



Neutral citation number: [2023] UKFTT 01057 (GRC)

Case Reference: EA.2023.0133

**First-tier Tribunal
General Regulatory Chamber
Information Rights**

**Heard remotely by video
On: 3 October 2023**

Decision given on: 04 January 2024

Before

**TRIBUNAL JUDGE C GOODMAN
TRIBUNAL MEMBER M SAUNDERS
TRIBUNAL MEMBER S WOLF**

Between

WILLIAM SHIEL

Appellant

and

INFORMATION COMMISSIONER

Respondent

Representation:

For the Appellant: Mr Holland of counsel
The Respondent did not appear

Decision: The appeal is Dismissed

REASONS

Background

1. The North Sunderland Harbour Commissioners (the “NSHC”) is a statutory harbour authority which is responsible for the maintenance, operation and improvement of the North Sunderland Harbour, which is also known as Seahouses Harbour (“the Harbour”). In March 2023, there were approximately 28 commercial and 12 recreational vessels operating from or

kept in the Harbour. The Appellant lives in North Sunderland and is part owner of two fishing boats which operate from the Harbour.

2. The NSHC's governing instrument is the North Sunderland Harbour Order 1931 ("the 1931 Order"). The 1931 Order provides for a governing body of nine Commissioners, three of whom are to be elected from and by the registered fishermen of North Sunderland. The NSHC is required by the 1931 Order to maintain a register of local fishermen solely for the purpose of determining who is entitled to stand for and vote in elections for the fishermen's Commissioners.

The Request

3. On 13 and 14 August 2020 the Appellant made requests for information about the NSHC Commissioners from 2000 onwards and copies of meeting minutes. The Appellant re-sent those emails again on 30 March 2021. The NSHC declined those requests for information on the basis that it was not subject to the Freedom of Information Act 2000 ("FOIA").
4. On 25 May 2022, the Appellant made the following further request for information ("the Request"):

"Dear Chairman

In March of last year I asked the Commissioners to send me details of their names, dates of appointment and the names of their respective appointers.

After much delay the Commissioners refused to comply with my request saying they were not subject to the Freedom of Information Act 2000.

I now realise that, as a public authority for the purposes of the Environmental Information Regulations (EIR), the Commissioners are required to deal with requests for information under the EIR. The information I requested plainly comprises information on measures, including administration measures, and activities designed to protect elements of the environment as envisaged by the EIR. "Environmental Information" has been widely defined.

Warkworth Harbour Commissioners were held to be a public authority for the purposes of EIR in a decision of the Information Commissioner's Office in 2011.

I now understand it was the Commissioners' duty rather than mine to identify the relevant regulations governing the provision of the information I sought last year. The Commissioners were acting in direct breach of that duty by relying on the Freedom of Information Act when refusing to provide the information I sought last year. They ought to have known of their obligation to provide the information under EIR. They surely must have known they were acting in blatant contradiction of government guidance in the conduct of Trust Ports with its emphasis on openness and transparency.

Will the Commissioners now please provide the following information:

[1] The names of the current commissioners;

[2] The date on which each commissioner (not being a fisherman Commissioner) was appointed;

[3] The name of the appointer of each non fisherman Commissioner;

[4] The names of those persons on the register of fishermen;

[5] The dates of the last two elections of fishermen's Commissioners;

[6] The names of the elected fishermen's Commissioners.

I assume the requested information will be readily available from the Commissioners' records and therefore ask you to reply within 14 days. If any particular item is not so available please do not delay sending the remainder. You have in hand my payment of £100 towards the costs which you incur in providing me with the information I have requested.”

[Numbers in square brackets added by Tribunal for convenience of reference.]

5. The NSHC responded on 17 June 2022, noting that the Request was “substantially different” from the Appellant’s previous request in March 2021. The NSHC asserted that the information requested “(either previously or now)” was not environmental information which it was obliged to disclose pursuant to the Environmental Information Regulations (the “EIR”). Even if it was environmental information, the NSHC asserted that the exemption in Regulation 12(3) EIR (personal information) applied to information about living individuals, and the exemption in Regulation 12(4) EIR (manifestly unreasonable) applied to information about individuals who were dead and to its meeting minutes.
6. The NSHC did voluntarily provide in relation to paragraphs [1], [2] and [3] of the Request, the names of the then eight Commissioners, their years of appointment and the basis for their appointment. In relation to [6], no information was held because none of the Commissioners had been elected by fishermen. The NSHC later informed the Appellant that in relation to [5], it believed that the last election of fishermen’s Commissioners had been in 2000.
7. The Appellant made further requests for information on 21 July 2022. Those requests are not the subject of this appeal.

