



Tribunals Service
Information Tribunal

Appeal Number: EA/2006/0083

The Environmental Information Regulations 2004 (EIR)

Determined upon the papers

Date 10th April 2007

Decision Promulgated

31st May 2007

BEFORE

INFORMATION TRIBUNAL DEPUTY CHAIRMAN

Fiona Henderson

And

LAY MEMBERS

Marion Saunders

And

Jenni Thomson

Between

THE PORT OF LONDON AUTHORITY

Appellant

And

INFORMATION COMMISSIONER

Respondent

And

MR JOHN HIBBERT

Additional Party

Decision

The Tribunal Upholds the decision notice dated 2nd October 2006 and dismisses the appeal. For the reasons set out below, the Tribunal does not require the Appellant to take any further action:

- The Tribunal is satisfied that no river works licence was issued in relation to Temple Pier in December 1988,
- In light of the Appeal to the Tribunal and its investigation of the existence of and decision relating to the river works licence, a refusal notice would no longer serve any purpose.

Reasons for Decision

The request for information

1. Mr Hibbert wrote to the Port of London Authority (PLA) on 24th June 2005 stating:
*“On the 21st December 1988 the Port of London Authority granted a River Works Licence to the Temple Pier Company Ltd. for works to be carried out at Temple Pier.
I would be grateful if you would advise me of the date when the works specified in the above River Works Licence were either started or completed”.*

2. This request for information was the culmination of a chain of correspondence between Mr Hibbert and the PLA concerning planning issues relating to Temple Pier. The PLA responded by letter dated 15th July 2005 indicating:
*“I am endeavouring to ascertain the relevant information in response to your letter of 24 June.
However, please be aware that your assertion that a River Works Licence was granted in December 1988 in respect of Temple Pier appears incorrect.”*

3. Mr Hibbert responded by letter dated 18th July 2005 asking that:
“..under the terms of the Environmental Information Regulations 2004 [EIRs] that copies of all Licences, Agreements, Constructional Drawings and correspondence be made available to me... regarding the reconstruction and development works carried out to Temple Pier, Victoria Embankment, WC2R 2PN between 1st January 1988 and 1st January 1991.”

4. The Tribunal takes the request for environmental information to have been crystallized by the letter of 18th July 2005, since this is the first letter to specify that the request is under the Environmental Information Regulations, but we take into account the correspondence relating to the initial request on 24th June since the information requested in that letter was included in the

formal request under the EIR. Both the Appellant and Mr Hibbert rely upon the 2 streams of correspondence in consideration of the EIR request and complaint to the Commissioner.

5. By letter dated 1st August 2005 the PLA amplified the information already provided pursuant to the letter of 24th June 2005 stating the following:

“On 21 December 1988, the PLA entered into a contract with Crescent Shipping Limited for the construction and placement of an extension to Temple Pier. The works were started on site on 22 February 1989. An agreement was also entered into which revised the terms of an existing agreement between the Temple Pier Company and the PLA and allowed for future use of the extended pier by the Temple Pier Company. It was also, by agreement, permitted to sub-lease the use of part of the extension to Catamaran Cruises Limited once the extension work was completed. From the records we retain, it appears that use of the extension commenced sometime after 8 May 1989 but before 24 August 1989...”

6. On 2nd August 2005 the PLA again wrote to Mr Hibbert this time in response to the 18th July 2005 letter as follows:

“ The PLA has been advised that, notwithstanding the guidelines issued by DEFRA, it should not consider that the provisions of the regulations apply to its operations as it exercises independent statutory functions and the Secretary of State has no power to control or direct the exercise of these functions..

Notwithstanding this view the PLA will provide information when requested as far as other legislation and regulation allows and subject also to such requests being reasonable and in such a form and extent as would be considered compliant with the regulations.

With regard to the information you have requested, I consider that the information requested goes beyond environmental information as defined in regulation 2. ...

Nevertheless, I have asked for the Legal, Marine Engineering and Civil Engineering archives to be examined and assessed with regard to the extent of environmental information contained within them. This will take some time but in the meantime you will need to make clear the environmental information you are seeking.”

Mr Hibbert was also told that his request had been passed to Transport for London because ownership of the pier had been passed to them in 1999.

7. Mr Hibbert did not contact the PLA to specify what environmental information he was seeking or why he considered the information to be environmental, and consequently the PLA did not provide any disclosure at this stage.

The complaint to the Information Commissioner

8. On 8th August 2005 Mr Hibbert wrote to the Information Commissioner stating that he wished to make a formal complaint:

“regarding the Port of London Authority (PLA) and their claim to be exempt from the Environmental Information Regulations 2004.” =

With this letter he enclosed a copy of the PLA environmental policy and his correspondence with the PLA.

9. The Commissioner wrote to the PLA on 5th June 2006 notifying them of the existence of that complaint and stating:

“It is the opinion of the Information Commissioner that the PLA is a public authority for the purposes of the EIRs. The Commissioner has come to this conclusion as the PLA carries out functions of public administration; regulation 2(2)(c)...

