Hugh Craddock

v

The Information Commissioner

Grounds for appeal to Upper Tribunal

A. Introduction

A.1. In *Hugh Craddock v Information Commissioner*,[1] the General Regulatory Chamber of the First-tier Tribunal ('the FTT') dismissed the appellant's appeal against the decision of the Information Commissioner in relation to a request made under the Environmental Information Regulations 2004 ('the EIRs') to Kent County Council ('the council') for tithe-map data ('the tithe information'). That request initially was refused under r.6(1)(b) of the EIRs, and the refusal was upheld by the Information Commissioner and by the FTT.

A.2. The key provision considered in the appeal was the effect of r.6(1)(b), which provides that:

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

A.3. The FTT found, in accordance with that provision, that the tithe information was publicly available and easily accessible to the appellant in another form or format.

A.4. This document comprises the appellant's submission of grounds for appeal against the decision of the FTT.

1 [2024] UKFTT 00009 (GRC): EA/2022/0455

A.5. The appellant seeks permission to appeal on the following grounds, set out in sections C to F identified below. Those sections explain why, in the appellant's view, the FTT erred in its interpretation of r.6(1)(b) and of the parallel régime in the Freedom of Information Act 2000 (FOIA) in relation to the appellant's request for the tithe information.

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A.6. Reference to a regulation ('r.') is a reference to that regulation of the EIRs. Reference is made in brackets to paragraphs of the judgment of the FTT, *e.g.* [24]. Reference is made to the Aarhus Convention ('the Convention') of 25 June 1998,[2] and Directive 2003/4/EC ('the Directive')[3] as aids to interpretation of the EIRs.

B. The facts and law

B.1. The facts of the appellant's original request for information under the EIRs, the council's decision on that request, and the subsequent determination of the Information Commissioner, are set out in the judgment of the FTT at [1–18], and the relevant law at [19–20].

B.2. In summary, the appellant asked the council under the EIRs to supply him with copies of tithe maps, already held by the council in electronic form as scanned images, on a hard disk. The council refused, and instead referred to the availability of those images to view on a computer screen at its archives centre. It relied upon this alternative as satisfying the requirements of r.6(1)(b), and the Information Commissioner agreed. No party disputes that the tithe maps comprise environmental information.

2 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.

3 of the European Parliament and of the Council of 28 January 2003 on public access to environmental information. Available as retained law at: www.legislation.gov.uk/eudr/2003/4/contents/adopted.

C. Ground 1: was the tithe information 'publicly available'?

C.1. The appellant contends that the FTT erred, as a matter of law, in finding that the tithe information, available to view at the council's archives centre, was 'publicly available'.

C.2. The FTT held [44]:

> We consider that 'publicly available' means 'available to the public'. We consider that the information which is subject of the Request is available to the public in the ordinary sense of those words: the information is not restricted from any person in principle.

The FTT decided that the availability of the tithe information in the council's archives centre ensured that it was publicly available.

C.3. The FTT found that:

> We do not consider that the availability to the public of the digital maps in the Council's Searchroom[4] is any less 'genuine' than that which might be achieved by publication of the types identified by the Appellant,[5] and is consonant with the requirements of Article 3(5)(c) of the Directive

C.4. As the appellant understands it, the FTT found that, if a public body makes the information available to the public in one or more of its premises, the information becomes 'publicly available' for the purposes of r.6(1)(b). The FTT does not appear to discriminate between the council's archives centre, which is advertised as open to the public, and the office of any public body, where information may be made available to the public. If the FTT did seek to rely on any such distinction, it is submitted that it would have been mistaken to do so — not least, because, in practice, the council asks members of the public to make an appointment to view the tithe information,[6] much as any member of the public might make such an arrangement with any public body in order to view information at its office.

4 *I.e.*, within the archives centre.

5 See para.C.11 below.

6 See the Commissioner's decision notice (the subject of the appeal), at [13], in which it is stated that: "In response to the Appellant's request for a formal refusal notice, on 3 September 2021 the Council responded to the request as follows: '…Whilst access does need to be organised by contacting the Centre direct… .'"