The Decision Notice

8. The Appellant complained to the Commissioner about the NSHC’s response to the requests for information which he had made in August 2020, March 2021 and May 2022.
9. The Commissioner opened a case in relation to the request dated 25 May 2022, the Request, and invited the Appellant to submit separate complaints if he also wished to complain about the earlier requests. In response, in an email dated 15 November 2022, the Appellant’s counsel, Mr Holland confirmed that the investigation should focus only on the request of 25 May 2022.
10. The Commissioner issued Decision Notice IC-201511-G1F4 to on 9 February 2023. The Commissioner concluded in relation to the Request that the NSHC had provided the information requested other than that falling within scope of paragraph [4] i.e. “the names of those persons on the register of fishermen”. The Commissioner concluded that this information was not environmental information as defined in the EIR, and therefore the NSHC had no obligation to disclose it in response to the Request.

The Appeal

11. The Appellant appealed to the Tribunal. The NSHC did not respond to an invitation to be joined as a second respondent to the appeal.
12. A remote hearing was held by video on 3 October 2023. The Commissioner did not attend. The Appellant did not attend but was represented by Mr Holland.
13. The Tribunal had before it an open bundle of 635 pages. In addition, Mr Holland provided a Skeleton Argument, a bundle of authorities, and a copy of a consent order in the High Court relating to the Appellant’s application for judicial review of the NSHC’s failure to hold an election of fishermen’s Commissioners since 2000.
14. There was no closed bundle; the Tribunal did not have access to the withheld information.

The Law

15. Regulation 5 EIR provides that subject to certain provisions, “a public authority that holds environmental information shall make it available on request”.
16. Regulation 2(1) EIR provides that:
 - “ “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... and the interaction among these elements;
 - ...
 - (a) 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)... as well as measures or activities designed to protect those elements;
 - ...”
17. The EIR give effect to the Aarhus Convention and EU Directive 2003/4/EC and must be interpreted as far as possible in light of the wording and purpose of the Directive and the Convention. The first recital to the Directive provides that:
 - “increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment”.
18. The definition of “environmental information” is to be interpreted broadly, but this does “not give a general and unlimited right of access to all information held by public authorities which has a connection, however minimal, with one of the environmental factors” in Regulation 2(1) (a) (*Glawischnig v Bundesminister für Sicherheit und Generationen* (13 June 2003)). In a borderline case, the Tribunal should be cautious in finding that information is to be disclosed.
19. In *Dept for BEIS v IC & Henney* [2017] EWCA Civ 844, the Court of Appeal proposed the following approach:

- a. identify the measure which the information is “on”;
 - b. information is “on” a measure if “it is about, relates to or concerns the measure in question” (at paragraph 37). The Upper Tribunal later observed that “the principle established by the Court of Appeal in *Henney* and in *Glawischnig* [is] that information which has only a minimal connection with the environment is not environmental information. The principle must apply not only in deciding whether information is on an environmental matter but whether a measure or activity has the requisite environmental effect” (*Dept for Transport v IC and Cieslik* [2018] UKUT 127 (AAC) at [33]);
 - c. identifying the relevant measure may require a consideration of the wider context and is “not strictly limited to the precise issue with which the information is concerned... it may be relevant to consider the purpose for which the information was produced, how important the information is to that purpose, how it is to be used, and whether access to it would enable the public to be informed about, or to participate in, decision-making in a better way” (at paragraph 43 of *Henney*). The definition should be applied purposively.
20. In Decision Notice FS50378095 issued on 6 October 2011, the Commissioner decided that Warkworth Harbour Commissioners (WHC), a statutory harbour authority like the NSHC, were a public authority for the purposes of the EIR and that information about the granting of a licence by WHC to lay moorings was “environmental information”. The Information Commissioner said:

“16. Having considered the [*Port Marine Safety Code*], the Commissioner considers the purpose of WHC, as a harbour authority, is to maintain, operate, improve and conserve the harbour. In short, to look after the physical asset and to keep it fit for purpose as a harbour. Performing this duty, including managing the letting of moorings, will have an impact on the environment and therefore can be considered a measure, under regulation 2(1)(c) of the EIR, likely to affect the elements of the environment. It therefore follows that information on how WHC carries out its duty to maintain the harbour will be information on that measure and hence environmental information.

