IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. UA-2024-000424-GIA
[2024] UKUT 320 (AAC)

On appeal from the First-tier Tribunal (General Regulatory Chamber)

Between:

Hugh Denis Craddock

Appellant

- v -

The Information Commissioner

Respondent

Before: Upper Tribunal Judge Wikeley

Hearing date: 10 September 2024
Decision date: 7 October 2024

Representation:

Appellant: In person
Respondent: Mr Eric Metcalfe of Counsel, instructed by the Information Commissioner's Legal Service Directorate

DECISION

The decision of the Upper Tribunal is to dismiss the appeal. The decision of the First-tier Tribunal made on 8 January 2024 under number EA/2022/0455 was not made in error of law (section 11 of the Tribunals, Courts and Enforcement Act 2007).

REASONS FOR DECISION

Introduction

1. The Appellant poses the question raised by this appeal in the following terms: where a public authority holds environmental information in electronic form, can it effectively parry a request for the information to be supplied in that same format by instead inviting the requester to visit its premises and displaying the information on a computer screen at those premises?

2. The short answer to that question (prefacing a long decision) is that in principle the public authority may do so (depending on the facts).

3. It follows that the main legal issue arising on this appeal concerns the proper construction of regulation 6(1)(b) of the Environmental Information Regulations 2004 (SI 2004/3391), which provides as follows (emphasis in italics added):

> **Form and format of information**
>
> 6 (1) Where an applicant requests that the information be made available in a particular form or format, a public authority shall make it so available, unless—
>
> (a) it is reasonable for it to make the information available in another form or format; or
>
> (b) *the information is already publicly available and easily accessible to the applicant in another form or format*.

4. As a subsidiary issue, this appeal also concerns the qualified exemption in section 39(1) of the Freedom of Information Act 2000, which provides as follows:

> **Environmental information**
>
> 39 (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.

Abbreviations

5. The Environmental Information Regulations 2004 are referred to in this decision as the EIR. The Freedom of Information Act 2000 is abbreviated as FOIA. The 'Convention' means the Convention on Access to Information, Public participation in Decision-making and Access to Justice in Environmental Matters (agreed at Aarhus on 25 June 1998) while the 'Directive' refers to Council Directive 2003/4/EC on public access to environmental information.

The parties to this appeal

6. The Appellant is Mr Hugh Craddock, who requested the environmental information from the public authority in question (Kent County Council, from now on simply 'the Council'). The Respondent is the Information Commissioner. The Council has not been a party to the appeal proceedings either before the First-tier Tribunal or the Upper Tribunal.

The factual context of this appeal

7. The background to this appeal was helpfully summarised thus by the First-tier Tribunal in its decision:

> 6. The Appellant conducts rights of way research in relation to Kent on a voluntary basis on behalf of the British Horse Society. For this purpose, he needs high quality copies of individual tithe maps. As at September 2021, he had researched more than thirty ancient parishes in Kent and intended to research more. He says the research calls for frequent reference to the tithe maps prepared for parishes in Kent under the Tithe Act 1836; extracts from the maps may be required for inclusion in applications to record or upgrade rights of way made to the Council; the Council holds the vast majority of the maps in its records office; there are about 425 maps; with the benefit of a Heritage Lottery Fund grant of £310,000 in or around 1997, the Council has restored and digitised the maps. The Appellant told us in the hearing that he looks for various information in the maps which might indicate an unrecorded right of way, for example a route coloured in sienna might, taken together with other information, indicate an unrecorded right of way.

8. The original tithe maps are extremely large, many being 14 foot and over (4.25 metres or more) in both length and width. The digital versions are stored on an external hard drive which can be ordered in the archive Searchroom in the Council's records office in Maidstone. The digital images are not available online or on the Council's networked storage because of the total size of the images. Digital copies may be purchased at £15 a map with a discount for bulk orders (it does not appear to be in dispute that the Council's charge for copies of all the digital maps in question would be £5,100). Both the original tithe maps and the digital copies can be consulted free of charge in the archive Searchroom, which is open 5 days a week (Tuesday-Saturday, 9 a.m.-5 p.m.).

The Appellant's request for environmental information

9. On 8 August 2021 Mr Craddock made the following request to the Council:

> I request under the Environmental Information Regulations 2004 or the INSPIRE Regulations 2009 (as amended), as may apply, a copy of all digitised tithe maps for the County of Kent, A1 Reference: IC-144241-S0K1 2 to be supplied in electronic form on a portable hard disk, or alternatively to be made available for download on a file transfer facility.
>
> I will on request supply a portable hard disk for this purpose. I am content to receive the data for each tithe map as a number of individual components in image files.

10. On 31 August 2021 the Council responded, in essence advising Mr Craddock that (i) the tithe maps were available to access at its archive centre, (ii) the maps were very large and so facsimiles had been created, (iii) he could arrange an appointment to view the documents by contacting the archive team; and (iv) digital copies were available for purchase. On 3 September 2021 the Council clarified that its response had been made by reference to regulation 6(1) of the EIR. Mr Craddock then lodged a complaint with the Information Commissioner about the Council's handling of his request.

The Information Commissioner's Decision Notice

11. The Information Commissioner's Decision Notice dated 30 November 2022 (IC-144241-S0K1) made the following observations about the phrase the 'form or format' of the information sought (footnotes omitted and bold font as in the original text):

> 12. The Commissioner considers that the use of the phrase "particular form or format" means that a requester may specify not only the physical form but also how the information is configured or arranged within that form, i.e., the format. For example, in relation to electronic information the term 'format' is generally used to refer to a file type, such as PDF or Microsoft Excel or CSV, and so a requester may express a preference for one of these formats. In this instance, the complainant has requested the information by electronic form.
>
> 13. The Commissioner's guidance on regulation 6 states that the EIR Code of Practice explains why a preference for a particular form or format must be considered:
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> **"A public authority should be flexible, as far as is reasonable, with respect to form and format, taking into account the fact, for example, that some IT users may not be able to read attachments in certain formats, and that some members of the public may prefer paper to electronic copies".** (Paragraph 22)
>
> 14. However, the duty to make the requested information available in the preferred form or format is not an absolute one. It is qualified by regulations 6(1)(a) and 6(1)(b) in that a public authority does not have to meet the requester's preference if either it is reasonable for it to make the information available in another form or format, or the information is already publicly available and easily accessible to the applicant.
>
> 15. Although the Council hasn't specifically cited which subsection of regulation 6(1) it is relying upon, it has clearly stated that it considers the requested information to be publicly available and easily accessible to the complainant. Therefore the Commissioner considers that it is relying upon regulation 6(1)(b).

