THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

UPPER TRIBUNAL CASE NOS: UA-2024-000721 and 000905-GIA
[2024] UKUT 369 (AAC)
SHIEL V INFORMATION COMMISSIONER

Decided following an oral hearing on 23 October 2024.

Representatives

William Shiel	Jonathan Rodger, lay representative
Information Commissioner	Clíodhna Kelleher of counsel, instructed by Information Commissioner's Legal Department

DECISION OF UPPER TRIBUNAL JUDGE JACOBS

On appeal from the First-tier Tribunal (General Regulatory Chamber)

References: EA/2023/0133 and 0338
Decision dates: 4 January 2024 and 22 January 2024

The decisions of the First-tier Tribunal did not involve the making of an error on a point of law under section 12 of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

A. Introduction

1. These cases concern the application of the definition of 'environmental information' as defined in regulation 2(1) of the Environmental Information Regulations 2004 (SI No 3391) ['EIR' from now on].

2. Mr Shiel made requests for information from the North Sunderland Harbour Commissioners . The Commissioners are a public authority for the purpose of EIR, but not for the purpose of the Freedom of Information Act 2000 ['FOIA' from now on].

3. The North Sunderland Harbour Order 1931 (Statutory Rules and Orders No 928) provides for the governance of the harbour. It has been amended, but not in a way that

affects this case. Article 7 provides for the execution of the Order to be the responsibility of the Commissioners, who are made a body corporate.

4. EIR provides for the circumstances in which the Commissioners were under a duty to provide environmental information on request. It does not prevent the Commissioners from disclosing other information and they have done so.

B. The legislation

5. The issue is whether the information requested was 'environmental information' under EIR. Regulation 2(1) contains the definition:

> '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 the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c); …

6. The 'Directive' is defined as 'Council Directive 2003/4/EC'.

C. The case law

7. I was referred to three cases.

8. *Department for Business, Energy and Industrial Strategy v Information Commissioner* [2017] PTSR 1644 is a decision of the Court of Appeal. Like the parties, I will refer to this case as *Henney*, which was the name of the requester.

9. The following passages from Beatson LJ's judgment set out how the definition of environmental information is to be interpreted and applied:

14. The starting point is that the EIR must be interpreted, as far as possible, in the light of the wording and the purpose of the Directive, which itself gives effect to international obligations arising under the Aarhus Convention. …

15. The importance of the obligation to provide access to environmental information is seen from the recitals to the Directive and the Aarhus Convention. The first recital to the Directive states 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.'

The recitals to the Aarhus Convention include:

> 'citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters';

and,

> 'improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns'.

16. It is well established that the term 'environmental information' in the Directive is to be given a broad meaning and that the intention of the Community's legislature was to avoid giving that concept a definition which could have had the effect of excluding from the scope of that directive any of the activities engaged in by the public authorities …

35. … [It is wrong to take] an approach that assesses whether information is 'on' a measure by reference to whether it 'relates to' or has a 'connection to' one of the environmental factors mentioned, however minimal. That … is not permissible because, contrary to the intention of the Directive, it would lead to a general and unlimited right of access to all such information.

36. … an approach which is not focussed on the statutory definition is liable to introduce uncertainty and error. …

37. … Information is 'on' a measure if it is about, relates to or concerns the measure in question. …

39. … the Tribunal is not restricted by what the information is specifically, directly or immediately about. In my judgment, this is consistent with the language used in regulation 2(1)(c). Nothing in that language requires the relevant measure to be that which the information is 'primarily' on.

43. … identifying the measure that the disputed information is 'on' may require consideration of the wider context, and is not strictly limited to the precise issue with which the information is concerned, here the communications and data

component, or the document containing the information, … 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. None of these matters may be apparent on the face of the information itself. It was not in dispute that, when identifying the measure, a tribunal should apply the definition in the EIR purposively, bearing in mind the modern approach to the interpretation of legislation, and particularly to international and European measures such as the Aarhus Convention and the Directive. It is then necessary to consider whether the measure so identified has the requisite environmental impact for the purposes of regulation 2(1).

45. … A literal reading of regulation 2(1)(c) would mean that any information about a relevant 'measure' would be environmental information, even if the information itself could not be characterised as having, even potentially, an environmental impact as defined. However, as recognised by the Judge (at §91), 'simply because a project has some environmental impact', it does not follow that 'all information concerned with that project must necessarily be environmental information'. … I have concluded that the statutory definition in regulation 2(1)(c) does not mean that the information itself must be intrinsically environmental.