17. It should be noted that the Commissioner does not consider that all information held by WHC is environmental information simply because its duties can have an environmental impact. For example, WHC may perform duties that do not have an environmental impact. However, in this case, the Commissioner considers that the letting of moorings and the terms under which they are let is likely to have some impact on the use of the harbour; for example the volume of vessels using it. This may have consequences for the environment and may also have an impact on other physical facilities at the harbour, which again will have some impact on the environment.”

Right of Appeal to Tribunal

- 21. The enforcement and appeals provisions of FOIA apply to the EIR by virtue of Regulation 18 EIR.
- 22. Section 50 FOIA allows any person (a complainant) to apply to the Commissioner for a decision as to whether a specific request for information made by the complainant to a public authority has been dealt with in accordance with the EIR. On receiving an application, the Commissioner must make a decision and must serve notice of their decision on the complainant and the public authority.

23. Section 57 FOIA gives the complainant and public authority the right to appeal to the Tribunal against a decision notice served on them by the Commissioner.
24. The powers of the Tribunal in determining appeals are set out in s.58 FOIA as follows:
- “(1) If on an appeal under section 57 the Tribunal considers -
- (a) that the notice against which the appeal is brought is not in accordance with the law, or
- (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,
- the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.
- (2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”
25. The Tribunal stands in the shoes of the Commissioner and takes a fresh decision on the evidence before us. The Tribunal does not undertake a review of the way in which the Commissioner’s decision was made.

Scope of the Appeal

26. Mr Holland submitted on behalf of the Appellant that the appeal concerned, not only the Request, but also the previous requests for information made by the Appellant in August 2020 and March 2021. Mr Holland submitted in particular that:
- a. in responding to the Request, the NSHC had repeated the previous requests and asserted that none of the information requested in any of the requests was “environmental information”;
 - b. correspondence between the NSHC’s solicitors and Mr Holland before the complaint was made to the Commissioner addressed all the requests;
 - c. the complaint to the Commissioner referred to all the requests;
 - d. Mr Holland’s email of 15 November 2023 could not be construed as excluding the earlier requests because he stated that the Request repeated the earlier requests; and
 - e. the Commissioner had addressed the earlier requests in the Decision Notice, saying at paragraph 12 that it declined to issue a decision on them because of the “undue delay” in bringing them to the Commissioner’s attention.
27. The Tribunal considered these submissions carefully. However, as noted in paragraphs 22 and 23 above, the right of appeal to the Tribunal under FOIA is against a decision notice served by the Commissioner, and that decision notice must relate to a specific request for information. The Decision Notice which is the subject of this appeal addressed only the Request. The Commissioner expressly declined, in paragraph 12 of the Decision Notice, to issue a decision in relation to the earlier requests. The fact that the Appellant and the NSHC

corresponded about the previous requests before or after service of the Decision Notice is not relevant to this appeal. The Appellant was invited by the Commissioner to make separate complaints in respect of the earlier requests, but declined to do so. The Tribunal concluded that the scope of the appeal was limited to the Request.

28. The information which is in scope of this appeal, which we shall refer to as the “withheld information”, is therefore:
 - a. under paragraph [2], the actual dates of appointment (only the years were provided by the NSHC);
 - b. under paragraph [4], the names of those persons on the register of fishermen; and
 - c. under paragraph [5], the date of the previous election of fishermen’s Commissioners before 2000.
29. Mr Holland confirmed at the hearing that the Appellant was not appealing in relation to the way in which the Request had been dealt with by the NSHC nor any failure in respect of its duty to assist and advise.
30. Mr Holland asked the Tribunal to make a declaration as to whether information which had been provided voluntarily by the NSHC was “environmental information”. The Tribunal declines to do so. Our statutory role, as set out in section 58 FOIA, is to decide whether or not a Decision Notice is in accordance with the law, not to make general declarations on the law. We are only required to decide matters which are in issue before us.

