Hugh Craddock

v

The Information Commissioner and Kent County Council

Reply and skeleton argument of the appellant

Contents

A. History of the application....2
Background....2
The request for disclosure....2
The application to the Information Commissioner....4
The appeal to the First-tier tribunal....4
B. The grounds for appeal to the First-tier tribunal....5
C. Context....5
D. Regulation 6(1)....6
R.6(1)(b): Whether the information was already publicly available and easily accessible in another form or format....8
The form or format....9
Publicly available....9
Easily accessible....16
Conclusion on r.6(1)(b)....22
R.6(1)(a): Whether it is reasonable for it to make the information available in another form or format....23
Conclusion on r.6(1)(a)....24
E. FOI....24
S.2(2)(b) public interest test....28
S.21 reasonably accessible....29
S.11 form....30
Conclusion on FOI....31
F. R.8: Charging....31
G. Annexe: key legislative provisions....35
EIRs: art.6(1)....35
Directive 2003/4/EC: art.3(4)....35
Aarhus Convention: art.4(1)....35

A. History of the application

Background

A.1. The appellant conducts rights of way research in relation to Kent on a voluntary basis on behalf of the British Horse Society. The research calls for frequent reference to the tithe maps prepared for parishes in Kent under the Tithe Act 1836. Extracts from the tithe maps may be required to be included in applications to record or upgrade rights of way made to Kent County Council (KCC).[1] It is suggested that there are around 425 tithe maps for Kent. All (or nearly all) of these are held by KCC.

A.2. KCC holds, in its records office (Kent History Centre), the vast majority of tithe maps prepared within the county under the Tithe Act 1836, being generally the parish copy deposited under s.64 of the 1836 Act and now transferred to KCC. The Heritage Lottery Fund (HLF) provided £310,900 of support to the Kent Tithe Map Project under an agreement made on 16 June 1997, primarily to restore and digitise the tithe maps of Kent. Under the terms of the agreement (disclosed by the HLF),[2]

> The Grantee [KCC] will arrange for the public to have full appropriate access to the Property… . The Grantee will ensure that no person is unreasonably denied access to the Property.

A.3. The digitised maps are available to view on a terminal in the Kent History Centre, and copies of local maps are held on CD at some KCC libraries for viewing at library terminals. It is not possible to make electronic copies of the digitised maps at Kent History Centre. The digitised maps are not available online. The original tithe maps are also available for retrieval and viewing on request, but the maps are venerable and unwieldy, and one of the purposes of digitisation was to reduce handling.

The request for disclosure

A.4. The appellant made a request to KCC under the Environmental Information Regulations 2004 (EIRs) on 8 August 2021 for:

1 Applications are made under s.53(5) of the Wildlife and Countryside Act 1981, and must 'be accompanied by—copies of any documentary evidence…which the applicant wishes to adduce in support of the application' (Sch.14, para.1(b)).

2 Copy of agreement supplied by Heritage Lottery Fund.

> a copy of all digitised tithe maps for the county of Kent, to be supplied in electronic form on a portable hard disk, or alternatively to be made available for download on a file transfer facility.

An offer was made to supply a portable hard disk for the purpose. The appellant's request also referred to the INSPIRE Regulations 2009,[3] but this aspect was not taken further.

A.5. The request was acknowledged on 9 August, and assigned reference 23787341.

A.6. KCC sought clarification of the request on 10 August, to which a reply was made on the same day.

A.7. KCC made a response on 31 August. This stated that the maps were available to view at the Maidstone archive, and copies were available to purchase on request. The appellant considered that the response was not in accordance with the EIR, and on the same day, responded asking for a compliant response. KCC replied on 2 September that the request was being addressed as a review. The appellant replied on the same day to explain that a review had not been requested, but a compliant response was sought.

A.8. KCC sent a compliant response received on 3 September. The response explained that the refusal was made under r.6(1), and agreed that, in those circumstances, the response ought to have complied with r.6(2). It was stated that the information was already 'available direct' by contacting the Maidstone archive.

A.9. The appellant requested an internal review on 6 September, on the grounds that the information was not 'easily accessible to the applicant'.

A.10. KCC emailed with its outcome to the review on 29 September. The reply explained that, in addition to relying on r.6(1), KCC made available the information requested at a charge in accordance with r.8.

A.11. The appellant replied on the same day, to say that the charge was not stated, and KCC had not proceed in accordance with r.8(4) by requiring advance payment of a charge. The appellant also asked where the charge was documented, pursuant to r.8(8)(a), in its schedule of charges, or if it was not documented in the schedule, what was the charge? The appellant sent a reminder on 25 October.

3 SI 2009/3157

A.12. KCC replied on 8 November that the 'copying charge for one tithe map is £15', and that the charge was recorded on an archives web page, 'Copying documents'.[4] A discount of 20% was proposed for a request for more than 40 tithe maps.

The application to the Information Commissioner

A.13. R.18 EIR applies the régime in Parts IV and V of the Freedom of Information Act 2000 (FOI), with modifications, for the purposes of enforcement and appeal.

A.14. The appellant applied to the Information Commissioner on 5 December, exercising the power conferred on a complainant by s.50(1) FOI as applied and modified by r.18 EIR. The application was on the basis that KCC was wrong to refuse the request under r.8 in that, so far as the information requested is made available at a charge, the charge specified does not comply with r.8(3) because the charge is not a reasonable amount; no request was made in accordance with r.8(4); and the charge was not published in its schedule of charges in accordance with r.8(8).

A.15. The Information Commissioner decided, in a decision notice dated 30 November 2022 (referred to below as IC/D/*n*, where *n* is the paragraph number of the decision),[5] that the request for information under the EIRs was correctly refused under r.6(1) and that r.8 therefore was not engaged.

The appeal to the First-tier tribunal

A.16. This appeal is brought under s.57(1) FOI, as applied and modified by r.18.

A.17. The appellant seeks, pursuant to s.58(1), that the tribunal substitute a notice for that issued by the commissioner, allowing the appeal and requiring KCC to disclose the information in the form sought.

A.18. The commissioner has made a response to the notice of appeal, in a submission dated 23 March 2023 signed by Louisa Lansell, Solicitor. The appellant refers to the response as IC/R/*n*, where *n* is the paragraph number of the response. For consistency, the appellant refers to the response as made by the commissioner (rather than by Ms Lansell acting on his behalf).

4 At: www.kentarchives.org.uk/our-services/copying-documents/

5 Under reference IC–144241–S0K1.

B. The grounds for appeal to the First-tier tribunal

B.1. No dispute is taken that the information sought is environmental information for the purposes of the EIRs. The commissioner agrees (IC/R/19) that the requested information is environmental information. The appellant proceeds on the basis that it is.

B.2. The appellant's grounds for appeal contend that:

i) Insofar as the information was available in other forms (*i.e.* for viewing at [KCC's] records office), it was neither publicly available nor easily accessible to the appellant (r.6(1)(b) EIRs) and the commissioner was wrong to decide that the request for information was correctly refused under r.6(1)(b). The information was not publicly available by virtue of being available for inspection at [KCC's] records office. The information was not easily accessible because it was disclosed in a form remote from the appellant, and incapable or impracticable of being captured in a satisfactory form for retention.

