Tribunals Service
Information Tribunal

Information Tribunal **Appeal Number: EA/2006/0061 and EA/2006/0062**

Environmental Information Regulations 2004

Heard at 45, Bedford Square, London
Decision Promulgated 17th July 2007

BEFORE

INFORMATION TRIBUNAL DEPUTY CHAIRMAN
David Farrer Q.C.
and
LAY MEMBERS
Jenni Thompson
And
Henry Fitzhugh

Between

Appellant **NETWORK RAIL LIMITED**

and

Respondent **THE INFORMATION COMMISSIONER**

and

NETWORK RAIL INFRASTRUCTURE LIMITED
FRIENDS OF THE EARTH
IAN FISHER
Additional Parties **EDWARD CHAMBERS**

Representation:

For the Appellant and the First Additional Party: Mark Shaw Q.C
For the Commissioner: Timothy Pitt - Payne
Mr. Chambers appeared in person

Mr. Fisher did not appear

Friends of the Earth ("FOE") withdrew from the Appeals before the Hearing.

Decision

These appeals are allowed.

Reasons for Decision

1 Introduction

On 26th March, 2005, Mr. Fisher requested information from Network Rail Limited ("NRL") regarding flooding of his home near the Newcastle – Carlisle railway line. This was treated, following the intervention of the Information Commissioner (the "IC"), as a request for information made under the Environmental Information Regulations, 2004 ("EIR").

On 28th July, 2005, Mr. Chambers requested information from NRL relating to work carried out at the Dudding Hill junction in North London in 2003 and the future use of the Dudding Hill branch.

The content of those requests, though important to the complainants, has no bearing on the outcome of these conjoined appeals for reasons which will become apparent.

The upshot of both requests was a denial by IRL that it was a public authority within the definition in regulation 2(2)[1], hence that it was subject to EIR.

[1] Though there was apparently no reply to Mr. Chambers` request.

2 On 26th. July, 2006 the IC issued Decision Notices .Each stated that the relevant request should be treated as a request made under the EIR, that NRL was a public authority for the purposes of EIR, though not for those of the Freedom of Information Act, 2000 ("FOIA") and that the information sought was "environmental information" within regulation 2(1). NRL had therefore failed in each case to comply

- with regulation 5(1), by failing to provide information which it held and
- with regulation 6(2), by failing to give the complainant the reason for its decision not to supply the information.

3 The appeals

NRL appealed against both Decision Notices on three grounds, only one of which is now material. The appeals were consolidated since they raised the same issue. Both Mr. Fisher and Mr. Chambers were joined as Additional Parties. FOE was also joined so that it might argue points on jurisdiction and the character of the information requested. It abandoned both and did not, therefore, in the event, appear.

4 Though joined as additional parties, neither Mr. Fisher nor Mr. Chambers felt able to add to the largely forensic arguments, which this hearing involved. This was entirely understandable and in no way reflects on the sincerity of the concerns, which led to their requests for information.

5 In its Notices of Appeal NRL indicated that it was not the proper target of the requests since, if the information sought was held at all, it was held by Network Rail Infrastructure Limited ("NRIL"), a wholly – owned subsidiary of NRL, which was directly responsible for the management of NRL `s estate. Nothing hinged on this apparent confusion since, for reasons which emerge later in this judgment, the critical issue is the same, whichever of the two companies held the information requested.

Whilst the Tribunal notes the distinction between the two companies, they are treated as one for most purposes in this judgment.

6 That issue is: Is NRL or NRIL a "public authority" within regulation 2(2)(c) ? If either is, the Decision Notices must be upheld, since it is now agreed that the information would, on that finding, be environmental information within regulation 2(1).

7 Shortly after the hearing of these appeals, the decision of this Tribunal, (differently constituted) in *Port of London Authority v Information Commissioner EA/2006/0083* was published. Alerted to this impending decision, we gave all parties the opportunity of making further written submissions as to its materiality to these appeals. The Appellants and the I.C. did so and we have had regard to such submissions in reaching our decision.