46. The question is how to draw the line between information that qualifies and information that does not. The example given by the judge (a report focussed on the public relations and advertising strategy of the Smart Meter Programme) and other examples canvassed at the hearing show that there may be difficulties in doing this. Mr Facenna recognised that not all information would qualify but submitted that the example given by the Judge would do so because having access to information about how a development is to be promoted will enable more informed participation by the public in the programme. His example of information that would not qualify was information relating to a public authority's procurement of canteen services in the department responsible for delivering a road project. This information would not qualify because it is likely to be too remote from or incidental to the wider project to be 'on' it for the purposes of regulation 2(1)(c).

47. In my judgment, the way the line will be drawn is by reference to the general principle that the regulations, the Directive, and the Aarhus Convention are to be construed purposively. Determining on which side of the line information falls will be fact and context-specific. But it is possible to provide some general guidance as to the circumstances in which information relating to a project will not be information 'on' the project for the purposes of section 2(1)(c) because it is not consistent with or does not advance the purpose of those instruments.

10. The Court also relied on two paragraphs from the judgment of the Court of Justice of the European Union in *Glawischnig v Bundesminister für soziale Sicherheit and Generationen* (Case C-316/01) ECLI:EU:C:2003:343. The case concerned an earlier Directive, but the principle is applicable to the 2003 Directive that is implemented by EIR. The paragraphs are:

> 24. The Community legislature's intention was to make the concept of 'information relating to the environment' defined in Article 2(a) of Directive 90/313 a broad one, and it avoided giving that concept a definition which could have had the effect of excluding from the scope of that directive any of the activities engaged in by the public authorities (see *Mecklenburg*, paragraphs 19 and 20).
>
> 25. Directive 90/313 is not intended, however, to 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 mentioned in Article 2(a). To be covered by the right of access it establishes, such information must fall within one or more of the three categories set out in that provision.

11. *DfT, DVSA and Porsche Cars GB Ltd v Information Commissioner and John Cieslik* [2018] UKUT 127 (AAC) is a decision of the Upper Tribunal. The judge considered whether performing an emission test on a vehicle was an activity. She said:

> 32. The first line of reasoning by the FTT, at paragraphs 62-63, was that the test involved running an engine and that this caused emissions which affected the air. Thus, said the FTT, the method by which the test was conducted was 'an interaction with the environment'.
>
> 33. That reasoning confuses the steps involved in carrying out an activity and the activity itself. Although running a car engine was a necessary element of carrying out the safety test, that did not of itself mean that, on a purposive approach to the EIR, the test affected environmental elements or factors. It fails to reflect the principle established by the Court of Appeal in *Henney* and in *Glawischnig* that information which has only a minimal connection with the environment is not environmental information. That 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.

D. The First-tier Tribunal's decisions

12. The tribunal made two decisions, each by a different panel.

EA/2023/0133

13. The requests in this case were made on 25 May 2022. The numbering was added by the Information Commissioner for convenience of reference:

> 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.

14. The Information Commissioner dealt only with request 4 on the basis that the Commissioners had already provided the other information requested. He decided that the names of the persons on the register of fishermen was not environmental information.

15. Mr Shiel also asked the Information Commissioner to consider other requests that he had made earlier. In particular:

> The names of all individual Commissioners who have served on NSHC since 2000, who have appointed each such commissioner and who acted as chair and vice-chairman.
>
> Copies of the minutes of the meetings of NSHC.

The Information Commissioner, at paragraph 12 of the decision notice, declined to issue a decision in relation to those requests on the ground that 'there was undue delay in bringing them to his attention.' He said, at paragraph 13, that 'it is unlikely he would have considered such information to be environmental anyway as it is not sufficiently connected to either the elements of the environment themselves or a measure affecting them.'

16. The tribunal dismissed the appeal. It refused to consider the requests about the names of the Commissioners and the minutes of their meetings on the ground that they were not within the scope of the Information Commissioner's decision notice, and so outside its jurisdiction under section 57 FOIA. Just for the record, the Commissioners have now provided the last five sets of minutes of their meetings.

17. The tribunal considered the following measures and activities suggested by Mr Shiel. It decided:

- The *harbour* itself consisted of a number of elements of the environment, but was not a measure of an activity.
- The *1931 Order* was a measure, but request 4 was not *on* the Order.
- The *Commissioners' exercise of the powers* under the Order involved implementing measures and carrying out activities, but Mr Shiel had not identified a specific exercise of the Commissioners' powers that the information requested was *on*.
- The *entire operation and activities of the Commissioners* were not measures or activities.
- The *constitution and governance of the Commissioners* (keeping the register of fisherman) were neither a measure nor an activity, and had minimal impact in any event.