(ii) The commissioner failed to consider in the alternative whether, if the request for information was correctly refused under r.6(1)(b), the information should have been communicated under [FOI].

(iii) If the Commissioner was wrong to decide that the request for information was correctly refused under r.6(1), the fee proposed to be charged by [KCC] was not a reasonable amount for the purposes of r.8(3), and was not contained within its schedule of charges for the purposes of r.8(8). Or if, in the alternative, the information should have been communicated under FOI, then the fee proposed to be charged by the information holder was not within the powers conferred by s.9 FOI.

C. Context

C.1. The EIRs were made under the European Communities Act 1972 to implement the United Kingdom's obligation to give effect to Directive 2003/4/EC ('the Directive') of the European Parliament and of the Council of 28 January 2003 on public access to environmental information.[6] The Directive was in turn intended to be consistent with the Aarhus Convention ('the Convention') of 25 June 1998,[7] These sequential derivations

6 Available as retained law at: www.legislation.gov.uk/eudr/2003/4/contents/adopted.

7 Available via: unece.org/environment-policy/public-participation/aarhus-convention/text. See recital 5 of the Directive, which refers to the need for provisions of EU law to be consistent with the Convention.

have been recognised by the Supreme Court in *Office of Communications v The Information Commissioner.* [8]

C.2. In *Office of Communications v Information Commissioner*,[9] the Court of Justice of the European Communities observed (para.22) that:

> It should be noted that, as is apparent from the scheme of Directive 2003/4 and, in particular, from the second subparagraph of Article 4(2) thereof, and from recital 16 in the preamble thereto, the right to information means that the disclosure of information should be the general rule and that public authorities should be permitted to refuse a request for environmental information only in a few specific and clearly defined cases. The grounds for refusal should therefore be interpreted restrictively, in such a way that the public interest served by disclosure is weighed against the interest served by the refusal.

C.3. References are made below to the Convention and the Directive, as defined above, and also to the *Aarhus Convention — an implementation guide*[10] ('the Convention implementation guide'). The appellant agrees with the commissioner's position (IC/R/6) that the Convention implementation guide is:

> an explanatory document, capable of being taken into consideration, if appropriate, among other relevant material for the purpose of interpreting the convention[.][11]

D. Regulation 6(1)

D.1. R.6(1) provides that:

> Where an applicant requests that the information be made available in a particular form or format, a public authority shall make it so available, unless—
> (a) it is reasonable for it to make the information available in another form or

8 [2010] UKSC 3: www.bailii.org/uk/cases/UKSC/2010/3.html. See the judgment given for the court by Lord Mance at [2].

9 Case C–71/10: www.bailii.org/eu/cases/EUECJ/2011/C7110.html. This was a referral of a question to the Court of Justice of the European Union by the UK Supreme Court in its decision cited at footnote 8.

10 Second edition, 2014, via: unece.org/environment-policy/publications/aarhus-convention-implementation-guide-second-edition.

11 Citing the judgment of the the Court of Justice of the European Communities in *Fish Legal and Shirley v Information Commissioner and Others*, case C–279/12: www.bailii.org/eu/cases/EUECJ/2013/C27912.html.

> format; or
> (b) the information is already publicly available and easily accessible to the applicant in another form or format.

D.2. The exceptions prescribed in r.6(1) are found in similar terms in the Directive, art.3(4). In turn, equivalent exceptions appear as art.4(1)(b) of the Convention. (These three key provisions are reproduced in the annexe at p.35 below.)

D.3. The appellant requested:

> a copy of all digitised tithe maps for the county of Kent, to be supplied in electronic form on a portable hard disk, or alternatively to be made available for download on a file transfer facility.

The appellant contends that the information was sought 'in a particular form or format', and that form or format was in an electronic or digitised form — that is, electronic copies of the electronic files in which the information was stored. KCC had previously digitised the tithe maps, and so the information was already held in such an electronic form — it was no part of fulfilling the request that the information be converted into that form.

D.4. Para.(1) of r.3 provides that KCC has a duty to make the information available in the form or format requested by the appellant unless it can satisfy the exceptions stated.

D.5. Para.(1) provides two exceptions to the requirement on KCC to supply the information in the form or format requested, specified in sub-paras.(a) and (b).

D.6. Sub-paras.(a) and (b) are alternatives. If the exception in either sub-para.(a) or (b) is satisfied, KCC is not compelled to comply with the appellant's request that the information be made available in electronic form.

D.7. In the appellant's view, sub-paras.(a) and (b) are distinguished by whether the information is to be offered in another form or format in the particular case (because the test in sub-para.(a) is satisfied), or the information is already publicly available in another form or format (because the test in sub-para.(b) is satisfied), such as in a widely-available book or on a website.

D.8. Both KCC and the commissioner relied on the sub-para.(b) exception (IC/D/15 & 25; IC/R/26–27). The appellant agrees that the sub-para.(b) exception is relevant in this case, and not sub-para.(a). This is because KCC did not offer, per sub-para.(a), to 'make the

information available in another form or format' in response to the appellant's request, for example by offering to send print-outs of the tithe maps held in electronic form. Nor did KCC allege that it was 'reasonable' to make the information available in such a form. Instead, it argued (IC/D/16) 'that the information is publicly available'. Accordingly, the key question is whether the exception in sub-para.(b) is satisfied.

R.6(1)(b): Whether the information was already publicly available and easily accessible in another form or format

D.9. The sub-para.(b) exception in r.6(1) is that:

> the information is already publicly available and easily accessible to the applicant in another form or format.

D.10. The meaning of the sub-paragraph is not entirely clear. Possible meanings are:

- the information is already publicly available *to the applicant in another form or format* and easily accessible to the applicant in [that] form or format;
- the information is already publicly available *to the applicant*, and easily accessible to the applicant in another form or format;
- the information is already publicly available, and easily accessible to the applicant in another form or format;
- the information is already publicly available *in another form or format* and easily accessible to the applicant in [that] form or format.

D.11. It is submitted that only the last meaning is rational in the context. So far as the first two meanings are concerned, then if information genuinely is publicly available, it is by definition available to the applicant, and it is the second limb of the sub-paragraph which establishes whether such public availability is easily accessible to the particular applicant. So far as the third is concerned, it would make no sense to define an exception where the information is publicly available in the form requested by the applicant, but easily accessible to the applicant in another form.

D.12. Thus the relevant considerations arising from r.3(1)(b) are (1) whether the information was publicly available in another form or format when made available at the records office, and if so, (2) whether the information was easily accessible to the appellant in that other form or format.

D.13. However, it first is necessary to consider what is meant by ‘form or format’ in order to confirm that the form or format of the information made available at the records office was different to the (‘another’) form or format requested by the appellant.

The form or format

D.14. KCC said (reported at IC/D/16) that the information was available at the records office ‘in both original hardcopy and as electronic images (on an orderable hard drive) for inspection’.

D.15. The information held in original form (*i.e*. the original tithe maps) plainly is not in the form requested by the appellant.

D.16. On the face of it, KCC holds the information in the electronic form requested by the appellant, viz, ‘as electronic images (on an orderable hard drive) for inspection’. However, what was proposed to be made available was not information in the form requested by the appellant, which was to be ‘in electronic form on a portable hard disk, or alternatively to be made available for download on a file transfer facility.’