12. The Decision Notice also set out its decision in the following straightforward terms:

> 1. The complainant requested from Kent County Council ("the Council") historic maps that are stored at the local records office. The Council refused to provide the requested information under regulation 6(1)(b) of the EIR, as it considered the information requested to be publicly available and easily accessible to the complainant.
>
> 2. The Commissioner's decision is that the information is publicly available and easily accessible to the complainant, and therefore regulation 6(1)(b) of the EIR is engaged.
>
> 3. The Commissioner does not require any steps to be taken.

13. In its own decision the First-tier Tribunal also usefully summarised the Information Commissioner's reasoning in the Decision Notice as follows:

> 14. By his Decision Notice, the Commissioner stated that although the Council had not specified the sub-section of Regulation 6(1) EIR on which it relied to refuse disclosure, he considered that it was relying on Regulation 6(1)(b) on the basis that the Council had stated that it considered the requested information was publicly available and easily accessible. He concluded that: any decision about whether information is easily accessible depends upon the circumstances; while he recognised that the Appellant would need to travel to the Archive centre, incurring both time and cost which would multiply depending upon the amount of separate visits needed, he also recognised that the information was made available for inspection at the centre, which is a local records office, whose purpose is to maintain historic records and allow their public inspection; he was satisfied that the information was publicly available and easily accessible to the Appellant at a facility established and maintained for the purpose of examination of the information, and that accordingly Regulation 6(1)(b) was engaged. He noted that he had not considered the Council's application of Regulation 8 EIR which appeared to have been based on a misunderstanding of the EIR, and that "if information is publicly available and easily accessible for the purposes of the EIR, the Council is not required to make the information available in another form or format."

14. The Appellant lodged an appeal with the First-tier Tribunal against the Commissioner's Decision Notice, advancing three grounds.

15. First, Mr Craddock submitted that insofar as the information was available in other forms (i.e. for viewing at the Council's records office), it was neither 'publicly available' nor 'easily accessible' within the meaning of regulation 6(1)(b) EIR, and the Commissioner was wrong to decide that the request was correctly refused under that regulation. Rather, the information was not 'publicly available' simply by virtue of being available for inspection at the Council's records office, and it was not 'easily accessible' because it was disclosed in a form that was remote from the Appellant and incapable or impracticable of being captured in a satisfactory form for retention.

16. Secondly, Mr Craddock contended that the Commissioner had failed to consider in the alternative whether, if the request was correctly refused under regulation 6(1)(b), the information should have been communicated to him under FOIA.

17. The third ground of appeal concerned the reasonableness of the fee proposed to be charged by the Council for copies of the tithe maps. In the event the First-tier Tribunal did not find it necessary to rule on this point and the fees matter has not been pursued further on appeal to the Upper Tribunal.

The First-tier Tribunal's decision and the further grounds of appeal

18. In a sentence, the outcome of the first instance appeal was that the First-tier Tribunal upheld the Commissioner's Decision Notice and dismissed the Appellant's appeal. Mr Craddock now appeals to the Upper Tribunal on three grounds.

19. First, he submits that the First-tier Tribunal erred in law in finding that the tithe information, available to view at the Council's archive centre, was 'publicly available' within the meaning of EIR regulation 6(1)(b).

20. Second, the Appellant contends that the First-tier Tribunal erred in law in finding that the tithe information was 'easily accessible to the applicant in another form or format', also within the meaning of regulation 6(1)(b).

21. Third, Mr Craddock argues that the First-tier Tribunal erred in law in finding that the information was, under FOIA, 'reasonably accessible' to him and so exempt from disclosure under section 21 of FOIA.

22. The Information Commissioner resists the appeal on all three bases and in effect seeks to cross-appeal on the third ground, submitting that the FOIA regime was not applicable in any event by virtue of the exemption in section 39 of FOIA.

Ground 1: Was the information 'publicly available' within regulation 6(1)(b)?

The Information Commissioner's Decision Notice

23. The Information Commissioner dealt with the application of regulation 6 in the following way:

> 19. The Commissioner's guidance on regulation 6 explains there is no geographical limit, or distance, beyond which information is not easily accessible for inspection. Any decision about whether information is easily accessible depends on the circumstances.
>
> 20. In the circumstances of this case, the Commissioner recognises that the complainant would need to travel to the Centre, incurring both time and cost, which would multiply depending on the amount of separate visits needed.
>
> 21. However, the Commissioner also recognises that the information is made available for inspection at the Centre, which is a local records office. The Commissioner notes that the purpose of a local records office is to maintain historic records and allow their public inspection.
>
> 22. The Commissioner's guidance on regulation 6 (and specifically the section on 'Inspection') explains that it is an expectation of the EIR that the public may inspect information at facilities "which the public authority makes available for that examination" (regulation 8(2)(b)).
>
> 23. The same guidance explains that the "establishment and maintenance" of such facilities is a specific requirement of Article 3(5)(c) of the European Council Directive 2003/4/EC, which the EIR implements in UK law.
>
> 24. Whilst the Commissioner recognises that the complainant will need to bear the cost of visiting the Centre, he is satisfied that the information is publicly available and easily accessible to the complainant by virtue of it being available for inspection at a facility established and maintained for the purpose (i.e. the local records office).
>
> 25. As the Commissioner is satisfied that the information is both publicly available and easily accessible to the complainant, he finds that regulation 6(1)(b) is engaged.

The First-tier Tribunal's decision

24. The First-tier Tribunal reviewed the parties' respective submissions on what was meant by the expression 'publicly available' in regulation 6(1)(b) in some detail in paragraphs [25]-[42] of its decision. It then expressed its conclusions at paragraphs [43]-[45]:

> 43. We are conscious that the close analysis of the Convention and the Directive invited by the Appellant, may tend to conflate the issue of the Council's fundamental compliance with Regulation 4 EIR (and behind EIR, the Directive), which is not an issue before us, with the interpretation of the words "publicly available" within Regulation 6(1)(b) EIR for the purposes of considering the lawfulness of the Decision Notice, which is an issue before us. The question before us is whether the access currently afforded by the Council is such as to enable the information properly to be characterised as "publicly available" (and "easily accessible", with which separate concept we deal below) so as to engage the application of Regulation 6(1)(b).
>
> 44. We do not consider that there is any ambiguity in the words "publicly available" which requires us to draw on the Directive or the Convention behind it to understand them, nor any words we need to imply or read in to give effect to the Directive's intention - which is, in summary, that such information should be publicly available, promoting the use of electronic technology, including telecommunication networks, where available. 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. Both the Convention and the Directive set out non-exclusive methods by which that should be achieved, with an exhortation for the use of electronic methods where possible. In this case, the method by which the relevant information is made available to the public is as set out in the Council's letter of 21 October 2022, to which we have already referred. The progressive dissemination of information by electronic means is a separate, ancillary issue (as the means by which the Directive and Convention would prefer information to be made available); the primary consideration is whether information is publicly available.
>
> 45. The Appellant has submitted that for information to be properly characterised as publicly available, it must be "genuinely" publicly available, which means published in a library or on a website or in a publication scheme. We do not consider that the availability to the public of the digital maps in the Council's Searchroom is any less "genuine" than that which might be achieved by publication of the types identified by the Appellant, and is consonant with the requirements of Article 3(5)(c) of the Directive. Such publications are some, but not the only, methods of making the information available to the public. Moreover, the information has been made available using electronic technology, even though not published online. We accept that, were the information to be published online, that may be more convenient to the Appellant himself (even if not to someone who did not have internet access and for whom the information would only be available by a visit to the Searchroom), but we

consider that that raises an issue of access rather than 'availability' in principle.

The parties' submissions on Ground 1

25. I received helpful oral and written detailed submissions from both Mr Craddock and Mr Metcalfe on the matters raised by this appeal. I intend them no disrespect by summarising their respective positions in relatively short order in relation to each of the three grounds of appeal. I do so if only to keep the length of this decision within reasonable bounds.

26. The Appellant's primary submission was that the First-tier Tribunal had erred in law in finding that the tithe information available to view at the Council's archive centre was 'publicly available' within the meaning of EIR regulation 6(1)(b). At first blush (and indeed I find on further analysis) this is an ambitious argument – how can maps (whether the original maps or the digital copies) available for viewing in the Council's Searchroom in Maidstone be other than 'already publicly available'? Mr Craddock sought to square this circle by reference to regulation 8(2)(b). This provides that in every case where the public authority is entitled to charge a fee for disclosure of the information, the requester is entitled without charge 'to examine the information requested at the place which the public authority makes available for that examination'. Such information is necessarily 'publicly available'. Mr Craddock's submission was that the First-tier Tribunal erred in law in finding that the phrase 'publicly available' in regulation 6(1)(b) meant no more than what is inevitably required of any public authority in relation to disclosure under the EIR – namely to make the information available for inspection on its premises. If regulation 6(1)(b) merely alluded to the expectation imposed on a public authority by virtue of regulation 8(2)(b) to make any and all environmental information available for inspection on its premises free of charge, the words 'already publicly available and' in regulation 6(1)(b) are redundant. Accordingly, Mr Craddock argued, regulation 6(1)(b) required something more for information to be (as he put it) *genuinely* 'publicly available', e.g. being put in the public domain by disclosure on a website or in a public library. He referred further to the Directive (including the French language text of article 3(4)(a)) and the Convention in support of this proposition.

27. The Respondent's core submission was straightforward: the First-tier Tribunal had (unsurprisingly) concluded, applying the natural and ordinary meaning of the words, that 'publicly available' under regulation 6(1)(b) meant 'available to the public', i.e. that 'the information is not restricted from any person in principle' (paragraph [44]). On the particular facts of this case, it had gone on to find that the Council had made the tithe maps 'publicly available' by making them available for inspection at its archive facility in Maidstone. There was no warrant, Mr Metcalfe contended, for the Appellant's gloss of 'something more' to be applied to the natural and ordinary meaning of the words of regulation 6(1)(b): information was either 'publicly available' or it was not. To satisfy the requirements of the regulation, the information must also 'already' be available at the time of the request. One very common means of making information 'publicly available' was to make it available to the public by enabling them to inspect the documents at a particular place (hence the reference in regulation 8(2)(b)). But neither the Convention, the Directive nor the EIR stipulated the precise form or format by which a public authority might make environmental

information 'publicly available'. It could be in a library, on a website or in a council archive, so long as the core requirement of public availability was met.

Discussion

28. I find this ground of appeal is not made out for the following reasons.

29. The starting point must be the natural and ordinary meaning of the words used in regulation 6(1)(b). As a matter of linguistic construction, one can hardly cavil with the First-tier Tribunal's conclusion that 'publicly available' means 'available to the public', no more and no less. Moreover, on the evidence it would have been positively perverse for the First-tier Tribunal to have found as a fact that the tithe maps were other than 'already publicly available'. It is, as Mr Metcalfe submitted, in effect a binary question – the information is either 'publicly available' or it is not. The fact that it could have been made additionally available to the public through other mediums is beside the point.

30. Nor can this be fairly critiqued as a narrow and unduly technical reading of regulation 6(1)(b). It also makes sense if one has regard to the role of the provision within the overall framework of the EIR. Notably, regulation 4(1)(a) exhorts public authorities that hold environmental information to 'progressively make the information available to the public by electronic means which are easily accessible' – but while this may appear to impose a duty on public authorities, there is no corresponding right in Hohfeldian terms on the individual requester to receive information in such manner. Instead, one must turn for elucidation to regulation 5(1), which stipulates that 'a public authority that holds environmental information shall make it available on request'. That duty in turn is subject to the contingent proviso in regulation 6(1) that 'where an applicant requests that the information be made available in a particular form or format, a public authority shall make it so available, unless … (b) the information is already publicly available and easily accessible to the applicant in another form or format.' There is considerable force in the First-tier Tribunal's observation that the Appellant's submissions tend to conflate the general duty under regulation 4 with the much narrower and targeted duty arising under regulation 6.

31. Nor was I persuaded by Mr Craddock's submission that the First-tier Tribunal's reading of regulation 6(1)(b) is circular – his case was that the EIR predicates that all environmental information (at least that which is not otherwise excepted from disclosure e.g. under regulation 12) must be made available to the public, and therefore all such environmental information is publicly available. It follows, the Appellant submitted, that 'publicly available' must means 'something more'. One difficulty with this submission is that it overlooks the requirement in regulation 6(1)(b) that the information be '*already* publicly available'. The qualifying term 'already' necessarily can only mean that the information in question has previously been made actually available (rather than theoretically obtainable on request) to the public in some other format. Seen in this way, the First-tier Tribunal was entirely justified in finding that regulation 6 represented a balancing of the competing interests of public authorities and requesters respectively.

