

Freedom of Information Act 2000 (Section 50) Environmental Information Regulations 2004

Decision Notice

Date: 31 August 2011

Public Authority: Hayle Harbour Authority
Address: The Old Customs House
North Quay
Hayle
Cornwall
TR27 4BL

Summary

The complainant wrote to Hayle Harbour Authority (HHA) and requested information relating to its dredging activities. HHA claimed that it did not constitute a public authority for the purposes of the Environmental Information Regulations (EIR) and was not therefore obliged to respond to the request in accordance with that piece of legislation. It did, however, direct the complainant to its website for further information on dredging. The Commissioner has decided that HHA is a public authority under the EIR and, as such, is required to respond to the request in accordance with its provisions.

The Commissioner's Role

1. The Environmental Information Regulations (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

The Request

2. On 12 March 2010 the complainant made the following request for information to HHA:

I would be grateful if you could kindly provide copies of the following information in relation to the Hayle Harbour Authorities [sic] Dredging Operations: -

- 1) Copies of all testing records from 2003 to present;*
 - 2) The daily dredging records pursuant to clause 5.1 of the Dredging Licence;*
 - 3) Copy of the scheduled plan to the 2003 Licence;*
 - 4) Copy of the Authorities [sic] long term Dredging Protocol pursuant to clause 4.4 of the licence;*
 - 5) Copies of the Bathymetric surveys conducted pursuant to clause 2.3 of the licence;*
 - 6) Confirm the tonnage of sand on North Quay and Dynamite Quay as at 12th March 2010;*
 - 7) Copies of all proposals the Authority has made pursuant to clause 6.3 of the Licence;*
 - 8) Copy of the Limit of Dredging Harbour Land Plan annexed to the Hayle Harbour Act 1989;*
 - 8) The reason why the Authority has applied to dredge in Zone D/ Dynamite Quay;*
3. HHA responded to the request on 16 December 2010 (it is unclear why there was such a delay associated with the response). HHA claimed that it did not represent a public authority under the EIR and was not therefore bound by its provisions. Notwithstanding this view, HHA indicated that a considerable amount of relevant information was contained on its website.

The Investigation

Scope of the case

4. On 27 January 2011 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider:
- (i) whether HHA constitutes a public authority for the purposes of the EIR; and

(ii) whether the requested information should have been disclosed.

5. HHA has argued that it does not constitute a public authority under the EIR and has not therefore considered the request under this access-regime. For this reason, the Commissioner's decision only focuses on the initial question of whether HHA is subject to the EIR.

Chronology

6. The Commissioner has been informed by submissions provided by HHA on a separate case. This was not concluded by way of a decision notice and so no final determination was made on the status of HHA. In addition, on 1 June 2011 HHA provided the Commissioner with further arguments to support its view that it was not covered by the EIR.

Analysis

Procedural Matters

7. The legal provisions relevant to this determination are set out in the Legal Annex appended to the Decision Notice.

Definition of "public authority"

8. The Commissioner has considered whether the HHA would be covered by the provisions of the EIR. Regulation 2(2) of the EIR sets out the organisations that will constitute public authorities for the purposes of the legislation. The Commissioner is satisfied that regulation 2(2)(c) is the applicable subsection in this case.

9. Regulation 2(2) of the EIR provides –

'Subject to paragraph (3), "public authority" means –

(c) any other body or other person, that carries out functions of public administration...'

10. The EIR does not define what is meant by "functions of public administration." The Commissioner has therefore been guided by the Upper Tribunal in *Smartsource Drainage & Water Reports Limited v The Information Commissioner* (GI/2458/2010)¹ when making his decision.

¹ <http://www.informationtribunal.gov.uk/DBFiles/Appeal/i460/GI%202458%202010.pdf>

11. In that case the Upper Tribunal endorsed a multi-factor approach to the question of whether a body is a “public authority” within regulation 2(2)(c) of the EIR, further commenting that:

“We agree with, and approve of, the multi-factor approach taken by the Information Tribunal in both the Network Rail² and the Port of London Authority³ cases, namely that the decision on whether a body is a “public authority” within regulation 2(2)(c) of the EIR 2004 depends on a range of factors.”(para 64)... “Applying the multi-factor approach means that we have to identify the relevant factors which point one way or the other and weigh them in the balance in the process of determining whether the body in question is performing of public administration and so a public authority within regulation 2(2)(c).” (para 66)

12. Taking the *Network Rail* and the *Port of London* cases as indicative of the criteria that should be looked when considering the application of regulation 2(2)(c), the Commissioner has weighed up the following factors:

- whether the functions exercised by the body in question are typically governmental in nature.
- whether the functions of the HHA form part of a statutory scheme of regulation;
- whether, if those functions did not exist, some governmental provision would need to be made for the exercise of those functions;
- whether the organisation has a statutory basis, or whether it exists purely as a matter of contract; and
- whether the organisation is accountable to members or shareholders, or to government.

