# Hugh Craddock

# v

# The Information Commissioner

# In the Upper Tribunal

# Appellant's response to the Commissioner and skeleton argument

## 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 ('the 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 Commissioner and by the FTT.[2]

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. In the appellant's view, this appeal poses the following question: where a public authority holds environmental information in electronic form (*i.e*. which it almost invariably will), can it parry a request for that information to be supplied in that form instead by

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

2 The Commissioner, in his response [21], characterises the position as the council having 'refused only to provide the information in the particular format sought by the Appellant'. The appellant agrees: but the effect nonetheless is a refusal to comply with the terms of the request, giving rise to the appeal mechanism in r.18.

displaying the information on a computer screen at its premises (and inviting the requester to visit)? The Tribunal will, of course, wish to decide the appeal on its particular facts. But the appellant observes (to his surprise) that what appears to him to be a question of remarkable relevance to the disclosure of publicly-held information in electronic form in the present day, has not directly been addressed by the UK courts.

A.5. This document comprises the appellant's submissions on his appeal against the decision of the FTT, in the light of the Commissioner's response to the appeal.[3]

A.6. The appellant was granted leave to appeal on the grounds set out in sections D to F identified below. The 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.



A.7. 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], and to paragraphs of the Commissioner's response *e.g*. [16].

## 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 Commissioner, are set out in the judgment of the FTT at [1–18], and the relevant law at [19–20]. See also the Commissioner's summary of the facts at [3–16] of his response.

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

3 The Commissioner's response is dated 9 May 2024 and was sent to the appellant on 10 May.

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 Commissioner agreed. No party disputes that the tithe maps comprise environmental information.[4]

B.3. 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.[5] The Directive was in turn intended to deliver (at least) the requirements of the Aarhus Convention ('the Convention') of 25 June 1998.[6] These sequential derivations have been recognised by the Supreme Court in *Office of Communications v The Information Commissioner.*[7]

B.4. In *Office of Communications v Information Commissioner*,[8] the European Court of Justice observed [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.

B.5. References are made below to the Convention and the Directive, as defined above, and also to the *Aarhus Convention — an implementation guide*[9] ('the Convention guide').

4 The Commissioner, before the FTT, appeared to misunderstand the appellant's ground for appeal that the information was also capable of disclosure under the FOIA (in this appeal, forming ground 3 at section F), as contending that the information was not, or might not be, environmental information at all. This is not the appellant's position (now or then).

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

6 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.

7 [2010] UKSC 3: www.bailii.org/uk/cases/UKSC/2010/3.html. See the judgment given for the court by Lord Mance at [2].

8 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 7.

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

In *Morgan v Hinton Organics (Wessex) Ltd*[10], Carnwath LJ (as he then was) said [22] (delivering the judgment of the court) that:

> …the Convention has the status of an international treaty, not directly incorporated. Thus its provisions cannot be directly applied by domestic courts, but may be taken into account in resolving ambiguities in legislation intended to give it effect… .

B.6. The appellant agrees with the Commissioner's position that the Convention guide is[11]:

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

B.7. The interpretation of the EIRs is subject to the 'Marleasing' principle — that national courts must, as far as possible, interpret national law in the light of the wording and purpose of the relevant EU directive in order to achieve the result envisaged by the directive.[12]

B.8. S.3 of the Retained EU Law (Revocation and Reform) Act 2023 abolishes the supremacy of EU law. However, s.6(3)(a) of the European Union (Withdrawal) Act 2018 preserves the effect of assimilated case law.[13] The Upper Tribunal is not one of the higher courts specified in s.6(4) as not bound by assimilated case law, nor is it specified in regulations made under s.6(5A).[14] Accordingly, assimilated EU case law remains binding on the Upper Tribunal.

## C. The context of the Convention, the Convention guide and the Directive

C.1. The preamble to the Convention recites that:

10 [2009] EWCA Civ 107: www.bailii.org/ew/cases/EWCA/Civ/2009/107.html.

11 Commissioner's response to the appellant's first appeal to the FTT, at [6]. 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.

12 Case C–106/89: *Marleasing SA v La Comercial Internacional de Alimentacion SA*: eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61989CJ0106#SM

13 Which includes assimilated EU case law: see definition of 'assimilated case law' in s.6(7).

14 See The European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 (SI 2020/1525: www.legislation.gov.uk/uksi/2020/1525/contents/made).

> …in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns, …
>
> Noting, in this context, the importance of making use of the media and of electronic or other, future forms of communication, …
>
> Acknowledging that public authorities hold environmental information in the public interest, … [.][15]

C.2. A requirement of the Convention is that:[16]

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

C.3. The Convention guide explains that the above requirement[17]:

> …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[18] will tend to exist in electronic form. The purpose of this final provision[19] 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.

C.4. The Convention guide further notes[20] that enabling the applicant to choose the form facilitates:

15 From the 9th, 15th and 17th unnumbered paragraphs of the recital to the Convention.
16 art.5(3)
17 p.107
18 See the Convention, art.5(3)(a)–(d).
19 *I.e.* the provision quoted immediately preceding, in para.C.2.
20 p.80

> • Faster provision of information.
> • Less costly provision of information.
> • Accommodation of members of the public with special needs… .
> • Efficient use of complex information systems, such as geographic information systems… .

C.5. The Directive implements the Convention requirements, so far as they relate to the communication of environmental information by public bodies.

C.6. The objectives of the Directive are[21]:

> (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.

The objectives help secure 'more effective participation by the public in environmental decision-making'.[22]

C.7. The Directive provides that[23]:

> 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[24]:

21 art.1
22 recital, para.(1)
23 recital, para.(21)
24 recital, para.(14)

> …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.