32. It follows that there is no ambiguity in the meaning of regulation 6(1)(b). As such, it is not appropriate to cast the interpretative net any wider. Mr Craddock's learned submissions made extensive reference to both the Convention and the

Directive, but neither instrument stipulates the precise form or format by which a public authority may or indeed must make environmental information 'publicly available' for the purposes of regulation 6(1)(b). Article 4(1)(b)(ii) of the Convention requires public authorities to make information available 'in the form requested unless … the information is already publicly available in another form' (and so, incidentally, imposes no test of ease of accessibility). In turn, article 3(4)(i)(a) of the Directive requires public authorities to make requested information available in a specified format unless 'it is already publicly available in another form or format … which is easily accessible by applicants'. The international instruments provide no greater specificity. Accordingly, the Appellant gains no assistance from the EIR's stipulation that 'expressions in these Regulations which appear in the Directive have the same meaning in these Regulations as they have in the Directive' (regulation 2(5)). Likewise, the finer nuances of the meaning of the verb 'publier' in the French text of the Directive constitute far too fine a thread on which to hang the Appellant's preferred interpretation of 'publicly available'.

33. Finally, and crucially, the pragmatic approach taken by the First-tier Tribunal to the meaning of the term 'publicly available' within regulation 6(1)(b) is entirely consistent with the analysis more recently adopted by the High Court in *Surrey Searches Ltd and Others v Northumbrian Water Ltd and Others* [2024] EWHC 1643 (Ch) (hereafter simply '*Surrey Searches Ltd*'). This important judgment determined the first phase of highly complex multi-party litigation raising issues about the application of the EIR in a case involving some 14 lead claimants and 11 defendants. The High Court's judgment was handed down on 28 June 2024 and so was obviously not before the First-tier Tribunal in the present appeal (although, conversely, a passage from the Information Commissioner's Decision Notice in the instant case does make a brief appearance in the High Court's judgment (at [526])). I am grateful to Mr Craddock who very properly drew my attention to the High Court's decision. I also note, if only for the record, that permission to appeal to the Court of Appeal was refused at first instance: *Surrey Searches Ltd and Others v Northumbrian Water Ltd and Others* [2024] EWHC 2283 (Ch). The case does not seem to appear on the Court of Appeal's online Case Tracker for Civil Appeals (casetracker.justice.gov.uk).

34. Remarkably, the monumental judgment of Richard Smith J runs to a total of 765 paragraphs – and even so the judgment relates only to the stage 1 trial of just some of the issues arising for decision in the proceedings. In (the barest if not inadequate) summary, the claimants were personal search companies (PSCs) who carried out searches for use in commercial and residential sale and purchase transactions on behalf of solicitors and their clients. In particular, the claimants had sought water and drainage information from the defendant water and sewerage companies (WASCs) about properties in their areas. The claimants argued that the resulting CON29DW water and drainage reports constituted environmental information within the EIR and as such the defendants were obliged to make such information available for free or at least for no more than a reasonable charge.

35. One of the issues which fell for determination ('Issue 3') was whether any of the information in question was covered by regulation 6 of the EIR (or regulations 12 or 13), such that the defendants were not obliged to disclose it. In particular, was the information relevant to a CON29DW water and drainage information

search report 'publicly available' in the same or a different format and 'easily accessible' for the purpose of regulation 6(1) (known in the *Surrey Searches Ltd* litigation as 'Issue 3.1')?

36. The generic issues raised by Issue 3.1 are discussed in Part I of the High Court's judgment in *Surrey Searches Ltd*. Part I deals with introductory matters ([501]-[503]), the parties' positions ([504]-[508]), the legislative scheme of regulation 6(1)(b) ([509]-[512]), the parties' submissions respectively on 'publicly available' ([513]-[521]) and on 'easily accessible' ([522]-[527]) and an introduction to the application of regulation 6(1)(b) ([528]-[529]). The next and extensive section of the judgment (Part J) deals with the application of regulation 6(1)(b) to the particular circumstances of each of the defendants (or at least nearly all of them) in considerable and granular detail ([530]-[723]). Both Mr Craddock and Mr Metcalfe respectfully expressed some disappointment that the High Court's discussion of the parties' submissions on 'publicly available' ([513]-[521]) (and on 'easily accessible' ([522]-[527])) was not followed immediately thereafter by a passage explicitly setting out the judge's findings about the scope and proper application of regulation 6(1)(b) on the basis of those submissions.

37. I do not share their sense of disappointment for three reasons.

38. First, the judge's discussion in Part I (as opposed to Part J) of the parties' submissions in *Surrey Searches Ltd* was not confined to a simple exposition or unvarnished summary of those representations. Rather, the discussion was accompanied by a series of critical observations on certain of those submissions. So, for example, the judge expressly rejected the claimants' suggestion that regulations 5 and 6(1)(b) required the public authority to make available all the information it held to answer a request ([516]). Further, the judge found that it was sufficient for regulation 6(1)(b) purposes to satisfy a request for environmental information by its provision in combination with other publicly available material or tools ([517]). Crucially for present purposes, the judge concluded (at [520]) that (with my emphasis added):

> publicly available does not mean having completely unfettered public access and that information may qualify as such even if some registration process, permission or physical attendance for inspection purposes might be required. Moreover, information may be publicly available if it is available in hard copy, by e-mail request, online or on a computer terminal to be viewed *in situ*. In this regard, the Claimants suggested in relation to certain sources of responsive information relied on by the Defendants that, only being available on request from that source, the information was, 'by definition', not 'already' publicly available. I disagree. If, for example, a WASC can no longer allow in person access to its PAC because of Covid restrictions and provides a public map e-mail request service instead, or seeks to discharge its obligation to make available trade effluent consent information by providing copies of its electronic register in response to a phone call, e-mail or in-person request rather than through inspection of its former physical hardcopy register or if it provides stand-alone services for the provision of individual elements of CON29DW information upon submission of an order form, there is no reason why this too is not publicly available. If such access carries with it restrictions or conditions too onerous for the requester, that may militate against it being publicly

> available. However, I reject the Claimants' related suggestion that information available 'on request' is 'by definition' not publicly available.