13. By taking into account these factors the Commissioner considers he is able to answer the principal questions of whether, firstly, HHA is undertaking functions that are public in nature and, secondly, whether those functions are administrative.

14. To assist him with the task of answering these questions the Commissioner has also been directed by his determination on *Mersey Docks and Harbour Company* (FER0195081)⁴; both cases sharing considerations common to a decision on the status of a harbour authority under the EIR.

² <http://www.informationtribunal.gov.uk/DBFiles/Decision/i102/Network%20Rail.pdf>

³ <http://www.informationtribunal.gov.uk/DBFiles/Decision/i160/PLA.pdf>

⁴ http://www.ico.gov.uk/~media/documents/decisionnotices/2009/FER_0195081.aspx

15. The Commissioner has considered the extent to which the duties of the HHA can be deemed 'governmental in nature.' While the Tribunal did not define what is meant by 'governmental in nature' in the *Port of London* case, the Commissioner found in his *Mersey Docks* decision that a function which is governmental in nature is one which involves:

"...the authoritative administration, management, control or direction of a function in the public interest or in the interests of society as a whole." (para 25)

16. HHA was established as a statutory harbour authority pursuant to the Hayle Harbour Act 1989 (the "Harbour Act"). This conferred upon HHA "certain powers to enable them to operate Hayle harbour as a public harbour undertaking; to construct works in the harbour; and for other purposes." The effect of the Harbour Act is to give HHA a statutory basis, satisfying the fourth condition set out at paragraph 12.

17. HHA has contrasted the statutory scheme set out by the Harbour Act with the Port of London Act 1968, which was considered by the Tribunal in the *Port of London* case. In particular, HHA argued that:

"The language of the Port of London Act 1968 speaks in terms of duties and powers. By contrast, the Hayle Harbour Act 1989 is a much simpler Act that is cast, primarily, in terms of the powers of 'the Company' to act."

18. The Commissioner accepts that many of the powers and duties contained in the Harbour Act are expressed as permissive rather than obligatory. However, the Commissioner is also mindful that the Harbour Act makes clear that HHA is only being granted these powers "to ensure that the harbour is effectively managed and to secure its commercial future", with section 17 of the Act further referring to HHA's "responsibility to maintain the safety of the harbour".

19. For this reason the Commissioner is satisfied that the Harbour Act does impose positive duties upon HHA. In essence, the purpose of the Harbour Act was to have a body to discharge the duties of a harbour authority and to operate the harbour.

20. Following a government consultation on the future of trust ports the Department of Transport (DfT) published *Modernising Ports* (second edition) in August 2009. In this document, the DfT said:

*"Although it is aimed specifically at trust ports, all ports are encouraged to use the relevant elements of the guidance as a benchmark, as **all ports on whom Parliament has devolved***

statutory powers and duties in the public interest should be accountable for their use. " (the Commissioner's emphasis)

21. The Commissioner considers that the DfT's comments give an indication that it was always intended that all ports were to be regarded as public bodies because of the functions they carry out in the public interest.
22. The Commissioner is also aware that, notwithstanding the Harbour Act, a harbour authority by its very nature will also be subject to a Code of Practice from the Department of Transport on Marine Safety (the "Code"). This is a compulsory code of conduct that applies to all Competent Harbour Authorities (CHA)s. While the Code is not directly enforceable, it nevertheless establishes a national standard.
23. The effect of the Code was addressed in detail by the Commissioner at paragraphs 29 – 37 of his *Mersey Docks* decision. In general the Commissioner considers that the points made in that decision relating to the Code would have a similar resonance here. He does not therefore feel it necessary to recite these points again, other than to note the importance that the Code played in the Commissioner finding that Mersey Docks did, in fact, represent a public authority for the purposes of the EIR.
24. The Commissioner also recognises there are elements of governmental control over HHA that were not addressed in the *Mersey Docks* decision. These controls include the following:
 - HHA has a duty to prepare plans to deal with oil spills which must be approved on behalf of the Secretary of State pursuant to the Merchant Shipping (Oil Pollution Preparedness Response and Co-operation Convention) Regulations 1998.
 - The Harbour Act, specifically sections 7, 9(1), 9(3), 10, 12(1), 16, 19(5), 35(1)(b) and 35(2)(a), gives examples of where the Secretary of State exercises an influence over what HHA is required to do and where HHA cannot act without his consent.
 - Section 25 of the Harbour Act provides that the refusal of houseboat licences is subject to appeal to the Secretary of State.
25. Drawing on the *Mersey Docks* case, and the controls referred to above, the Commissioner considers there are cogent grounds for assuming that HHA constitutes a public authority under the provisions of the EIR. However, the Commissioner understands that an intensive regulatory regime is not of itself sufficient to show that a service is public in