My initial assessment of the request is that the request would appear to be a request for environmental information as defined in regulation 2(1)(a),(b) and (c).”

10. The PLA responded by letter dated 29th June 2006 in which they reiterated their contention and provided arguments that they were not covered by the EIRs and further indicated their:

“...view that the information requested by Mr Hibbert goes beyond the proper scope of environmental information for the purposes of the Regulations. Further or alternatively, we consider that one or more of the exceptions provided in the Regulations is likely to be applicable to certain information”.

They also indicated that they had forwarded the request to Transport for London (the current owners of the Pier) and that they were in the process of reviewing their files with a view to disclosing the information on a “without prejudice” basis.

11. On 17th July 2006 the PLA wrote to Mr Hibbert reiterating their contention that they were not covered by the EIRs and explaining that they had now completed their review and enclosing copies of the information thus identified:

“I can confirm that we have not withheld any information requested by you, which would have been available to you under the Regulations.”

The information provided included:

- The Construction agreement dated 21st December 1988 between PLA (the employer) and Crescent Shipyard Ltd (the Contractor) in relation to the Works at Temple Pier_{7.2}
- Letters dated 22nd February 1989, 15th March 1989 from Crescent Shipyard Ltd to PLA expressing concern that Mr Roberts (of the Temple Pier Co Ltd) was corresponding directly with them despite their contract being with the PLA.
- Fax dated 6th April 1989 from Crescent Shipyard Ltd to PLA asking for instructions before placing an order in relation to Piles_{7.2}
- Various correspondence showing that Mr Roberts constructed and supplied some items pertaining to the works as a subcontractor to Crescent and as the end user was involved in obtaining planning permission and in detailing the specifications that he would like to see on the works.

but did not include a copy of any river works licence dated 21st December 1988. Neither did the letter specify whether any information in existence had been withheld because of reliance upon an exemption (which would not make it disclosable under the regulations).

12. Mr Hibbert wrote to the Commissioner on 19th July 2006 indicating that he was not satisfied with the disclosure received from the PLA because:
 - He had sought to establish as a point of general principle that the PLA were subject to the EIRs,
 - Included in the documentation from the PLA was an apparent contradiction as to whether the work had commenced on 2nd January 1989 or 22nd February 1989 which led him to question whether he had received complete disclosure.

13. In a letter dated 25th July to Transport for London, the PLA indicated that it was:

“in the process of providing that information which remains in its possession [to Mr Hibbert]...” This would appear to contradict the assertion a week earlier that all relevant information had been provided to Mr Hibbert on 17th July 2006 and raised the issue of whether the information provided was complete. The Tribunal now understands that this apparent inconsistency was due to a delay in the dispatch of the 25th July.

14. The Commissioner wrote to the PLA on 20th July noting that Mr Hibbert had expressed dissatisfaction with the disclosure and specifically asking the PLA to:
 - Release the information in the River works licence granted to the Temple Pier Company in 1989 (sic) or
 - Issue a refusal under regulation 14 of the EIR stating the reasons for withholding the information.

15. The PLA responded dated 25th July 2006 stating that:

*“..the works to Temple Pier were carried out on behalf of the PLA, pursuant to a contract with Crescent Shipping Limited (a copy of which Mr Hibbert now has), in exercise of its statutory power **under s.62 of the Act**. As such, no licence was required for the carrying out of the works, and none was granted..”*

16. Unfortunately the letter of 25th July 2006 does not appear to have reached the Commissioner who sent 2 further chasing letters. The PLA responded to these in a letter dated 19th September 2006 in which they stated:

*“The PLA still does not accept that it is subject to these Regulations. However, all the information requested by Mr Hibbert and held by the Port of London Authority concerning Temple Pier and **to which he would be entitled under the Regulations**, has been forwarded to Mr Hibbert by our solicitors...*

*With regard to the River Works Licence, claimed by Mr Hibbert to have been granted to the Temple Pier Company in 1989 by the Port of London Authority.. no such licence existed. The Pier was constructed for the PLA **under Section 60** of the Port of London Act 1968, and not by any third party under Section 66. The PLA does not require a river works licence for its own works and so no River Works Licence was ever granted..*

Without prejudice to the PLA’s position that the Regulations do not apply to it, my understanding is that the PLA’s response to Mr Hibbert that the river works licence requested never existed would, under the Regulations, amount to a disclosure of information and therefore there has been no refusal of a request for environmental information under regulation 14.”

(The emphasis is that of the Tribunal.)

17. The Commissioner issued a decision notice FER0086096 dated 2nd October 2006 in which he:

- Concluded that section 5 of *the Port of London Act 1968* (the 1968 Act) placed a duty on the authority to carry out functions of public administration and that the PLA were therefore a public authority pursuant to regulation 2(2)(c) of the EIRs;
- Concluded that he believed that the information requested (as set out in the request of 18th July 2005) and including the river works licence was

environmental information (EIRs 2(1) (a), (b) and (c)) but in the absence of having seen the information or having been furnished by the PLA with an explanation of why it was not environmental information it was difficult to be definitive on this point.