39. Secondly, in the passage introducing Part J (the application of Issue 3.1 to the individual defendants) the judge made the following overarching points:

> 529. In this regard, a general observation is warranted at the outset, namely an air of unreality on the Claimants' part at times in their criticism of the arrangements that the WASCs had put in place to manage demand for, and for the operation of, their PAC, with seemingly none considered adequate. Standing back from the detail, their complaints were, generally, either of a relatively minor nature, not implicating ease of accessibility, or were really concerned with how they thought the WASCs should organise themselves better to enable the PSCs to harvest information in a manner more convenient and efficient for them. Although no doubt always keen to improve their turnaround times, the evidence of many of the PSC Claimants was to the effect that they were generally able to complete in relatively short order their outstanding 'regulated' searches. As such, whether or not the WASCs may have experienced the occasional IT outage or the PSCs might have preferred slightly longer time on the PAC to facilitate a further 20 searches on certain days, the evidence indicated their general ability to obtain in a timely fashion the information they required.

40. Thirdly, in Part J the judgment descends into the detailed granular findings of fact as to whether the provision made by the various WASCs amounted to the relevant information being both 'publicly available' and/or 'easily accessible' for the purposes of regulation 6(1)(b). However, in the extensive analysis in Part J there is not even the whisper of a suggestion that the concept of 'publicly available' connotes something more than simply being available to the public (if necessary on request). Likewise, as will be seen in relation to Ground 2, the judge draws a distinction between ease of access to information and re-use of that same information. Ultimately, the application of regulation 6(1)(b) was regarded as a paradigmatic fact-sensitive enquiry.

41. Thus, as Mr Craddock frankly but rightly conceded in his helpful supplementary skeleton argument, 'the judgment, so far as is relevant, is almost entirely against the appellant'.

42. The question then arises as to the precedent status of the decision in *Surrey Searches Ltd* in the present proceedings. The starting point is that a decision of the High Court (other than historically under its supervisory jurisdiction) is not binding on the Upper Tribunal (see *Gilchrist v Revenue and Customs Commissioners* [2014] UKUT 169 (TCC); [2015] Ch 183 and *Hussain v Waltham Forest LBC* [2019] UKUT 339 (LC); [2020] 1 WLR 2723). But this only tells part of the story. As Upper Tribunal Judge Jacobs has observed *ex cathedra*, 'A decision of the High Court will be followed by the Upper Tribunal as a matter of comity. Normally, it would be followed unless the tribunal was convinced that the judgment was wrong' (*Tribunal Practice and Procedure* (5th edn, 2019, para 13.78). Moreover, where specialised issues arise, the Upper Tribunal 'may in a proper case feel less inhibited in revisiting issues decided even at High Court level, if there is good reason to do so' (*Secretary of State for Justice v RB* [2010] UKUT 454 (AAC); [2012] AACR 31 at [41])].

43. Even if the construction of the EIR raises specialised issues, I am certainly not persuaded that there is good reason for revisiting the proper approach to regulation 6(1)(b). This question was not dealt with by the High Court by way of a side-wind – the treatment of regulation 6(1)(b) took up a total of some 222 of the 765 paragraphs in the judgment. I also bear in mind that the hearing of Stage 1 of *Surrey Searches Ltd* lasted for a month and engaged the services of the equivalent of a complete football side of 11 counsel including a stellar 5-a-side information rights team of King's Counsel. If Mr Craddock's arguments on the application of regulation 6(1)(b) were realistically likely to have any traction, I would have expected them to be ventilated in some way before Richard Smith J. They were not, which tells its own story.

44. It follows that the First-tier Tribunal did not err in law in relation to the question of whether the tithe information was 'publicly available' within the meaning of regulation 6(1)(b) EIR.

Ground 2: Was the information 'easily accessible' within regulation 6(1)(b)?

The Information Commissioner's Decision Notice

45. As is evident from the passage cited above (see paragraph 23), the Information Commissioner's Decision Notice dealt with the 'publicly available' and 'easily accessible' tests together.

The First-tier Tribunal's decision

46. The First-tier Tribunal identified the Appellant's central submission as being that '"*accessible"* connotes not only the ability to access information but to make use of it, engaging consideration not only of issues such as the distance an applicant may need to travel to the Searchroom, and the associated costs, but the ease with which an applicant may review, capture and take away the information to study' (paragraph [46]). The First-tier Tribunal expressed its conclusions on the issue as to whether the information sought was 'easily accessible' within regulation 6(1)(b) in paragraphs [50]-[54] of its decision:

> 50. We consider that that is to overstate consideration of the applicant's convenience. 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. On the facts of this case, we consider that the information is easily accessible to the Appellant. We accept that he must make a journey, at cost, to the Searchroom but we do not consider his journey times or costs to be material for the purposes of EIR. Some kind of travel is inevitable for any applicant where the information, albeit in electronic form, is held in a specific, physical location. Travel distances and travel costs will necessarily vary for individuals, and consequently achieving access, in that sense, will inevitably take longer or be more expensive or arduous for some than for others.
>
> 51. As it is, 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. He has not suggested that any of the information is not readily accessible by him at the point of the screen. The practical

arrangements around that access which are offered by the Council afford every reasonable accommodation.

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

53. The Appellant referred us to *Office of Communications v Information Commissioner* EA/2006/0078, in which the First-tier Tribunal found [69] that whether the information sought by the applicant in a particular form or format was easily accessible to the applicant should be assessed by reference to the particular format which had been requested. In that case, the applicant sought information relating to the location, ownership and technical attributes of mobile phone cellular base stations in the United Kingdom contained in localised maps published on a website operated by Ofcom. He requested for every mobile phone base listed on the website, various categories of information, including a grid reference number. He noted that there was no facility to download the information on all the base stations. He asked for the information to be supplied as either a text file, csv file, Access database, or Excel spreadsheet. The Tribunal found that while access to the website was easy and that it would have been possible, once on the website, to extract the relevant information, base station by base station, and to assemble it into a text listing of some form containing the whole of the network, the second of those steps would have been time consuming, could not be described as an easy process, and it would not have yielded the grid number, which was not, in any event, disclosed on the site. On that basis the Tribunal did not consider that that part of the information could properly be described as easily accessible.

54. The Tribunal is not bound by the previous decisions of the First-tier Tribunal. It seems to us in this case 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. By that means, there is a risk that assessment of accessibility is viewed only, or overly, through the lens of the applicant's convenience and purpose. Possible difficulties in recording and using information, once accessed, do not make information any less accessible. Moreover, there is no suggestion before us that any information in the original tithe maps has not been included in the digitised versions so that it is not accessible at all through that medium.