C.8. 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, where available.[25]

C.9. 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.[26]

C.10. The FTT correctly observed [43] that the above requirement of the Directive in art.7(1), implemented in r.4 EIRs, was 'not an issue before [it]'. But in the appellant's submission, the objectives and requirements of the Convention and Directive are relevant to interpretation of the Directive, and of the EIRs.

C.11. Moreover, under r.2(5):

> Except as provided by this regulation, expressions in these Regulations which appear in the Directive have the same meaning in these Regulations as they have in the Directive.

It is not required that such expressions expressly are defined in the Directive, only that they appear in the Directive as well as the EIRs. Nor is there any exception for cases where a contrary intention is apparent — only where a contrary meaning is defined in r.2.[27] Thus, where an expression is used in the Directive, and also in the EIRs, then (subject to the expressions expressly defined in r.2), the meaning of that expression in the EIRs is the meaning which it has in the Directive.

25 The proviso to art.7(1) is 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.

26 Art.7(1)

27 This provision strikes the appellant as surprising and somewhat reckless. But there it is.

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

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 'publicly available'.

D.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.

D.3. The FTT found [45] that:

> We do not consider that the availability to the public of the digital maps in the Council's Searchroom[28] is any less 'genuine' than that which might be achieved by publication of the types identified by the Appellant,[29] and is consonant with the requirements of Article 3(5)(c) of the Directive.[30]

D.4. As the appellant understands it, the FTT found that, if a public authority 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 authority, 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,[31] much as any member of the public might make such an arrangement with any public authority in order to view information at its office.

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

29 See para.D.14 below.

30 As to which, see para.D.8 below.

31 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… .'"

Disclosure of environmental information at a public authority's premises

D.5. In every case where the public authority 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.[32]

D.6. In practice, this means that every public authority must make environmental information available to the public, free of charge, at its premises. It is arguable that this provision goes further, and confers a right on a requester to examine the information at the public authority's premises even if a fee would not be charged.

D.7. Thus, unless the public authority is prepared to satisfy any, and every, request for information without charge, the public authority 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 authority of any size having more than an occasional request made to it under the EIRs will be likely to appoint an office where information habitually 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.

D.8. 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[.]

32 There is some uncertainty whether r.8 enables a public authority to pass on charges for, for example, the cost of sifting or procuring the information (the Information Commission gives the example of data which must be retrieved from storage off-site at a fee per item retrieved), notwithstanding that the information is then examined at the public authority's premises. The Directive appears to be equally ambiguous (see art.5(1) and (2)). The Convention appears to contemplate that charges may be made (art.4(8)) save for access to publicly-accessible lists, registers or files (art.5(2)(c)). The Commissioner takes the view that such charges may be levied: *Charging for information under the Environmental Information Regulations (EIR)*: What can't we charge for?/Examination of the information 'in situ': ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/charging-for-information-under-the-eir/#cant.

D.9. The Directive recognises that the effect of the requirement to make information available for inspection on a public authority's premises at no charge gives rise to a need for such bodies to provide 'facilities for the examination of the information required'.

D.10. 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 available'.

D.11. The Commissioner states [23] that the FTT made a specific finding on the facts: see para.D.2 above. The appellant submits that the specific finding made by the FTT, 'that the information…is available to the public [and] the information is not restricted from any person in principle', is the near-inevitable consequence of the requirements of the EIRs. It is nothing novel or different for the council to state that, in relation to the requested information, it is available to the public — of course it is, that is what the EIRs require.

D.12. The Commissioner rightly draws attention [25] to the requirement under r.6(1)(b) that the information is '*already* publicly available'. It is suggested that the intention of the adverb 'already' is to discourage a public authority from responding to a request for information by then (and only then) truly making the information publicly available, such as placing the information on the internet (see para.D.14 below), and then relying on r.6(1)(b). The public authority must already have taken such steps, prior to the request, in order to avail itself of r.6(1)(b).

<u>The requirement for 'something more'</u>

D.13. It is submitted that r.6(1)(b) contemplates something more. If the provision merely alludes to the expectation imposed on a public authority by virtue of r.8(2)(b) 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.[33] They need not be included in the provision, because that requirement will be satisfied in relation to every public authority of any size in relation to all of the environmental information held under the EIRs, by virtue of r.8(2)(b).[34]

33 Save perhaps in relation to a small public authority 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. Even then, it may be that such a body must provide premises for inspection in order to comply with r.8(2)(b).

34 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.

D.14. 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 FOIA.[35]

D.15. 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 authority 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'.

D.16. Strictly speaking, as the Commissioner observes [23], the FTT decided only that the particular circumstances of the tithe maps stored and made available to view at the council's archives centre were sufficient to make the data 'publicly available'. It did not need to reach any view as to whether any public authority would be able to rely on the same exception in r.6(1)(b) in relation to information made available at its premises. It may be that the FTT was particularly persuaded by the council's arrangements for the archives centre to be open to the public. Yet while another public authority might not advertise such a facility, it would need to operate on much the same basis — admitting requesters to view documents by arrangement.

<u>The requirements of the Directive</u>

D.17. The appellant draws on art.3(4)(a) of the Directive, from which the relevant provision in r.6(1)(b) is derived. Article 3(4) states:

35 Under subs.(2) of s.19 FOIA, 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.' 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 is suggested that the information may be sufficiently 'publicly available', because it is apparent from the publication scheme that it is available to the public and on what terms. In effect, the publication scheme offers a statutorily-guaranteed level of transparency.

> 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.18. Sub-para.(a) above refers to information already being 'publicly available…in particular under Article 7'. The cross-reference in the Directive to art.7 is not found in r.6(1)(b).[36]

D.19. As noted at para.C.8 above, 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'. The Directive appears to contemplate that 'publicly available' means, in particular, disclosed on a website or other digital medium.