- Consequently the PLA did not deal with the request for information in accordance with the regulations.
- The PLA were directed to provide the complainant with the information requested or a refusal in accordance with Regulation 14 within 35 days of the date of the notice.

The Appeal to the Tribunal

18. The PLA appealed this decision notice on 30th October 2006 upon the following grounds:
- a) that the Information Commissioner acted ultra vires and/or unfairly in finding that the PLA was a public authority under EIRs 2(2)(c) as a preliminary issue and without inviting submissions from the PLA,
 - b) that the decision that the PLA was a public authority under EIRs 2(2)(c) was wrong in law,
 - c) that the Commissioner erred in law and fact in finding that the PLA breached the EIRs for not disclosing the River Works Licence or issuing a refusal notice pursuant to EIRs 14,
 - d) if the PLA was in breach of the EIRs, the Commissioner should have exercised his discretion differently and:
 - i) not issued a Decision notice, or
 - ii) he should not have required the PLA to issue a refusal notice following the Decision.
19. Following an application by Mr Hibbert dated 2nd December, in which he said that he:
- Opposed the appeal,

- Contrary to the disclosure he had received, he had been told by Polly Kearsley of the PLA on 6th October 2006 that a River Works Licence had been granted to the Temple Pier Co on 21st December 1988 (reference AN/19/71A)
- He did not believe that this information constituted disclosure under the EIRs.

He was joined to the Appeal as an additional party pursuant to Rule 7 of the *Information Tribunal (Enforcement) Appeals Rules 2005*

Issues for the Appeal

20. The following issues are not before the Tribunal and consequently not considered in this judgment for the following reasons:
- The Appellants no longer pursue their first ground of appeal,
 - The Appellants have not sought to challenge in their grounds of appeal the Commissioner's provisional finding of fact that all the information requested was environmental,
 - Mr Hibbert has not alleged in his application of joinder that there is any information requested (beyond the 1988 River Works Licence) that he has not received which he should have. Consequently except as relates to the disputed River Works Licence, the Tribunal has not considered whether there was other information available that has not been disclosed to Mr Hibbert either through administrative error or because of the applicability of an exemption under the regulations. (See paragraph 64 below)
21. At the directions hearing on 18th January 2007 the issues before the Tribunal were itemised as follows:
1. Whether the Respondent's decision that the PLA is a public authority as defined in Regulation 2(2) (c) of the EIRs is wrong in law. Specifically:
 - (1) Whether the PLA performs any functions of public administration under regulation 2(2)(c) of the EIRs?
 - (2) If the answer to (1) is yes, would that allow for any of the functions of the PLA to be private in relation to 2(2)(c) EIRs?

- (3) If the answer to (2) is yes, would the issue of a river licence be a private or a public function under 2(2)(c)?
2. Whether the Respondent erred in law and fact in finding that the PLA was in breach of the EIRs for not disclosing the River Works Licence or issuing a refusal notice in accordance with Regulation 14 of the EIRs; (the Tribunal was asked to consider as a fact whether the River Works Licence was ever issued and if so whether it was held at the time of the request).
3. Whether, if the Tribunal finds that the PLA is in breach of the EIRs in this respect, the Respondent should nevertheless have exercised his discretion differently. Specifically:
- i. Does the Tribunal have jurisdiction to consider whether the Respondent ought to have exercised his discretion not to issue a decision notice?
 - ii. If the Tribunal does have jurisdiction on (i) above, should the Respondent have exercised his discretion not to issue a decision notice? and
 - iii. Should the Respondent in any such Decision Notice have required the PLA to issue a refusal notice following the Decision?

Does the PLA perform any functions of public administration under regulation 2(2)(c) of the EIRs?

22. The definition of public authority is to be found in regulation 2(2) of the *Environmental Information Regulations*. It is common ground that PLA is not a government department (EIRs 2(2)(a)) or a public authority as defined under section 3(1) of FOIA (EIRs (2)(2)(b)). The section relied upon by the Commissioner and Mr Hibbert is that under EIR Regulation 2(2)(c) the PLA is:
- “any other body or other person, that carries out functions of public administration”.

23. No party seeks to argue that pursuant to Section 2(2)(d) they are an arms length organisation “under the control of” a public authority as defined in 2(2)(a),(b) or (c).
24. There is no definition of “functions of public administration” within the regulations, and the Tribunal’s attention has been drawn to the UN Economic Commission for Europe’s Implementation Guide to the Aarhus Convention, and the DEFRA guide to interpreting the EIRs. The EIRs are derived from and seek to implement the aims of the Aarhus Convention, which is the origin of the phrase “functions of public administration”.
25. The Defra Guidance states (paragraph 2.11) that the coverage of 2(2)(c) will be relatively narrow given that most bodies which would fall under this limb in many countries, are covered by FOIA in the UK.
 - 2.15 does not require the functions to relate to the environment.
 - Under 2.16, the function that is being performed is unlikely to be determinative of an organization’s status as a public authority in and of itself.
 - 2.23 relates to public authorities where the regulations do not apply when they are acting in a judicial or legislative capacity. These public authorities are, however, public authorities for the purpose of these regulations to the extent that they carry out other functions, such as the management of their own estate and operations.
 - The head note states that “this is defined broadly, so as to encompass all organisation that carry out functions of public administration”.
26. The Aarhus guide states that this is narrower than “public responsibilities or functions” which is used in the “arms length” category (reflected in the EIRs at 2(2)(d).)
27. The Commissioner’s case is that the PLA falls within regulation 2(2)(c) of the Regulations, both generally and in relation to its functions regarding River Works Licences. He asserts that it is necessary to take into account