The parties' submissions on Ground 2

47. In summary, the Appellant's principal submission was that the requirement for the regulation 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 these words refer to the ability of the requester to 'get at' (in the First-tier Tribunal's words) the information then, in order to have any effect, Mr Craddock contended, they must relate to the ability of the requester to go on and use the information. If they merely guarantee that the requester can 'view' the data, then they are doing no more than requiring compliance with the EIR. The requirement for the information to be 'easily accessible to the applicant', he argued, 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 potentially productive way.

48. The Respondent characterised the substance of the Appellant's complaint not in terms of being that he cannot readily access the digital tithe maps at the Council's facility (i.e. view them), but rather that the format in question is not a convenient one for the purposes of his own research. However, according to Mr Metcalfe, the test of accessibility under regulation 6(1)(b) is accessibility 'to the applicant', and not accessibility to his or her computer. Information may be 'easily accessible' to an applicant, even if it is provided in a form or format that is less convenient to him. Nor, he submitted, is there any support in either the EIR, the Directive or the Convention for the question of accessibility under regulation 6(1)(b) being determined by reference to either (i) the purposes an applicant may wish to use the information for, or (ii) the ease with which the applicant can transfer the information between his different devices. Again, although regulation 6(1) EIR and section 11(1) FOIA both enable applicants to receive information in a particular format, there is no requirement on the public authority under regulation 6(1)(b) to consider the reasonable practicability of doing so. The test is simply and solely whether the environmental information in question is (a) 'already publicly available'; and (b) 'easily accessible to the applicant' in another format.

Discussion

49. The summary of the parties' respective positions in the previous two paragraphs necessarily focuses on the main area of disagreement as to the meaning of 'easily accessible'. However, before turning to consider those core submissions, it is relevant to mention a different aspect of the notion of whether information is 'easily accessible', namely the question of travel to the place where the information in question is made 'publicly available'.

50. In this latter respect the parties' positions have arguably moved somewhat closer together over the course of these proceedings. In the appeal at first instance, the Appellant argued that both the distance the requester had to travel and the associated costs were relevant to determining whether the information was 'easily accessible'. However, as we have seen, the First-tier Tribunal did 'not consider that accessibility to information is properly determined by considerations of travel for the purposes of EIR' (at [51]). In this further appeal, Mr Craddock wisely did not seek to argue that his personal circumstances (involving travel from his home in Surrey to the Council's archive in Maidstone) meant that the tithe information was not 'easily accessible' to him. The

Respondent, in turn, did not submit that the distance and costs of travel could never be relevant factors in the assessment of accessibility. The parties appeared to be at one that on the facts of the present case travel issues were simply not a live issue in determining ease of accessibility. Accordingly, I need say no more about that matter.

51. As noted above, the Appellant's principal submission in relation to this ground of appeal was that the First-tier Tribunal had erred in finding that the information in the tithe maps was 'easily accessible to the applicant in another form or format' within the meaning of regulation 6(1)(b), on the basis that the maps could be viewed on a computer screen in the Council's Searchroom. At the outset I recognise that access to on-screen information is (at best, and putting it mildly at that) inconvenient for Mr Craddock's purposes – in order to be used in his further study and research, the information needs to be laboriously transcribed or (if indeed permitted) photographed in a series of overlapping screenshots which may well make solving a 1,000 piece jigsaw a walk in the park by comparison. However, the statutory requirement is that the information is 'easily accessible to the applicant in another form or format' and not that it is 'easily accessible to *and manipulable by* the applicant in another form or format'. As the First-tier Tribunal found in colloquial but accurate terms, accessibility connotes the ability to 'get at' the information in question – nothing more and nothing less. Moreover, as Mr Metcalfe submitted, the test of accessibility under regulation 6(1)(b) is accessibility 'to the applicant', and not accessibility to their computer or other hardware.

52. Mr Craddock relied on a number of subsidiary submissions in support of his primary argument that regulation 6(1) is designed to confer on a requester the ability to specify the medium in which the information is made available, subject to the possibility that the public authority may supply the information in an alternative format if that is 'easily accessible' (including for its onward re-use) to the requester. However, on further analysis none of these arguments was found to be persuasive.

53. First, reliance was placed by the Appellant on the decision of the Court of Appeal in *Innes v Information Commissioner and Buckinghamshire CC* [2014] EWCA Civ 1086. There, Underhill LJ (giving the main judgment) observed that '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' (at [39]). However, that case concerned the obligation on a public authority under section 11(1) of FOIA to provide information in a 'form acceptable to the applicant … so far as reasonably practicable'. But, as Mr Metcalfe submitted, whether a particular form of information is 'acceptable to the applicant' under that provision is an entirely different matter to whether the information itself is 'easily accessible to the applicant' in a particular form. Thus, the exception in regulation 6(1)(b) is concerned only with the applicant's ease of access to the information in a particular form, not the reasonable practicability of providing it in that form.

54. Secondly, Mr Craddock relied on a series of decisions by the Compliance Committee established under the Convention to the effect that electronic information must be made available to a requester, it not being sufficient to respond to a request for information under article 4 by simply providing access

to examine the information free of charge. However, as the Appellant rightly acknowledged, the Compliance Committee is not a court of law and its opinions are not binding under domestic UK law. Nor am I persuaded as a matter of statutory construction that there is sufficient ambiguity in the terms of regulation 6(1)(b) to warrant resort to such extrinsic materials.

55. Thirdly, the Appellant took issue with the First-tier Tribunal's observation (at [50]) 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'. Mr Craddock contended that the Council's position did nothing to alleviate any burden placed upon it but rather increased the cost burden. However, I agree with Mr Metcalfe that it is not for the First-tier Tribunal (nor indeed the Upper Tribunal) to take into account the costs which a public authority may legitimately take upon itself by deciding whether to provide information in a particular form. That is so even if either Tribunal were to consider that another form might conceivably be cheaper: judicial decision-makers are not well placed to make such findings, which are pre-eminently a matter for the public authority concerned.

