraph 3(c) in the Implementation Guide states as follows [p 54-55]:

> "The Convention takes note of the fact that the human environment, including human health and safety, cultural sites, and other aspects of the built environment, tends to be affected by the same activities that affect the natural environment. They are explicitly included here to the extent that they are or may be affected by the elements of the environment, or by the factors, activities or measures outlined in subparagraph (b). The Convention requires a link between information on human health and safety, conditions of human life, etc., and the elements, factors, activities or measures described in subparagraphs (a) and (b), in order to impose a reasonable limit on the vast kinds of human health and safety information potentially covered. Those involved in the negotiation of the Convention were faced with a situation in which looser language would have brought a whole range of human health and safety information unrelated to the environment under the definition…"

88. The Implementation Guide states:

> "Human health and safety are not identical to the terms "environmental health" or "environment and health", as used, for example, in the context of the WHO European Region ministerial meetings on environment and health (see the commentary to the fourth preambular paragraph). For example, human health may include a wide range of diseases and health conditions that are directly or indirectly attributable to or affected by changes in environmental conditions. Human safety may include safety from harmful substances, such as chemicals,

factors, such as radiation, or other natural or manmade conditions that affect human safety through manipulation of environmental elements."

89. The Implementation Guide explains the relationship between article 2(3)(a), (b) and (c) as follows:

> "The matters covered by subparagraph (c) depend upon a linkage with those covered in subparagraphs (a) and (b). If the subparagraph (c) matters are potentially affected by the elements in (a) or their interaction, they qualify as subjects of environmental information. If the subparagraph (c) matters are potentially affected by the factors, activities or measures in (b), they also qualify as subjects of environmental information, so long as the effects pass through an environmental filter or medium in the form of subparagraph (a) elements."

90. This relationship, which is mirrored in the Directive and the EIR, places a limit on the extent to which information on the state of human health and safety is intended to be included i.e. in terms of the EIR only inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by any factors, measures or activities affecting or likely to affect the environment.

91. Although we apply a purposive approach to interpretation, the starting point is the wording of the EIR, which is identical to the wording of the Directive.

92. Environmental information is any information is 'on' one of the matters listed in regulations 2(1)(a)-(f). Information is "on" a matter if it is about, relates to or concerns the matter in question.

93. The information requested in this appeal is a list of documents (in a broad sense) that in any way or in all ways concern the project known as 'All in. All together.' campaign.

94. The documents themselves would, by definition, be 'on' the 'All in. All together.' campaign. In our view, a list of those documents, which would presumably consist of the title or a description of each document held, would also be 'on' the 'All in. All together.' campaign.

95. The 'All in. All together.' campaign was a partnership between the Government and news publishers to communicate important public health messages about the response to Covid.

96. The tribunal is not restricted by what the list is specifically, directly or immediately about, and can consider the context. In the circumstances, we find that the list is also 'on' the communication of public health messages about the response to Covid.

97. Mr. White argues that this falls within a number of the different subparagraphs of regulation 2(1) and so we have considered each in turn.

98. Regulation 2(1)(a) covers information on the state of the elements of the environment. It gives a non-exhaustive list of examples of elements of the environment. These are air and atmosphere, water, soil, land, landscape and natural sites and biological diversity.

99. In relation to regulation 2(1)(a) Mr. White submits that Covid-19 is an element of the environment.

100. Mr. White that Covid-19 is an element of the environment within regulation 2(1)(a) EIR. Mr. White draws the tribunal's attention to the Cartagena Protocol on Biosafety[2] which defines, for the purposes of the Protocol, a 'living organism' as 'any biological entity capable of transferring or replicating genetic material, including sterile organisms, viruses and viroids'. On this basis he submits that Covid-19 would come under 'biodiversity' in regulation 2(1)(a).

101. Mr. White has taken this from the Implementation Guide, which considers 'biological diversity and its components, including genetically modified organisms'. The Implementation Guide explains that biodiversity concerns the variability among living organisms including species diversity, ecosystem diversity and genetic diversity. 'Genetically modified organisms' are explicitly included as one of the components of biodiversity. These are not defined in the Convention, but the Guide refers to the definition in the Cartagena Protocol as 'any living organism that possesses a novel combination of genetic material obtained through the use of modern biotechnology' and as further elucidation of the terms used in that definition includes the definition of living organism relied on by Mr. White above.

102. It is not the case that information on anything that is a living organism as defined in the Cartagena protocol is environmental information. Information about a single species is not information on biodiversity.

103. Mr. Smith submits in the alternative that as Covid-19 is spread via droplet or aerosol the definition of air or atmosphere in the Commissioner's guidance is met (i.e. that the definition of air or atmosphere includes the solid particles and gases that it is made of).

104. We do not accept that simply because something can be found temporarily in or on one of the elements of the environment, it would fall within the definition of that element 2(1)(a). Nor does something affect the state of that element simply because it is temporarily found either on or in it. That would be too wide a

[2] An international treaty governing the movements of living modified organisms (LMOs) resulting from modern biotechnology from one country to another. It was adopted on 29 January 2000 as a supplementary agreement to the Convention on Biological Diversity and entered into force on 11 September 2003. The United Kingdom is a party to the Cartogena Protocol.

definition. There is nothing in the world that is not found either on or in the air, water or land.

105. In relation to regulation 2(1)(b) Mr. White submits that the information is on a factor affecting or likely to affect the elements of the environment. He says that this is because Covid-19 is a 'biohazard' through emission into the environment from people infected with the virus, which is a factor within section 2(1)(b). Alternatively, he submits that the factor is its 'infectiousness'.