C.5. Every public body must, in practice, make environmental information available to the public, free of charge, at its premises. That is because, in every case where the public body is entitled to charge a fee for disclosure of the information, the person requesting the information is entitled without charge (r.8(2)(b)):

> to examine the information requested at the place which the public authority makes available for that examination.

C.6. Thus, unless the public body is prepared to satisfy any, and every, request for information without charge, the public body will be bound, where it raises a charge in order to satisfy a request, alternatively to make the information available for inspection on its premises. Any public body of any size having more than an occasional request made to it under the EIRs will be likely to appoint an office where information is made available to the public for inspection. Such premises may not be, as with the council's archives centre, expressly advertised as open to the public, but in practice the position will be the same: they will be premises to which the public is admitted for the purposes of examining information.

C.7. The Directive (art.3(5)(c)) requires Member States to ensure that:

> practical arrangements are defined for ensuring that the right of access to environmental information can be effectively exercised, such as…the establishment and maintenance of facilities for the examination of the information required[.]

C.8. The directive recognises that the effect of the requirement to make information available for inspection on a public body's premises at no charge gives rise to a need for such bodies to make available 'facilities for the examination of the information required'.

C.9. Yet, on the FTT's finding, all such information (that is, information made available under the EIRs by public bodies of any size) must be deemed to be 'publicly accessible'.

C.10. It is submitted that r.6(1)(b) contemplates something more. If the provision merely alludes to the requirement imposed by virtue of r.8(2)(b) on a public body to make any and all environmental information available for inspection on its premises free of charge, the words in r.6(1)(b), 'already publicly available and', are redundant.[7] They need not be

7 Save perhaps in relation to a small public body seldom receiving requests under the EIRs, and which never need make information available for inspection on its premises, because it can comply with every request by sending a copy of the information.

included in the provision, because that requirement will be satisfied in relation to every public body of any size in relation to all of the environmental information held under the EIRs, by virtue of r.8(2)(b).[8]

C.11. In the appellant's skeleton submission to the FTT [D.27], it was suggested that the 'something more':

> 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.

C.12. The appellant submits that the FTT erred in law to find that the words 'publicly available' in r.6(1)(b) mean no more than what is inevitably required of any public body of any size in relation to disclosures under the EIRs — to make the information available for inspection on its premises. In seems that, in the judgment of the FTT, such information then becomes 'publicly available'.

C.13. The appellant submits that something more (such as publication online) is needed in order to satisfy the requirements of those words, and that those words were not satisfied in relation to the appellant's request for the tithe information.

D. Ground 2: was the tithe information 'easily accessible to the applicant in another form or format'?

D.1. The appellant contends that the FTT erred, as a matter of law, in finding that the tithe information, available to view at the council's archives centre, was 'easily accessible to the applicant in another form or format' (the 'accessibility test').

D.2. The council offers to provide access to the tithe data by viewing the data on a computer screen in its archives centre.[9] This is said to render the information 'easily accessible to the applicant in another form or format'.

8 It might in that case be necessary to make further provision in relation to small public bodies (such as small parish councils) which do not keep premises suitable for visits by requesters, and which intend to respond to every request for information by supplying it without charge.

9 It is not possible to do other than to view the data: one cannot, for example, copy the data to a personal computer.

D.3. The FTT held [51]:

> …we do not consider that accessibility to information is properly determined by considerations of travel for the purposes of EIR. We consider that accessibility connotes, more immediately, the ability to 'get at' (our own, inelegant phrase) the information in its entirety. In our view, access to the information is afforded directly to the Appellant at the point of the screen.

D.4. The appellant accepts that the FTT was correct in that overall approach: the accessibility test is not concerned with questions of travel.

D.5. The FTT's found that the accessibility test, as interpreted by the FTT to mean the ability of the requester to 'get at' the information, was satisfied in this case. The appellant submits that it was mistaken in its interpretation of the accessibility test in order to arrive at that finding.