56. Finally, there is another reason why I conclude that Ground 2 cannot succeed. This is because the First-tier Tribunal's approach to the question of whether the information in question was 'easily accessible' is (again, as with the concept of 'publicly available') entirely consistent with the approach taken in the *Surrey Searches Ltd* judgment. That case in effect confirms that the EIR (and in particular regulation 6(1)) do not concern the right to re-use environmental information or the ease with which that can be done; rather, they only concern the right of access to such information in the first place. The High Court made extensive, detailed and granular findings of fact as to the provision of information made by the various water companies for the purposes of regulation 6(1)(b) being 'easily accessible'. There was not even the remotest suggestion in *Surrey Searches Ltd* that inconvenience to the requester in terms of the ability to re-use the data in question was a material consideration in deciding the ease of accessibility test. Indeed, quite to the contrary, as the judge repeatedly observed that matters of convenience to the claimants and in particular their ability to re-use information should not be conflated with ease of access to that information (see e.g. *Surrey Searches Ltd* at [543], [549], [552], [565], [569], [591], [615], [633], [657], [673] and [709]). Thus, Richard Smith J rejected one submission made by the claimants on the basis that it conflated 'ease of accessibility to the information in question (with which Reg 6(1)(b) is concerned) with the convenience to the user (with which it is not)' ([608]). Furthermore, and in any event, on the facts the practical arrangements for accessing environmental information made by the water companies were typically rather more restrictive than those put in place by the Council in the instant appeal.

57. It follows that the First-tier Tribunal did not err in law in relation to the question of whether the tithe information was 'easily accessible' within the meaning of regulation 6(1)(b) EIR.

Ground 3: The application of the FOIA regime

The legislative context

58. The third and final ground of appeal concerns the inter-relationship between the EIR and FOIA regimes. The legislative context is set by sections 39 and 21 of

FOIA. Section 39 of FOIA provides for a qualified exemption for environmental information as follows:

> **Environmental information**
>
> 39 (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 EU 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).

59. Section 21 of FOIA in turn provides for an absolute exemption:

> **Information accessible to applicant by other means**
>
> (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.

The First-tier Tribunal's decision

60. The First-tier Tribunal was faced with competing submissions from the parties as to the relevance of section 39 of FOIA:

> 57. The Appellant submitted that, if we were to find that the Council was entitled to rely on Regulation 6(1)(b) EIR to refuse the Request, the information ought to be disclosed under FOIA. This was on the basis that if the Council is not required to make the information available under EIR

because of the application of Regulation 6(1)(b), the information nevertheless satisfies section 39(1)(a) FOIA because the information must be made available under EIR, and is not therefore exempt under section 39(1)(b).

58. The Commissioner's position is that the information requested is environmental information which falls to be considered by EIR not by FOIA; section 39(1)(a) FOIA provides that information is exempt information if the public authority holding it is obliged by environmental information regulations to make the information available to the public in accordance with those regulations.

61. The First-tier Tribunal rejected the Commissioner's submission on the section 39 point, reasoning as follows:

60. We do not accept the Commissioner's submission (as we understood it) that disclosure of environmental information does not fall to be considered under FOIA, only under EIR. We read section 39 FOIA as acknowledging EIR as the paramount but not exclusive regime governing the disclosure of environmental information. The legislation is effectively linked in that section 39(1) FOIA gives an exemption under FOIA for information which the public authority (a) is obliged by EIR to make available, or (b) would be obliged by EIR to make available were it not for an exemption in EIR. However, the FOIA exemption is a qualified exemption so that the public interest in maintaining the exemption must outweigh the public interest in disclosure.

61. The Appellant speculated in his Reply to the Commissioner's Response to his Notice of Appeal as to what public interest might justify withholding the information in the form sought, even though this was not an issue which the Commissioner addressed in his Response (or in the Decision Notice). The Appellant noted that in the Commissioner's published guidance "Charging for information under the Environmental Information Regulations (EIR)", the ICO has stated "*Section 39 of FOIA states that information is exempt from disclosure under the Act if the public authority is obliged to disclose the information under the EIR. The exemption is subject to a public interest test. Although there is a public interest in making information freely available under FOIA, the ICO considers that there is an overriding public interest in implementing the EIR as intended by the Directive. Therefore, the ICO would not accept the argument that it would be in the public interest for requests chargeable under the EIR to be handled under FOIA instead."* The Commissioner also did not address the issue of the public interest in his final written submissions.

62. The Appellant inferred that perhaps the Council did not wish its intellectual property rights in the map data to be prejudiced by proliferation of the data in the public domain e.g. if it were to place the data on a website. He submitted that the placing of the data in the public domain would indirectly achieve the objectives of the Directive; that the Council had received a substantial grant to digitise the maps so that the public might have access to the data; the Convention recognises that public authorities hold environmental information in the public interest; and the

> Convention Guidance refers to the requirement of public authorities to serve the needs of the public, including individual members of the public.
>
> 63. It may be that it was implicit in the Commissioner's position that there is a public interest in upholding EIR as the exclusive regime to govern disclosure of environmental information. It is not obvious to us, however, that there is a public interest in upholding EIR as the exclusive regime, and, absent submission from the Commissioner on the public interest point in any event, we are 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.

62. The First-tier Tribunal accordingly went on to consider section 21 of FOIA:

> 64. Accordingly, it is necessary for us to consider section 21 FOIA, which provides that information which is reasonably accessible to the applicant otherwise than under s1 FOIA is exempt from disclosure under FOIA. Information is to be regarded as reasonably accessible to the applicant even though it is accessible only on payment (section 21(2)(a)), and if it is information which the public authority 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 (section 21(2)(b)).
>
> 65. We read section 21(2) as identifying non-exclusive circumstances in which information might be characterised as reasonably accessible. Section 21(2)(a) is of no relevance as the Council is not making the information available to the Appellant under the EIR on condition of payment. We do not consider that the information falls to be characterised as reasonably accessible under section 21(2)(b) as the Council is not obliged to communicate the information in the maps to the Appellant (as distinct from making it available to him).
>
> 66. Section 21(1)(3) provides that information which does not fall within section 21(2)(b) is not to be regarded as reasonably accessible to an applicant merely because it is available from the public authority 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. Although the tithe maps are not available in accordance with the Council's publication scheme, in our view, it is not right to characterise the information in the maps as being available on request. The Council has made the information publicly available. The request which an applicant must make is only to enable practical arrangements for inspection to be made.
>
> 67. We consider that the information is to be regarded as reasonably accessible to the Appellant within the meaning of section 21 FOIA. We accept that he must travel, at a cost and with expenditure of time, to the Searchroom but we do not consider that this means the information is not reasonably accessible by him. The Searchroom opening hours are generous. He has not suggested that any of the information is not readily accessible at the point of the screen in the Council's Searchroom. We remind ourselves of the Appellant's position that accessibility of

information entails the ability to capture, retain and take it away for study. As we have already observed, we do not consider that such matters properly inform a determination of accessibility per se. We conclude, therefore, that the information is exempt from disclosure pursuant to section 21 FOIA.