D.17. KCC offers the public the opportunity to view the images ‘for inspection’. Such inspection is taken on a computer terminal. That the images happen to be derived from an electronic form is immaterial to the manner of inspection: they might as well be stored on microfilm, or photographs stored in a box. What is made available to the viewer is the image on the screen. There is no opportunity offered to the viewer to retain the images, other than perhaps (and this is a speculative suggestion) a facility to print to paper for a fee. The form or format offered by KCC at its records centre is therefore a visual medium which is incapable of being retained by the viewer save in the mind, or by taking notes. KCC appears to confirm the position by adding that, ‘the electronic images are not available online or on the Council’s networked storage due to their file size.’ Thus the viewer has no access to the electronic images themselves.

D.18. It therefore is concluded that the form in which the information is made available at the records office is a different form to the electronic form requested by the appellant and sub-para.(b) is engaged. This conclusion is not contested by the commissioner.

Publicly available

D.19. Is the information ‘publicly available’ to the applicant ‘in another form or format’?

D.20. KCC argued that it was (IC/D/16). It is reported to have said:

> …that the information is publicly available, in both original hardcopy and as electronic images (on an orderable hard drive) for inspection at the Kent History and Library Centre ("the Centre"), which is open Tuesday-Saturday (between 9:00am and 5:00pm) with no restrictions in place.

It added that:

> …the information is easily accessible to the complainant by their attending the Centre.

D.21. The commissioner agreed (IC/D/21–23). The commissioner:

> …notes that the purpose of a local records office is to maintain historic records and allow their public inspection.

D.22. The commissioner found (IC/D/21–23) that the availability of the information at KCC's record office was consistent with his guidance, that it is an expectation of the EIRs that information be made available at such facilities (r.8(2)(b)), and that such facilities are a specific requirement of art.3(5)(c) of the Directive.

D.23. The commissioner found (IC/D/24):

> that the information is publicly available and easily accessible to the complainant by virtue of it being available for inspection at a facility established and maintained for the purpose (i.e. the local records office).

D.24. In his response to the appellant's notice of appeal, the commissioner states (IC/R/31) that the cost of visiting the local records office:

> does not prevent the requested information from being publicly available and easily accessible to the Appellant by virtue of it being available for inspection at a facility established and maintained for the purpose (i.e. the local records office).

D.25. The commissioner (correctly) observes that the appellant has availed himself of the records office on several occasions, notwithstanding the appellant's personal circumstances (in living some distance away), and he (IC/R/29):

> submits that there is no there is no geographical distance, beyond which information is not easily accessible for inspection.[12]

D.26. The appellant submits that the keeping and disclosure of documents held in a records office does not make them 'publicly available' for the purposes of sub-para.(b). If that were the intention of the expression 'publicly available', it would have a circular effect. Any document which a public authority makes available for viewing on its premises on a request made under the EIRs would become 'publicly available'. That KCC opens the records office to the public does not distinguish the practice from, for example, that of a water company which makes its records of water abstraction, treatment and discharges available to a member of the public at its corporate records inspection centre.[13]

D.27. It is suggested that 'publicly available' requires a clear intention to place information in the public domain. Most obviously, this might comprise placing the information on a website controlled by the public authority, or information which is published in a widely-available reference book (which might be available in a local library or published online, such as Acts of Parliament), but also information which is contained in a publication scheme adopted by the authority under s.19 FOI.

D.28. Under subs.(2) of s.19 FOI, a publication scheme must:

> (a) specify classes of information which the public authority publishes or intends to publish,
>
> … and
>
> (c) specify whether the material is, or is intended to be, available to the public free of charge or on payment.

D.29. Where information is specified in a publication scheme, it will be clear whether the information is published, and if it is available to the public free of charge. In such a case, it

12 The commissioner's guidance on r.6, *Form and format of information:* ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/form-and-format-of-information-regulation-6/, states (emphasis added) that, 'it should not be taken to mean there is a *specific* geographical limit, or distance, beyond which the information is not easily accessible. Any decision on this point will depend on the circumstances.'

13 Or, if it does not have one, at its head office, perhaps in a reception room intended for use by members of the public seeking information.

is suggested that the information may be sufficiently 'publicly available', because it is apparent from the publication scheme that it is publicly available.

D.30. The appellant finds support in art.3(4)(a) of the Directive, from which the relevant provision in r.6(1)(b) EIRs is derived. Article 3(4) states:

> Where an applicant requests a public authority to make environmental information available in a specific form or format (including in the form of copies), the public authority shall make it so available unless:
>
> (a) it is already publicly available in another form or format, in particular under Article 7, which is easily accessible by applicants… .

D.31. Sub-para.(a) above notably refers to information already being publicly available 'in particular under Article 7'. Art.7(1) requires public authorities to take steps to ensure the 'active and systematic dissemination to the public [of environmental information held by them], in particular by means of computer telecommunication and/or electronic technology'.[14] It requires member states to 'ensure that environmental information progressively becomes available in electronic databases which are easily accessible to the public through public telecommunication networks.' Art.7(1) is replicated in r.4 EIRs.

D.32. Art.7(1) is consistent with the objectives of the Directive, set out in art.1:

> The objectives of this Directive are:
>
> (a) to guarantee the right of access to environmental information held by or for the public authorities and to set out the basic terms and conditions of, and practical arrangements for, its exercise; and
>
> (b) to ensure that, as a matter of course, environmental information is progressively made available and disseminated to the public in order to achieve the widest possible systematic availability and dissemination to the public of environmental information. To this end the use, in particular, of computer telecommunication and/or electronic technology, where available, shall be promoted.

14 The proviso to art.7(1) provides that such requirements do not apply to information collected before the entry into force of the Directive (14 February 2003) unless it is already available in electronic form. As the appellant's request for information relates to information held in electronic form, the proviso is immaterial.

D.33. It is submitted that the expression 'publicly available' must be interpreted with the objectives, and the gloss provided by art.3(4)(a), of the Directive. And that, on the contrary, the making available of information, and particularly electronic information, in a council records office, is not making that information publicly available for the purposes of r.6(1)(b) EIRs.

D.34. The appellant notes that KCC is reported to have stated (IC/D/16):

> that the electronic images are not available online or on the Council's networked storage due to their file size.

The appellant submits that, in the present era, and having regard to the expectations of the Directive, KCC's failure to put the information online is regrettable and contrary to the expectation of the Directive.[15]

D.35. The appellant acknowledges that art.3(5)(c) of the Directive requires member state to ensure that:

> …practical arrangements are defined for ensuring that the right of access to environmental information can be effectively exercised, such as:
>
> — the designation of information officers;
>
> — the establishment and maintenance of facilities for the examination of the information required,
>
> — registers or lists of the environmental information held by public authorities or information points, with clear indications of where such information can be found.

D.36. However, it is submitted that merely maintaining 'facilities for the examination of the information required', such as a records office, does not render the information available in those facilities 'publicly available'. It is apparent from the opening words to sub-para.(c) of art.3(5) — 'practical arrangements…for ensuring that the right of access to environmental information can be effectively exercised' — that these measures are intended to promote the exercise of the right to any and all environmental information held by public authorities, and their discharge does not in itself cause such information to become 'publicly available'.

