

## Environmental Information Regulations 2004 (EIR)

### Decision notice

**Date:** 24 May 2018

**Public Authority:** Folkestone Harbour Company

**Address:** Strand House  
Pilgrims Way  
Monks Horton  
Kent, TN25 6DR

#### Decision (including any steps ordered)

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1. The complainant has requested information relating to public registers of lists held by Folkestone Harbour Company (FHC)
2. The Commissioner's decision is that FHC does not hold any further information, other than that provided in its initial response.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

#### Request and response

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4. On 24 July 2017, the complainant wrote to FHC and requested information in the following terms:

*As you know The Folkestone Harbour Company (FHC) is considered a statutory port and therefore some of its activities fall within the scope of the Environmental Information Regulations 2004 (EIRs).*

*Regulation 8(2) prevents FHC from making any charge to access public registers or lists of environmental information it holds, or to examine the information that has been requested at a place made available by FHC.*

*One method of achieving this is for FHC to provide public registers and lists of environmental information that are easy to access and straightforward to use. They should also provide clear instructions on how to access the information listed. The Directive is derived from the*

*Aarhus Convention and as the Aarhus Implementation Guide (AIG) states, in this way, an applicant will be able to frame a request for environmental information more precisely. Charging for assisting in this is incompatible with promoting the right to access environmental information.*

*I note FHC does not have a public register or list of environmental information available on its website. However, FHC should note that providing this information will enable them to help meet the obligation set out in Regulation 4 to proactively and progressively disseminate the environmental information they hold. FHC can achieve this can by including the lists and registers in their guide to information (the means by which a FHC meets its obligations to publish information in accordance with the model publication scheme).*

*Although neither the EIR nor the Directive provide a definition of a "public register", it is likely to comprise a record of documents the public is entitled to access in accordance with statutory legislation. Examples of public registers of environmental information include the Planning Register, the Contaminated Land Register, the Hazardous Waste Register, the Water Quality and Pollution Control Register, and the Register of Radioactive Substances.*

*Neither the EIR or the Directive provide a definition of a "list of environmental information". However, the AIG suggests that the terms "lists", "registers" and "files" are often used interchangeably and the form of the list, register or file can vary. This indicates that Regulation 8(2)(a) EIR is not limited to formal, statutory registers and can also include lists that are compiled by public authorities for a variety of reasons and in a variety of forms. For example, the AIG states that this may include collections of documents relating to a decision-making process such as an environmental impact assessment. The underlying purpose of these lists is that they will be able to assist applicants in accessing environmental information they are interested in.*

***Please could you FHC provide me with all public registers or lists of environmental information it holds.***

*If my request is denied in whole or in part, I would ask that you justify any redactions, by reference to specific exceptions with the Regs/Directive. I will also expect all non-exempt material to be released.*

*FHC have a duty under Regulation 9 to consider whether they should provide advice and assistance to me on different options to make information available. One of these being to offer an in-situ inspection at no cost then FHC must offer this option to the applicant alongside any charges they propose for making the information available via other*

*means. FHC may comply with its duty under Regulation 9 if it includes in its schedule of charges that certain information is available to inspect free of charge.*

5. FHC responded on 21 August 2017. It stated that it issues bathymetric information on its website which is measured annually and that it maintained training and a contract for oil spill assistance in case of need for Tier 1 and Tier 2 incidents.
6. The complainant wrote to FHC the same day stating:

*"FHC have not supplied me with the requested information. So this a request for an internal review.*

*The information authorities, including FHC, must organise and publish.*

*Regulation 4(4)(a) of the EIR states that public authorities must organise and publish, as a minimum, any information they hold that is listed in Article 7(2) of EU Directive 2003/4/EC. These being:*

*Article 7(2) European Directive 2003/4/EC The information to be made available and disseminated shall be updated as appropriate and shall include at least:*

*(a) texts of international treaties, conventions or agreements, and of Community, national, regional or local legislation, on the environment or relating to it;*

*(b) policies, plans and programmes relating to the environment;*

*(c) progress reports on the implementation of the items referred to in (a) and (b) when prepared or held in electronic form by public authorities;*

*(d) the reports on the state of the environment referred to in paragraph 3;*

*(e) data or summaries of data derived from the monitoring of activities affecting, or likely to affect, the environment;*

*(f) authorisations with a significant impact on the environment and environmental agreements or a reference to the place where such information can be requested or found in the framework of Article 3;*

*(g) environmental impact studies and risk assessments concerning the environmental elements referred to in Article 2(1)(a) or a reference to the place where the information can be requested or found in the framework of Article 3.*

*FHC have failed to provide or direct me to their public registers or lists of environmental information it holds; which it MUST publish, by law.*

*FHC must bear in mind that the Aarhus Convention and EU Directive 2003/4/EC set out principles that are in favour of disseminating environmental information.*

*Furthermore FHC have owned the site since 2004 and has not published the required public registers or lists for the last 13 years. FHC is not above the law and MUST comply with the Aarhus Convention, EU Directive 2003/4/EC, the Regulations and the Code of Practice.*

*So again I ask to be supplied with the public registers or lists as set out per 7(2) of the Directive."*

7. Following an internal review FHC wrote to the complainant and stated that it did not hold any information, other than that provided in its initial response, within the scope of the request.