The Appellant’s position

31. We have set out below the Appellant’s submissions only in relation to the withheld information which we found to be in scope of this appeal.
32. The Appellant’s position was neatly summarised in paragraph 8.18 of Mr Holland’s letter to NSHC dated 21 July 2022 as follows:

“as the requested information concerns the governance of the Harbour, it is about, relates to and concerns the measures and activities in [*Regulation 2(1)(c) EIR*], and - applying a purposive test - its provision would quite plainly relate to the requirement that citizens have access to information to enable them to participate in environmental decision-making more effectively.”
33. That position was further developed in the grounds of appeal and Reply, and in Mr Holland’s Skeleton Argument and oral submissions, as follows:
 - a. Applying *Henney*, the withheld information is “environmental information” within Regulation 2(1)(c) EIR (Mr Holland confirmed at the hearing that he was no longer relying on Regulation 2(1)(a) or (f)).
 - b. The term “environmental information” must be given a broad meaning.
 - c. The Harbour, the water in it and the seabed below it, the air and atmosphere above it, the dry land it occupies, its buildings, pier and breakwater, and the coastal and marine area around it, are all “elements of the environment” within Regulation 2(1)(a).

- d. The withheld information is information “on” measures and activities affecting or likely to affect, or designed to protect, those elements.
- e. The relevant measures or activities were:
 - i. the Harbour itself because it was a human intervention which is designed to protect, and which affects, those elements of the environment;
 - ii. the 1931 Order because it was designed to protect and was likely to affect the Harbour and associated elements of the environment by constituting the NSHC and granting it powers to administer, maintain and improve the Harbour;
 - iii. the exercise by the NSHC of its powers under the 1931 Order to administer, maintain and improve the Harbour; and
 - iv. the constitution and governance of NSHC as set out in the 1931 Order and in particular the appointment of its governing body, the holding of elections, and the keeping of a register of fishermen who could stand and vote in elections.
- f. Not all information which related to those measures or activities would be “on” the measures and activities. For example, Mr Holland suggested, the appointment of a car park attendant or the menu for the Commissioners’ Christmas dinner would be too remote or extreme.
- g. However, the withheld information was “on” the measures or activities, in the sense that it was about, related to or concerned them in a wider context, taking into account the purpose for which the information was produced and that access to the information would enable the public to be better informed about and participate in decision making relating to the Harbour. Mr Holland submitted that there was a lack of transparency in relation to the governance of the NSHC. The Commissioners are personally accountable for their function and for marine safety in the Harbour, and are required to follow the Ports Good Governance Guidance and the Port Marine Safety Code.
- h. The Commissioner had misapplied the purposive approach required by *Henney*. Mr Holland emphasised that the NSHC’s powers included decisions about environmental control and that its governance had a clear impact on environmental protection. The purpose of the register of fishermen, “67 years before the Aarhus Convention”, was to enable public participation in environmental decision making in relation to the Harbour. Furthermore, the fishermen of North Sutherland, including the Appellant, have a particularly “intimate relationship with the Harbour and the aquatic environment”.

The Response of the Commissioner

- 34. In its Response, the Commissioner relied on the Decision Notice.
- 35. The Commissioner conceded that the NSHC had not fully responded to paragraphs [2] and [5] of the Request, but submitted that the information withheld in relation to these paragraphs was not in any event environmental information within the EIR.

36. In relation to the register of fishermen, the Commissioner submitted that the Appellant's approach was unduly broad and that the register:
- a. "would be at least one step removed from the "administrative measure" suggested by the Appellant and was therefore not "on" such a measure";
 - b. had no environmental purpose in itself and was not used to monitor actions with an environmental impact; and
 - c. even if arrangements for and the undertaking of the governance, management and administration of the Harbour were measures within the EIR, the register of fishermen was not "on" those measures.

Discussion

37. The reasons for the Tribunal's decision are set out in full below. There is no closed annex.
38. In reaching its decision, the Tribunal took into account all the evidence before it and the submissions made by both parties, whether or not specifically referred to, and applied the law as set out in paragraphs 15 to 20 above. We noted that the Commissioner's Decision in relation to WHC was not binding upon us.
39. It was not in issue between the parties that the NSHC are subject to the EIR. The issue for the Tribunal was whether the remaining withheld information identified in paragraph 28 was "environmental information" within Regulation 2(1)(c) EIR.

"Environmental information"

40. The water in the Harbour, the seabed below it, the air and atmosphere above it, the dry land it occupies, and the coastal and marine area around it, are all "elements of the environment" within Regulation 2(1)(a) EIR. The Harbour is made up of a number of such elements.
41. The Appellant submitted that the withheld information was environmental information within Regulation 2(1)(c) EIR because it was "on" measures or activities affecting or likely to affect those elements. As noted above, the Appellant identified the following relevant measures or activities: (1) the Harbour itself, (2) the 1931 Order, (3) the exercise of the NSHC's powers under the 1931 Order, and (4) the constitution and governance of the NSHC under the 1931 Order.