15 And not in accordance with KCC's agreement with the HLF, 'for the public to have full appropriate access' (para.A.2 above).

D.37. Accordingly, it is suggested that, whilst the commissioner's decision (IC/D/22) states that:

> …it is an expectation of the EIR that the public may inspect information at facilities 'which the public authority makes available for that examination'… .

and that such facilities are 'a specific requirement' of at.3(5)(c) of the Directive, he is in error to conclude that this enables information held at such facilities to be designated as publicly available.

D.38. The commissioner also refers to r.8(2)(b) EIR (which provides that an authority may not make a charge to examine information at a place made available for such examination) and describes such a place as giving rise to 'an expectation of the EIR' that information may be examined at such place. The appellant agrees. But the function of r.8(2) is to remove any power conferred on the authority to charge for inspection of information at such place — not to designate the information so made available as 'publicly available'. Indeed, it is suggested that the purpose of r.8(2)(b) is to encourage applicants to request to see information 'on site',[16] to avoid any possible imposition of a charge — but again, the effect is not thereby to render such information 'publicly available' merely because the authority has complied with r.8(2)(b) and art.3(5)(c) of the Directive.

D.39. Further support for the appellant's interpretation is to be found in the Convention.

D.40. Para.15 of the preamble to the Convention notes:

> in this context,[17] the importance of making use of the media and of electronic or other, future forms of communication… .

D.41. Para.(2) of art.5 of the Convention, on the collection and dissemination of environmental information, requires the Party (*i.e*. the State[18]) to:

> ensure…that environmental information is effectively accessible… .

D.42. Para.(3) provides that:

16 By means of a requested made under r.6(1), if needs be.

17 The context appears to be the foregoing provisions of the preamble, and not the preceding provision in para.14. The implementation guide states by way of amplification that: '…advances such as electronic means of storing and retrieving information and the possibility of instant access to worldwide information through the Internet have greatly improved the capacity of the public and public authorities to process and use information and to engage in public participation electronically.'

18 In art.2(1), '"Party" means, unless the text otherwise indicates, a Contracting Party to [the] Convention'.

> Each Party shall ensure that environmental information progressively becomes available in electronic databases which are easily accessible to the public through public telecommunications networks. Information accessible in this form should include:
>
> …
>
> (d) Other information, to the extent that the availability of such information in this form would facilitate the application of national law implementing this Convention,
>
> provided that such information is already available in electronic form.

D.43. Art.4(1) of the Convention states:

> Each Party shall ensure that, subject to the following paragraphs of this article, public authorities, in response to a request for environmental information, make such information available to the public, within the framework of national legislation, including, where requested and subject to subparagraph (b) below, copies of the actual documentation containing or comprising such information:
>
> (a) Without an interest having to be stated;
>
> (b) In the form requested unless:
>
> (i) It is reasonable for the public authority to make it available in another form, in which case reasons shall be given for making it available in that form; or
>
> (ii) The information is already publicly available in another form.

D.44. It will be noted that exception (ii) does not contain the requirement that the information which is publicly available is also 'easily accessible'. That additional requirement is added to art.3(4)(a) of the Directive, and thus is found in sub-para.(b) of r.6(1) EIR.[19]

19 The exceptions in paras.(i) and (ii) of art.4(1)(b) of the Convention and sub-paras.(a) and (b) of r.6(1) EIR are reversed in paras.(a) and (b) of art.3(4) of the Directive.

D.45. The Convention does not include a requirement that publicly-available information should also be easily accessible, because, it is suggested, 'publicly available' was intended to have a restrictive meaning such as advocated in para.D.27 above (information on website, in local library or, arguably, contained in publication scheme). Such media did not need to be further qualified by a requirement that they be 'easily accessible'. By this means, a public authority must act in accordance with art.4(1) of the Convention, that an applicant may request 'copies of the actual documentation containing or comprising' the information requested, unless the information is genuinely 'publicly available' as the appellant understands it to mean. A generous interpretation, such as afforded to it by the commissioner, effectively negates the art.4(1) expectation, because any information is essentially 'publicly available' by virtue of being available for inspection at the public authority's office.

D.46. Accordingly, the appellant contends that the information is not 'publicly available…in another form or format' for the purposes of sub-para.(b) of r.6(1).

Easily accessible

D.47. If the tribunal agrees with the appellant's submissions as to the meaning of 'publicly available' and their application to the appellant's request for information, it is not necessary for the tribunal to go on to consider whether the information also is 'easily accessible to the applicant' — the refusal to disclose the information relying on r.6(1)(b) is unlawful. But in the event that the tribunal does not agree with those submissions, the appellant considers this second element also.

D.48. Is the information 'easily accessible to the applicant' in the form or format in which it is publicly available?

D.49. The commissioner found the information 'accessible' because:

> the information is publicly available and easily accessible to the complainant by virtue of it being available for inspection at a facility established and maintained for the purpose (*i.e*. the records office).

D.50. The commissioner's guidance[20] refers to the *Convention implementation guide* which latter guide states (p.80) that:

20 *Form and format of information (regulation 6).*

> This provision also means that *public authorities must provide copies of documents when requested*, rather than simply providing the opportunity to examine documents. … If they so request, public authorities must allow them to do so, subject to paragraphs 1 (b) (i) and (ii) discussed below.[21] [italicisation added]

D.51. The *Convention implementation guide* continues (p.80):

> …under the Convention, *public authorities must upon request provide copies of the actual documents containing the information*, rather than summaries or excerpts prepared by the public authorities. This requirement goes together with subparagraph (b), requiring that information should be given in the form requested, subject to certain exceptions. The requirement that copies of actual documents should be provided ensures that members of the public are able to see the specific information requested in full, in the original language and in context. [italicisation added]

D.52. That guidance plainly is sensible and reasonable. The provision of environmental information on a screen in an office (which is what KCC has offered the appellant) is not the same as the opportunity to receive a copy of the information to review elsewhere. And in relation to the appellant's request, a copy of the information must refer to a copy in electronic form (the information itself being held in electronic form).

D.53. The guidance appears to rely in turn on art.4(1) of the Convention itself (see para.D.43 above, or the annexe, for the relevant wording).

D.54. It will be noted that art.4(1) expressly provides for 'copies of the actual documentation containing or comprising' the requested information, subject to the exceptions which, broadly speaking, are replicated in r.6(1) EIR. It will also be noted that exception (ii) does not contain the requirement that the information which is publicly available is also 'easily accessible'. That additional requirement is added to art.3(4)(a) of the Directive, and thus in sub-para.(b) of r.6(1) EIR.

D.55. The Defra *Environmental Information Regulations 2004 detailed guidance: 6. Handling requests for environmental information*[22] states (para.6.14):

21 The reference to 'subparagraphs (i) and (ii) below' is effected in the EIRs by paras.(a) and (b) of r.6(1).

22 Available on the National Archives web archive. This guidance is no longer published on www.gov.uk, but there is no clear indication that it has been withdrawn.