68. In circumstances where we find that the information is exempt from disclosure pursuant to Regulation 6(1)(b), it is not necessary for us to address the Appellant's submissions as to the reasonableness of the Council's proposed charges for copies of the maps under Regulation 8 EIR.

The parties' submissions on Ground 3

63. The Appellant submitted that, notwithstanding the EIR, environmental information may be disclosable under FOIA. He recognised that such disclosure may potentially be exempt under section 39(1), but that exemption is qualified, not absolute, and so is subject to the public interest test (see further section 2(2)(b) and 2(3)). Mr Craddock argued that there was accordingly a twin-track regime in relation to environmental information, an approach which was consistent with the UK's international obligations under both the Convention and the Directive. There was, he contended, no public interest which required the First-tier Tribunal to find that the tithe information was exempt from communication under section 39 of FOIA.

64. Turning to section 21, the Appellant submitted that the First-tier Tribunal fell into error in concluding that the display of the tithe information on a computer terminal in the Council's archives centre complied with the requirement that such information should be 'reasonably accessible' to the Appellant. Mr Craddock contended that, if there is any material difference in the meaning of 'easily accessible' (in EIR regulation 6(1)(b)) and 'reasonably accessible' (in FOIA section 21), the First-tier Tribunal 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. The Appellant further submitted that the First-tier Tribunal failed correctly to interpret and apply the statutory criteria in section 21(2) and (3) as to what should be considered to be, or not to be, 'reasonably accessible'.

65. The Respondent submitted that the First-tier Tribunal, having concluded that the exemption from the disclosure of environmental information in section 39(1)(b) was engaged, had erred in concluding that the balance of the public interest in disclosing the tithe maps outweighed that in maintaining the exemption. The Commissioner contended that while the exemption under section 39 is a qualified one, there is nonetheless an overriding public interest in implementing the EIR as intended by the Convention and the Directive, which includes dealing with all requests for environmental information under its framework. The Commissioner further argued that, given the fact that public authorities have an obligation to respond to requests for environmental information under the EIR, it was hard to envisage any circumstances where it would be in the public interest for the authority to also consider that information under FOIA. The UK's international obligations may not be so lightly set aside, Mr Metcalfe submitted, at least not without the First-tier Tribunal first having identified some similarly weighty but countervailing public interest in disclosure.

66. If section 39 did not render the environmental information in question exempt, the Commissioner submitted in the alternative that the tithe maps were in any event exempt from disclosure under section 21 for the reasons given by the First-tier Tribunal at paragraphs 64-68 of its decision (see paragraph 62 above).

67. Thus, in a nutshell, Mr Craddock submitted that the First-tier Tribunal had correctly applied section 39 but had erred in its application of section 21. The Information Commissioner, on the other hand, contended that the First-tier Tribunal had erred in its treatment of section 39 but (if he was wrong about that) had approached section 21 correctly.

Discussion

68. This ground of appeal can be dealt with rather more shortly than the first two grounds. At the outset there is a procedural issue to mention. I referred earlier to the Information Commissioner in effect seeking to cross-appeal on the section 39 issue. On one view the Respondent should have sought permission to cross-appeal on that point. However, it is also arguable that permission is unnecessary as the First-tier Tribunal's decision did not confer any additional benefit on the Commissioner, given the Tribunal's finding on the section 21 point (see by analogy *Secretary of State for Home Department v Smith (appealable decisions; PTA requirements; anonymity*) [2019] UKUT 216 (IAC) and *HMRC v SSE Generation Ltd* [2021] EWCA Civ 105). In any event, the permission requirement may be waived where it is fair and just to do so (Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) rule 7(2)(a); see also rule 24(1B) and (1C)). The Commissioner had made his position clear in the response to the appeal and there was no prejudice to the Appellant, who made detailed written submissions and attended the oral hearing fully prepared to argue the section 39 point.

69. Turning then first to the section 39 question, the First-tier Tribunal correctly took as its starting point the different genesis of the EIR and FOIA respectively. The former, of course, is secondary legislation mandated by the Directive while the latter is domestic primary legislation. They also make different provision for disclosure. The First-tier Tribunal referred in this context (at paragraph 59 of its decision) to the observations by the (former) Information Tribunal in *Rhondda Cynon Taff CBC v Information Commissioner* (EA/2007/0065)):

> In that case, the Tribunal viewed it as better to describe the two regimes as running in parallel. Each legislation imposes distinct obligations on public authorities, most notably section 1(1)(b) FOIA provides that an applicant has a right to have the information communicated to him, whereas Regulation 5 EIR provides that the public authority is obliged to make environmental information it holds available to the applicant upon request i.e. there is no obligation to communicate it to the applicant; inspection at the authority's records office may be sufficient.

70. In the instant case the First-tier Tribunal read section 39 'as acknowledging EIR as the paramount but not exclusive regime governing the disclosure of environmental information'. In my assessment there is considerable force in Mr Craddock's submission that if Parliament had intended the EIR to be the wholly exclusive regime for public authorities handling requests for environmental information then it could and would have legislated to that effect. The very fact that section 39 provides for a qualified exemption and not an absolute

exemption reflects a recognition that there could (albeit perhaps exceptionally) be some cases where environmental information was properly subject to disclosure under FOIA. In finding that the First-tier Tribunal did not err on the section 39 issue, I also bear in mind that it appears that the Commissioner did not make any effective submissions at first instance on the operation of the public interest test.

71. Moving onto the section 21 issue, I detect no error of law in the First-tier Tribunal's approach. The linguistic distinction between information being 'easily accessible' (regulation 6(1)(b)) and 'reasonably accessible' (section 21) is at most cigarette paper thin. It follows that the First-tier Tribunal's previous findings as to the meaning of accessibility have equal purchase here, and its reasoning at paragraph 67 accordingly discloses no error of law. The provisions of section 21(2) and 21(3) take Mr Craddock no further forward for the reasons given by the First-tier Tribunal at paragraphs 65 and 66 of its decision.

72. It follows that I agree with Mr Craddock so far as the application of the public interest test under section 39 is concerned. However, I agree with Mr Metcalfe on the section 21 issue. As a result, the substance of the third ground of appeal does not succeed.

Conclusion

73. Having considered but dismissed each of the Appellant's three grounds of appeal, I therefore conclude that the decision of the First-tier Tribunal does not involve any material error of law. I accordingly refuse the appeal. The decision of the First-tier Tribunal stands (Tribunals, Courts and Enforcement Act 2007, section 11). My decision is also as set out above.

Nicholas Wikeley
Judge of the Upper Tribunal

Authorised for issue on 7 October 2024