

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 16 May 2018

Public Authority: Folkestone Harbour Company
Address: Strand House, Pilgrims Way, Monks Horton,
Ashford, Kent
TN25 6DR

Decision (including any steps ordered)

1. The complainant has requested information relating to land comprised in several title numbers.
2. The Commissioner's decision is that Folkestone Harbour Company (FHC) does not hold any of the information requested. However, the Commissioner also finds that FHC did not comply with its duties under regulation 14(5)(a) as it failed to advise the complainant of his right to request a review.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Request and response

4. On 23 August 2017, the complainant wrote to FHC and requested information in the following terms:

"Please could you provide me with all

1. *policies plans and programmes*
2. *progress reports*
3. *reports on the state of the environment*
4. *data or summaries of data derived from the monitoring of activities affecting, or likely to affect, the environment;*
5. *environmental impact studies and risk assessments concerning the environmental elements referred to in Article 2(1)(a)*

relating to the whole of the land comprised in Title Numbers K721157, K774627, K744624 and K667505."

5. FHC responded on 20 September 2017 and denied holding the requested information.
6. Following an internal review FHC wrote to the complainant on 17 October 2017 and maintained its position.

Background

7. 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

8. The complainant contacted the Commissioner on 17 October 2017 to complain about the way his request for information had been handled as he considered that FHC should have provided him with the information requested.
9. The complainant stated that FHC has issued a complete blanket refusal which he believes is not a tenable position and that the information requested should have been released, either in whole or part.
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 the EIR.

Reasons for decision

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.
12. FHC explained that the request was to provide the complainant with information held by a separate entity which is the Folkestone Harbour (General Partnership) Limited (“FHGP”). This is a private company that is not subject to Environmental Information Regulations 2004. FHC holds none of the information requested by the complainant.

13. The complainant's position appears to be that because the owner of the Folkestone Harbour Company is the principle shareholder of (amongst other companies) FHC and FHGP then the EIR and the Aarhus Convention must extend to all of the companies of which he is a shareholder and not just FHC.
14. Consequently the first issue for the Commissioner to consider is whether FHGP is a public authority for the purposes of EIR.
15. Public authorities include government departments, local authorities, the NHS, police forces and universities. The Regulations also cover some other bodies that do public work that affects the environment. For simplicity, all organisations subject to the Regulations are referred to as 'public authorities'.
16. The Regulations cover public authorities as defined by the Freedom of Information Act, in England, Northern Ireland and Wales. The public authorities listed in Schedule 1 of the Act are subject to the Regulations.
17. The following are public authorities under the EIR:
 - Government departments and their executive agencies.
 - Bodies listed in Schedule 1 of the Freedom of Information Act 2000 (FOIA), unless they are listed for only some of the information they hold.
 - Companies wholly-owned by other public authorities under FOIA.
 - Bodies carrying out functions of public administration. A body carries out functions of public administration if it has been given special legal powers that are not available to ordinary companies.
 - Bodies that have public responsibilities, carry out functions of a public nature, or provide public services relating to the environment, and which are under the control of another public authority.
18. The Regulations also cover organisations that carry out 'functions of public administration'; these functions do not have to relate to the environment – these could include private companies or public private partnerships. Bodies that are under the control of public authorities may also be included if they carry out functions that relate to the environment.
19. Clearly FHGB is not a Government department or executive agency, neither is it listed in Schedule 1 of the FOIA. FHGB is not wholly owned by another public authority and the Commissioner can find no evidence

that it carries out functions of public administration. Therefore the Commissioner concludes that FHGB is not a public authority.

20. The next matter is to determine if FHC holds any of the requested information.

Regulation 12(4)(a) – Information not held

21. FHC has explained that it does not hold any information in relation to the request. Regulation 12(4)(a) of the EIR states that a public authority may refuse to disclose information to the extent that it does not hold that information when an applicant's request is received.
22. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. In addition, she will consider any reason why it is inherently likely or unlikely that information is not held.
23. The Commissioner is not expected to prove categorically whether the information was held, but to make a judgement on whether the information was held on the civil standard of the balance of probabilities.
24. In its submission to the Commissioner FHC stated that it had never held such information and would have no reason to do so.
25. Despite the complainant's assertions that FHGB and FHC are both public authorities and are inextricably linked, the Commissioner has no evidence that this is the case.
26. Therefore the Commissioner considers, that on the balance of probabilities, FHC does not hold any recorded information within the scope of the request.
27. The complainant stated:

"I would like to draw to your attention that there was a breach of my s10(1) rights and that the Organisation failed to inform me of my appeal rights in their internal review response, thus breaching the act and potentially my Article 6 rights, as there is a legitimate expectation of fair process on my behalf.

Furthermore they sought the motives of the request when the code of practice and the ICO guidance make it clear that requests are "motive blind". They also ask "How many more requests are we to expect from

you please?" They have received seven EIR Requests from me in the past six months."

28. The complainant has referred to section 10(1), however this relates to the FOIA. The equivalent regulation in the EIR is regulation 14(2) which states:

(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.

29. From the evidence provided to the Commissioner FHC provided its response on the 18th working day and has therefore complied with regulation 14(2).

30. However, regulation 14(5) states:

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.

31. In essence regulation 11 is the right to request an internal review. In this instance FHC did not advise the complainant of this right.

32. Regulation 18 relates to enforcement and appeal provisions. However, it has no bearing in the context of this request under the EIR.

Other matters

33. In correspondence to the Commissioner the complainant raised other matters relating to FHC's overall handling of EIR requests.

34. The complainant has advised, and the Commissioner has seen evidence of, FHC's questioning his motives and how many more requests he is likely to make.

35. The Commissioner's guidance¹ states that in most cases, authorities should consider requests without reference to the identity or motives of the requestor.
36. An authority may however take the requester's identity and motives into account in some limited circumstances.

The requester's identity may be taken into account when;

- the authority has reason to believe that the requester hasn't provided their real name;
 - the requested information contains the requester's own personal data;
 - assessing whether the information is reasonably accessible to the requester by other means; and
 - assessing whether the request is a repeated request.
37. The requester's identity and motive may be taken into account when the authority is considering refusing a request as manifestly unreasonable. The Commissioner has not been provided with any evidence from the complainant that indicates FHC were considering the exception cited at regulation 12(4)(b) – manifestly unreasonable. However, the Commissioner has not sought any arguments from FHC as to why it felt it was necessary to question the motives or number of requests it could expect to receive. Consequently, the Commissioner is not in a position to comment any further other than to advise that FHC should refer to her guidance when dealing with future requests from any individual.

¹ <https://ico.org.uk/media/for-organisations/documents/1043418/consideration-of-the-identity-or-motives-of-the-applicant.pdf>

Right of appeal

38. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

39. 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.
40. 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
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