

**Freedom of Information Act 2000 (FOIA)  
Environmental Information Regulations 2004 (EIR)  
Decision notice**

**Date:** 2 December 2022

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

**Decision (including any steps ordered)**

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1. The complainant requested information from Hayle Harbour Authority (“HHA”) relating to the removal of sand at Hayle Harbour. HHA claimed that it did not constitute a public authority for the purposes of FOIA and was not therefore obliged to respond to the request. The complainant referred HHA to a decision notice from 2011 in which the Commissioner found that HHA is a public authority for the purposes of the EIR. HHA provided no further response. The Commissioner has considered whether HHA continues to be a public authority for the purposes of the EIR.
2. The Commissioner’s decision is that HHA is a public authority for the purposes of the EIR and therefore bound by its provisions and that HHA did not deal with the request for information as required by the EIR.
3. The Commissioner requires HHA to take the following steps to ensure compliance with the legislation.
  - either disclose the requested information or issue a refusal notice meeting the requirements of regulation 14 of the EIR.

4. HHA must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of FOIA and may be dealt with as a contempt of court.

## **Request and response**

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5. On 24 November 2021, the complainant wrote to HHA and requested information in the following terms:

“May we please make a freedom of information request with regards to the sand at Hayle Harbour.

We would like to know

- 1) How much sand has been dredged;
- 2) How much other sand removed;
- 3) How the sand was analysed;
- 4) If it was approved by Hayle Harbour Advisory Group;
- 5) How much the sand was sold for; and
- 6) Could you also please explain the difference between Sennybridge (Hayle Harbour Authority) Ltd and Hayle Harbour Authority Operations Ltd.”

6. HHA responded on 25 November 2021. It stated that it was its understanding that harbour authorities are not subject to FOIA therefore it would not be responding to the request.
7. On 27 November 2021 the complainant referred HHA to a decision notice from 2011 in which the Commissioner found that HHA is a public authority for the purposes of the EIR<sup>1</sup>. HHA provided no further response.

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<sup>1</sup> [https://ico.org.uk/media/action-weve-taken/decision-notices/2011/635560/fer\\_0375670.pdf](https://ico.org.uk/media/action-weve-taken/decision-notices/2011/635560/fer_0375670.pdf)

## Scope of the case

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8. The Commissioner considers that the information requested is environmental information as defined in regulation 2(1)(c) of the EIR. The information requested in parts 1-5 of the request relate directly to the removal of sand at Hayle Harbour and therefore falls within the definition at 2(1)(c) of the EIR as this is an activity affecting a coastal area. The Commissioner's well-established view is that public authorities should adopt a broad interpretation of environmental information, with this in mind, the Commissioner's view is that, within the context of this request, the information requested in part 6 of the request also constitutes information on activities affecting the coastal area and is therefore environmental information.
9. The scope of this case is to determine whether HHA continues to be a public authority for the purposes of the EIR.

## Reasons for decision

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### Is HHA a public authority for the purposes of the EIR?

10. The EIR definition of what constitutes a public authority is broader than that of FOIA and focuses more on the functions the particular organisation performs.
11. Regulation 2(2) of the EIR sets out the definition thus:
  - (a) government departments;
  - (b) any other public authority as defined in section 3(1) of [FOIA], disregarding for this purpose the exceptions in paragraph 6 of Schedule 1 to [FOIA], but excluding—
    - (i) any body or office-holder listed in Schedule 1 to [FOIA] only in relation to information of a specified description; or
    - (ii) any person designated by Order under section 5 of [FOIA];
  - (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.

12. Clearly, HHA is not a government department, nor is it a publicly-owned company. HHA is not listed in Schedule 1 of FOIA and therefore it does not fit within the definition of either Regulation 2(2)(a) or Regulation 2(2)(b) of the EIR.

**Regulation 2(2)(c) – carrying out functions of public administration**

13. The Commissioner turns next to the question of whether HHA can be said to be carrying out functions of public administration.
14. Regulation 2(2)(c) of the EIR transposes, into UK law, Article 2(2)(b) of Directive 2003/4/EC which defines one category of public authorities to include:

“Any natural or legal person performing public administrative functions under national law, including specific duties or services in relation to the environment.”