> A person may request that the environmental information is supplied, for example, in electronic form, or may prefer to inspect the original document or a photocopy or other copy of the actual documentation containing or comprising such information. While this legislation (unlike, for example, the EU Regulations on public access to documents) provides for access to information, rather than access to specific documents, the intention is to be helpful to the applicant. The aim of the authority should therefore be to be flexible, as far as is reasonable, with respect to form and format, taking into account the fact, for example, that some IT users may not be able to read attachments in certain formats, and that some members of the public may prefer paper to electronic copies.

D.56. The expression 'easily accessible' has two components. The Oxford English Dictionary (OED) defines 'easily' as meaning (relying on the most appropriate definition):

> 4a. With little exertion, labour, or difficulty.

and 'accessible' as meaning (again relying on the most appropriate definition):

> 1c. Able to be received, acquired, or made use of; open or available (to a particular class of person).

In other words, 'able to be…made use of…with little…difficulty'. This meaning is consistent with its use in r.6(1). An applicant is able to request information to be made available in a particular form or format, and such a request is to be granted unless (sub-para.(a)) it is reasonable to make the information available in another form, or (sub-para. (b)) the information is publicly available and able to be made use of with little difficulty. Both exceptions to the requested form of disclosure are drafted with the applicant's interests foremost, and the applicant's preferred form of disclosure is only to be overridden because the alternative (in either case) is almost equally acceptable.

D.57. It is suggested that the commissioner erred in assigning to the expression 'easily accessible' a meaning which focused on the ease with which the appellant could travel to and inspect the information at the records office. The commissioner (IC/D/19–20, 24) had regard to the distance which the appellant would need to travel to visit the records office, and the cost to the appellant. The commissioner quite properly took into account the appellant's submissions on such matters.

D.58. However, the commissioner in his response to notice of appeal (IC/R/29) appears to distance himself from his earlier position which had regard to the appellant's circumstances, and states that:

> he submits that there is no there is no geographical distance, beyond which information is not easily accessible for inspection.

D.59. The appellant submits that the commissioner's position, as stated above, plainly is untenable, and inconsistent with the intention of the Convention and the Directive.

D.60. In *Office of Communications v Information Commissioner*,[23] the Information Tribunal (as it then was) examined an application for the disclosure of information in a database form, where the information was already available by interrogation of a website. The tribunal found that the process of interrogation:

> …would be time consuming. It could certainly not be described as an easy process and it would not have yielded the five digit grid reference number. We do not believe, therefore, that this part of the requested information may properly be described as being "easily accessible".

D.61. In *Martyres v Information Commissioner*,[24] the First-tier Tribunal decided that planning records available at Mr Martyres' council offices were both publicly available and easily accessible.[25] It appears that the planning records were contained within KCC's publication scheme,[26] It is not clear on what basis the tribunal decided that the information was 'easily accessible', but it appeared to be influenced by the commissioner's model publication scheme and the availability of the information to inspect free of charge.[27] Mr Martyres did not appear to argue that 'easily accessible' had any meaning beyond questions of travel and cost.

D.62. While such a meaning may well be relevant and properly taken into account, it is suggested that 'accessible' in this context also possesses the sense implicit in the OED definition. It is not simply a question of travel to view the information, but also the extent to

23 EA/2006/0078: www.bailii.org/uk/cases/UKIT/2007/EA_2006_0078.html. The decision was appealed to the High Court and subsequently to the Court of Appeal, and the decision remitted back to the tribunal, but the tribunal's reasoning on this element was not the subject of the appeal.

24 [2010] UKFTT EA_2009_0101 (GRC): www.bailii.org/uk/cases/UKFTT/GRC/2010/2009_0101.html.

25 Para.65.

26 Para.60.

27 Paras.63–64.

which, having attended at the records office, the appellant is able to make use of the information with little difficulty. In other words, is the information capable of being easily reviewed, captured and taken away for further study?

D.63. In the request made by the appellant, the appellant sought electronic copies of the information — but he was offered the opportunity to view the information 'in another form or format', *viz*, rendered on a computer screen. Such information cannot be taken away, save perhaps in the mind of the viewer, or in notes taken. It might also be possible to take photographs of the screen, but it is not clear whether this would be permitted by KCC's officers (*i.e*. archivists or archive administrators), and even if it were, the images would be confined to what is shown on screen, and photographic copies would be impaired by glare and flicker, and questions of resolution and scale[28]. It may further be possible to print copies of the screen, but if this option were available (and it has neither been suggested to the appellant nor by KCC), it would again be impaired by questions of resolution and scale, as well as charges.

D.64. The appellant estimates that there are some 425 tithe maps held in electronic form by KCC. Each tithe map covers a single parish within the county of Kent, and contains information relating to features (such as fields, buildings and roads) across the whole parish. It is not practicably possible to retain the information relating to a tithe map on the basis of a viewing in KCC's records office, whether that information is partially retained in the mind of the viewer, or imperfectly taken down in notes. Even if it were permitted to take photographs of the screen during a viewing, or to print copies (at a fee which has not been addressed), the effect would be to dissect the tithe map into dozens of photographs or printed copies of discrete parts of the map, displayed (and photographed or printed) at a sufficient scale to permit the detail to be discerned. It is suggested that no such methodology is reasonably practicable in relation to a single tithe map, let alone in relation to many tithe maps, or KCC's collection of tithe maps estimated to number 425.

D.65. It may be said that it is only the volume of material embraced by the appellant's request for information that gives rise to questions of accessibility. The appellant does not agree, for the reasons given in the last sentence of the preceding paragraph. The

28 If a tithe map is drawn on an original plan $1m^2$ in side (an unusually small size for a tithe map), how many screenshots of data ought to be captured in photographs or print-outs? Plainly viewing the entire map on one screen would render detailed information unintelligible. Nine screenshots might be a satisfactory compromise. Many more would be required for a larger tithe map. Any such screenshot would lack the scale bar appearing in one corner of the map.

appellant also notes the following decision referred to in the *Convention implementation guide*:

> In its findings on communication ACCC/C/2008/24 (Spain),[29] the Compliance Committee found the Party concerned to be not in compliance with the Convention when authorities responding to an information request failed to provide the information in electronic form on a CD-ROM as requested, and instead provided paper copies of the information. The provision of information in paper form proved to be 100 times more expensive to the communicant than provision of the information in the form requested would have been. The requester determined that it could not afford to pay 1,200 euros for the complete 600-page document. The requester decided to take only 34 pages, and also gave up its request for copies of certain relevant plans for which an additional charge would have been levied. Thus, the failure to provide information in the manner requested significantly limited the public's access to environmental information in that case.

D.66. The decision of the compliance committee impliedly disapproves any notion that accessibility should not take account of the considerations arising from satisfying a request for a relatively large volume of information (providing, of course, that the request is not deemed to be 'manifestly unreasonable', per art.4(3)(b), replicated in r.12(4)(b) EIR. There is no suggestion that the appellant's request is manifestly unreasonable).

D.67. This aspect to accessibility is not relevant just to the appellant's request for information. The appellant hypothesises a request made by a member of the public to a water company, for information about sewerage discharges to a chalk stream. The request seeks disclosure in electronic form. The company responds that the information can be viewed on a screen in the company's public records centre (which happens not to be convenient to the person making the request), and that such information therefore is publicly available. The company relies on r.6(1)(b). But the person, on visiting the records centre, is presented with a stream of data on a screen, which must be either laboriously transcribed, or photographed (if permitted) in countless and confusing screenshots. The appellant suggests that such disclosure does not satisfy the intentions of the EIRs, the Directive or the Convention, and not does KCC's response to the appellant's request.