EA/2023/0338

18. The requests in this case were made on 21 July 2022. By the time the case reached the First-tier Tribunal, it was able to summarise the requests still in issue as:

i. Request 1 -

- a list of NSHC's procedures, policies and plans concerning:

o leadership, effectiveness, accountability and remuneration;

- o stakeholder engagement;
- o formal complaints handling procedure;
- the procedures, and the procedures, polices and plans themselves.

ii. Request 2 - the six most recent annual accounts and statements of capital expenditure produced by NSHC pursuant to articles 59(2) and (4) of the 1931 Order;

iii. Request 3 - the current register of interests for each of the current Commissioners.

19. The tribunal allowed the appeal in respect of part of request 1: stakeholder engagement, complaints handling procedure, and procedures, policies and plans. The tribunal decided that this information would inform the public and allow them to participate in decision-making in an informed way.

20. Otherwise, the tribunal dismissed the appeal. As to the rest of request 1 (leadership, effectiveness, accountability and remuneration), the tribunal decided that this request was not *on* a measure or activity, but was concerned with effective internal governance. As to requests 2 and 3, the tribunal decided that this information would neither inform the public nor allow them to participation in decision-making in an informed way.

E. The scope of the appeal to the First-tier Tribunal in EA/2023/0133

21. As I have said, the Information Commissioner dealt only with request 4. He considered that the public authority had provided all the information sought in requests 1-3 and 5; it did not hold the information for request 6. And he declined to consider the additional grounds in view of the delay in notifying them.

22. Mr Rodger argued that the First-tier Tribunal had been wrong to limit itself to request 4 ‘without giving any reasons for not doing so.’ He described this as ‘an extraordinary failing.’

23. Contrary to Mr Rodger’s argument, the tribunal did give reasons for limiting itself to request 4. It did so in paragraph 27 of its written reasons. It explained, correctly, that section 57 FOIA limited the appeal to the decision notice, which had dealt only with request 4. As the Information Commissioner had dealt only with request 4, that was the limit of the tribunal’s jurisdiction.

24. I consider that the tribunal’s reasoning was correct. If I am wrong, I would not set the tribunal’s decision aside on this ground. The Commissioner had given the opinion that the information requested would likely not have been environmental information. I consider that that was correct and the tribunal’s analysis was sufficient to show that that it was correct.

F. The essential flaws in Mr Rodger’s arguments for Mr Shiel

25. I now come to Mr Rodger’s arguments on the environmental information. In order to avoid the need for multiple repetitions, I begin by setting out the flaws in those arguments.

26. Only heads (a), (b) and (c) of the definition in regulation 2(1) are relevant. Head (a) deals with the state of the elements of the environment. Head (b) deals with factors that may be released into the environment affecting or likely to affect the elements of the environment. The issue in this case depends on head (c).

27. Head (c) applies to

> 'information on … measures … and activities'.

This is qualified by limiting the measures and activities to those

> 'affecting or likely to affect' the elements and factors in (a) or (b) or
>
> 'designed to protect the elements'.

28. Mr Rodger adopted that structure for head (c) in paragraph 20 of his skeleton argument. Having set out the correct structure, he argued, again correctly, that it had to be interpreted broadly to give effect to the purposes of the international provisions.

29. Mr Rodger's argument went wrong by failing to interpret the definition as a whole. This led him to focus on the qualifications and to emphasise how the information he wanted would inform the public or allow them to participate in decision-making.

30. Head (c) applies to measures and activities, but only those that have the necessary relationship to the environment set out in the qualifications. Mr Rodger accepted that at face value, but placed so much emphasis on the qualifications that in effect he read the reference to measures and activities out of the definition. That left the qualifications with nothing to qualify.

31. In doing so, his argument failed to show that the requests were for environmental information as defined. That is contrary to *Glawischnig* at [25], *Henney* at [45], and *Cieslik* at [33].

32. And that in turn came dangerously close to arguing for a general and unlimited right of access to information with any potential connection to the environment. That is prohibited by *Glawischnig* at [25]. In effect, his approach would change EIR into a FOIA for the environment.

G. Mr Rodger's specific arguments

33. Mr Rodger's argument can conveniently be split into two parts: measures and activities; and serving the purpose of EIR.

Measures and activities

34. Mr Rodger argued that the following were measures or activities: the harbour itself; the North Sunderland Harbour Order 1931; the Commissioners; and the policies, plans and programmes of the Commissioners.

35. The *harbour itself* is not a measure. However broad an interpretation I might give to *measure*, it cannot include the harbour. It is a geographical location with the buildings and related structures like wharfs, moorings and cranes. Ms Kelleher called it 'a site', which I accept as a general description.

