

Freedom of Information Act 2000 (Section 50)

Environmental Information Regulations 2004

Decision Notice

Date: 5 February 2009

Public Authority: The Mersey Docks and Harbour Company
Address: Maritime Centre
Port of Liverpool
L21 1LA

Summary

The complainant wrote to the Mersey Docks and Harbour Company (the "MDHC") and requested information relating to a landing stage which sunk in 2006. The MDHC refused to comply with the request, claiming that it did not constitute a public authority for the purposes of the Environmental Information Regulations 2004 (the "EIR"). The Commissioner has considered the case and has decided that the MDHC is a public authority under the EIR and as such is required to consider whether the requested information is environmental information, and if so to respond to the request.

The Commissioner's Role

1. The 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 11 April 2007 the complainant wrote to the MDHC and requested the following information:

"[regarding] ... berthing charges, passenger dues, rents and licence fees received by you in respect of the landing stage, please can you also provide us with details from your statutory and other records of what has been received by you and from whom, since [5 July 1985]".

3. The MDHC wrote to the complainant on 26 April 2007, however, it did not address the request for information.
4. The complainant wrote to the MDHC again on 25 May 2007 and repeated its request for information. In addition, the complainant requested:

“a copy of your full records of maintenance of the landing stage”.
5. It is not clear from the correspondence on file whether the complainant received a response to its letter of 25 May 2007. What is clear is that the complainant wrote to the MDHC again on 24 August 2007 and stated that it believed the MDHC was subject to the EIR, and that it intended to use the EIR to obtain the requested information.
6. Having not received a response, the complainant wrote again to the MDHC on 28 September 2007 and repeated its request for information. The complainant cited the decision of the Information Tribunal (the “Tribunal”) in the case of *Port of London Authority v Information Commissioner* (EA/2006/0083) (the Port of London case), in which the Port of London Authority (the “PLA”) was deemed to constitute a public authority for the purpose of the EIR. The complainant explained that in its view, its case was analogous to that of the PLA.
7. On 8 October 2007 the MDHC wrote to the complainant and asked it to explain the basis on which it considered the information requested to be ‘environmental information’ within the meaning of the EIR.
8. The complainant wrote to the MDHC on 7 November 2007 and explained that it considered the information requested to constitute environmental information for the following reasons:

Request for maintenance records

- The complainant suggested that the information fell within regulation 2(1)(c) EIR as a measure which affects the elements of the environment listed in regulation 2(1)(a). It explained that “it is self evident that the Landing Stage and its maintenance, which includes dredging, affects the river, the river bed and the associated natural processes, and so the maintenance records constitute environmental information...”
- The complainant also suggested that regulation 2(1)(f) may apply to the requested information, as silting at the rear of the landing stage (one of the elements of the environment listed in regulation 2(1)(a)) affects the state of human health and safety, as where silting has occurred hand gangways are sometimes required on the landing stage.

Request for charges

- The complainant explained that records of charges made by the MDHC record the use of the landing stage, and therefore relate to an activity, namely the

movement of vessels on the Mersey, which affects or is likely to affect the elements of the environment listed in regulation 2(1)(a).

9. Having not received a response, the complainant wrote to the MDHC again on 6 December 2007.
10. On 12 December 2007 the MDHC wrote to the complainant and explained that, in its view, it did not constitute a public authority for the purpose of the EIR, and therefore it was not obliged to provide the requested information. The MDHC stated that:

“the constitution of the Port of London Authority is entirely different to that of Mersey Docks and Harbour Company and therefore the decision in relation to the Port of London Authority is not applicable to the Mersey Docks and Harbour Company”.
11. The complainant wrote to the MDHC on 21 December 2007. It stated that it considered the MDHC was sufficiently similar to the PLA to be brought under the EIR. The complainant asked the MDHC to review its decision to withhold the requested information.
12. The MDHC responded on 17 January 2008. It maintained that it was not bound by the EIR, however provided a schedule of its expenditure regarding the maintenance of the landing stage on a ‘without prejudice’ basis, along with invoices, purchases and expenditure records used to prepare the schedule.

The Investigation

Scope of the case

13. On 5 March 2008 the complainant contacted the Commissioner to complain about the way its request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - i. whether the MDHC constitutes a public authority for the purposes of the EIR;
 - ii. whether the requested information is environmental information; and
 - iii. whether the information should have been released to the complainant.
14. For reasons that shall be explained in the ‘other matters’ section below, the Commissioner has only considered point (i) of the complaint.