106. We do not accept that when people infected with an airborne disease sneeze or cough, this is comparable to an emission which is likely to affect the elements of the environment. Covid-19 does not alter the state of the air or the 'air quality'. It simply exists in the air for a short period of time. The fact that Covid-19 is a biohazard, i.e. can adversely affect human health does not mean that it falls within regulation 2(1)(b).

107. Mr White submits that the collaboration between the government and the newspaper industry about Covid-19 communications was an activity in itself which affected the elements in regulation 2(1)(a) or the factors in regulation 2(1)(b) because the collaboration affected the spread of Covid in the environment.

108. In the alternative Mr. White submits that the collaboration could be viewed as a measure or activity in this own right or as part of the main measures, policies, and activities the Government implemented because they affected the spread of Covid-19 and would therefore fall under regulation 2(1)(c).

109. We do not accept that because a measure or activity affects the spread of Covid-19 it therefore affects or is likely to affect the state of the elements of the environment for the reasons we have given in relation to regulation 2(1)(a). We do not accept that because a measure or activity affects the spread of Covid-19 it therefore affects or is likely to affect factors affecting or likely to affect the elements of the environment for the reasons we have given in relation to regulation 2(1)(b). We reject Mr. White's argument under regulation 2(1)(c).

110. Mr. White submits that the fact the Government decided to implement the measure as part of its plan to limit the spread of Covid-19 puts the request within scope of regulation 2(1)(e) (cost-benefit and other economic analyses) because he is sure there were discussions about how much the plan would cost and how best it could benefit stopping the spread of Covid-19. Regulation 2(1)(e) only applies if within the framework of the measures and activities referred to in (c). Accordingly, we reject this argument for the same reasons.

111. Mr. White refers to the linkage between health and the environment in regulation 2(1)(f) EIR. He relies on the Aarhus Convention Implementation Guide, which quotes at page 25 the definition of 'environmental health' as used by the World Health Organisation (WHO) Regional Office for Europe which includes "both the direct pathological effects of chemicals, radiation and some biological agents, and

the effects (often indirect) on health and well-being of the broad physical, psychological, social and aesthetic environment, which includes housing, urban development, land use and transport." He submits that there can be no argument that Environmental Health includes the effects of Covid-19.

112. As we have set out above, the definition in regulation 2(1)(f) is different to that used by the WHO, as acknowledged in the Implementation Guide.

113. We accept that the *All in All together* campaign can be seen as a public health measure and so can the wider measures taken by the government to prevent the spread of Covid-19. However, for the reasons set out above, we do not accept that the information is on the state of human health and safety '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)'.

114. The Aarhus Convention similarly only covers public health in so far as it is affected by the state of the elements of the environment or the relevant factors. Accordingly, we reject Mr. White's arguments in relation to regulation 2(1)(f) for the same reasons as we rejected his arguments in relation to 2(1)(a) and (b).

115. For those reasons we find that the requested information was not environmental information within the EIR.

FOIA

116. We appreciate that Mr. White did not want his request dealt with under FOIA. However, as it was not a request for environmental information, the Cabinet Office was obliged to respond to it in accordance with its obligations under FOIA. As Mr. White has disputed the amount of time that it would take to respond to his request it is appropriate for us to consider whether the Cabinet Office was entitled to refuse to comply with the request under section 12 FOIA.

117. We note that the request was for a list of documents rather than copies of the documents. The Cabinet Office appear to have appreciated this because they set it out in their substantive response (i.e. their response to the internal review). Whether or not the Commissioner appreciated that the request was for a list is irrelevant, because we undertake a full merits review, although we note that the Commissioner did reproduce the full text of the request in the Decision Notice.

118. The estimate provided by the Cabinet Office is contained in their email to the Commissioner dated 22 December 2023.

119. For the purposes of section 12, the tribunal considers the way in which the Cabinet Office holds the information, not the way in which the Cabinet Office should hold the information.

120. The Cabinet Office stated that the following would need to be searched:

120.1. The shared Google drive for the relevant team – estimate 275 hours
120.2. The inboxes of seven key officials – estimate 12 hours for one inbox.
120.3. The inboxes of in excess of fifty people working on Covid-19 communications.

121. A search of the shared Google Drive (without time limits) for the search terms 'All in. All Together' and 'Press Partnership' produced 153,410 results. Taking account of the length of the campaign, the Cabinet Office estimate that around 33000 documents would relate to the period covered by the request. The Cabinet Office estimate that it would take approximately 30 seconds per document to open the document and review it to identify whether or not relevant information would be held and to extract the information for the purposes of the request. This would take around 275 hours.

122. The tribunal accepts that it is reasonable to open each document to review it to identify whether or not it fell within the scope of the request. It is unclear to the tribunal what the Cabinet Office mean by 'extracting the information for the purposes of the request'. For the purposes of creating a list it would only be necessary to 'extract' the title or create a description of the document. However, in our view, 30 seconds is not an unreasonable estimate for opening a document, checking if it is in scope and adding its title or description to a list. In any event, given that there are 33000 documents potentially in scope, even if the Cabinet Office were only to spend on average 3 seconds per document it would still take more than 24 hours to respond to the request.

123. On top of this the Cabinet Office would still need to review the emails. The sample search carried out on one of the seven key officials email inbox produced 1528 emails. We accept that each of these emails would need to be reviewed to ascertain if they fell within the scope of the request. In addition to this the inboxes of the other 50 people would need to be reviewed.

124. On the basis of the above, we accept that the Cabinet Office's estimate that it would exceed the relevant limit to respond to the request is reasonable in the sense that it is sensible, realistic, and supported by cogent evidence.

Signed Sophie Buckley Date: 11 October 2024

Judge of the First-tier Tribunal