



**Tribunals Service**  
Information Tribunal

**Information Commissioner's number**  
**Information Tribunal Appeal Number:**

**FS 50117954**  
**Case No. EA/2007/0065**

**Decided at Procession House**  
**London**  
**On 2nd November 2007**

**Decision Promulgated**  
**05<sup>th</sup> December 2007**

**BEFORE**

**DEPUTY CHAIRMAN**

**Peter Marquand**  
**and**

**LAY MEMBERS**

**Paul Taylor**  
**Henry Fitzhugh**

**B E T W E E N:**

**RHONDDA CYNON TAFF COUNTY BOROUGH COUNCIL**

**Appellant**

**and**

**THE INFORMATION COMMISSIONER**

**Respondent**

**Written Representations:**

**For the Appellant:**

**Mr Paul Lucas**

**For the Respondent:**

**Mr James Cornwall, Counsel**

## **DECISION**

The Tribunal allows this appeal for the reasons set out below.

### **SUBSTITUTED DECISION NOTICE**

**The Tribunal allows the appeal and substitutes the following Decision Notice in place of the Decision Notice dated 19th June 2007**

**IN THE MATTER OF THE FREEDOM OF INFORMATION ACT 2000 AND  
REGULATION 18 OF THE ENVIRONMENTAL INFORMATION  
REGULATIONS**

**INFORMATION TRIBUNAL APPEAL No: EA.2007/0065  
SUBSTITUTED DECISION NOTICE**

Dated: 05<sup>th</sup> December 2007

Public authority: Rhondda Cynon Taff County Borough Council  
The Pavillions  
Cambrian Park  
Clydach Vale  
Tonypandy  
Rhondda Cynon Taff CF40 2XX

Substitute Decision:

For the reasons set out in the Tribunal's Decision, the substituted decision is that Rhondda Cynon Taff County Borough Council ("the Council") has dealt with the request for information made by the Complainant in accordance with the requirements of the Environmental Information Regulations and Part 1 of the Freedom of Information Act. Namely, it has made available to the Complainant, the information to which he was entitled under the Environmental Information Regulations 2004. Furthermore, the information

was reasonably accessible to the Complainant and, therefore, under section 21 FOIA there was no obligation on the Council to provide it.

Signed:



Peter Marquand  
Deputy Chairman

Date: 05<sup>th</sup> December 2007

### **Reasons For Decision**

#### **Background and Request for Information**

1. The Complainant made a written request for information on the 30<sup>th</sup> January 2006 to Rhondda Cynon Taff County Borough Council (“the Council”) in the following terms:

*“Further to my requirements I would also like a copy of your current working order of the Land Drainage Act”.*

2. The Council replied in a letter including the following:

*“... I regret that this is a copyright document and I am unable to supply this information. This information is in fact exempt under section 21 of the Act as it is available elsewhere. You will be able to purchase this document from the publisher or it may be available over the internet or in your local library.”*

This letter is dated 26<sup>th</sup> January 2006, but the Tribunal is satisfied this date is incorrect and this is a reply to the Complainant’s letter dated 30<sup>th</sup> January 2006.

3. It is agreed that this Appeal relates to a copy of the Land Drainage Act 1991 itself as the Council does not hold anything else that amounts to “a working order of the Land Drainage Act”.

4. In the light of this response the Complainant wrote to the Information Commissioner (“the Commissioner”) who referred the Complainant to his right to request an internal review from the Council. Such a request was made by the Complainant by letter dated 29<sup>th</sup> March 2006. The Council replied by letter dated the 18<sup>th</sup> April 2006 including the following:

*“You can view the Land Drainage Act on <http://www.opsi.gos.uk/>. (sic) If you do not have internet access at your home you are of course very welcome to use the computers in one of our libraries.”*

5. The Complainant wrote to the Commissioner by letter dated 24<sup>th</sup> April 2006 enclosing the various pieces of correspondence. From the papers before the Tribunal, there is no evidence of a request from the Complainant to the Council requesting the Land Drainage Act in any particular format. However, in a letter to the Commissioner’s officer (undated but stamped as received on 17<sup>th</sup> January 2007) when referring to the internet address the Complainant stated:

*“... can you get any info from this jibberish”.*

6. In any event, the Commissioner issued a Decision Notice dated 19<sup>th</sup> June 2007. This concluded, insofar as it is relevant to this Appeal, that the Council must supply the Complainant with a copy of the Land Drainage Act. The reasons for that decision were that the request for information fell under the Environmental Information Regulations and as there is no exception to the obligation to provide information in circumstances when it was reasonably accessible to an applicant, the Council ought to provide it.