D.20. The appellant finds some further support for this interpretation in the French language edition of the Directive, which provides, in art.3(4)(a):

> l'information est déjà publiée sous une autre forme ou dans un autre format, en particulier tel que visé à l'article 7, qui est facilement accessible par les demandeurs, … .

In the French language edition, 'publicly available' is represented by the past participle of the verb 'publier'.

D.21. The Larousse dictionary of French records that 'publier' means[37]:

> 1. Rendre quelque chose public, le faire connaître officiellement, en particulier par voie d'affichage, d'impression, etc. : *Publier les bans à la mairie*.
>
> 2. Faire connaître une information au public, en particulier dans un organe de la presse écrite : *Publier une annonce*.

36 R.6(1)(b) would need to cross-refer to r.4, which replicates the requirements of art.7 of the Directive.

37 Definitions 3 and 4 are not quoted here, as not relevant: www.larousse.fr/dictionnaires/francais/publier/64966.

D.22. '*Publier*' means to make something public, or make known officially, or make known to the public. It is suggested that merely to make information available to the public is not within the senses intended (as reinforced by the expectation that the information is disclosed under art.7).

D.23. It is submitted that the expression 'publicly available' must be interpreted consistent with the objectives, and the gloss provided by art.3(4)(a), of the Directive. And the meaning of 'publicly available' in the Directive is, by virtue of r.2(5),[38] the meaning which must be assigned to it in the EIRs. On that basis, the making available of information, and particularly electronic information, via a council archives centre, is not making that information publicly available for the purposes of r.6(1)(b).

D.24. The appellant acknowledges the requirement on member states in art.3(5)(c) of the Directive to secure 'practical arrangements' for 'examination of the information required' (see para.D.8 above). 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 art.3(5)(c) — 'the 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 compliance does not in itself cause such information to become 'publicly available'.

<u>The requirements of the Convention</u>

D.25. Further support for the appellant's interpretation is to be found in the Convention.

D.26. The 15th paragraph of the recital to the Convention notes:

> in this context,[39] the importance of making use of the media and of electronic or other, future forms of communication… .

38 See para.C.11 above.

39 The context appears to be the foregoing provisions of the preamble, and not merely the preceding provision in the 14th paragraph. 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.'

D.27. Art.5(2) of the Convention, on the collection and dissemination of environmental information, requires the Party (*i.e*. the State[40]) to:

> ensure…that environmental information is effectively accessible… .

D.28. Art.5(3) provides that:

> 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.29. Art.4(1) of the Convention states that:

> 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.[41]

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

41 In the French language version (French being one of the three original texts), para.(ii) reads: 'Que les informations en question aient déjà été rendues publiques sous une autre forme.'

D.30. It will be noted that exception in para.(ii) does not contain the requirement that the information which is publicly available is also 'easily accessible'. That additional requirement is inserted into art.3(4)(a) of the Directive, and thus is found in r.6(1)(b) EIR.[42]

D.31. It is suggested that the Convention does not include a requirement that publicly-available information should also be easily accessible, because the expression 'publicly available' was intended to have a restrictive meaning such as advocated in para.D.14 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', because they intrinsically were so.

D.32. The judgment of the FTT erodes the distinction between paras.(i) and (ii) of art.4(1)(b), in that para.(i) already affords to the public authority a means to make information available in another form (subject to the reasonableness test and the giving of reasons). If the public authority can rely on para.(ii), by attesting to the availability of information to view at its premises, it need never rely on para.(i), and never need show that its reliance on para.(i) were reasonable.

D.33. The Convention guide puts the matter more plainly. The Tribunal is invited to review the guidance on art.4(1) at pp.79–81 of the Convention guide. The guidance gives an illustration of information which is: 'already publicly available in another form, such as in a government-published book that may be found in a public library.' But it then counsels that if the only library copy is distant from the applicant, that may not suffice.

<u>'Publicly available': concluding remarks</u>

D.34. In the appellant's submission, the words of the Directive and Convention, supported by the Convention guide, inform the correct interpretation of r.6(1)(b). It is suggested that the position of the Commissioner and the FTT is circular: all environmental information (not otherwise excepted from disclosure) must be made available to the public, and therefore, all such environmental information is publicly available. On the contrary, the appellant contends that the tithe information is not 'publicly available…in another form or format' for the purposes of that provision.

42 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.

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

E.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').

E.2. The council offers to provide access to the tithe information by viewing the data (which were digitised into an electronic form, and which remain available to the council in that form) on a computer screen in its archives centre.[43] This is said to satisfy the accessibility test.

The accessibility test: questions of travel

E.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.

E.4. The appellant demurs from the FTT's determination that the accessibility test is not concerned with questions of travel. The appellant notes that the Commissioner [28] 'does not submit that distance and costs can never be relevant factors in the assessment of accessibility'. However, the appellant does not propose to put forward a case that his personal circumstances render the tithe information not 'easily accessible' to him. The appellant suggests that the Tribunal may wish to make no finding on whether the accessibility test may also be concerned with questions of travel, in the absence of detailed submissions from the parties.

43 It is not possible to do other than to view the data: one cannot, for example, copy the data to a personal computer. That the tithe information 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 council 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.

The accessibility test: access to and use of the information

E.5. The FTT 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.

E.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 of providing access in this form is to render the information severely less accessible to the appellant. The appellant is required, if desired, to capture the information and take it home (whether by means of memory, multiple photographs of screens, or notes), in a form which cannot directly be processed by a computer.[44]

E.7. The information displayed on the screen is not in the appellant's submission: 'information [which] is…easily accessible to the applicant in another [*i.e*. that] 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 authority may supply the information in an alternative medium, but only if in so doing, that alternative medium is 'easily accessible' to the requester.