8 Background

There was no significant dispute as to the primary facts. Mr. Richard Smith, Head of Legal Services Litigation for NRIL made a detailed witness statement, supported by extensive documentary evidence, setting out the relevant history and the structure, funding and activity of NRL and NRIL, which are critical to the determination of the issue. From his account we gratefully extract and shortly summarise the salient features.

9 The Railways Act, 1993 (the "1993 Act") separated the management of the infrastructure of the railway system from the provision of train services. Responsibility for infrastructure was transferred to Railtrack PLC ("Railtrack") which was privatised in 1996. Train services and all other commercial operations were broken up and sold or franchised to private companies through the Department of Transport ("the Department"). Though contemporary and subsequent debate on these measures has involved little reference to the point, the 1993 Act implemented the provisions of Council Directive 91/440/EEC on the development of the Community `s railways, a fact of some significance,

in our view, when considering whether NRL is a public authority for the purposes of EIR.

10 Railtrack was placed in "Railway Administration" by order of the High Court in October, 2001. Following the discharge of that order, it was acquired by NRL in October, 2002. Railtrack was renamed NRIL and re - registered as a private company limited by shares.

11 NRL was set up on the initiative of the Department acting in conjunction with the Strategic Rail Authority ("SRA") to ensure a viable bid for Railtrack[2]. It was formed as a private "not for dividend "company limited by guarantee. That means that all profits are reinvested in the business. NRL is the parent company of all the companies in the Network Rail group, including NRIL and neither trades nor has physical assets or employees. It is not a listed company but operates by the rules of corporate governance observed by publicly listed companies and makes stock exchange announcements in the same way.

12 It has members, not shareholders and those members are required to act always in the interests of NRL, a duty not generally imposed on a shareholder. Its articles of association provide for three classes of member, industry members, for example train operating companies ("TOCs") and freight operating companies ("FOCs"), public members, for example commercial rail users and members of the public and a special member, the Department, acting through an appointed representative. Among other special rights, the special member has the right to remove all other members in the event of fundamental financial failure as defined in contractual arrangements between NRL and the Department. Sixty per cent of all members are required by Article 3.2.2 and the Membership Policy to be from the private sector. Members` powers correspond closely to those of shareholders; in particular, they have no role in the day to day management of NRL but hold the

[2] See "Network Rail – Making a Fresh Start" – Report by the Comptroller and Auditor General 14th. May, 2004 paras. 1.16 – 1.19

directors to account for its conduct of NRL `s business. They may have no financial interest in NRL.

13 Directors are appointed by the board on the basis of recommendations of the Nominations Committee. The board fulfils the functions of any board of a private sector company. The Department has the right to appoint a special director but has not exercised it hitherto.

14 NRIL is a wholly owned subsidiary (through an intermediary) of NRL. It has the same board of directors. It owns and operates the network and employs staff. It is under the effective control of NRL.

15 Funding of NRL comes from four sources :

(i) Government grants amounting to about 33% of the total.

(ii) Borrowing on a very large scale under a Debt Issuance programme currently guaranteed by a government indemnity for which a fee is paid.

(iii) Track access charges (about 20%) paid by TOCs and FOCs pursuant to track access agreements with NRIL.

(iv) Income from letting and selling NRIL `s property (including leasing stations and depots to TOCs and FOCs) (about 10%).

16 As from March, 2003, NRL was classified by the Office of National Statistics as a private non – financial corporation in the National Accounts

17 NRIL operates under a licence granted by the Department under s. 8 of the 1993 Act. It permits NRIL to run the railway network subject to a range of conditions relating to consumer interests, safety, standards of service, financial accountability and corporate governance. The licence is administered by the Office of the Rail Regulator (“ORR”)

18 Responsibility for Health and Safety standards within the network or as applying to the operation of its users was transferred at the end of 2000 to the Rail Safety and Standards Board (the "RSSB") and, through further legislation, to ORR in 2003. Previously, they had been set by Railtrack. NRIL is required to take all reasonable steps to ensure that train and station operators comply with relevant safety cases as part of its own health and safety duties.