#### Appeal to the Tribunal

7. The Council appealed to the Tribunal with a Notice of Appeal dated 12<sup>th</sup> July 2007. The Commissioner served a Reply dated 6<sup>th</sup> August 2007. Subsequently, the Commissioner applied to amend his Reply to introduce further arguments based on the European Directive 2003/4/EC on Public Access to Environmental Information (“the Directive”), which is brought into effect in English law by the

Environmental Information Regulations 2004 (EIR). On 22<sup>nd</sup> August 2007 the Tribunal issued Directions and in accordance with that Order the Commissioner served an amended Reply dated 29<sup>th</sup> August 2007.

8. The final hearing was on 2<sup>nd</sup> November 2007 and dealt with on the basis of a bundle of documents and written submissions supplied by the parties. The Tribunal has considered all the documents provided to it, even if they are not referred to in this Decision.

#### Issue for the Tribunal

9. The issue for the Tribunal to determine is as follows:

*“Did the Commissioner err in requiring the Council to disclose a copy of the Land Drainage Act under EIR”.*

#### The Tribunal’s Jurisdiction

10. The Tribunal’s remit is governed by the Freedom of Information Act (FOIA) and in particular section 58, which is also applied to appeals concerning environmental information as well by regulation 18 of EIR. Section 58 is set out below:

*“58 – Determination of Appeal.*

*(1) If on an appeal under section 57 the Tribunal considers –*

- i. that the Notice against which the appeal is brought is not in accordance with the law, or*
- ii. to the extent that the Notice involves an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

*the Tribunal shall allow the appeal or substitute such other Notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.*

*(2) On such an appeal, the Tribunal may review any finding of fact on which the Notice in question was based.”*

11. The starting point for the Tribunal is the Decision Notice of the Commissioner, but the Tribunal also received evidence, which is not limited to the material that was before the Commissioner. The Tribunal, having considered the evidence, may make different findings of fact from the Commissioner and consider the Decision Notice is not in accordance with the law because of those different facts. Nevertheless, if the facts are not in dispute the Tribunal must consider whether FOIA and/or EIR have been correctly applied. In cases involving the public interest test, a mixed question of law and fact is involved. If the facts are decided differently by the Tribunal, or the Tribunal comes to a different conclusion on the same facts, that would involve a finding that the Decision Notice was not in accordance with the law. The Tribunal's powers are the same under FOIA and EIR.

#### Relevant Law

12. The Tribunal thinks it important to draw attention to a point of terminology in EIR and FOIA, which is reflected in this Decision. Both EIR and FOIA put obligations on public authorities, which are discussed below. However, both regimes also contain circumstances where the public authority may be relieved of those obligations. In EIR those are referred to as "exceptions" but in FOIA as "exemptions". This terminology is used through out this Decision.
13. "Environmental Information" is defined in Regulation 2 EIR, which states as follows:

*“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on—*

*(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*

*(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases*

*into the environment, affecting or likely to affect the elements of the environment referred to in (a);*

*(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;*

*(d) reports on the implementation of environmental legislation;*

*(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and*

*(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);”*

14. Regulation 5 of EIR places an obligation upon public authorities such as the Council as follows:

*“(1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information **shall make it available on request**” [our emphasis]*

Paragraphs (2), (3), (4) and (5) are not relevant. Paragraph (6) states:

*“Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply.”*

15. Insofar as it is relevant, Regulation 6(1) EIR states:

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

- (a) it is reasonable for it to make the information available in another form or format; or*
- (b) the information is already publicly available and easily accessible to the applicant in another form or format.”*

16. The Freedom of Information Act (FOIA) at section 1(1) states:

*“Any person making a request for information to a public authority is entitled –*

- a. To be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- b. if that is the case, to have **that information communicated to him**”. [our emphasis].*

17. We are not concerned in this case with a public authority seeking to claim an exemption in relation to the obligation in section 1(1)(a) FOIA. However, a public authority like the Council is exempt (if it chooses to claim the exemption) from the obligation to communicate information in section 1(1)(b) FOIA by virtue of section 21 FOIA:

*“(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.*

*(2) For the purposes of subsection (1)—*

*(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."*

18. In addition, a public authority such as the Council may claim an exemption under section 39 FOIA, which states as follows:

*"(1) Information is exempt information if the public authority holding it—  
(a) is obliged by environmental information regulations 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.*

*(1A) In subsection (1) "environmental information regulations" means—  
(a) regulations made under section 74, or  
(b) regulations made under section 2(2) of the European Communities Act 1972 for the purpose of implementing any Community obligation relating to public access to, and the dissemination of, information on the environment.*

*(2) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).*

*(3) Subsection (1)(a) does not limit the generality of section 21(1)."*

19. Section 39 is however also subject to a further requirement by section 2 FOIA. As section 39 is not an absolute exemption listed in section 2(3), it is necessary to apply the test in section 2(2)(b) namely whether *"in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information"*. This requirement is often referred to as the "public interest test".

20. The Directive, which is the basis for EIR insofar as it is relevant, states:

*“Article 3*

- (1) Member States shall ensure that public authorities are required, in accordance with the provisions of this Directive, to make available environmental information held by or for them to any applicant at his request and without his having to state an interest.*
  - (2) Subject to Article 4 and having regard to any timescale specified by the applicant, environmental information shall be made available to an applicant: [time limits are then set out].*
  - (3) ...*
  - (4) Where an applicant requests a public authority to make environmental information available in a specific form or format (including in the form of copies), the public authority shall make it so available unless:
    - a. it is already publicly available in another form or format, in particular under Article 7, which is easily accessible by applicants; or*
    - b. it is reasonable for the public authority to make it available in another form or format, in which case reasons shall be given for making it available in that form or format.**
- ...”*

For the avoidance of doubt, Article 4 refers to exceptions, which are not relevant to this Appeal and Article 7 relates to the dissemination of environmental information, which again is not relevant to the Appeal.

Submissions on the Law

21. The Commissioner’s submissions may be summarised as follows:
  - (i) EIR and FOIA are mutually exclusive regimes. Environmental information defined in EIR is dealt with under that regime and not under FOIA.
  - (ii) As the Land Drainage Act is environmental information, section 21 FOIA is not available to the Council. There is no equivalent provision within EIR as Regulation 6 is only triggered where an applicant has made a request for information in a particular

“form or format”. The Commission relies upon a previous Information Tribunal decision Perrins v. The Information Commissioner and Wolverhampton City Council, Appeal No. EA.2006/0038, dated 9<sup>th</sup> January 2007 at paragraphs 12 and 13:

*“...[The Commissioner] also argues that such information was publicly available and readily accessible to the Appellant for the purposes of Regulation 6(1)(b) of the Regulations, and therefore the Council would not, in any event, have been required to provide it to him by other means. However, he concedes that the Council was in breach of its obligation under Regulation 6(2) to inform the Appellant that it was not providing the information to him because it was already publicly available and that the Decision Notice may have been defective by virtue of failing to identify this breach.*

*13. We conclude that the Decision Notice was defective in this respect. We do not accept that the terms of Regulation 6 provide the answer which the Information Commissioner suggests as it is only brought into play where the information has been requested in a particular form or format and the Public authority declines to provide it in the format requested. However, nothing turns on the point, given that the Appellant’s own research has brought to light such relevant material as appears to continue in existence and, for the reasons given below, the substantive appeal is rejected.”*

- (iii) The Commissioner also relies upon Friends of the Earth v. The Information Commissioner & Export Credits Guarantee Department EA2006/0073, dated 20<sup>th</sup> August 2007, paragraph 77, which states:

*“Unlike the FOIA regime, there is no exemption for what would be called alternative access ...”*

- (iv) Regulation 6 EIR does not absolve the Authority of the obligation to disclose information but rather absolves the obligation to provide information in the format requested. Where

an applicant has not requested information in a particular format, Regulation 6(1) does not apply.