E.8. (A typical scenario is that the requester asks for information in printed form, but the public authority, noting that the request has been made by email, decides to provide the information as a pdf[45] to minimise costs to itself and the requester.)

E.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

44 Photographs can be processed by a computer. But one tithe map might need to be displayed on between, say, 10 and 50 screens, each photographed in turn, in order to capture sufficient detail. These photographs then would need to be stitched into a single highly-distorted image to reconstitute the original map, which itself would suffer from reflections, glare, flicker, stretch and warp, and so on.

45 Portable document format

> 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.

E.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 — to promote 'more effective participation by the public in environmental decision-making'[46] — 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.'[47]

E.11. In *Innes v Information Commissioner* before the Court of Appeal,[48] Underhill LJ (with whom the other lord justices of appeal agreed) had to decide whether a request for information under the FOIA could (relying on s.11(1)(a) FOIA) specify provision in a particular software format. The court found that it could. Underhill LJ said[49]:

> Such a reading fits…with the apparent philosophy of the [FOIA]. Citizens are given the right of access to public information at least in part so that they can make use of such information. A construction of the Act which makes it easier for them to do so effectively is to be preferred.
>
> Conversely, it is hard to see any policy objection to a construction which enables an applicant to specify a preferred software… . If an authority is asked to provide information in a software format in which it is not already held

46 Directive, recital, para.(1)

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

48 [2014] EWCA Civ 1086: www.bailii.org/ew/cases/EWCA/Civ/2014/1086.html

49 At [39–40]

> (or into which it cannot readily be converted) it would be entitled to seek to rely on the reasonable practicability qualification[50]… .

E.12. The appellant submits that, if that is the philosophy of the FOIA, it must also be the philosophy of the EIRs — that is abundantly plain from the context of the Convention and the Directive, as considered in section C above. And as the Court of Appeal observed, the public right to access information is 'so that [citizens] can make use of such information.'

E.13. 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 judgement, the tithe information would not be accessible to a requester with visual impairment,[51] but it is not obvious otherwise how in general terms the provision of information at the public authority's premises otherwise could fail to satisfy the FTT's interpretation of the accessibility test. If the tithe information were projected onto the display screen at Piccadilly Circus, that, in the FTT's perspective, would appear to satisfy the accessibility test.

E.14. Moreover, the requirement is that the tithe information be 'easily accessible *to the applicant*'.[52] It is submitted that the FTT failed to take into account the italicised element.

E.15. 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]
>
> '…there is a risk that assessment of accessibility is viewed only, or overly, through the lens of the applicant's convenience and purpose.' [54]
>
> 'Possible difficulties in recording and using information, once accessed, do not make information any less accessible.' [54]

E.16. 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

50 See the concluding words to s.11(1) FOIA.

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

52 Emphasis added.

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.

E.17. The appellant also submits that the FTT was incorrect in suggesting that the accessibility test risked being 'viewed only, or overly, through the lens of the applicant's convenience and purpose.' Leaving aside the express requirement that the tithe information, disclosed in the council's archives centre, must be 'easily accessible *to the applicant*', the appellant suggests that his own requirements are hardly particular. Every requester seeking environmental information will wish that information to be disclosed in a form which the requester can use or take away. A requester seldom will be entirely satisfied by looking at the information on a public authority's computer screen.

E.18. The Commissioner, in turn, appears to denude the accessibility test of any real function. The Commissioner [28] does not accept that 'distance and costs can never be relevant factors', without accepting that they might have any potency, but also states [29] that there is:

> no support in either the Regulations, the Directive or the Convention for the question of accessibility under regulation 6(1)(b) being determined by reference to the purposes for which an applicant may wish to use the information.

It is not clear what meaning or function the Commissioner would ascribe to the accessibility test (at least in cases where distance and cost are not in issue), other than perhaps the entirely obvious requirement that the requester must be able to view the data.

E.19. The appellant's position is supported by several decisions of the compliance committee established by the Convention.

E.20. In ACCC/C/2009/36,[53] a public authority in Spain[54]:

53 unece.org/env/pp/cc/accc.c.2009.36_spain; report at: unece.org/DAM/env/pp/compliance/C2009-36/Findings/ece_mp.pp_c.1_2010_4_add.2_eng.pdf adopted by the committee on 18 June 2010.

54 Para.60

> made the information available only in one location and that the physical presence of the requester was necessary (to access the data in the computers); that they did not allow for the digital copying of the information available on the computers in Merida; that they did not provide the information to the communicant in the form requested… [.]

E.21. The committee observed that[55]:

> article 4, paragraph 1, requires that 'copies' of environmental information be provided. In the Committee's view 'copies' does, in fact, require that the whole documentation be close to the place of residence of the requester or entirely in electronic form, if the requester lives in another town or city.

E.22. In ACCC/C/2009/44,[56] the public authority in Belarus provided access to an environmental impact assessment report[57]:

> limited only to the examination at the premises of the Directorate, while the provision of the electronic copy of this report was refused because of the economic interest of the developer.

E.23. The committee reprised its findings in respect of the complaint against Spain (para.E.20 above), noting by way of criticism that[58]:

> information was restricted to the site of the Directorate of the NPP in Minsk only and no copies could be made.