29 Available via unece.org/info/Environmental-Policy/events/18059.

D.68. It therefore is submitted that, for the purposes of the test in sub-para.(b), the information made available in the form of viewing in KCC's records office is not easily accessible to the appellant. Such a conclusion is justified not only by the journey which the appellant must make for each visit, but the singular ineffectiveness of any visit in procuring the information in the form in which it is viable to the appellant.

Conclusion on r.6(1)(b)

D.69. It therefore is submitted that KCC proposed to make the information requested available for inspection at the records office in 'another form or format', but that the information was neither 'already publicly available' nor 'easily accessible to the applicant' for the purposes of sub-para.(b) of r.6(1).

D.70. It has not been suggested that KCC might make the information available in any other form or format.

D.71. Accordingly, r.6(1) applies, such that KCC must make the information available in the form or format requested, unless in the alternative, sub-para.(a) of r.6(1) is satisfied.

D.72. The appellant draws support for this conclusion from the *Aarhus Convention — an implementation guide* (cited at para.C.3 above) and the Defra guidance on *Handling requests for environmental information* (cited at para.D.55 above), both of which commend the desirability of an applicant being provided with copies of information. It is suggested that it is unlikely that an obligation to provide copies of information (in whatever form) might be defeated, as appears to be the commissioner's analysis, merely because the applicant is capable of travelling (and indeed, does from time to time travel) to the public authority's office.

D.73. Neither KCC nor the commissioner sought to rely on sub-para.(a), but if the tribunal considers that sub-para.(b) is not satisfied, either respondent may now wish to rely on sub-para.(a) in the alternative. The appellant therefore proposes to consider whether sub-para.(a) might be satisfied. The tribunal is invited to make a finding on that element.

R.6(1)(a): Whether it is reasonable for it to make the information available in another form or format

D.74. If the tribunal is satisfied that sub-para.(b) of r.6(1) did not apply to the appellant's request, either of the respondents may wish to put forward the proposition that sub-para.(a) applied in the alternative — that:

> it is reasonable for it to make the information available in another form or format[.]

D.75. In the appellant's view, any such submission can be addressed quite shortly. The appellant requested that the information be disclosed in electronic form — *i.e*. as computer files. In his application to the Information Commissioner, the appellant suggested that:

> To comply with my request, a member of staff would need to plug in the portable disk supplied by me, select the relevant files on a drive or folder (*i.e*. all of them), copy them to the portable disk, remove and post the disk. I estimate the staff time taken would be about 15 minutes (but it might take considerably longer to await completion of the file transfer, which would not need to be supervised).

D.76. If KCC were to rely on making the information available in another form or format for the purposes of sub-para.(a), it might be expected to do so in one of the the forms proposed to the commissioner (IC/D/16):

> The Council argues that the information is publicly available, in both original hardcopy and as electronic images (on an orderable hard drive) for inspection at the Kent History and Library Centre ("the Centre"), which is open Tuesday-Saturday (between 9:00am and 5:00pm) with no restrictions in place. The Council has further elaborated that the electronic images are not available online or on the Council's networked storage due to their file size.

D.77. In order to facilitate inspection of the electronic images at the records centre, it would need to reserve a place for the appellant, book in the appellant, set up a computer, retrieve the orderable hard drive from storage, install the drive, direct the appellant to it, and give any guidance necessary on the operation of the software. This would need to be done on whatever number of visits would be required for the appellant to view all estimated 425 tithe maps.[30] Alternatively, the original tithe maps could be retrieved from storage, which would be considerably more demanding because each map is bulky, stored rolled, and must be unrolled and laid out on a large table. For the reasons already explorer at para.D.64 above, either alternative would offer the appellant an immeasurably inferior and unsatisfactory medium for access to the information.

30 It would not be necessary to give full guidance on operation of the software on repeated visits.

D.78. The appellant is unable to conceive how either such alternative could be described as ‘reasonable’ whether from the perspective of KCC or the appellant. On the contrary, it is suggested that the only reasonable mechanism to satisfy the appellant’s request for the information is to comply with it.

D.79. It is suggested that the sole motivation for KCC to seek to rely on either alternative medium for disclosure would be to avoid disclosure of the electronic data, and that this would be an improper motivation.

Conclusion on r.6(1)(a)

D.80. Accordingly, it is submitted that, if KCC were unable to rely on sub-para.(b) in r.6(1), it could not in the alternative rely on sub-para.(a).

E. FOI

E.1. If, contrary to the appellant’s submissions, the tribunal nevertheless finds that the information requested is not required to be disclosed under the EIR owing to the operation of r.6(1), the appellant in the alternative contends that it ought to be disclosed under the FOI, and that the commissioner failed to consider this alternative requirement. In that event, the tribunal is invited to make a finding on eligibility under FOI.

E.2. Under subs.(1) of s.1 FOI:

> Any person making a request for information to a public authority is entitled—
>
> (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
>
> (b) if that is the case, to have that information communicated to him.

E.3. Subs.(1) is subject to certain other provisions (see subs.(2)), including the provision for exempt information in Pt.II FOI.

E.4. The appellant made the request for information expressly under the EIRs.[31] However, s.8(1) FOI provides that a ‘request for information’, for the purposes of FOI:

> is a reference to such a request which—

31 And also under the INSPIRE directive: that aspect is not pursued here, as it was not pursued in the appeal to the commissioner.

> (a) is in writing,
>
> (b) states the name of the applicant and an address for correspondence, and
>
> (c) describes the information requested.

E.5. It follows that the appellant's request to KCC for information was, so far as is necessary, also a 'request for information' for the purposes of FOI, notwithstanding that it was expressed to be made under the EIRs.[32]

E.6. Under subs.(1) of s.39 FOI (one of the exemption provisions within Pt.II):

> Information is exempt information if the public authority holding it—
>
> (a) is obliged by environmental information regulations[33] to make the information available to the public in accordance with the regulations, or
>
> (b) would be so obliged but for any exemption contained in the regulations.

E.7. If KCC is not required to make the requested information available under the EIRs because of the operation of r.6(1) EIRs, the information nevertheless is information which satisfies subs.(1)(a) of s.39 FOI, because the information nevertheless must be made available (albeit in a different form or format: in this case, by inspection at the records office). The requested information therefore is not exempt under subs.(1)(b).

E.8. In that event, the requested information is exempt information for the purposes of Pt.II. But it is a qualified exemption.[34] What this means is that the duty to 'to have that information communicated to' the person making the request (s.1(1)(b) FOI) is subject to the qualified exemption specified in s.2(2) — so that the duty:

> does not apply if or to the extent that—
>
> …

32 The converse scenario is of course widely accepted to be correct and commonplace: that a request expressed to be made under FOI nevertheless must be taken to be a request under EIRs where the information sought is environmental information.

33 Including the EIRs: see subs.(1A); the EIRs satisfy the requirement in subs.(1A)(b).

34 See, by contrast, the absolute exemptions specified in s.2(3) FOI, which do not include the (qualified) exemption in s.39.