- a. Guidance from the Department of the Environment Food and Rural Affairs (Defra) is not statutory guidance, nor is it legally binding. It is, in any event, incorrect and inconsistent with previous Tribunal decisions.
  - b. It is necessary to read EIR in the light of the Directive.
  - c. Section 39(3) of FOIA does not have a clear application, it either effectively incorporates section 21 into EIR or is to clarify that the existence of the exemption for environmental information under section 39(1)(a) is not intended to affect the existence of the general application of section 21(1).
22. The Commissioner does question whether the Decision in Perrins is the right one.
23. The Council's submission may be summarised as follows:
- (i) Perrins referred to above is distinguishable from the present case and, in any event, that Tribunal was merely referring to Regulation 6 and section 21 as an aside.
  - (ii) The Friends of the Earth case referred to above is distinguishable as the information was not in the public domain, in contrast to a United Kingdom Statute such as the Land Drainage Act.
  - (iii) Section 39(1) of FOIA may not act to remove entirely from the Act all requests for information concerning environmental information. Notwithstanding EIR, a public authority, such as the Council, may legitimately rely on section 21.
  - (iv) FOIA was the correct regime for this request.

#### Conclusions in relation to the law

24. The Tribunal is not bound by the previous Decisions of the Tribunal and in any case the Decisions we were referred to did not have to consider the issues in this case directly. In our view, it is not quite correct to consider EIR and FOIA as mutually exclusive regimes. EIR is legislation derived from the Directive and is enacted "*in pursuance of paragraph 2(2) of Schedule 2 to the European Communities Act 1972*".

FOIA, by contrast, is primary domestic legislation. This Tribunal views it as better to describe the two regimes as running “in parallel”.

25. It is, in our view, important to note the distinction between the obligations imposed on public authorities by the two regimes. Under FOIA, section 1(1)(b), an applicant has a right to have the information “communicated to him”. However, under EIR Regulation 5 the public authority is obliged to make environmental information that it holds “available on request”.
26. In our view, this is an important distinction in that under FOIA an applicant has a right to receive the information. Under EIR, the obligation is to provide access to an applicant, which may not mean physically providing an applicant with a copy of the information i.e. there is no obligation to communicate it to the applicant. For example, the obligation under EIR could be met by allowing inspection of the information held by the public authority. If the applicant does not like the way that it has been made available, but then requests the information in a particular form or format, Regulation 6 comes into play.
27. It therefore follows that under EIR there may be three responses to an application for environmental information when confirmation is given that the information is held and no form or format is specified by the applicant. These are as follows:
  - (i) An applicant is offered inspection of the information. Either there is no further request by the applicant or the applicant requests that the information is communicated to him in a particular form or format. The public authority, in reliance upon regulation 6(1) EIR declines to make it available in that format. For example, the applicant requests a physical copy of information as opposed to being allowed to inspect the material;
  - (ii) The public authority relies on an exception in EIR and declines to make the information available at all;
  - (iii) The public authority communicates the environmental information to the applicant or otherwise makes it available to the applicant. Either the applicant is satisfied or the public authority communicates it to him in the form or format subsequently requested by the applicant.

28. In the circumstances covered by points (i) and (ii) above, the applicant is not having the information communicated to him. This means that the public authority must go on to consider the application of FOIA. This is because section 1(1) FOIA gives a right to an applicant to have the information communicated to him and there is nothing in EIR or FOIA that says that an applicant must “elect” to use one regime or the other.
29. A response in the terms of point (i) above may be exempt under section 39 or section 21. Section 39 is applicable by virtue of sub-section (1)(a) because it is information that the public authority is obliged to make available under EIR, even though no exception under EIR is being claimed. If the exemption under section 39 is claimed, the public authority must also consider the public interest test in section 2(2)(b).
30. Section 21 is available to a public authority, provided the necessary criteria are met, namely that the information is reasonably accessible to the applicant. It is important to note in the context of a response in the form of point (i) above, that the information will not automatically be deemed to be “reasonably accessible.” This is because Section 21(3) states that this is only the case when there is an obligation “*by or under any Enactment to **communicate** [the information] (otherwise than by making the information available for inspection) to members of the public on request ...*” [our emphasis]. In other words, the obligation to make the information available under EIR alone, does not make it reasonably accessible per se. In our view, this is where section 39(3) comes into effect. Section 39(3) must be necessary, because it would otherwise be considered that section 39(1)(a) might be seen to be limiting the general application of section 21 when applied to environmental information, which, although it had been made available to an applicant, had not in fact been communicated to him/her. Therefore, although environmental information in this circumstance does not automatically qualify as “reasonably accessible” under section 21(2)(b), the exemption is fully available to a public authority, provided that the requirements of section 21(1) and (3) are otherwise met.