Chronology

15. On 3 April 2008 the Commissioner wrote to the MDHC and informed it that he had received a complaint under the EIR. The MDHC wrote to the Commissioner on 29 April 2008 and explained that it did not consider itself to be bound by the Act.

16. The Commissioner wrote to the MDHC on 21 October 2008 and explained that, in his view, the MDHC was caught by the EIR and therefore obliged to respond to requests for information made under them. The Commissioner asked the MDHC to provide him with the information necessary to progress the complaint to the next stage, or, if it continued to believe that the MDHC was not a public authority for the purposes of the EIR, it should explain to him why this was the case.
17. On 4 November 2008 the MDHC wrote to the Commissioner and explained that it did not believe it was bound by the EIR, for reasons set out in its earlier correspondence. It did not provide any further detail.
18. The Commissioner wrote to MDHC again on 6 November 2008 and requested that it provide him with certain information to allow a decision to be made as to whether MDHC constituted a public authority for the purpose of the EIR.
19. On 14 November 2008 the MDHC wrote back to the Commissioner and provided the information requested. In addition, it provided the Commissioner with a schedule of information detailing charges it had received in respect of the landing stage since 1985. It explained that it did not consider this information was environmental, and further that it was 'commercially confidential'.

Analysis

Procedural matters

20. The full text of all the regulations cited is set out in the legal annex to this Decision Notice.

Definition of 'public authority'

21. The Commissioner has considered whether the MDHC is a public authority for the purposes of the EIR. Regulation 2(2) EIR sets out the organisations which will constitute public authorities for the purposes of the EIR. The Commissioner has considered the various categories of organisations set out at regulation 2(2) and has determined that regulation 2(2)(c) is most appropriate in this case.
22. 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...”

23. The EIR do not define what is meant by “functions of public administration”.
24. In the Port of London case, one of the issues the Tribunal considered was whether the PLA constituted a public authority for the purposes of regulation 2(2)(c) EIR. The Commissioner put forward the following factors, which he

considered were to be taken into account in determining this issue, and which the Tribunal found “helpful”:

- whether the functions exercised by the ‘public authority’ are typically governmental in nature;
- whether the functions of the body in question 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.

The Commissioner has been guided by these factors when considering this case.

25. The Commissioner has considered the extent to which the duties of the MDHC can be said to be ‘governmental in nature’. The Tribunal did not define what is meant by ‘governmental in nature’ in the Port of London case. The Commissioner considers 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.
26. The MDHC was incorporated as a public trust in 1857 known as the Mersey Docks and Harbour Board and was reconstituted as a statutory company in 1971, by virtue of section 4(1) of the Mersey Docks and Harbour Act of the same year. The MDHC therefore has a statutory basis, satisfying the fourth consideration set out at paragraph 24.
27. According to its website (www.shipcanal.co.uk) the MDHC is both the Statutory Harbour Authority (SHA) for the Port of Liverpool and the Competent Harbour Authority (CHA) for the same port under the provisions of the Pilotage Act 1987.
28. Accordingly, the MDHC is bound by the Department for Transport's Port Marine Safety Code (the “Code”), which is a compulsory code of conduct that applies to all CHAs. The Code, and further information about it, is available online at the following link:

<http://www.dft.gov.uk/pgr/shippingports/ports/pmsc/portmarinesafetycodeintroduction>
29. The Commissioner is aware that a number of organisations will be subject to safety regulations, and that this will not necessarily result in them being considered public authorities under the EIR. However, the Commissioner considers that the following extracts from the introduction to the Code, which detail the role of CHAs in respect of the public interest, go beyond what would ordinarily be expected of an organisation in terms of safety measures, and represent a different level of highly extensive control over safety:

- “16. Harbour authorities have been created by statute to serve a public interest. Where a harbour authority has been established, there is a public right to use the harbour for the shipping and unshipping of goods and passengers. As a general rule, there is also a public right of navigation in harbour waters. The public interest is wider than that of harbour users, however, including the local community and environment; and there are duties to ensure that these too are protected in the management of the harbour undertaking.
17. Harbour authorities have a duty to take reasonable care, so long as the harbour is open for the public use, that all who may choose to navigate it may do so without danger to their lives or property. The function of a harbour authority is to regulate and facilitate the exercise of these rights.
18. Every harbour authority is given general and specific statutory powers to enable it to discharge the duties imposed upon it. These include powers to raise dues for the discharge of a harbour authority's statutory obligations. People use ports on the condition that they pay dues. Safety systems must be properly funded. The exercise of any [of] these powers is ineffective unless it fulfils its purpose. The Code therefore concentrates on the standard to which powers are to be undertaken.
19. The specific statutory duties outlined in this part of the Code imply a general obligation to keep under formal and active consideration the overall safety of the harbour, and to apply all available statutory powers as appropriate to secure the safe use of the harbour by ships and other craft.”
30. The Code also explains that CHAs should hold themselves publicly accountable in respect of their duties to the public interest:
- “20. Harbour authorities have duties to ensure the safety of waters within their jurisdiction. Harbour authorities should hold themselves publicly accountable for the duties they have to the public interest. They must treat these duties as primary. Their boards are accountable for the standards they set, the resources they allocate to safety - and for the effectiveness of systems they choose to adopt. Board members' approach to safety will be judged by the decisions they make. Management at all levels taking safety seriously give an essential lead to staff, users and other interests. They will also notice if the requirements of the Code are not taken seriously or properly resourced. Harbour authorities are accountable not only to users but in respect of their local communities and natural environment as legitimate elements of the public interest. Authorities need to adopt an open approach, promoting consultation with a range of interests including users. These interests must recognise in turn that they share a general duty to ensure the safety of the harbour, but not the formal legal duties and powers of the authority.”
31. The Code also sets out the general duties and powers applying to CHAs, under paragraph 1.2.1:

- “A. Harbour authorities have a duty to take reasonable care, so long as the harbour is open for the public use, that all who may choose to navigate it may do so without danger to their lives or property.
 - B. This includes an obligation to conserve, and facilitate the safe use of, the harbour; and a duty of care against loss caused by the authority's negligence.
 - C. Each harbour authority has an obligation to have regard to efficiency, economy and safety of operation as respects the services and facilities provided.
 - D. Harbour authorities typically have an express duty to take such action as the harbour authority consider necessary or desirable for or incidental to the maintenance, operation, improvement or conservancy of their harbour.”
- 32. In addition, the Code sets out, at paragraph 1.3.1, a number of specific duties and powers relating to CHAs:
 - “A. A harbour master must have his powers determined in byelaws.
 - B. Powers to direct vessels are available - and should be used - to ensure safety of navigation.
 - C. Dangerous vessels and substances, and pollution, must be effectively managed.
 - D. A pilotage service must be provided if required in the interests of safety.
 - E. Properly maintained aids to navigation must be provided, and any danger to navigation from wrecks or obstructions effectively managed.”
- 33. The Commissioner considers that paragraphs 29 to 32 make it clear that the MDHC exercises functions which are governmental in nature, thus satisfying the first of the considerations set out at paragraph 24.
- 34. The Code also outlines the Government's role in working with CHAs to uphold standards and to safeguard the public interest:
 - “32. The Code fulfils the Government's role to ensure that an agreed overall standard is applied; and to safeguard the public interest. The Government has therefore undertaken not only to promote an agreed standard but also good practice. This will include advice on appropriate powers, and accessible procedures for authorities to adopt them.
 - 33. The Government represents the flag state and the port state, with responsibility for enforcing internationally agreed standards for ships' seaworthiness and operation. It aims to work with port authorities in discharging this function, to ensure that their operations fully and properly discharge their duties, and to support them in implementing them.
 - 35. Harbour authorities will not be required to submit their plans for formal approval before putting them into operation. These plans will relate to their local duties and powers for which they are accountable. Harbour authorities will, however, be asked to supply to the Department of the

Environment, Transport and the Regions copies of the policies and plans required by this Code to be published. The Department is committed to working closely with the industry to implement the Code, and to monitor its effect. Regular meetings with representative bodies will be held for this purpose: meetings may be sought by and with individual authorities as appropriate. The Department aims to assess progress with initial implementation at six-monthly intervals and will invite harbour authorities to assist with surveys for this purpose.”