the nature of the functions performed by the public authority, and its legal structure and basis. The Commissioner poses various questions:

- whether these are the type of functions that are typically governmental in nature?
- do the functions of the body in question form part of a statutory scheme of regulation?
- are those functions such that if the body did not exist some Governmental provision would need to be made for the exercise of those functions?
- whether the organisation has a statutory basis, or whether it exists purely as a matter of contract;
- whether the organisation is accountable to members or shareholders, or alternatively whether it has some formal accountability to government (e.g., a requirement to make reports to Parliament).

28. The PLA argue that Regulation 2(2)(c) EIRs should be interpreted restrictively, and whether obligations imposed by EIRs apply in respect of any given information should be determined on the basis of whether the function to which that information relates is a function of public administration. They assert that not all the PLA's activities can be properly classified as functions of public administration, and that it cannot be said that because of the PLA's nature all functions are necessarily functions of public administration, specifically they argue that the functions covered by this request were not functions of public administration.

29. The Tribunal finds the Commissioner's analysis of considerations (para 27 above) helpful. The PLA is established by statute, it was originally established by the *Port of London Act 1908* and is now governed by the *Port of London Act 1968* ("the 1968 Act"). The PLA argue that the statutory basis of the body is not determinative of the status of an organisation and rely upon *R (West) v Lloyd's of London [2004] EWCA Civ 506* as an example of an organisation founded by statute which can be considered to be private. We are satisfied that this case is distinguishable because:

- Lloyd's objects are all of a commercial nature^{7.4}.
- Membership of Lloyd's is voluntary and all those affected by the provisions of the statute have chosen to enter into a contractual arrangement with Lloyds.
- Regulation of all insurance entities including Lloyd's is exercised by the Financial Services Authority.

The Tribunal agrees that the fact that the body is statutory is not determinative but considers that the terms of the statute are of assistance in defining the nature of the organisation.

30. In deciding whether the PLA carries out functions of public administration, the Tribunal has had regard to the provisions of "the 1968 Act" set out below. The general duties and powers are set out in Section 5:

- (1) It shall be the **duty** of the Port Authority
 - (a) to provide, maintain, operate and improve such port and harbour services and facilities in or in the vicinity of the Thames as they consider necessary or desirable and to take such action as they consider incidental to the provision of such services and facilities;
 - (b) to take such action as they consider necessary or desirable for or incidental to the improvement and conservancy of the Thames.

31. The Tribunal considers that in performing any of its permitted functions the PLA must have regard to the duty under section 5 (and that would include the decision to issue a River Works Licence under section 66 or to develop a site pursuant to Sec 62) (paras 48 below et seq). The Tribunal notes that the PLA are tasked with **duties** and powers, and is satisfied that this supports the Commissioner's contention that these are functions which ought to be carried out rather than are permitted. The PLA argue that prior to the original Act in 1908 these functions were carried out by disparate organisations, we do not consider this to be material as we have had no evidence as to the status of these early organisations, neither have we been addressed concerning the evolution of government regulation of external

bodies. We are satisfied that were the PLA not responsible for these functions the Government would need to ensure that another organisation was tasked with them.

32. The PLA argue that they are an autonomous and self-financing trust, not owned or controlled or funded or specifically regulated by the government. The Tribunal is satisfied that the PLA is subject to a degree of Governmental Control and Regulation, and that whilst their accountability is not to private shareholders they do have an accountability to Parliament. In support of this the Tribunal notes the matters set out below.

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33. The appointment of the Board of the PLA is heavily influenced by the Secretary of State. Section 3 provides that the Authority shall consist of between 7 and 12 members. The Secretary of State appoints the Chairman and up to 3 other members of the Port Authority. The Port Authority (which includes the Secretary of State's Appointees) appoints the remainder of the members and Officers.

34. Section 8 (1) provides that the PLA must make an annual report to the Minister "*on the exercise and performance of their functions*" during the preceding financial year and the Minister shall lay a copy of every such report before each House of Parliament. There is no suggestion that any of the functions are private and need not be covered within this report. This report must include a statement of the audited accounts of the Port Authority for that year;

35. Section 9 provides that the PLA shall give the Minister such returns, statistics and information "with respect to the exercise of their powers" as he may require. This requirement is therefore not limited to the PLA's duties and would not appear to exclude any "commercial" transactions which would be exercised pursuant to the powers contained within the 1968 Act.