E.24. In ACCC/C/2009/69,[59] the Ministry of Culture in Romania offered to provide[60]:

> …the archaeological study at the premises of the Alba County Department of the Ministry of Culture free of charge. Moreover, the communicants were

55 Para.61

56 unece.org/env/pp/cc/accc.c.2009.44_belarus; report at: unece.org/fileadmin/DAM/env/pp/compliance/CC-33/ece.mp.pp.c.1.2011.6.add.1.e.pdf adopted by the committee on 28 June 2011.

57 Para.68

58 Para.69

59 unece.org/env/pp/cc/accc.c.2012.69_romania; report available only in compilation of all findings at: unece.org/sites/default/files/2023-08/Compilation_of_CC_findings_14.08.2023_eng.pdf at pp.691–709; adopted by the committee on 26 June 2015.

60 Para.53

> informed that they could make copies of the requested documentation, at their own expense.

E.25. The committee found that[61]:

> …according to article 4, paragraph 1, of the Convention it is not sufficient to respond to a request for information from the public under article 4 by simply providing access to examine the information free of charge. Article 4, paragraph 1, expressly requires the applicant to be provided with copies of the actual documentation. With respect to the Party concerned's reference to article 4, paragraph 1 (b), the Committee clarifies that article 4, paragraph 1 (b), does not entitle a Party to refuse to provide copies of the requested information, but rather refers to the form the copies of the requested documentation is provided in: for example, paper form, electronic form, or on a CD Rom. Providing free access to examine the requested documentation does not amount to providing a copy of the requested information. Thus, in the present case, the Party cannot rely on article 4, paragraph 1 (b), because the information was not provided to the communicants in any other form nor was it already publicly available in another form.[62]

E.26. The position of the compliance committee is plain: electronic information must, under the Convention, be made available to a requester. The appellant accepts that the compliance committee is not a court of law, and its opinions are not binding in UK law.[63] However, it is suggested that the opinions assist in understanding the intention of the Convention rights.

61 Para.55

62 The committee noted that: 'It is not clear from the information before the Committee whether an electronic version of the requested information existed. If it did, it would have been reasonable to have made the requested information available to the communicants in that form. However, even if an electronic version did not initially exist, given the authority's statement that it had received other requests for the same information, an efficient approach may have been for the authority to have the requested pages scanned, and then it would have been able to meet both the requests of the communicants and other similar requests without much additional effort. However, this did not happen, nor was any other means used to provide the communicants with a copy of the requested information.'

63 See *R (Evans) v Secretary of State for Local Government* [2013] EWCA Civ 114: www.bailii.org/ew/cases/EWCA/Civ/2013/114.html, in which Beatson LJ (with whom the other lord justices of appeal agreed) said [38] that: 'The Committee's view and concern is undoubtedly worthy of respect. But…its view would have had no direct legal consequence.'

‘Easily accessible’ as used in r.4(1)(a)

E.27. The expression ‘easily accessible’ appears not only in r.6(1)(b), but also in r.4(1)(a):

> (1) Subject to paragraph (3), a public authority shall in respect of environmental information that it holds—
>
> > (a) progressively make the information available to the public by electronic means which are easily accessible… .

E.28. R.4(1)(a) reflects the requirement on member states in art.7(1) of the Directive to[64]:

> ensure that environmental information progressively becomes available in electronic databases which are easily accessible to the public through public telecommunication networks

E.29. In the context of r.4(1)(a), ‘easily accessible’ can have only the meaning which the appellant contends it should have in r.6(1)(b). It cannot refer to questions of time and distance, because ‘electronic means’ are not subject to such constraints, and r.4 is not concerned with any particular requester of information. And for the reasons already examined in relation to r.6(1)(b), the expression must signify something more than merely the ability of the public to view the information, and intend to ensure that the information can be easily used.

E.30. It also is notable that the use of the expression ‘easily accessible’ in r.4(1)(a) replicates the sole use of that expression in the Convention, in art.5(3), which requires each Party to ‘ensure that environmental information progressively becomes available in electronic databases which are easily accessible to the public through public telecommunications networks’.[65]

E.31. In ACCC/C/2015/131,[66] it was alleged that a UK planning authority had failed promptly to place certain data about a planning application online.[67]

64 See paras.C.8–C.10 above.

65 See para.C.2 above.

66 unece.org/env/pp/cc/accc.c.2015.131_united-kingdom; report at unece.org/sites/default/files/2021-11/ECE_MP.PP_C.1_2021_23-2113407E.pdf; adopted by the committee on 26 July 2021.

67 Para.98

E.32. The committee referred to the requirement in art.5(3) of the Convention, opining that[68]:

> The word 'progressively' in article 5 (3) must be construed in the context that more than two decades have passed since the Convention's adoption. Compared to the early, emerging state of electronic information tools at that time, the primary means through which environmental information is now disseminated by public authorities in most, if not all, Parties is through electronic means, namely public authorities' websites.
>
> The requirement that electronic databases be 'easily accessible' has several components including that: access is free of charge; registration requirements, if any, are kept to a minimum without the need for personal identification; databases have a user-friendly interface with easy-to-use search functions including, where relevant, the possibility to easily identify all documents relevant to particular procedures; and the databases are systematically organized and well-structured.
>
> 'Easily accessible' also entails that the information is accessible in a timely fashion. This has at least two aspects. First, the information must be promptly uploaded onto websites once it comes into the public authority's possession. Second, the information must be immediately retrievable when using the database. Information cannot be 'easily accessible' from a website if the public effectively has to make an access-to-information request under article 4 of the Convention to gain access to the information in the database.