> (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

E.9. Moreover, the duty under s.1(1)(b) FOI 'to have that information communicated to' the person making the request is a duty to *communicate* the information, and not merely to *make it available* as is the requirement under EIRs (r.5(1)). Thus, for the purposes of FOI, there is a duty to supply the information, but subject to the public interest test in maintaining the s.39 qualified exemption.

E.10. Under subs.(1) of s.21 FOI (another exemption provision within Pt.II):

> Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.

E.11. In that event, the requested information is exempt information for the purposes of Pt.II, and the exemption is an absolute exemption specified in s.2(2)(a) and (3)(a) FOI. But the information will be exempt only if it is 'reasonably accessible' to the applicant (an expression not quite consistent with the terminology in r.6 EIRs).

E.12. Finally, under s.11 FOI, if the applicant requests 'a copy of the information in permanent form or in another form acceptable to the applicant' (subs.(1)(a)), then 'the public authority shall so far as reasonably practicable give effect to that preference' (subs.(1)), and in determining whether it is reasonably practicable, 'the public authority may have regard to all the circumstances, including the cost of doing so' (subs.(2)).

E.13. Accordingly, in deciding whether the request should be granted under FOI so that the requested information must be communicated to the appellant, the appellant identifies the following considerations:

- The information is exempt information only if 'in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.' (FOI, s.2(2)(b))
- The information is exempt information if it is information which is reasonably accessible to the applicant otherwise than under section 1 (*i.e*. under the EIRs).
- In deciding whether to give effect to the request that the information be disclosed in electronic form, the public authority 'shall so far as reasonably practicable give effect to that preference', having regard to all the circumstances including the cost.

E.14. The appellant refers to the analysis of the Information Tribunal in *Rhondda Cynon Taff County Borough Council v Information Commissioner.*[35] The tribunal concluded that:

> …it is not quite correct to consider EIR and FOIA as mutually exclusive regimes. … This Tribunal views it as better to describe the two regimes as running 'in parallel'.

E.15. Accordingly, the commissioner, in his response (IC/R/19–25) is mistaken to infer (at IC/R/22) that the appellant contends:

> that the requested information is not 'environmental information'… [.]

The appellant makes no such contention, but submits that the information is potentially subject to disclosure under both EIRs and FOI, and that the tests for disclosure under each régime must be considered in order to decide whether the request was correctly handled. The appellant notes that the commissioner recognises the potential duality of requests being handled under both EIRs and FOI, in his guidance, *Charging for information under the EIRs.*[36]

E.16. Accordingly, it is no part of the appellant's submissions that the information requested is not environmental information.

S.2(2)(b) public interest test

E.17. S.2(1)(b) FOI provides that the entitlement in s.1(1)(b) to have information communicated in response to a request, in relation to information which is subject to the qualified exemption in s.39:

> does not apply if or to the extent that—
>
> …

35 EA/2007/0065: www.bailii.org/uk/cases/UKIT/2007/EA_2007_0065.html.

36 ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/charging-for-information-under-the-eir/. See under 'Why doesn't FOI apply': 'Section 39 of FOIA states that information is exempt from disclosure under the Act if the public authority is obliged to disclose the information under the EIR. The exemption is subject to a public interest test. Although there is a public interest in making information freely available under FOIA, the ICO considers that there is an overriding public interest in implementing the EIR as intended by the Directive. Therefore, the ICO would not accept the argument that it would be in the public interest for requests chargeable under the EIR to be handled under FOIA instead.'

> (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

E.18. The appellant does, and no doubt the tribunal may, encounter some difficulties in answering an allegation (that there is a public interest in maintaining the exemption) which has not been made.

E.19. The appellant struggles to identify any public interest which would justify withholding the information in the form sought. The appellant infers that KCC does not wish its intellectual property rights in the digitised tithe map data to be prejudiced by the proliferation of the data in the public domain — for example, if the appellant, having had his request satisfied, were to place the data on a website.[37]

E.20. However, even if that were to be the outcome of satisfying the appellant's or any similar request, the appellant suggests that disclosure would indeed be in the public interest. It would help indirectly achieve the objectives of the Directive, which includes in art.7(1) requirement on public authorities to take steps to ensure the 'active and systematic dissemination to the public, in particular by means of computer telecommunication and/or electronic technology'.

E.21. Moreover, KCC's intellectual property rights are founded in data which originated nearly two centuries ago, and which KCC received nearly one-third of a million pounds to digitise so that the public might:

> …have full appropriate access to the Property… . The Grantee will ensure that no person is unreasonably denied access to the Property.[38]

E.22. It is far from obvious what, if any, public interest is served by refusing disclosure.

E.23. Moreover, the preamble to the Convention includes a provision (para.17):

> Acknowledging that public authorities hold environmental information in the public interest,

and the *Convention implementation guide* refers (p.34) in this context to:

37 It need hardly be said that this is not the appellant's intention.

38 See para.A.2 above.

> the notion that public authorities must serve the needs of the public, including individual members of the public, so long as this does not interfere with the rights of others.

E.24. It is suggested that disclosure in the form requested will 'serve the needs of the public, including individual members of the public', without in any way interfering with the rights of others.

E.25. The appellant tentatively anticipates that the commissioner might contend that the public interest is better served if a request for the disclosure of plainly environmental information is exclusively determined under the EIRs (and that a request for the disclosure of non-environmental information is exclusively determined under FOI). However, that plainly is not the intention of the FOI, which (indirectly) provides, in s.2(3), that environmental information — although specified as exempt information in s.39 — nevertheless is subject to a qualified, and not an absolute exemption. If Parliament had intended environmental information to be subject exclusively to determination under EIRs, it would have specified that environmental information was subject to an absolute exemption for the purposes of Pt.II of FOI.

S.21 reasonably accessible

E.26. It is submitted that the effect of s.21, which is similar in drafting to s.25 of the Freedom of Information (Scotland) Act 2002, is summarised in *Glasgow City Council v Scottish Information Commissioner*[39]:

> information which does not fall within subsec[tion] (2)(b)[40] is not reasonably obtainable by the applicant merely because the information is available on request from the public authority which holds it, unless it is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.

39 [2009] CSIH 73: www.bailii.org/scot/cases/ScotCS/2009/2009CSIH73.html, at [36]. At [59], Lord Reed described s.25(3) of the 2002 Act (in similar terms to s.21(3) FOI) as 'not a model of clarity', but continued: 'the legislation proceeds on the basis that the role of the commissioner in approving publication schemes (under sec 23(1)(a) [s.19(1)(a) FOI]) is a sufficient guarantee that the information will be reasonably obtainable. Where a publication scheme operates in accordance with the Act, no further evaluation of whether the information is reasonably obtainable is necessary or appropriate.'

40 Subs.(2)(b) of s.25 of the 2002 Act, which effectively replicates subs.(2)(b) of s.21 FOI.

E.27. The requested information does not fall within s.21(2)(b) — KCC is not required under EIRs 'to communicate [the information] (otherwise than by making the information available for inspection)'.

E.28. And although the requested information is available on request, it is not made available in accordance with the authority's publication scheme nor is any payment required specified in, or determined in accordance with, the scheme.

E.29. Accordingly, the information is not exempt for the purposes of s.21.