19 The ORR, established by the Railways and Safety Transport Act, 2003, is now the independent regulator for the whole railway industry. It issues licences on behalf of the Department and checks compliance with licence conditions.. It monitors the terms of track access agreements, including price. It supervises NRIL `s management of the network in the interests of its users. It sets health and safety standards and enforces compliance.

20 In summary, NRIL `s and through it NRL `s business is running the railway system by ensuring reasonable access to track, appropriate timetables, proper and timely maintenance and development of track, signalling, stations which it operates and adequate performance of the many ancillary functions which ensure that passengers and freight are moved safely and efficiently about the network.

The regulations, the directive and the Convention

21 EIR implement Council Directive 2003/4/EC on public access to environmental information ("the 2003 Directive") of which the material provision is Article 2(2), which defines public authority. The Directive implements the 1998 UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, more commonly and conveniently known as the Aarhus Convention after the Danish town in which it was signed. Article 2.2 (b) of

the Convention contains the relevant definition. EIR Reg. 2(2) sets out the definition of “public authority” which is for practical purposes indistinguishable from those of the English versions of directive and convention, as is to be expected.

(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.

We highlight in bold font the paragraphs relevant to these appeals.

22 It is common ground that, if NRL or NRIL is a public authority it must be through paragraph (c) or, in the case of NRIL, (d), which would again require that NRL satisfied (c).

23 We have been greatly assisted by very careful submissions on behalf of the Appellants and of the IC, supported by citation of significant relevant authority. We shall not rehearse them sequentially here but refer to them, where necessary, as we consider how the issue should be determined.

"Functions of public administration"

24 For the purposes of FOIA, public authorities are in most cases designated rather than defined.[3] EIR founds jurisdiction exclusively on definition, reflecting the legislative history outlined above. The instantly striking feature of Regulation 2(2)(c) is its reference to "administration". A body does not fall within EIR simply because it carries out functions of a public nature ; they must be administrative functions. Our attention was drawn to the Implementation Guide to the Aarhus Convention and to the very recent DEFRA Guidance to EIR. Paragraphs 2.15 and 2.16 of the latter document suggest that functions of public administration are functions normally performed by governmental authorities as determined by the varying laws of signatory states. The Aarhus Guide offers similar guidance to the very similar definition of "public authority" in the Convention.

25 We have been helpfully referred to the related definitions of "public authority" contained in s. 6(3) of the Human Rights Act, 1998 ("HRA") which, in dealing with public authorities other than those which act only in the public arena ("core" public authorities), speaks of "persons certain of whose functions are "functions of a public nature" and in CPR Part 54.1 which , dealing with judicial review procedures, applies them to a body "performing a

[3] See sections .3(1)(a) and 5 and Schedule 1

public function". Neither of those definitions contains a limitation as to the type of function involved, such as is found in EIR reg. 2(2)(c). Public functions plainly extend beyond administration, however that is defined. If that were not so, the reference to administration in reg. 2(2)(c) would be superfluous. The range of functions must therefore be narrower than those to which such comparable provisions apply.

26 Useful guidance as to what makes a public body a public administrative body or one that "carries out functions of public administration" is to be derived from the judgment of Blackburne J. in *Griffin v South West Water Services Limited [1995] IRLR 15 (ChD)[122 – 123]* where the issue was whether South West Water (SWW) was a "public administrative body" within the meaning of Article 1(2)(b) of Council Directive 75/129 which dealt with collective redundancies. He observed at paragraph 123 :

" SWW is no more an 'administrative body' because it 'administers' a service (the supply of water and sewerage services) than is a company carrying on business, manufacturing and distributing sweets because such a company 'administers' that enterprise or is a firm of solicitors because it administers a service of supplying legal advice. I agree … that SWW's primary function, as a supplier of water and provider of a sewerage service, is to be contrasted with administrative functions such as town planning, court administration and any of the myriad administrative functions of the civil service".

27 Having regard to the wording of reg. 2(2)(c), the Defra guidance as to the EIR, the guide to the definition in the Aarhus Convention and the reasoning of Blackburne J. in *Griffin,* a closely analogous case in our opinion, we conclude that, even if NRL or NRIL is a body which carries out public functions, it is not a body which carries out public administrative functions.