nature; only forming one part of the multi-factor approach referred to previously. He has therefore gone on to consider the arguments put forward by HHA in opposition to the view that it would be subject to the EIR.

26. HHA has informed the Commissioner that Hayle Harbour Company Limited (now HHA) operated the harbour facilities at Hayle prior to the adoption of the Harbour Act. An Agreement dated 3 July 1990 between the Company, the Nature Conservancy Council, Cornwall Council and Penwith District Council records that it was the Company which promoted the Bill that became the Harbour Act. This Act was to give the Company additional powers to ensure that the harbour is efficiently managed and to secure its commercial future.

27. HHA considers that its essential function, namely the management of the harbour, remains the same as it did prior to the adoption of the Harbour Act and is not governmental in nature. HHA has therefore gone on to argue that:

"It is by no means certain (or indeed even likely) that governmental provision would be made for the exercise of the functions carried out by HHAL if it were to cease to manage the harbour. The role of HHAL is significantly different from that of the PLA [Port of London Authority] and the Mersey Docks and Harbour Company both of whom are responsible for the management of significantly larger and strategically more important harbours."

28. The Commissioner, however, respectfully disagrees with this line of argument. Instead, the Commissioner considers that the introduction of the Harbour Act explicitly imposed conditions on HHA that are governmental in nature, such as "the responsibility to maintain the safety of the harbour", as well as making HHA subject to the Code. Referring back to the *Mersey Docks* decision, the Commissioner viewed the application of the Code as providing:

"...a clear indication that harbour authorities are accountable and have been set up to serve the public interest, as CHAs are required to provide the Government with copies of certain policies and plans, to allow it to ensure the Code is implemented and to monitor its effect."

29. Furthermore, while the Commissioner does not dispute that the Port of London and the Mersey Docks may occupy a more important strategic role than Hayle, he maintains that paragraphs 32 and 33 of the Code make it clear that the Government regards CHAs in general as discharging a public function. Therefore, the Commissioner considers it

likely that if HHA did not carry out its function, another body would have to be established to fulfil this role.

30. Similarly, the Commissioner does not accept the HHA's reference to the administrative functions undertaken by HHA. In particular, HHA cited the distinction made by the Court in *Griffin v South West Water Services Limited* [1995 IRCR15] between an organisation engaged in a degree of administration in the course of providing a service with an organisation that provides an administrative service; believing HHA to fall within the former category. The Commissioner, however, agrees with the Tribunal in *Smartsource* in finding that the distinction has little value in this situation because of the substantially different context.
31. The Commissioner does, though, place greater weight on the points made by HHA with respect to the accountability of the harbour authority. The Commissioner accepts that HHA, in common with any private company, is accountable to its shareholders. Furthermore, it is the shareholders and the existing directors who are responsible for the appointment of the board of HHA.
32. To this extent, the Commissioner accepts that HHA is dissimilar to the Port of London where its accountability was not to private shareholders. The Commissioner further acknowledges that, unlike the Port of London, HHA is not required to submit an annual report to the Houses of Parliament. On which point, HHA commented:

"We note that in the Mersey Docks case the ICO referred to the fact that the Marine Safety Code that the Marine Safety Code requires the Harbour Authority to submit copies of its policies and plans to the Department of Transport. This is very different however from having to make reports to Parliament which, as is evident from the PLA Case, is the key test of accountability."
33. Bearing in mind these factors the Commissioner considers that, to paraphrase the Tribunal in *Smartsource*, HHA has fewer characteristics of a public authority than Mersey Docks and the Port of London. However, the Commissioner has also found that the cumulative weight of the factors identified at paragraph 12 is sufficient to conclude that HHA does constitute a public authority for the purposes of the EIR.
34. This finding is based on the consideration of the statutory basis of HHA, the importance of the strategic role played by harbour authorities and the regulatory regime associated with HHA. In essence, the Commissioner is satisfied that core functions of HHA are public in nature and not simply ancillary to HHA's primary commercial purposes.