S.11 form

E.30. S.11(1)(a) FOI provides:

> Where, on making his request for information, the applicant expresses a preference for communication by any one or more of the following means, namely—
>
> (a) the provision to the applicant of a copy of the information in permanent form or in another form acceptable to the applicant,
>
> …
>
> the public authority shall so far as reasonably practicable give effect to that preference.

E.31. The appellant sought the release of the information requested in electronic form, as files to be downloaded or loaded onto a portable hard disk. The preference was therefore, for the purposes of subs.(1)(a) of s.11, for 'a copy of the information in permanent form or in another form acceptable to the applicant'. In *Innes v Information Commissioner* in the Court of Appeal,[41] Underhill LJ (who gave the leading opinion, with whom the other judges agreed) decided that subs.(1)(a) enabled an applicant to ask for information to be supplied in electronic form (being a permanent form), as opposed to paper form, but also in a particular software format,[42] subject only to the concluding words of subs.(1) — that 'the public authority shall so far as reasonably practicable give effect to that preference.'

41 [2014] EWCA Civ 1086: www.bailii.org/ew/cases/EWCA/Civ/2014/1086.html.

42 [35]–[40].

E.32. The appellant is unable to identify any issues which might make compliance with the appellant's request not reasonably practicable. On the contrary, the request would be eminently straightforward and economical to execute.

Conclusion on FOI

E.33. The appellant submits that, if the tribunal finds that KCC was entitled under EIR to refuse to disclose the requested data in electronic form, then KCC was also obliged to consider whether the information should be disclosed under FOI.

E.34. In that event, the appellant submits that the only plausible conclusion is that KCC should have acceded to that request under FOI.

F. R.8: Charging

F.1. The commissioner, in his response to the appellant's notice of appeal (IC/R/36) states that:

> The Commissioner submits that any commercial fee that the Council seeks for a permanent copy of the requested information would not represent a disclosure under the EIR. As stated above the Council has already complied with its obligations under reg. 5(1) EIR by making the requested information available for inspection at the Centre and as such reg. 6(1)(b) EIR applies to the Request. The Commissioner maintains that he was not required to make a finding on reg. 8 EIR given his conclusion on reg. 6(1)(b) EIR for the reasons in the [IC/D/26–28].

F.2. If the tribunal is satisfied that the appellant's request is not one to which r.6(1)(a) or (b) applies, the appellant invites the tribunal to consider (which the commissioner did not, for the reasons stated) whether the charge prospectively imposed to satisfy the request is lawful for the purposes of r.8.

F.3. Under para.(1) of r.8:

> Subject to paragraphs (2) to (8), where a public authority makes environmental information available in accordance with regulation 5(1) the authority may charge the applicant for making the information available.

F.4. Para.(3) provides that:

> A charge under paragraph (1) shall not exceed an amount which the public authority is satisfied is a reasonable amount.

F.5. Para.(8) provides that:

> A public authority shall publish and make available to applicants—
>
> (a) a schedule of its charges; and
>
> (b) information on the circumstances in which a charge may be made or waived.

F.6. The information requested does not appear among the schedule of charges mounted on KCC's website.[43] It is, however, included among a list of copying charges contained on a separate website for KCC's records centre,[44] where it is stated:

> Tithe map – £15 per map

F.7. In responding to the appellant's request for information, KCC proposed a discount of 20% for copies of more than 40 tithe maps (see para.A.12 above).

F.8. The appellant calculates that, if (as the appellant believes) KCC holds 425 tithe maps in electronic form, the charge for disclosure would be £5,100.[45]

F.9. The commissioner's published guidance, *Charging for information under the EIR*,[46] suggests that:

> When thinking about a charge, you should begin by considering whether it's reasonable to apply a charge and whether it would deter the requester from accessing the information.

Plainly, a charge of £5,100 would deter any requester from accessing the information.

F.10. The guidance continues:

> Once you are satisfied that a charge is reasonable, you should then calculate the time and costs you will incur in supplying the information, and again

43 www.kent.gov.uk/about-the-council/information-and-data/access-to-information/publication-scheme

44 www.kentarchives.org.uk/our-services/copying-documents/ (see under 'Digital Copies').

45 425 × £15 × 80% = £5,100.

46 ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/charging-for-information-under-the-eir/

> consider whether the amount is also reasonable. Any charge you apply cannot exceed the actual cost of supplying the information.

Plainly, a charge of £5,100 would far exceed the actual costs of supplying the information.

F.11. The guidance further explains that a charge may include:

> the actual costs of the staff time it takes to locate information;
>
> staff time to put the information in an appropriate format for disclosure; and
>
> the disbursements (eg photocopying, printing and postage costs) in transferring the information to the requester.

Plainly, a charge of £5,100 would far exceed the costs of supplying the information calculated according to the guidance.

F.12. The guidance also states that:

> You must publish a schedule of charges in order to charge requesters for environmental information.

F.13. It is not directly stated in the guidance, but implied, that any proposed charge should be contained in the published schedule. The appellant submits that this too is the effect of para.(8) of r.8, and in *Leeds City Council v Information Commissioner and the APPS Claimants*[47] the First-Tier Tribunal reached the same conclusion.

F.14. Moreover, the commissioner's guidance advises that:

> The ICO considers that you should accept the costs associated with the routine administration of complying with requests as part of your obligations under the EIR.

47 EA/2012/0020 and 0021 at [119]: www.bailii.org/uk/cases/UKFTT/GRC/2013/EA_2012_0020.pdf

F.15. Accordingly, the appellant submits that KCC's proposed charge of £5,100 is not in accordance with r.8, and that as the actual costs involved in providing the information are confined to a short period of staff time and postage, any charge made under r.8 should be confined to a reasonable amount relating to such costs.

Hugh Craddock
7 April 2023

G. Annexe: key legislative provisions

EIRs: art.6(1)

Where an applicant requests that the information be made available in a particular form or format, a public authority shall make it so available, unless—

(a) it is reasonable for it to make the information available in another form or format; or

(b) the information is already publicly available and easily accessible to the applicant in another form or format.

Directive 2003/4/EC: art.3(4)

Where an applicant requests a public authority to make environmental information available in a specific form or format (including in the form of copies), the public authority shall make it so available unless:

(a) it is already publicly available in another form or format, in particular under Article 7, which is easily accessible by applicants; or

(b) it is reasonable for the public authority to make it available in another form or format, in which case reasons shall be given for making it available in that form or format.

For the purposes of this paragraph, public authorities shall make all reasonable efforts to maintain environmental information held by or for them in forms or formats that are readily reproducible and accessible by computer telecommunications or by other electronic means.

The reasons for a refusal to make information available, in full or in part, in the form or format requested shall be provided to the applicant within the time limit referred to in paragraph 2(a).

Aarhus Convention: art.4(1)

Each Party shall ensure that, subject to the following paragraphs of this article, public authorities, in response to a request for environmental information, make such information available to the public, within the framework of national legislation, including, where requested and subject to subparagraph (b) below, copies of the actual documentation containing or comprising such information:

(a) Without an interest having to be stated;

(b) In the form requested unless:

  (i) It is reasonable for the public authority to make it available in another form, in which case reasons shall be given for making it available in that form; or

  (ii) The information is already publicly available in another form.