28 NRL, through NRIL runs a railway system, just as SWW ran a water supply and sewage service. It does not administer anything, save in the sense that it runs its own business. It is not a regulator; that is the role of the ORR. Unlike its predecessor, it does not set safety standards. Like any commercial concern, its ability to influence or control the conduct of those with whom it deals derives, not from a regulatory power, but from the terms on which it contracts, here by entering track access agreements.

29 Whatever the position in 1947, running a railway is not seen nowadays in the United Kingdom as a function normally performed by a government authority. Indeed the 1993 Act reflected the view of the Conservative government of the day that ownership of and responsibility for running a rail network and providing train services belonged in the private sector. The present government shows no sign of wishing to return the railways to public ownership or control.

30 We are further impressed by the tenor of Council Directive 91/440/EEC on the development of the Community `s railways, which was implemented by the 1993 Act. Whilst it contemplates railway undertakings continuing to receive public funds or remain in public ownership, it sets out firmly in the third recital that, in the interests of competitiveness and efficiency,

"Member States must guarantee that railway undertakings are afforded a status of independent operators behaving in a commercial manner and adapting to market needs"

31 Section 11 is headed "Management independence". Article 4 requires Member States to ensure that railway undertakings have independent status and management, administration, internal controls, budgets and accounts separate from the state. Article 5 requires measures to enable such undertakings to adapt to the market and run as commercial concerns.

32 To summarise, the Directive which gave birth in large measure to the 1993 Act adopts the principle that running railways is an activity for independent bodies, however created and funded, operating as competitive, commercial concerns according to the dictates of the market. Such an approach is the antithesis of the proposition that running railways is a function of governmental authorities.

33 In *Port of London Authority v I.C.* the Tribunal ruled that the Port of London Authority ("PLA") was a public authority within the meaning of Reg. 2(2)(c). So far as functions of public administration are concerned, the Tribunal identified a range of regulatory and policing functions contained in the *Port of London Authority Act, 1968*, including the issue of River Works licences, somewhat akin to planning decisions, which clearly demonstrated that PLA performed functions of public administration[4]. Indeed, it seems that PLA conceded that certain of its functions satisfied the definition. We agree with the further submission of the Appellants that the functions of the PLA differ significantly from theirs.

Are NRL and NRIL public bodies at all?

34 The findings contained in paragraphs 21 – 33 are a sufficient basis for allowing these appeals on the fairly narrow ground that the Appellants` functions are not administrative. but we have read and heard extensive argument as to whether NRL / NIRL are public bodies at all. We think it right to rule on that issue, not least because our finding on the meaning of "administrative functions" may be tested.

35 In this broader context, decisions on s.6(3) of HRA and CPR Part 54.1 are plainly relevant..

[4] See paragraphs 30, 31, 38 and 40 of the decision

36 We perceive little difference in the approaches of the Appellants and the IC to the tests to be applied when determining whether NRL or NRIL are public bodies or bodies performing public functions. The differences lie in their application of those tests to the case of these Appellants.

37 No single factor is decisive. In *Parochial Church Council for the parish of Aston Cantlow and Wilmcote with Billesley v Wallbank and another [2003] UKHL 37 and [2004] 1 A.C. 546*, Lord Nicholl set out the right approach very succinctly (at paragraph 12 in the UKHL reference) :

"12. What, then, is the touchstone to be used in deciding whether a function is public for this purpose? Clearly there is no single test of universal application. There cannot be, given the diverse nature of governmental functions and the variety of means by which these functions are discharged today. Factors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service."

Such an approach was adopted in the very recent decision in *YL v Birmingham City Council [2007] UKHL 27* to which our attention was drawn in the Appellants` further submissions as well as in *R (on the application of Heather) v Leonard Cheshire Foundation [2002] 2 All ER 936* and *Poplar Housing and Regeneration Community Association Ltd v Donoghue [2002] QB 48.*

38 To Lord Nicholls` list, the Appellants suggest, two other factors can be added, namely ;

- The performance of a regulatory function *(R v Disciplinary Committee of the Jockey Club, ex p Aga Khan [1993] 1 WLR 909 (CA) at 923H*
- The degree of governmental control.