D.6. The FTT noted that [51], 'access to the [tithe] information is afforded directly to the Appellant at the point of the screen.' The effect is to render the information severely less accessible to the appellant. The information, which was digitised into an electronic form, and which remains available to the council in that form, is displayed to the appellant on a screen.[10] The appellant is required, if desired, to take it home in what effectively is an analogue form (whether by means of memory, photographs of the screen, or notes), and which cannot directly be processed by a computer.

D.7. The information displayed on the screen is not in the appellant's submission: 'information [which] is…easily accessible to the applicant in another form or format.' The appellant observes that the requirement is not merely that the information should be 'easily accessible', but that it should be 'easily accessible…in another form or format'. The appellant suggests that r.6(1) intends to confer on a requester, an ability to specify the medium by which the information is made available, subject in sub-para.(b) to the possibility that the public body may supply the information in an alternative medium, but only if in so doing, that alternative medium is 'easily accessible' to the requester.

10 That it is displayed on the screen does not mean it is made accessible in an electronic form, any more than if it were displayed on the screen in a cinema. Alternatively, the archives centre can produce the original maps for examination: these too are in a form which is substantially less accessible than the digitised electronic copies.

D.8. (A typical scenario is that the requester asks for a document in Microsoft Word, and the public body explains that the document was prepared in another proprietary word-processing package, and instead will make it available as a pdf.)

D.9. The FTT held [52] that:

> The Appellant's construction of 'accessible' entails not just the ability to access the information, but the ability to capture and retain the information in a particular way for a specific use by him outside the Searchroom, achieved by receipt of electronic copies of the maps. We consider that that is to strain the meaning of the words "easily accessible to the applicant" in the context of Regulation 6(1)(b), and we find no support for that in the Directive or the Convention. In this case, the Appellant has two challenges : (1) the nature of the information and the original medium in which it was collected (large maps) and from which it has been transposed to digital format, and (2) the use which he wishes to make of the information. The former precedes, and the latter succeeds, the point of access itself. We do not construe a requirement that the information be "easily accessible" as having to accommodate either of those challenges.

D.10. The FTT distinguished the appellant's ability to 'get at' the information, from 'the use which he wishes to make of the information', and decided that it could take no account of the latter. The appellant submits that the purpose of having access to environmental (or any) information is to make use of it, and that 'accessible' in this context must relate to a test of whether the information can both be inspected and practicably used. The duty is to make information 'available' (r.5(1)), not merely to make it visible. The most appropriate definition of 'available' is, 'Able to be used, obtained, or selected; at one's disposal.'[11]

D.11. If, as the FTT decided, whether the information is 'accessible' is a matter only of whether the requester can view the information, it sets a very undemanding threshold. Presumably, in the FTT's judgment, the tithe maps would not be accessible to a requester with visual impairment,[12] but it is not obvious otherwise how in general terms the provision of information at the public body's premises otherwise could fail to satisfy the FTT's interpretation of the accessibility test.

11 OED, 4. Uses 1 to 3 are obsolete or specialist legal usage.

12 It is unclear how the council could resolve the question of accessibility for a requester with visual impairment, in relation to tithe maps.

D.12. Moreover, the requirement is that the tithe information be '*easily* accessible *to the applicant*'.[13] It is submitted that the FTT failed to take into account the adverbial requirement.

D.13. The FTT found that:

- '…determining whether the information requested is to be regarded as easily accessible by reference to the particular format requested, would be the wrong approach.' [54]
- 'Possible difficulties in recording and using information, once accessed, do not make information any less accessible.' [54]

D.14. The appellant submits that, notwithstanding that the FTT was cognisant of the disadvantages manifested by access to the tithe information in the form in which the council preferred to provide it [17b, 48], it failed to consider whether such disadvantages might render the tithe information not 'easily accessible' to the appellant. In short, the FTT treated the threshold as whether the tithe information simply was accessible in the sense of being able to view the information. It took no account of how the information presented in that format (*i.e*. on screen) might then be used, nor whether the format would be accessible to the appellant himself. The appellant contends that the FTT erred as a matter of law in failing to take such account.