15. In *Fish Legal & Another v Information Commissioner & Others* [CJ-279/12] (“Fish Legal CJEU”), the Grand Chamber of the Court of Justice of the European Union further defined that Article:

“The second category of public authorities, defined in Article 2(2)(b) of Directive 2003/4, concerns administrative authorities defined in functional terms, namely entities, be they legal persons governed by public law or by private law, which are entrusted, under the legal regime which is applicable to them, with the performance of services of public interest, inter alia in the environmental field, and which are, for this purpose, vested with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law.”<sup>2</sup>

16. In *Cross v Information Commissioner* [2016] AACR 39 and subsequently in *Information Commissioner v Poplar Housing and Community Regeneration Association* [2020] UKUT 182 (AAC), the Upper Tribunal further interpreted the judgement in *Fish Legal CJEU* as laying out a dual functional test which requires two distinct conditions to be met in order for an organisation to qualify as a public authority under Regulation 2(2)(c):

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<sup>2</sup> Whilst the *Fish Legal CJEU* ruling was issued prior to the UK leaving the European Union, the Commissioner considers that it stands as retained case law (and is therefore binding) unless and until such times as the UK’s senior courts decide otherwise.

- Firstly, the organisation must have been entrusted, under the legal regime applicable to the organisation, with the performance of services of public interest (in practice this means a specific piece of law must delegate functions to the organisation).
- Secondly, the organisation must have been vested with "special powers" with the performance of services of public interest.

### **The "Entrustment" condition**

17. HHA was established as a statutory harbour authority pursuant to the Hayle Harbour Act 1989<sup>3</sup> ("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."
18. The Commissioner's view is that operating a public harbour meets the criterium of performance of services of public interest. As the function was delegated to HHA under the Harbour Act, the Commissioner's view is that the entrustment condition is met.

### **The "Special Powers" condition**

19. In *Fish Legal* CJEU, the Court held that a public authority must have:  
"special powers beyond those which result from the normal rules applicable in relations between persons governed by private law"
20. After having sought the opinion of the European Court of Justice, the *Fish Legal* case was referred back to the UK courts where it was considered by a three-judge panel of the Upper Tribunal in *Fish Legal & Shirley v Information Commissioner and others* [2015] UKUT 0052 (AAC) ("Fish Legal UT"). In its ruling, the UT stated that the question to be asked was:  
"Do the powers give the body an ability that confers on it a practical advantage relative to the rules of private law?"
21. The Harbour Act vests HHA with a wide range of powers. The Commissioner must consider whether these powers provide HHA with a practical advantage relative to the rules of private law.

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<sup>3</sup> <https://www.legislation.gov.uk/ukla/1989/12/contents/enacted>

22. Hayle Harbour Company Limited (now HHA) operated the harbour facilities at Hayle prior to the adoption of the Harbour Act. The Harbour Act was enacted in order to give the Company additional powers so that the harbour is efficiently managed and to secure its commercial future.

23. The introduction to the Harbour Act states,

“(1) The Hayle Harbour Company Limited (“the Company”) operate the harbour facilities at Hayle harbour (“the harbour”) in Cornwall:

(2) Commercial operations other than fishing at the harbour have declined and facilities for the fishing fleets are in need of improvement:

(3) The entrance to the harbour is dangerous and the absence of a marked and dredged channel has contributed to the decline of the harbour:

(4) It is expedient that the Company should be given certain other powers in order to ensure that the harbour is efficiently managed and to secure its commercial future:

(5) It is expedient that the Company should be authorised to construct works at the harbour:

(6) It is expedient that the Company should be constituted harbour authority for the harbour:”

24. Given that the rationale for the enacting of the Harbour Act was to confer additional powers to Hayle Harbour Company Limited (now HHA), which was already operating the harbour, the Commissioner’s view is that the powers conferred under the Harbour Act were considered to provide HHA with a practical advantage relative to the rules of private law. The Commissioner therefore considers that the special powers condition is met.

### **The Commissioner’s Decision**

25. As both the entrustment and special powers conditions are met, the Commissioner’s decision is that HHA is a public authority for the purposes of the EIR as it is a body that carries out functions of public administration as defined in regulation 2(2)(c) of the EIR.

26. HHA is therefore bound by the provisions of the EIR. HHA did not deal with the request for information as required by the EIR. At paragraph 3 above HHA is now required to respond to the complainant’s request in accordance with the EIR.

## Right of appeal

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27. 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@justice.gov.uk](mailto:grc@justice.gov.uk)

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

28. 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.
29. 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 .....**

**Victoria James**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**