E.33. The opinion of the committee in relation to the complaint against the UK, although given in relation to art.5(3), helpfully sets out the committee's view on the meaning of 'easily accessible' — an expression which appears only in art.5(3) of the Convention, but in the Directive is used both in art.3(4)(a) and art.7(1), and in the EIRs has been adopted in both r.4(1)(a) (replicating the requirement of art.7(1) of the Directive and art.5(3) of the Convention) and r.6(1)(b) (replicating the requirement of art.3(4)(a) of the Directive and art.4(1)(b)(ii) of the Convention). 'There is a presumption that where the same words are

68 Paras.101–103; see para.C.2 above.

used more than once in an Act they have the same meaning',[69] and it is submitted that the same presumption may be applied to the EIRs. Moreover, the effect of r.2(5) is that the meaning taken by the expression 'easily accessible' in the Directive — whatever the context — is the meaning taken by it in the EIRs.

E.34. Accordingly, it is submitted that the meaning of 'easily accessible', as used in the Convention, Directive and EIRs, is as found by the compliance committee.

The accessibility test: balancing rights and cost

E.35. 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.

E.36. It is understandable that the FTT and the Commissioner adopt 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).

E.37. 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.

E.38. 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.

E.39. 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.[70] 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

69 *Bennion, Bailey and Norbury on Statutory Interpretation*, at 21.3, which states (fn.1): 'This paragraph has been judicially approved: *MC v Secretary of State for Work and Pensions* (UC) [2018] UKUT 44 [www.bailii.org/uk/cases/UKUT/AAC/2018/44.html] at [24]; *Webb v Webb* [2020] UKPC 22 [www.bailii.org/uk/cases/UKPC/2020/22.html] at [119] (Lord Wilson).'

70 The appellant said, in a submission to the 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.

appellant's use of the equipment and to provide any assistance necessary, 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.)

E.40. 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 authority might refuse to provide information electronically because it would be cheaper to facilitate a personal, visual inspection of the data on the public authority's own premises.

E.41. The council, and public bodies generally, may well have reasons for effectively limiting access to information in electronic form. The council may wish to restrict the proliferation of electronic scans of historical documents which diminish direct engagement with the archives centre.[71] The council may wish to recover some of its costs incurred in digitising the tithe information,[72] by charging for the tithe information outside the terms of the EIRs. In other circumstances, a public authority may wish to make it difficult for a requester to acquire and process environmental data which could be deployed to its 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. Indeed, they have nothing to do with the objectives of the legislation or of the Convention.

E.42. 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', such charge to 'not exceed…a reasonable amount'.[73] Whereas the council could not

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

72 The Heritage Lottery Fund (HLF) provided £310,900 of support to the Kent Tithe Map Project. Under the terms of the agreement, 'The Grantee [the council] 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.'

73 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 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.

and does not charge the appellant for visiting the council's archives centre to view the tithe information on a screen.[74]

E.43. 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], it misdirected itself because that consideration could have no relevance to the appellant's request, nor to similar cases.

E.44. The Commissioner rightly states [31] that:

> neither of these objections has any bearing on the question of whether the tithe maps are "easily accessible" to the Appellant by virtue of being available for inspection at the facility.

The appellant agrees. But as both objections were addressed in the FTT's judgment, such that the FTT inferred the proposition set out in para.E.35 above, it is not unreasonable to suggest that they may have influenced the FTT's analysis, and the Tribunal may wish to be aware of them.

<u>The accessibility test: concluding remarks</u>

E.45. In summary, the appellant submits that the requirement for the r.6(1)(b) test to be satisfied only if 'the information is…easily accessible to the applicant in another form or format', must be intended to confer some protection on the requester. If, as the FTT contends and the appellant accepts, these words refer to the ability of the requester to 'get at' the information, then in order to have any effect, they must relate to the ability of the requester to use the information. If, as the FTT and the Commissioner appear to contend, they merely guarantee that the requester can 'view' the data,[75] then, as suggested at para.D.15 above, they are requiring compliance with the blindingly obvious. Neither the FTT nor the Commissioner explains what circumstances might render information <u>not</u> 'easily accessible to the applicant', such that the public would not be able to 'get at' it, or why express words are required in r.6(1)(b) to guard against those circumstances (which surely would speak for themselves as a departure from the fundamental principles of the EIRs).

74 See r.8(2)(b)

75 See Commissioner's words in parenthesis at [29]: '(i.e. view them)'.

E.46. The appellant is reminded of the disposition of the plans for the bypass through Arthur Dent's home described in *Hitchhiker's Guide to the Galaxy*,[76] which might perhaps fail to satisfy whatever threshold the Commissioner and FTT have in mind. But in the appellant's submission, no express words are required to address a situation where the information simply is unavailable to view. Mr Dent would be able to show that the requirements of the EIRs had not been met without adducing argument on whether the plans had been 'easily accessible' to him. Thus the requirement for the information to be 'easily accessible to the applicant' is intended to address not simply whether the applicant may view the information, but whether in doing so, it is made available in some useful and productive way.

## F. Ground 3: the FOIA régime

F.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.

<u>The public interest test applying to s.39(1)</u>

F.2. S.39(1) FOIA provides that:

> Information is exempt information if the public authority holding it—
>
> > (a) is obliged by environmental information regulations[77] 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.

F.3. The FTT accepted [57–60] the submission of the appellant[78] 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 the public interest test in s.2(2)

76 By Douglas Adams. As Arthur Dent's house is demolished, he is told by planning officers that the plans had been in the council's local planning office 'display department' for the last nine months, in a darkened cellar without stairs where: "the notice…was on display at the bottom of a locked filing cabinet stuck in a disused lavatory with a sign on the door saying 'Beware of the Leopard'."

77 As defined in s.39(2).

78 Having regard to the decision of the First-tier tribunal in *Rhondda Cynon Taff CBC v IC* [2007] UKIT EA_2007_0065: www.bailii.org/uk/cases/UKIT/2007/EA_2007_0065.html. This submission was contested by the Commissioner, but it seems on a misunderstanding of that submission (see FTT [58–63]). The Commissioner now relies on exemption under the public interest test.