D.15. Finally, the FTT observed that:

> The exceptions from disclosure afforded by Regulation 6(1)(a) and (b) are intended, in our view, to balance against the rights of the applicant the burden on a public authority.

D.16. It is understandable that the FTT (and perhaps also the Information Commissioner) adopts the position that freedom of information legislation should not be interpreted in such a way that the rights of the requester are unnecessarily enlarged at the expense of public bodies (and those whose taxes fund those bodies).

D.17. To the extent that the FTT's observation may have influenced its interpretation of r.6(1)(b), the appellant submits that the FTT misdirected itself, for two reasons.

13 Emphasis added.

D.18. The first is that, what is striking in the appellant's case is that the position taken by the council does nothing to alleviate any burden placed on it. On the contrary, it increases the burden.

D.19. The appellant had asked the council for the supply of the tithe information on a hard disk, and estimated that loading the disk would take an archives officer about 15 minutes.[14] By refusing to comply with his request, the appellant instead is required to attend from time to time at the council's archives centre, and its staff are required to book in the appellant, to set up a computer terminal to display the information required, to oversee the appellant's use of the equipment, and to put away the equipment at the end of the session. Hosting several such visits, potentially several tens of visits in relation to the estimated 425 parish tithe maps, will be substantially more costly to the council, than complying with his original request which might have taken around 15 minutes in all (this leaves entirely aside any consideration of the burden on the appellant in making many such visits).

D.20. It is now so cheap to convey large quantities of electronic data over the internet that the appellant suggests it is hard to conceive of a scenario in which a public body might refuse to provide information electronically because it would be cheaper to facilitate a personal, visual inspection of the data on the public body's own premises.

D.21. The council, and public bodies generally, may well have reasons for effectively limiting access to information in electronic form. It may wish to restrict the proliferation of electronic scans of historical documents which diminish direct engagement with the archives centre.[15] In other circumstances, a public body may wish to make it difficult for a requester to acquire and process environmental data which could be deployed to it disadvantage. But such reasons have nothing to do directly with limiting the burden imposed on public bodies by satisfying the request for information in electronic form.

D.22. The second reason is that, if the council had acceded to the appellant's request to supply the tithe information in electronic form, the council would have been enabled, by virtue of r.8(1) and (3), to charge the appellant 'for making the information available',

14 The appellant said, in a submission to the Information Commissioner, '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). The appellant had offered to supply a portable hard disk. The timescale was not disputed by the council.

15 *I.e.*, members of the public will not need to visit the archives centre in order to view documents held by it, which may lead to cuts to its budget as visitors 'through the doors' decline.

such charge to ‘not exceed…a reasonable amount’.[16] Whereas the council could not and does not charge the appellant for visiting the council’s archives centre to view the tithe information on a screen (see r.8(2)(b)).

D.23. Thus the FTT, if it was correct to view the function of r.6(1)(b) in its application to the present case, or similar cases, as ‘to balance against the rights of the applicant the burden on a public authority’ [50], misdirected itself because that consideration could have no relevance to the appellant’s request, nor to similar cases.

E. Ground 3: the FOI régime

E.1. The appellant contends that the FTT erred, as a matter of law, in finding that the tithe information was, under FOIA, ‘reasonably accessible’ to him and therefore exempt from disclosure under s.21 FOIA.

E.2. The FTT accepted [57–60] the submission of the appellant[17] that environmental information may be disclosable also under FOIA. Such disclosure may potentially be exempt under s.39(1) FOIA, but the exemption is subject to a public interest test. The FTT [63] was:

> not satisfied, in all the circumstances of the case, that the public interest in maintaining the exemption can be said to outweigh the public interest in disclosing the information. On that basis, we do not find that the information is exempt from disclosure under FOIA.