31. A response in the form of point (ii) of paragraph 27 may be exempt under section 39 by virtue of sub-section (1)(b). The public authority will have to go on to consider the public interest test in section (2)(b) FOIA.
32. For completeness, we do not consider Regulation 5(6) EIR to be relevant. This provision means that legislation or a rule of law that would otherwise prevent the disclosure of environmental information is “overruled” by EIR. In our view, this is not applicable to the exemptions in sections 21 and 39 of FOIA because they only come into play once the regime in EIR has been applied. They are not acting as a bar to disclosure under EIR, rather the regime in FOIA is providing a potential supplementary right of access to environmental information.
33. In our view, it is not necessary to consider the Directive or slight differences in wording between it and EIR.

#### Application of the facts to the law

34. The Long Title of the Land Drainage Act 1991 states:

*“An Act to consolidate the enactments relating to internal drainage boards, and to the functions of such boards and of local authorities in relation to land drainage, with amendments to give effect to recommendations of the Law Commission.”*

We have not set out any further detail of this Act but we have considered it and our conclusion is that it clearly falls within the definition of “environmental information” in particular paragraph (c), as set out in paragraph 13 above.

35. The Council, in the Tribunal’s view, particularly in its response to the Complainant on the 18<sup>th</sup> April 2006, made the information sought available by inviting the Complainant to use one of the computers at the Council’s libraries. However, if the Council had only referred the Complainant to the internet and the ability to access it elsewhere than at the Council’s offices, then we do not believe that the requirements of EIR would have been met. On the documents before the Tribunal, the Complainant never requested the Council to provide the Land Drainage

Act in a particular form or format. The request dated 30<sup>th</sup> January 2006 requested a “copy”, which in our view does not amount to a request for information in a particular form or format. A copy could be provided in various ways and this request is non-specific. Therefore, it is not necessary to consider Regulation 6 EIR. For the avoidance of doubt, we do not find the Complainant’s letter stamped 17<sup>th</sup> January 2007, referred to at paragraph 5, to be such a request as it was not addressed to the Council and did not in any case ask for the information in any form or format.

36. In relation to EIR, the Tribunal concludes that the Council has met its obligations to the Complainant.
37. The Council however, was under an obligation to consider this matter under FOIA as well, because, although it had made the information available, it had not communicated it to the Complainant as section 1(1)(b) FOIA requires.
38. The Tribunal is satisfied that the Land Drainage Act 1991 was reasonably accessible to the Complainant and that section 21 was appropriately claimed by the Council for the following reasons:
  - (i) The information requested does not fall within section 21(2)(b), because there is no obligation to communicate it to the Complainant under EIR. It is necessary therefore to consider section 21(3), which excludes the exemption if the information is available “merely” on request (unless it is in the publication scheme). In our view this information was not “merely” available on request. This would cover information such as leaflets published by a public authority. Acts of Parliament are available elsewhere. Therefore, Regulation 21(3) does not preclude a conclusion that the information in this case is “reasonably accessible”.
  - (ii) The Land Drainage Act 1991 was available in the Council’s libraries.
  - (iii) Obtaining copies of pieces of legislation is straightforward, either by correspondence with the Stationery Office and payment of the fee, or by internet access, where copies can be obtained without charge. It also seems to us conceivable that even if the

Complainant could not himself use the internet, he could ask a friend or one of the librarians to obtain the information for him, even though there may be some charge for this in relation to downloading and printing the information. The element of payment does not, of itself, preclude the information being reasonably accessible, as section 21(2)(a) makes clear.

39. The exemption in section 21 does not require the application of the “public interest test” as it is one of the absolute exemptions listed in section 2(3) FOIA. The Tribunal concludes that the Council is not obliged under FOIA to provide a copy of the Land Drainage Act 1991 to the Complainant by virtue of the information being exempt under section 21.
40. In the circumstances, it is not necessary for us to go on to consider the application of the exemption in section 39.

#### Conclusion

41. The Tribunal’s unanimous conclusion is that the Appeal should be allowed. The Council had complied with its obligation under Regulation 5 EIR by making the information available. The Council had also complied with its obligation under FOIA by relying on the exemption in section 21, namely that the information was reasonably accessible to the Complainant. A substituted Decision Notice appears at the beginning of this Decision.

Signed:

Peter Marquand  
Deputy Chairman

Dated: 05<sup>th</sup> December 2007