35. Paragraphs 32 and 33 of the Code make it clear that the Government regards CHAs as discharging a public function and therefore, if they did not carry out this function, another body would have to be established to fulfil this role. Clearly, the management and protection of the sea and skies are the responsibility of the Government; failure to properly protect these areas would have significant national and international security implications. Therefore, the case of the MDHC can be distinguished from that of Network Rail, which the Tribunal decided did not constitute a public authority for the purposes of the EIR in the case of *Network Rail Ltd v Information Commissioner* (EA/2006/0061 and EA/2006/0062).
36. Furthermore, there is 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.
37. The Commissioner has also considered whether the MDHC has powers and duties which go beyond those that he would expect a private organisation to have. According to the Code, CHAs:
 - can make byelaws (paragraph 1.2.11) and should prosecute to enforce them (2.4.4);
 - can appoint a harbour master (1.3.2);
 - must comply with directions from the Secretary of State where an accident has occurred and oil is likely to cause large scale pollution (1.3.6);
 - can give ‘general directions’ to regulate the movement and berthing of ships (1.3.5);
 - can prohibit entry to a port or harbour or detain a vessel (1.3.7 – 1.3.9);
 - must have regard to the environment in the exercise of all its powers and duties (1.3.30); and
 - can raise dues to pay for the discharge of its legal duties (1.6.1).
38. The MDHC also has powers relating to the Port of Liverpool Police Force, as confirmed on its website (<http://www.portofliverpool.police.uk>). The Chief Officer of the Port of Liverpool Police is accountable to a Police Committee consisting of three representatives from the MDHC, together with independent representatives from the various Port users and includes Local Magistrates and a representative from Merseyside Police Authority.
39. The MDHC has argued that its constitution is different from that of the PLA and therefore the Tribunal’s decision in that case is not relevant to it (see paragraph 10). The Commissioner finds that the constitution of the MDHC is not a factor of

any significance when determining whether it carries out functions of public administration.

40. Taking into account all of the information set out above, the Commissioner is satisfied that the MDHC exercises functions of public administration.

41. The Tribunal, in the Port of London case, stated:

“...the PLA submit[s] that it is possible that an organisation may be a public authority in respect of some of the information they hold and not others... The Tribunal does not dissent from this general proposition...”

and therefore went on to consider whether the function that the request related to was a public or a private function.

42. Respectfully, the Commissioner does not consider that this is the correct approach. Instead, he believes that once an organisation is deemed to exercise some functions of public administration, it is a “public authority” for the purposes of the EIR and is therefore required to consider all requests for environmental information, whether the environmental information requested relates to one of its functions of public administration or not.

43. The Commissioner considers that the MDHC constitutes a public authority for the purposes of the EIR and is therefore obliged to respond to requests for environmental information under that legislation.

The Decision

44. The Commissioner’s decision is that the public authority did not deal with the request for information in accordance with the EIR, as it has failed to properly consider the complainant’s request for information.

Steps Required

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

To consider whether the requested information is environmental information. If the MDHC concludes that the requested information is environmental it should provide either the information, or a refusal notice meeting the requirements of regulation 14 EIR, to the complainant.

46. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

47. 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

48. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters.
49. The EIR oblige public authorities to respond to requests for environmental information by either providing the requested information, or a refusal notice under regulation 14, explaining why the information shall not be provided. If the information requested is not environmental information, the public authority is not obliged to respond under the EIR. In these cases, however, the Commissioner would encourage the public authority, as a matter of courtesy, to inform the complainant in writing that it does not consider the information requested to be environmental information. If the MDHC judges the information requested not to constitute environmental information, whilst he cannot require it to do so, the Commissioner would ask the MDHC to inform the complainant in writing of its decision. This is to ensure the complainant understands why it has not received either the information requested or a refusal notice and to allow it the opportunity to make a complaint to the Commissioner, to determine whether the information requested is environmental information, if it so wishes.
50. The EIR require public authorities to respond to requests for environmental information no later than twenty working days after the date of receipt of the request. However, as explained at paragraph 49 above, if the requested information is not environmental information, then the public authority is not obliged, under the EIR, to take any action. The Commissioner's decision in this case is that the MDHC is a public authority for the purposes of the EIR, however he has not considered whether the requested information is environmental information. Therefore, the Commissioner has not considered whether the MDHC has breached any procedural aspects of the EIR.

Right of Appeal

51. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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 served.

Dated the 5th day of February 2009

Signed

**Steve Wood
Assistant Commissioner**

**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.

The Mersey Docks and Harbour Act 1971

Section 4(1) The Mersey Docks and Harbour Board constituted as a body corporate by section 5 (Constitution of Board to be called “the Mersey Docks and Harbour Board”) of the Act of 1857 is hereby reconstituted as a company known as the Mersey Docks and Harbour Company.