(b)[79] — that is, the entitlement under FOIA to have the information communicated to the applicant:

> does not apply if or to the extent that—…(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

F.4. 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.

F.5. However, the Commissioner [36–38] now contends that there is:

> an overriding public interest in implementing the EIR as intended by the Directive and the Convention, which includes dealing with all requests for environmental information under its framework.

The Commissioner continues that 'The UK's international obligations may not be so lightly set aside'.

F.6. The appellant has some sympathy for the Commissioner's position. The twin-track régime should not be allowed to undermine the UK's obligations under the Directive and the Convention.

F.7. But that is not the effect contended for by the appellant. If the tithe information is to be disclosed under FOIA, the effect is to confer on the appellant a more potent right of access to the information than would arise under the EIRs, an outcome which is contemplated by the Directive, which states that[80]:

> The provisions of this Directive shall not affect the right of a Member State to maintain or introduce measures providing for broader access to information than required by this Directive[.]

79 S.39 is not among those exemptions which are treated as absolute (and to which no public interest test applies): see s.2(3) FOIA.

80 Para.(24) of the recital. Art.3(5) of the Convention makes similar provision.

F.8. While s.39 FOIA is capable of giving rise to a twin-track régime in relation to environmental information, it is incapable of over-riding a public authority's disclosure obligations under the EIRs. If information is disclosable under the EIRs, it must and will be disclosed under the EIRs. The appellant suggests that the effect of the twin-track régime can only be to broaden the right of access to information in the UK, in that in some circumstances, environmental information either is disclosed under the EIRs but also disclosable under FOI, or is not subject to disclosure under the EIRs but nevertheless is disclosable under FOI. That is hardly contrary to the UK's obligations, but supplements the requirements of the EIRs. Disclosure under FOIA may also provide an alternative but compliant mechanism where the EIRs are non-compliant or defective in implementing the UK's obligations under the Convention and Directive. None of these circumstances can give rise to cause for regret at the national level nor in terms of the UK's obligations under the Convention.

F.9. In the appellant's submission, if the Tribunal is satisfied that r.6(1)(b) of the EIRs has the meaning found by the FTT, it may do so on the basis that the provision imperfectly implements the requirements of the Convention. If so then, again, the twin-track régime would help secure the UK's obligations.

F.10. In the absence of any other argument why, 'the public interest in maintaining the exemption [under s.39(1) FOIA] outweighs the public interest in disclosing the information',[81] the appellant submits that there is no public interest which requires the Tribunal to find that the tithe information is exempt from communication under s.39(1) FOIA. The position is entirely to the contrary.

Whether the tithe information is 'reasonably accessible' under s.21

F.11. The FTT went on to consider whether the tithe information was exempt from disclosure under s.21 FOIA.

F.12. S.21 provides that:

> (1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.
>
> (2) For the purposes of subsection (1)—

81 S.2(2)(b) FOIA

> (a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and
>
> (b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.

> (3) 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.

F.13. The criterion in subs.(1) is whether the tithe information was 'reasonably accessible to the applicant' under the EIRs[82] — a similar, but not identical, test to the accessibility test under r.6(1)(b). If it was, then the tithe information is exempt from disclosure under FOIA as well as under the EIRs. Subss.(2) and (3) then provide assistance in deciding whether the subs.(1) criterion is satisfied.

F.14. The appellant suggests that subss.(2) and (3) are intended to provide some guidance to the decision-maker as to what is and is not to be regarded as 'reasonably accessible' for the purposes of s.21. While the criteria in those two subsections are not exhaustive in defining what is and is not reasonably accessible, they are to be used to inform the decision-maker's judgement on the subs.(1) criterion.

F.15. Under subs.(2)(a), 'information may be reasonably accessible to the applicant even though it is accessible only on payment'. As noted at fn.73 to para.E.42,[83] the council seeks a payment of £5,100 for the tithe information in electronic form. The appellant suggests that the size of the payment renders the tithe information not reasonably accessible through the council's preferred mechanism.

82 Or any other non-FOIA régime — *i.e.* 'otherwise than under section 1' FOIA.

83 See also the Commissioner's response, at [31].

F.16. As to subs.(2)(b), if FOIA is in play in this case (because the Tribunal finds that the r.6(1)(b) test is satisfied, finds that the tithe information need not be disclosed in the requested form under the EIRs, and must consider whether the information must be disclosed under FOIA), then the tithe information is not: 'information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.' The tithe information instead is information which the council is obliged only to make available for inspection. In effect, subs.(2)(b) provides that, in the circumstances of the tithe information, the information is not to be taken as 'reasonably accessible' — because the council is obliged to do no more (under the EIRs) than to make it available for inspection. Subs.(2)(b) is not conclusive on this question — but again, the criterion guides the decision-maker towards a conclusion for the purposes of the subs.(1) criterion.

F.17. 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. The appellant instead characterises subs.(2) as signalling that the tithe information is not to qualify as 'reasonably accessible' on the two non-exhaustive criteria comprised in the subsection.

F.18. 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.

F.19. Subs.(3), apart from being opaque,[84] provides a further non-exhaustive criterion to identify 'reasonably accessible' information. Plainly, the tithe information does not fall within subs.(2)(b). Nor is it made available in accordance with the council's publication scheme.[85] On the face of it, the effect of subs.(3) is to deem the information not to be 'reasonably accessible' 'merely because the information is available from the public authority itself on request'.