36. Sections 48 and 49 relate to the borrowing powers and obtaining of temporary loans. In certain circumstances these require the approval of the Minister.
37. Schedule 4 provides for appeals to the Board of Trade in relation to licensing matters (sections 69 and 129).
38. The PLA argue that they are subject to government control in respect of planning regulations and that this puts them in the same category as a private organisation, further that their functions are consistent with their role as an owner and operator of a commercial port. However, we note that the functions of the PLA permit them to act in a way akin to a local authority or governmental authority. Sec 11 permits the compulsory purchase of land in connection with undertakings “as if the Port Authority were a local authority..” Further Sec 22 gives the PLA the power to make charging regulations and to require others to provide information in connection with the assessment and collection of a charge and to collect the charge.
39. It is also noted that in its own contracts the PLA on occasions refers to itself as a public authority:
- the contract dated 14th June 1984 relating to the “Wilfred”, First Schedule clause 7 (l) and
 - the contract dated 21st December 1988 between the PLA and the Temple Pier Co Ltd First Schedule, clause 5(m)
- both make reference to the Licencee complying:
- “with the lawful requirements of all Government Departments Local and **Public Authorities (including the PLA)..”**
40. Additionally the PLA are enabled to regulate others in excess of the powers permitted to the general public or private organisations. For example the 1968 Act creates various offences in relation to the functions of the PLA. Section 44 makes it an offence punishable by a fine to provide false

information or evade a charge. Section 117 makes it an offence if the Master of a vessel fails to comply with a general or special direction. Section 160 makes it an offence to impersonate a Port Constable. Section 91 provides for times when public use of the Thames may be restricted by the PLA. Sections 122 and 123 provide the power to remove projections over the Thames that are owned or occupied by others and require repair of landing places and embankments owned and occupied by others if presenting a danger. Section 154 allows the PLA to appoint Constables ~~to~~ [as](#) Port Police and under section 156 their powers include the right to enter and search a vessel within the port police area.

Does that allow for any functions of the PLA to be private in relation to 2(2)(c) EIRs?

41. The Tribunal is therefore satisfied that the PLA is an organization which carries out functions of Public Administration. The PLA appear to concede that it may be that they perform some functions of public administration however, they maintain that they also carry out private commercial functions which would take them outside the EIRs; and that the contracting of work to a third party on their own land in order to maximize their commercial gain is such a private function under section 62 *Port of London Act 1968* (as they assert was the situation applying to all the information requested within Mr Hibbert's request).
42. Both the Commissioner and the PLA submit that it is possible that an organization may be a public authority in respect of some of the information they hold and not others: (*Environmental Resources Management Ltd FER0090259*). The PLA further rely upon various judicial review cases to draw the analogy that a public organisation may undertake private acts. The Tribunal does not dissent from this general proposition, but does not consider the case law of assistance dealing as it does with a specific example unique to the facts in each case.
43. The PLA have sought to provide examples (from the evidence of David Cartlidge) of their activities that they say cannot be described as functions

of public administration. They cite their activities as a land owner wherein they may manage and use and develop their land in any way they see fit. The Tribunal notes that the Defra guidance paragraph 2.2.3 (para 25 above) gives the example of a public authority that would otherwise be exempt, being caught in relation to its land management functions.

44. The Tribunal considers the PLA's role as a land owner in the context of a commercial activity along with the examples that the PLA have given where they contract with third parties on a commercial basis where they have advertised and charge commercial rates comparable to other providers of similar services for this work. They undertake the work purely for commercial gain. The Tribunal does not find it necessary to decide which if any aspects of the PLA's activities could be categorized as private, since there are many specific activities which may be undertaken by the PLA upon which we have received no evidence. However, the Tribunal rejects the contention that the commercial activities cited as examples are entirely private functions.
45. There would appear to be an overlap between the activity described and the duties of the PLA. For example whilst such salvage work as they undertake is tendered for competitively, the fact that salvage is required cannot be divorced from the navigation, safety and nuisance considerations that they are under a duty to regulate. Similarly maintaining moorings owned and or operated by third parties might involve a situation where they would be required to issue a river licence were the work undertaken by a third party.
46. The PLA (in the evidence of David Cartlidge) assert that the cited examples are strictly commercial and in 2006 commercial activities represented 28.5% of the PLA's total annual revenue. However, the Tribunal notes that the PLA is a non profit making organisation (in that it reports to Parliament and not private shareholders who are entitled to a dividend). The Tribunal further notes that there is no separation of finances between public and "commercial" functions. This is demonstrated by Section 46 (the emphasis is that of the Tribunal):

“The port fund shall be continued and maintained and **all receipts** of the Port Authority shall be carried to the port fund and **all payments** by the Port Authority shall be made out of the port fund.