35. The Commissioner has therefore decided that HHA is obliged to respond to requests for environmental information under the EIR.

Environmental Information

36. In this case the Commissioner's investigation has been limited to determining whether HHA is a public authority under the EIR and therefore bound by its provisions. He has not therefore felt it necessary to see any information held by HHA that would fall within the scope of the request.
37. The Commissioner is nevertheless satisfied that the direction and context of the request means that any relevant information, where held, would be 'environmental' for the purposes of the definition provided by regulation 2(1) of the EIR. It is his view therefore that all parts of the request should be dealt with by HHA in accordance with this legislation.

The Decision

38. The Commissioner's decision is that the public authority did not deal with the request for information as required by the EIR.

Steps Required

39. The Commissioner requires the public authority to take the following steps to ensure compliance with the EIR:

HHA should either provide the requested information to the complainant or issue her with a refusal notice meeting the requirements of regulation 14 of the EIR.

40. HHA must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

41. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Other matters

42. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters.
43. The Commissioner accepts that, at the time the request was made, HHA did not consider itself as being subject to the EIR. Therefore, while the Commissioner's decision is that HHA is a public authority for the purposes of the EIR, he has not found it necessary to consider whether HHA breached any procedural aspects of the EIR.

Right of Appeal

44. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 31st day of August 2011

Signed

**Pamela Clements
Group Manager, Complaints Resolution**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

The Environmental Information Regulations 2004

Regulation 2 - Interpretation

Regulation 2(1) In these Regulations –

“the Act” means the Freedom of Information Act 2000(c);

“applicant”, in relation to a request for environmental information, means the person who made the request;

“appropriate record authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“the Commissioner” means the Information Commissioner;

“the Directive” means Council Directive 2003/4/EC(d) on public access to environmental information and repealing Council Directive 90/313/EEC;

“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 elements of the environment referred to in (b) and (c);

“historical record” has the same meaning as in section 62(1) of the Act;

“public authority” has the meaning given in paragraph (2);

“public record” has the same meaning as in section 84 of the Act;

“responsible authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“Scottish public authority” means –

- (a) a body referred to in section 80(2) of the Act; and
- (b) insofar as not such a body, a Scottish public authority as defined in section 3 of the Freedom of Information (Scotland) Act 2002(a);

“transferred public record” has the same meaning as in section 15(4) of the Act; and

“working day” has the same meaning as in section 10(6) of the Act.

Regulation 2(2) Subject to paragraph (3), “public authority” means –

- (a) government departments;
- (b) any other public authority as defined in section 3(1) of the Act, disregarding for this purpose the exceptions in paragraph 6 of Schedule 1 to the Act, but excluding –
 - (i) any body or office-holder listed in Schedule 1 to the Act only in relation to information of a specified description; or
 - (ii) any person designated by Order under section 5 of the Act;

- (c) any other body or other person, that carries out functions of public administration; or
- (d) any other body or other person, that is under the control of a person falling within sub-paragraphs (a), (b) or (c) and –
 - (i) has public responsibilities relating to the environment;
 - (ii) exercises functions of a public nature relating to the environment; or
 - (iii) provides public services relating to the environment.

Regulation 2(3) Except as provided by regulation 12(10) a Scottish public authority is not a “public authority” for the purpose of these Regulations.

Regulation 2(4) The following expressions have the same meaning in these Regulations as they have in the Data Protection Act 1998(b), namely –

- (a) “data” except that for the purposes of regulation 12(3) and regulation 13 a public authority referred to in the definition of data in paragraph (e) of section 1(1) of that Act means a public authority within the meaning of these Regulations;
- (b) “the data protection principles”;
- (c) “data subject”; and
- (d) “personal data”.

Regulation 2(5) Except as provided by this regulation, expressions in these Regulations which appear in the Directive have the same meaning in these Regulations as they have in the Directive.

Regulation 14 – Refusal to disclose information

Regulation 14(1) If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.

Regulation 14(2) The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.

Regulation 14(3) The refusal shall specify the reasons not to disclose the information requested, including –

- (a) any exception relied on under regulations 12(4), 12(5) or 13;
and
- (b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).

Regulation 14(4) If the exception in regulation 12(4)(d) is specified in the refusal, the authority shall also specify, if known to the public authority, the name of any other public authority preparing the information and the estimated time in which the information will be finished or completed.

Regulation 14(5) The refusal shall inform the applicant –

- (a) that he may make representations to the public authority under regulation 11; and
- (b) of the enforcement and appeal provisions of the Act applied by regulation 18.