The IC, using slightly different terminology in some cases, broadly agrees with the composite list of relevant considerations.

39 NRL is a private company which operates like a listed public company in many respects. That it has members rather than shareholders seems of little consequence. It seeks to produce a profit, like the care home in *YL;* the destination of that profit does not affect its commercial motivation.

40 Its directors are appointed by the existing board and the government exercises no influence or control.

41 It is subject to some potential control by the Government through the special member. That provides some but, given the degree of that control, limited support to the IC `s case.

42 Its operation serves a public interest. So do those of many large retailers.

43 It was not created by statute and its powers are not statutory powers.

44 It receives considerable public funding. That points to some degree in the direction of a public body.

45 It is regulated (by ORR) but not a regulator. That seems to us a completely neutral point. We note that a similar view was taken in *YL.*

46 The provision of rail services, like care of the aged, is a matter for which the state takes responsibility. That does not mean that those who provide the service are performing a public function, as Lord Neuberger observed in *YL* at 163 – 4.

47 If NRL did not perform these functions, they would be performed by some other similar body, not by central government.

48 The factors identified at paragraphs 39, 40, 43 and 47 lead us clearly to the conclusion that NRL and NRIL are not public bodies. We find that most of the other features identified above take the matter no further. The two that might point the other way carry little weight, taken with all the other factors in this case.

49 We note that in *Port of London Authority v IC*, in addition to the matters recited at paragraph 33, PLA `s powers are statutory powers and it is accountable to the Secretary of State and Parliament in a variety of ways. The functions and powers of PLA are clearly distinguishable from those of NRL.

50 In so far as it is necessary to review separately the position of NRIL, we conclude that the same considerations apply

51 These conclusions are substantially fortified by the decision in *Cameron v Network Rail Infrastructure Limited [2007] 1 WLR 163*, a strike – out application, in which a review of the factors which we set out above and others led Sir Michael Turner. to the conclusion that there was no real prospect of the claimant establishing that NRIL was either a core or a hybrid public authority for the purposes of s.6(3) of HRA.. He dismissed the idea that maintaining points and track could be regarded as the function of a public authority.

52 This is a decision applying a kindred provision (not involving the administrative requirement) to one of the Appellants. Notwithstanding the IC `s rather faint attempt to distinguish it in his oral argument and supplementary skeleton, we find it indistinguishable from the present case on the “public body” issue and we respectfully adopt its reasoning.

53 Since we find that Reg. 2(2)(c) does not apply to NRL, Reg. 2(2)(d) does not apply to NRIL. We do not propose therefore to examine further arguments relating to that provision

Our Conclusions

(i) The Appellants` functions are not functions of administration, whether. public or private

(ii) Anyway, they are not public functions.

(iii) Since NRL is accordingly not a public authority by virtue of EIR Reg. 2(2)(c), Reg. 2(2)(d) does not apply to NRIL.

(iv) Neither Appellant is, therefore, a public authority within the meaning of EIR Reg. 2(2).

(v) The Decision Notices were therefore not in accordance with the law.

Our Decisions.

55 A postscript

56 Notwithstanding our decision on the issue of law arising on these appeals and without wishing to cast any doubt on the environmental credentials of the Appellants, we have some concerns as to its implications. NRIL is a major landowner whose estate is intensively visited by the public, has a significant impact on the daily lives of many people and, in the words of its website, includes “many sites of great environmental, geological, historical and architectural importance” as well as much contaminated land. Yet, if our decision is correct, it has no duty to provide information in accordance with EIR.

57 The structure, functions and accountability of NRL are clearly unusual and it may be that the consequences for its legal responsibilities as to environmental information, given the practical realities of its stewardship, are therefore anomalous.

58 DEFRA and/or the Department of Transport may wish to consider whether, by whatever route, NRIL should be brought

within EIR (rather than FOIA) so that it is required to supply environmental information. We recognise that there may be no convenient way to achieve this within the existing regulations but believe that the present position is clearly unsatisfactory.

David Farrer Q.C.

Deputy Chairman
Date 17th July, 2007