Section 47 - Application of Port Authority’s Revenue,

(1)(a)to be applied to any part of the cost of performing the Port Authority’s duties or exercising their powers which is properly chargeable to revenue account,.

any balance left after making the payments referred to in this subsection shall be used as the Port Authority think fit **in the performance of their duties and the exercise of their powers”**

47. Consequently the Tribunal is satisfied that any “commercial” projects undertaken by the PLA are in order to raise revenue to conduct their section 5 duties, and that the public and commercial aspects of the PLA cannot therefore be separated on this basis.

Would the issue of a river licence be a private or a public function under 2(2)(c)?

48. River Works Licences are granted under section 66 of the 1968 Act.

(1) (a) The Port Authority may for a consideration to be agreed or assessed in accordance with section 67 (Consideration for licence) of this Act and on such terms as they think fit, including conditions as to variation and revocation of the licence and reassessment of the consideration from time to time, grant to a person a licence to carry out, construct, place, alter, renew, maintain or retain works, notwithstanding that the works interfere with the public right of navigation or any other public right...

(2) Application for a works licence shall be made in writing to the Port Authority and shall be accompanied by plans, sections and full particulars of the works to which the application relates, and in granting any such licence the Port Authority may require modifications in the plans, sections and particulars so submitted.

(3) If within three months from the date of the making of an application under subsection (2) of this section the Port Authority do not grant a works licence in accordance with the application, they shall be deemed to have refused the application. ..

49. The Tribunal is satisfied that the PLA has the power to licence works despite any interference with the public right of navigation or other public rights. The provisions of 66(2) are akin to the functions of a planning authority in respect of the ability to require modifications in the plans and particulars. It is further satisfied that in deciding whether to grant a licence the PLA would have to have due regard to its general duties under section 5 (para 30 above).
50. The consideration for the licence is defined in Section 67 1968 Act
 - (2) *The consideration shall be the best consideration in money or money's worth which, in the opinion of the arbitrator, can reasonably be obtained, having regard to all the circumstances of the case including the value of any rights in, under or over land of the Port Authority deemed to be conferred by the licence..”*
51. Consequently any commerciality associated with the issue of a River Works Licence is specifically provided for by statute and as already noted (para 46 above) any revenue obtained would be payable into the Port Fund to assist the PLA *“in the performance of their duties and the exercise of their powers”*. The Tribunal is satisfied that this section provides support for the contention that the commercial functions of the PLA cannot be divorced from their functions of public administration.
52. The Tribunal notes that appeals relating to the grant, terms or revocation of river works licences are governed by section 69 and Schedule 4 of “the 1968 Act” by way of an appeal to the Board of Trade. This level of governmental overview suggests that this is not a private function but a public one.

53. Finally in concluding that the grant of a river works licence is a “function of public administration” the Tribunal relies upon the mandatory nature of a river works licence for any third party wishing to construct works, and the “public” nature of the penalties available for breach, which are beyond the private remedies normally available for a private transaction. Section 70 of the 1968 Act provides:

(1) *“No person shall carry out, construct, place, alter, renew, maintain or retain works unless he is licensed so to do by a subsisting works licence and except upon the terms and conditions, if any, upon which the licence is granted and in accordance with the plans, sections and particulars approved in pursuance of section 66 (Licensing of works)..”*

(2) *A person who contravenes the provisions of this section or who fails to comply with any term or condition upon which a works licence is granted by the Port Authority shall be guilty of an offence and liable to a fine..”*

Would the entering into of contracts for and the undertaking of the works be a private or a public function under 2(2)(c)?

54. The PLA maintain that the Temple Pier works (the subject of Mr Hibbert’s request) were in fact governed by Section 62 of the 1968 Act and that consequently no river licence was issued. They contend that even if the PLA falls within EIRs in relation to the grant of a river works licence, this was a private commercial transaction the performance of which would not bring them within section 2(2)(c) EIRs.

55. The Tribunal has already considered the general position (para 41 et seq above) but considers here the specific issue of whether works undertaken under section 62 of the 1968 Act are a private or public function under 2(2)(c) EIRs.

Section 62 provides inter alia that:

The Port Authority may lay down, maintain and operate in and over the Thames such works and equipment as are required for or in connection with the exercise by them of any of their functions...

56. Geoffrey Ellis for the PLA has provided evidence that the reasons for the undertaking of the works were:
- To improve an existing PLA asset for commercial use;
 - To increase the amount of rental revenue the PLA could obtain from the site; and
 - To reinstate a vessel of “historical interest” on the River Thames.
57. Whilst he asserts that the considerations were purely commercial, the Tribunal notes that the works would “improve” the asset. Under section 5(1)(c) the PLA has a **duty** to improve such port and harbour services and facilities in or in the vicinity of the Thames as they consider necessary or desirable and to take such action as they consider incidental to the provision of such services and facilities.
58. Similarly the consideration that this would reinstate a vessel of historical interest to the Thames would appear to correlate directly with their 5(1)(d) duty to take such action as they consider necessary or desirable for or incidental to the improvement and conservancy of the Thames. The fact that this would have the benefit of improving the revenue stream does not take this into the private realm because the revenue generated would be used pursuant to section 46 of “the 1968 Act” in the performance of their duties and the exercise of their powers.