## **Background**

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8. FHC explained that its current activities are much less than they have been in the past when Folkestone was the embarkation port for Sealink Ferries sailing across the Channel to France. They are now limited to running the small harbour at Folkestone and overseeing the fishing fleet of around 10 vessels and about 40 small craft which moor there. There has been no other commercial shipping business for over ten years.

## **Scope of the case**

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9. The complainant contacted the Commissioner on 20 September 2017 to complain about the way his request for information had been handled.
10. The Commissioner considers the scope of this case to be to determine whether FHC holds the information requested and complied with its obligations under regulation 5(1) of the EIR.

## Reasons for decision

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### **Regulation 5(1) – duty to make environmental information available on request**

11. Regulation 5(1) says that a public authority that holds information shall make it available on request.

### **Regulation 12(4)(a) – environmental information not held**

12. Regulation 12(4)(a) says that an authority may refuse to disclose information to the extent that it does not hold that information when an applicant's request is received.
13. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
14. In other words, in order to determine such complaints the ICO must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or was held at the time of the request).
15. The Commissioner asked FHC a number of questions relating to how it had tried to locate any information within the scope of the request.
16. In its submission to the Commissioner FHC argued that the complainant had fundamentally misunderstood the powers and duties of the Commissioner under the legislation. Specifically, the powers of the ICO are to direct that material which is held by a public authority must be disclosed on request unless subject to an exception.
17. Furthermore, the Commissioner does not have the authority to determine what information should be held by a public authority.
18. The Commissioner acknowledges the limitations of her powers and concurs that she is unable to tell a public authority what information it should hold.
19. Regardless of FHC's submissions it remained unclear to the Commissioner whether it had actually carried out any searches, and if so what the outcome was. She further noted that FHC had also stated that the *request 'would be unreasonable in scope'* and that the *'request was not proportionate'* and that it was a very broad request. Therefore it was

unclear if it considered that regulation 12(4)(b) or 12(4)(c) may apply. The Commissioner therefore sought further clarification.

20. In its second submission FHC confirmed that after the initial request searches were carried out of both electronic and manual files. FHC explained that as it is such a small organization this did not take a significant amount of time. Following the request for an internal review, both the Harbour Manager and Captain Tom Miller, who chairs the Folkestone Harbour Advisory Board were also consulted.
21. The Harbour Manager was asked to identify the information she held that she believed was relevant to the request. She explained her filing system (electronic and paper), and the files were checked. It was determined that, consistent with the response to the initial request, there was nothing pertinent to the request except for the bathymetric information and the stand-by training and contract for support should a Tier 1 or Tier 2 oil spill incident occur.
22. Following this, Tom Miller was consulted, who also confirmed that to his knowledge nothing more was held or had been discussed at any board meetings which would inform the response. He explained that the bathymetric survey is required only every two years but that Folkestone Harbour does it annually to assist its users, and expressed the view that the low level of activity at Folkestone Harbour, a very small Harbour, did not require additional policies or activities.
23. In relation to regulations 12(4)(b) and 12(4)(c) of the Regulations, FHC explained that it did consider the request to be both manifestly unreasonable and too general, and it did not consider these grounds to be mutually exclusive.
24. It further explained that it considered that the request was manifestly unreasonable due to its being vexatious. The complainant's requests are numerous and frequent and bear no obvious relationship to the complainant and his interests or indeed to one another, and seem to sit only within a broader context in which the complainant's website, which features intemperate and critical writing relating to Sir Roger De Haan (amongst others) also sits.
25. FHC also considered the request to be too general as the request was essentially a request for all and any environmental information held by FHC. However, it considered the crucial point was that, after carrying out searches, no relevant information was held and no relevant information is being withheld by FHC.
26. FHC further argued that the complainant does not allege that its search for the information requested has been inadequate. He does not

complain that FHC is concealing information it does hold and should be disclosing. His complaint appears to be that if FHC does not hold the information then it should do.

27. It follows that if a proper search has been conducted in response to a request and the only information matching the request has in fact been disclosed then the complaint will not be upheld. Therefore the Commissioner considers, that on the balance of probabilities, FHC does not hold any further recorded information within the scope of the request.

## Right of appeal

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28. 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,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

29. 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.
30. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed** .....

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**