36. In support of the harbour being a measure, Mr Rodger argued that:

- 'The whole point of the harbour is to *affect* elements of the environment.'
- 'As a substantial man-made physical entity, the harbour necessarily *affects* … the natural environment.'
- 'The harbour was *designed* to protect the elements of the environment within its compass.'

I accept those points, but they relate to the qualifying conditions in head (c). They do not show that the harbour is a measure or an activity, either individually or collectively. The qualifying conditions must attach to either a measure or an activity. They have no independent existence.

37. Mr Rodger also referred to the Information Commissioner's guidance on a project being a measure. That does not help him, because the harbour is not a project.

38. Likewise, the harbour itself is not an activity. It may be a location where activities take place, but that is not the same thing.

39. In support of the harbour being an activity, Mr Rodger argued that:

- The management and maintenance of the harbour is an activity, as its purpose is to affect the elements of the environment.
- 'Simply having a harbour is an activity which affects the environment.'

40. I accept that constructing and maintaining the harbour will involve activities. There would also probably be measures related to and controlling those activities. But this does not make the harbour itself either a measure or an activity.

41. I also accept that the existence of the harbour affects the environment. But that does not make the harbour of itself an activity as opposed to a location where activities are carried out.

42. The *North Sunderland Harbour Order 1931* is a measure. It is a form of legislation, which is expressly included in the definition as a type of measure. I also accept that aspects of it can satisfy the qualifying conditions.

43. The Order is not an activity. The execution of the Order may involve or give rise to activities and those activities may satisfy the qualifying conditions.

44. The *Commissioners* are neither a measure nor an activity. They are a body corporate by virtue of Article 7 of the Order. That means that they constitute a legal body in whose name measures may be made – like policies, plans or byelaws – and activities may be undertaken – like running the business carried on in the harbour. The fact that their decisions may create measures and lead to activities does not make the Commissioners either a measure or an activity. To speak of them as either literally makes no sense.

45. I accept that the *policies, plans and programmes of the Commissioners* can be measures and that they can satisfy the qualifying conditions.

46. Mr Rodger also identified *constituting and administering the constitution* of the Commissioners and the *management and administration* of the Commissioners as activities. As before, the arguments focus on the qualifying conditions and proceed on the assumption that these are activities.

Serving the purpose of EIR

47. Mr Rodger extracted the purpose of EIR from the recitals to the Directive and the Aarhus Convention. He identified that purpose as being: '(1) to improve the environment, (2) by promoting the making of better decisions which affect the environment, (3) by facilitating better public engagement with environmental decisions and decision makers.' I accept that as a fair summary of the purpose of EIR.

48. Mr Rodger then argued that by providing public access to information, EIR ensures that the public is well informed about: '(1) the environment, (2) the decisions that affect the environment, (3) the makers of those decisions, (4) the factors that affect the making of such decision including such matters as the identity, powers and resources of the decision makers and the competing decision-related demands upon them.

49. I accept that all of these could be environment information. But that is not sufficient for them to satisfy the definition of environmental information. The information must first be information on a measure or activity. I have already dealt with Mr Rodger's argument on those matters.

50. Even if it is possible to identify a measure or activity, it is then necessary to show a sufficient connection with the environment. That involves two steps. First, it is necessary to satisfy one of the two qualifying conditions in head (c). Second, the subject of the request must properly be described as environmental information. The flaw in Mr Rodger's argument is to argue for a loose or general connection between the environment and the measure or activity. It will often be possible to construct an argument that there is some potential connection, but that is not sufficient. The information must be *on* the measure or activity. The measure or activity cannot be a convenient peg on which to hang a request that is *about* the environment.

51. It is significant that, when Mr Rodger explained why all his requests in both cases were environment information, he talked about information *about* the harbour, information *about* the Commissioners, and information of a kind that any public authority might be expected facilitate public engagement and accountability. And when he gave more detail about individual requests, he identified only a very general connection with environmental information. Just to take a couple of examples, one from each case. In EA/2023/0133, the names of the current Commissioners was information about the harbour because they ran it. And in EA/2023/0388, procedures, policies and plans concerning leadership, effectiveness, accountability and remuneration was information about how the harbour was managed.

H. Conclusion

52. Although Mr Shiel has obtained only limited information under EIR, it seems that his requests have persuaded the Commissioners to make public other information beyond what EIR requires. To that extent, he may consider his litigation a success.

Authorised for issue
on 18 November 2024

Edward Jacobs
Upper Tribunal Judge