Was the 1988 River Licence ever issued?

59. The Tribunal notes that under the EIRs Mr Hibbert is only entitled to information which is held and not information which should have existed. In consequence it is not a function of the Tribunal to decide whether a River Works Licence should have been issued. The Tribunal is therefore only

considering whether a 1988 River Works Licence was ever issued, in which case if held by the PLA it should have been disclosed to him pursuant to the EIRs. The Commissioner did not make a finding of fact on this point and the Tribunal is therefore satisfied that he did not err in fact in requiring the licence to be disclosed (in the alternative to the issue of a valid refusal notice). The Tribunal has been provided with more information and evidence than that seen by the Commissioner in relation to the existence or otherwise of this River Works Licence to enable it to make a finding of fact upon this point.

60. Mr Hibbert relies upon the fact that he contends that a River Works Licence **should** have been issued (and he has set out his understanding of the law on this point for the Tribunal along with a history of a dispute between the PLA and Westminster City Council) as evidence in support of his assertion that one **was** issued. The Tribunal considers that this does not take the matter further in light of the PLA's assertion that regardless of whether one should have been issued (which they do not accept) the fact is that one never was issued. In consequence of this the Tribunal has concentrated upon the evidence of the actual existence or otherwise of the RWL. The Tribunal is assisted by "the 1968 Act" only in so far as:

- In the papers before us the Tribunal has never seen an application for a RWL (which would be required under section 66(2)).
- From consideration of "the 1968 Act" we are satisfied that RWLs apply to works conducted by third parties and not the PLA itself. In addition to the wording of the section (66 and 62).
- Granting itself a RWL would involve an unworkable layer of bureaucracy for the PLA. There would be a requirement for the PLA to pay itself the best consideration possible pursuant to the conduct of the works (section 67).
- If the PLA failed to grant itself a licence it would have committed an offence against itself (section 70)

61. The Tribunal has had regard to the following documents:

- a) An example of a River Works Licence from around the time of the disputed works (granted in August 1988);
- b) The Construction agreement dated 21st December 1988 between PLA (the employer) and Crescent Shipyard Ltd (the Contractor) in relation to the Works at Temple Pier;
- b) The Use Agreement dated 21st December 1988 between the PLA and the Temple Pier Co Ltd (TPC) granting a licence for 40 years relating to the use of the Temple Pier Works;
- c) The Guarantee Agreement dated 21st December 1988 between the PLA, TPC and Catamaran Cruisers Ltd. relating to the Temple Pier Works;
- d) The Option Agreement dated 21st December 1988 between the PLA and Catamaran Cruisers Ltd relating to Temple Pier Works.

62. When considering the contracts itemised above, we are satisfied that these are genuine and that the following flows:

- The construction contract and the use agreement covers many of the same areas that are shown to be included in the example River Works Licence. There would be no purpose in having these contracts and issuing a river works licence for the same project.
- the PLA employed Crescent Shipyard Ltd. to construct the works, but Crescent Shipyard Ltd were not “undertaking” the works because:
 - the only benefit to the construction company was the price they were paid for undertaking the work.
 - Control of the construction works remained with the PLA.
- the TPC were those permitted to operate the works and who would eventually reimburse the PLA for the construction costs over time, however, they were not themselves responsible for or a party to the construction works.
 - Mr Roberts (of the TPC) applied for the planning permissions necessary,

- Mr Roberts submitted suggestions for amending the specifications,
- Crescent Shipyard Ltd wrote complaining to PLA that they were being contacted directly by Mr Roberts in relation to the specifications when he was not a party to any contract with them; (see paragraph 11 above).
- There was no provision whereby the TPC could be required to remove the works (as would appear in a standard RWL)
- Ownership of the works remained with the PLA despite the reimbursement of the constructions costs by the TPC

63. Mr Hibbert points to various confirmations that he has had that a river works licence was issued to the TPC in 1988. The Tribunal accepts that Mr Hibbert has been provided with inconsistent and inaccurate information on many occasions by the PLA, which has given him genuine grounds for believing that information is being withheld from him. He provides examples of the PLA providing categorical information, which is demonstrably wrong or exaggerated, sometimes in circumstances involving a declaration of truth. Whilst these examples do not specifically relate to the EIR request, Mr Hibbert relies upon this in support of his contention that the sworn evidence of the PLA cannot be relied upon to be accurate or complete:

- a) In Correspondence in November 2003 the PLA categorically asserted that they were unaware of any planning applications relating to the vessel Meridia or any other Class V passenger vessels, despite a letter in July 1993 to Westminster City Council in which the PLA said that they supported the planning application for Meridia to use Temple Pier.
- b) The PLA submitted evidence of 10 years of continuous use of the pier from July 1993 to August 2003 to Westminster City Council which they subsequently had to amend in the face of evidence that use had in fact ceased for a period in 1998.
- c) In their subsequent schedule relating to 10 years continuous use the PLA asserted that this was based on the anecdotal evidence of “witnesses” when in fact it was based upon a single person’s recollection.