The Harbour

42. The Tribunal did not accept that the Harbour is itself a "measure" or "activity" within Regulation 2(1)(c) EIR. It is not a policy, legislation, plan, programme or environmental agreement, nor akin to such measures identified in Regulation 2(1)(c). Activities may take place in and around the Harbour which fall within Regulation 2(1)(c), but the Harbour itself is not an "activity" under Regulation 2(1)(c).

The 1931 Order

43. The Tribunal found that the 1931 Order, or parts of it, was a "measure" within Regulation 2(1)(c). It is a statutory instrument of the type listed in Regulation 2(1)(c) and, when made, it affected the elements of the environment. It provided for the transfer of the Harbour to the

NSHC and for its management and maintenance. It provided for land to be acquired and for specific works to be carried out. It defined the limits of the Harbour and gave the NSHC powers to dredge and excavate the foreshore and seabed, and to levy rates for use of the Harbour, including by fishing vessels.

44. However, the Tribunal found, applying *Henney*, that the withheld information was not information “on” the 1931 Order. It is not “about” the 1931 Order. The register of fishermen is created, and the elections and appointments of Commissioners take place, as a result of the 1931 Order but they do not of themselves relate to or concern the Order, and in particular, those parts of the Order which have an impact on the environment. The purpose of creating the register and holding elections is to appoint Commissioners, an activity which has no immediate impact on the environment. The production and use of the register and information about elections and appointments has only a minimal connection to and impact on the environment – because those individuals who are elected or appointed as Commissioners will form part of a body which has powers and duties, the exercise of which are likely to have an impact on the environment.
45. In relation to the wider context, the Tribunal noted that as at the date of the NSHC’s response to the Request, no elections of fishermen’s Commissioners had taken place for over 20 years. Information on the register of fishermen (if it exists) and about elections prior to 2000 is highly unlikely to have any relevant impact on the environment. While it is arguable that the election of fishermen’s Commissioners is an early example of involving “the public” in environmental decision-making, that does not of itself mean that the register of fishermen is “on” the relevant measure i.e. the 1931 Order.

The exercise of the NSHC’s powers under the 1931 Order

46. The Tribunal found that in exercising its powers under the 1931 Order and its duties as a statutory harbour authority, the NSHC will regularly implement measures and carry out activities which affect or are likely to affect the elements of the environment. Like the WHC, the NSHC has a duty to maintain, operate, improve and conserve use of the Harbour, and the Port Marine Safety Code provides that it must have regard to the environment in exercising those duties.
47. A specific exercise of the NSHC’s powers, such as a decision to let moorings or to dredge the seabed, is therefore likely to have the requisite environmental effect to be a measure or activity under Regulation 2(1)(c). However, the Appellant has not identified in this appeal a specific relevant exercise of the NSHC’s powers which the withheld information is “on”. The Tribunal does not accept that the exercise of the NSHC’s powers in a general sense - its entire operation and activities - can be a “measure” or “activity”. As observed by the Commissioner in relation to WHC, not all information held by WHC was environmental information “simply because its duties can have an environmental impact”. Like WHC, the NSHC may also exercise powers and perform duties that do not have an environmental impact.

The constitution and governance of the NSHC under the 1931 Order

48. The Tribunal found that the appointment and election of Commissioners, the keeping of a register of fishermen and the governance of the NSHC generally was not a measure or activity within Regulation 2(1)(c). Those activities have only a minimal connection to and impact on the environment – because the individuals who are elected or appointed will form part of a

body which has powers and duties, the exercise of which are likely to have an impact on the environment.

49. If the governance of the NSHC generally was a measure or activity within Regulation 2(1)(c), information about the governance of any public authority which carries out activities which impact the environment would be classified as “environmental information”– including, for example, information about the governance of many local authorities and Government departments. Mr Holland was not able to take us to any authority where “environmental information” had been interpreted so widely. The authorities he provided all related to particular schemes, plans and projects which had a clear environmental impact. No such specific scheme, plan or project was identified by the Appellant in the context of this appeal.

Conclusion

50. The Tribunal concluded that the withheld information was not environmental information within Regulation 2(1)(c) and therefore the NSHC was not under a duty to disclose it pursuant to Regulation 5 EIR. The Tribunal therefore did not go on to consider whether any exemption would apply.
51. The appeal is dismissed.

Signed: District Tribunal Judge C Goodman

Date:14/12/2023