E.3. The FTT therefore went on to consider whether the tithe information was exempt from disclosure under s.21 FOIA.

E.4. Subs.(1) of s.21 provides that:

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

16 What is a ‘reasonable amount’ remains in dispute between the council and the appellant. The council sought to impose a charge which the appellant calculates in total would be £5,100. However, as the Information Commissioner determined that the charge was not imposed under the EIRs, it is not susceptible to review under r.8. The appellant contends that the council could have imposed a modest fee commensurate with 15 minutes of an officer’s time, plus postage costs.

17 Having regard to the decision of the First-tier tribunal in *Rhondda Cynon Taff CBC v IC* [2007] UKIT EA_2007_0065. This submission was contested by the Information Commissioner, but it seems on a misunderstanding of that submission (see [58–63]).

E.5. The question for the tribunal therefore was whether the information was ‘reasonably accessible to the applicant, in effect under EIRs — a similar, but not identical, test to the accessibility test under r.6(1)(b).

E.6. The FTT found subs.(2) ‘as identifying non-exclusive circumstances in which information might be characterised as reasonably accessible’, but that those circumstances were not relevant to the appellant’s case.

E.7. Subs.(3) provides that:

> For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information 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.

E.8. It appears [66] that the FTT found that subs.(3) was of no assistance, because the tithe information was publicly available (and therefore not available only ‘on request’), notwithstanding that the information was not contained in the council’s publications scheme.

E.9. It seems that the FTT instead (finding subss.(2) and (3) of no direct assistance), went on to consider whether the information was ‘reasonably accessible’ to the appellant for the purposes of subs.(1). The appellant observes, however, that subss.(2) and (3) provide some guidance to the decision-maker as to what is and is not to be regarded as ‘reasonably accessible’.

E.10. Nevertheless, the FTT found [67] that the information was ‘reasonably accessible’. It found that the information was ‘readily [*sic*] accessible’ on a computer screen, but did not consider that ‘the ability to capture, retain and take it away for study…properly inform a determination of accessibility per se.’

E.11. The appellant submits that the FTT was in error to conclude that the display of the tithe information on a screen in the council’s archives centre complied with the requirement that the tithe information should be ‘reasonably accessible’ to the appellant, on the same basis set out at section D above. The appellant submits that, if there is any material

difference in the meaning of ‘easily accessible’ (in r.6(1)(b)) and ‘reasonably accessible’ (in s.21 FOIA), the FTT was nevertheless wrong in law to construe ‘accessible’ (in either context) so as to exclude consideration of how the information presented on screen might then be used. Further, the appellant suggests that the FTT failed to have regard to the statutory ‘illustrations’ in subss.(2) and (3) as to what should be considered to be, or not to be, ‘reasonably accessible’.

F. Public interest

F.1. The appellant submits that permission to appeal should be granted not only on the grounds 1 to 3 set out above, but because the case raises a matter of considerable public interest and importance.

F.2. It invariably is the case that contemporary information within public bodies is generated in electronic form.[18] Even in relation to historical records, increasingly these are being digitised for ease of access, and preservation of the original documents (as were the tithe maps held by the council). Ever-increasing quantities of data are created by electronic devices and retained in electronic form.

F.3. In response to a request under the EIRs for the disclosure of the data in electronic form, the judgment of the FTT appears to enable a public body to insist that the requester attend its premises to view the data on a computer screen, relying on art.6(1)(b) (and therefore to refuse to disclose the electronic data). The impact of the public body electing to exercise its supposed discretion under r.6(1)(b) is to deprive the requester of access to the data in its electronic form,[19] which is most likely to be useful to the requester, and which is most likely to facilitate its storage, analysis and manipulation to enable, for the purposes of the Directive, ‘more effective participation by the public in environmental decision-making’[20].

F.4. It also would be contrary to the objective of the Directive[21] that:

18 Exceptions are likely to form a small part of the corpus of data: for example, manuscript notes of meetings or telephone calls.