F.20. The FTT [66] 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. The appellant submits that subs.(3) precisely captures the context in which the tithe information was disclosed: it was not contained in the council's publication scheme, and the appellant was required to request it to be made available on a computer terminal in the council's archives centre.

F.21. It is suggested that the FTT was mistaken to distinguish the subs.(3) criterion by resurrecting its finding (for the purposes of r.6(1)(b)) that the tithe information was 'publicly available'. Whether information is 'publicly available' (and what that might in practice mean) is not relevant to s.21 (the expression is not used in the FOIA). Instead, s.21 focuses solely on the test of whether information is 'reasonably accessible to the applicant' other than under FOIA itself (and if it is, the information is exempt for the purposes of FOIA — *i.e*. the applicant must then rely on the discrete non-FOIA régime, in this case in the EIRs). To assist the decision-maker in deciding whether information is 'reasonably accessible', three non-exhaustive criteria are set out in subs.(2) and (3) — and the circumstances of the tithe information satisfies none of them.

F.22. It seems that the FTT instead went on to consider from first principles whether the information was 'reasonably accessible' to the appellant for the purposes of subs.(1). The FTT found [67] that the information was 'reasonably accessible'. It found that the

84 In *Glasgow City Council v Scottish Information Commissioner*, [2009] CSIH 73: www.bailii.org/scot/cases/ScotCS/2009/2009CSIH73.html, the Inner House Court of Session considered s.25(3) of the Freedom of Information (Scotland) Act 2002, which was (as enacted) similar to s.21(3) FOIA. Lord Reed (who gave the judgment of the court) described that provision as one which 'does not readily yield its meaning' [36] and 'not a model of clarity' [59]. He concluded that: 'The implication is that information which is available on request *is* reasonably obtainable where…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."' S.21(3) subsequently has been amended by substitution in s.3 of the Freedom of Information (Amendment) (Scotland) Act 2013 (to clarify its meaning).

85 Finding of the FTT at [66]

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.’

F.23. The Commissioner [40] draws on *Gibbons v Information Commissioner*,[86] in which the FTT decided that a catalogued file available for inspection at the National Archives was ‘reasonably accessible’ to Mr Gibbons for the purposes of s.21 and ‘in the public domain’.[87] However, the FTT in that case appeared to have no regard to the non-exhaustive criteria in subss.(2) and (3). Moreover, the file in question was a paper file, and it is not suggested that it existed in digital form. Mr Gibbons had no choice but to access the file in paper form (or to ask, possibly at some expense, for a copy to be made). Like it or not, he was obliged to accept that the file, in paper form, was subject to all the limitations of that form. An applicant wishing to see or copy a paper file is inevitably constrained by the medium of paper, and the file is ‘reasonably accessible’ simply by being made available. That is not the case with an electronic file, which can be communicated over the internet with the tap of a key.

F.24. The appellant also relies on his analysis (in section E above) of why the tithe information was not ‘easily accessible’ for the purposes of r.6(1)(b), as also being relevant to the test of whether the information is ‘reasonably accessible’ for the purposes of s.21, and does not repeat that analysis here.

FOI: concluding remarks

F.25. The appellant submits that the FTT was in error to conclude that the display of the tithe information on a computer terminal in the council’s archives centre complied with the requirement that the tithe information should be ‘reasonably accessible’ to the appellant. 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 taken away and used. And the appellant submits that the FTT failed correctly to interpret and apply the statutory criteria in subss.(2) and (3) of s.21 FOIA as to what should be considered to be, or not to be, ‘reasonably accessible’.

86 [2024] UKFTT 268 (GRC): www.bailii.org/uk/cases/UKFTT/GRC/2024/268.html
87 [24]

F.26. The appellant submits that, on a proper application of the subs.(2) and (3) criteria, and in general terms a determination of whether the tithe information was 'reasonably accessible', it must be concluded that the tithe information was not, and that it therefore is not exempt under s.21.

F.27. In that event, the tithe information must be 'communicated' to the appellant.[88] The appellant has already expressed his preference for the information to be communicated in electronic form, and 'the public authority shall so far as reasonably practicable give effect to that preference.'[89]

## G. Closing comments

G.1. It invariably is the case that contemporary information within public bodies is generated in electronic form.[90] 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.

G.2. 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 authority 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 data in electronic form). The impact of the public authority electing to exercise its supposed discretion under r.6(1)(b) is to deprive the requester of access to the data in their electronic form,[91] which is most likely to be useful to the requester, and which is most likely to facilitate its storage, analysis and manipulation to enable 'the widest possible systematic availability and dissemination to the public of environmental information [using] computer telecommunication and/or electronic technology'.[92]

G.3. In the appellant's skeleton submission to the FTT,[93] the appellant contemplated:

88 S.1(1)(b) FOIA

89 S.11(1)(a) FOIA

90 Known as 'born-digital' form. Exceptions are likely to form a small part of the corpus of data: for example, manuscript notes of meetings or recordings of telephone calls and video-conferences.

91 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.

92 Directive, art.1(b)

93 At [D.67]

> …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.

G.4. 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.E.35 to E.41 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).

G.5. If the FTT is correct in its interpretation of r.6(1)(b), it is open to any public authority 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 Tribunal, the FTT itself, the Commissioner or public bodies. But it is of persuasive authority, and if left unchallenged, it was likely to be followed in a proliferating range of cases which are similar on the facts.

G.6. 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 interpretation of r.6(1)(b) is so far from the intention of the Convention, the Directive and the EIRs, that it ought not to be allowed to stand. To build on the analysis of the European Court of Justice in *Office of Communications v Information Commissioner*[94] — in the present case, the public interest served by disclosure is manifest; the interest served by refusal is obscure.

Hugh Craddock
7 June 2024

94 See para.B.4 above