19 For example, a document may be held in a proprietary word-processing format such as Microsoft Word, and chemical discharge or sewage emission data may be held in a spreadsheet.

20 Directive, recital, para.(1)

21 Directive, recital, para.(21)

> In order to increase public awareness in environmental matters and to improve environmental protection, public authorities should, as appropriate, make available and disseminate information on the environment which is relevant to their functions, in particular by means of computer telecommunication and/or electronic technology, where available.

and that:[22]

> …public authorities should be required to make all reasonable efforts to maintain the environmental information held by or for them in forms or formats that are readily reproducible and accessible by electronic means.

F.5. These provisions in the directive in turn appear to give effect to the requirement of the Convention that:[23]

> Each Party shall ensure that environmental information progressively becomes available in electronic databases which are easily accessible to the public through public telecommunications networks.

F.6. The *Aarhus Implementation Guide*[24] explains that:

> Article 5, paragraph 3, does not require Parties to put the information in electronic form. It only stipulates that, if the information is already in electronic form, it should be placed in publicly accessible databases on public telecommunication networks. In practice, the aforementioned categories of information[25] will tend to exist in electronic form. The purpose of this final provision[26] would appear to be to avoid imposing on public authorities an obligation to scan or type in handwritten or oral submissions from the public, as well as older documents that might not exist in electronic form.

22 Directive, recital, para.(14)

23 Convention, art.5(3)

24 *The Aarhus Convention: An Implementation Guide* (second edition, 2014): published under the auspices of the Convention, at: unece.org/environment-policy/publications/aarhus-convention-implementation-guide-second-edition.

25 See the Convention, art.5(3)(a)–(d).

26 *I.e*. the provision quoted immediately preceding, in para.F.5.

F.7. The FTT correctly observed [43] that the above requirement of the Directive, implemented in r.4, was 'not an issue before [it]'. But in the appellant's submission, the requirements of the Convention and Directive are relevant to interpretation of the Directive, and of the EIRs.

F.8. In the appellant's skeleton submission to the FTT, the appellant contemplated:

> …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 no[r] does [the council's] response to the appellant's request.

F.9. That scenario goes to the heart of the appeal, and the importance of the questions of law raised by it. If the FTT was correct to dismiss the appeal, and the scenario is correct that the water company is entitled to provide the discharge data only on-screen, the effect is seriously to undermine the public's effective access to environmental data. And, contrary to the view which the appellant contends was mistakenly adopted by the FTT as to minimising burdens on public bodies (see paras.D.15 to D.21 above), the judgment of the FTT increases the cost of public bodies' compliance with the EIRs (albeit that those bodies may have other reasons for wanting to impede access to environmental data even at increased direct cost to themselves).

F.10. If the FTT is correct in its interpretation of r.6(1)(b), it is open to any public body to refuse to disclose electronically-held data in electronic form. In its refusal to grant the appellant leave to appeal to the Upper Tribunal, the FTT said that:

> The Tribunal's findings are not determinative of the approach to be taken by public authorities to other requests for environmental information.

The FTT's judgment in relation to the appellant's case is not binding on the FTT, the Information Commissioner or public bodies. But it is of persuasive authority, and it is likely to be followed in a proliferating range of cases which are similar on the facts. Moreover, the case explores an aspect of the EIRs, in r.6(1)(b), which has received virtually no judicial engagement to date, where there is therefore little relevant caselaw apart from the FTT's judgment, and yet which is key to public rights to access electronic environmental data.

F.11. The appellant submits that the FTT's judgment was wrong in law in the context of the facts of the appellant's case, on all of grounds 1 to 3. It is suggested that the FTT's judgment is so far from the intention of the Convention, the Directive and the EIRs, that the Upper Tribunal ought to grant leave to appeal the FTT's finding, not only on the grounds submitted, but owing to the public importance attached to the case.

F.12. The appellant therefore invites the Upper Tribunal to grant permission to appeal.

Hugh Craddock
2 April 2024