64. The Tribunal has also been provided with examples relating specifically to this EIR request and deals with each example in turn:

- a) The River Committee minutes dated 4th January 1988 stated: “a river works licence should be granted...”
- b) Mr Ellis for the PLA reflected this in his statement as being that the minutes “refer to a RWL being granted”.

The Tribunal notes that the fact that a licence **should** have been granted, does not mean that one was granted. Mr Ellis has paraphrased the minutes inaccurately giving the impression that one “was” granted when that is not what the minutes said. The Tribunal is satisfied that the decision taken to approve the works and the capital expenditure is consistent with the contracts that we have seen as itemized in paragraph (para 61 above).

- c) In correspondence dated 25th July 2006 the PLA asserted that the works were carried out pursuant to section 62 of the 1968 Act, however, in correspondence dated 19th September 2006 they relied upon section 60 of the 1968 Act.

65. It is accepted by all parties that Mr Hibbert was told in September 2006 by Polly Kearsy, the PLA Licencing Officer that a RWL was granted on 21st December 1988 reference (AN/19/71A). Mr Hibbert asserts that this information was also given to him on 2 prior occasions by Polly Kearsy and Sally Westbrook (also of the PLA) respectively. The Tribunal does not find it necessary to resolve the factual dispute relating to the frequency that he has been provided with this information because we have been referred to the River Estate Management (REM) system upon which the information was stored and to which PLA employees would turn in response to an enquiry. Having regard to the evidence of Polly Kearsy and the screenshots provided by the PLA the Tribunal is satisfied that the information recorded there:

- Was not information of which Polly Kearsy would have had any contemporaneous knowledge,
- Was not recorded contemporaneously onto the system (REMs having been developed around 1999) and would derive from data input from the archive documents that we have seen,

- The REMs system is primarily designed to record RWLs, and whilst not designed for the logging of the contractual situation which has arisen in this case, was a logical place to record information relating to Temple Pier,
- The information has therefore been forced to fit a format for which it was not designed and the information in fact recorded on the Temple Pier Entry would not be fully comprehensible without reference back to the archive documents,
- The fact that the same reference number is recorded in relation to the 1988 works as is used relating to the grant of a later RWL in 1999 can be explained by the fact that the reference identifies the site rather than a RWL.

The Tribunal is therefore satisfied that in misinforming Mr Hibbert in September 2006, Polly Kearsey misinterpreted information that had been placed inappropriately on the REMs system and that she jumped to a conclusion by which she no longer stands.

66. The Tribunal has dealt with the specific inconsistencies highlighted in relation to the existence or otherwise of the River Works Licence and noted the frequency of inaccuracies and the provision of contradictory and misleading information that has occurred in Mr Hibbert's direct experience. Indeed in serving 2 affidavits in this case to counteract Mr Hibbert's assertion that the PLA had failed to include licence agreements with Catamaran Cruisers Ltd from the original disclosure to him in July 2006, they have asserted that this was in fact done in July 2007 (a date yet to occur). The Tribunal has not been asked to and does not consider the question of whether information other than the River Works Licence that would have been disclosable under the EIR request was withheld, but takes this and the other incidents detailed above into account in concluding that the PLA has not paid attention to detail and demonstrated a somewhat cavalier attitude to the provision of information in circumstances where other parties ought to be entitled to rely upon their accuracy.

67. Notwithstanding the above, we are satisfied that the inconsistencies are adequately explained by the PLA and that 1988 River Works Licence was never issued, it has never existed and consequently was not held at the time of the request by the PLA.

Should the Commissioner have issued a Decision Notice?

68. The Commissioner argues that the Tribunal does not have the jurisdiction to consider whether he ought to have exercised his discretion not to issue a decision notice, since appeal only lies to the Tribunal after a decision notice has been issued (sec 57 FOIA). They further argue that any consideration of the exercise of the discretion of the Information Commissioner under section 58(1)(b) can therefore only apply to the exercise of discretion within the decision notice.
69. Before considering the questions (as set out in paragraph 21 above) the Tribunal must first be satisfied whether the issue of the Decision Notice in this case was an exercise of discretion by the Commissioner.
70. Regulation 18 of the EIRs causes the enforcement and appeal provisions of FOIA to apply to the EIRs with specified modifications. The applicable statute and regulations are as follows (the emphasis is that of the Tribunal);

Section 50 of FOIA states:

- (2) *On receiving an application under this section, the Commissioner shall make a decision unless it appears to him –*
- (c) that the complainant has not exhausted any complaints procedure which is provided by the public authority in conformity with the code of practice under section 45,*
 - (d) that there has been undue delay in making the application,*
 - (e) that the application is frivolous or vexatious, or*
 - (f) that the application has been withdrawn or abandoned.*

(3) *Where the Commissioner has received an application under this section, he shall either –*

- (a) *notify the complainant that he has not made any decision under this section as a result of the application and of his grounds for not doing so, or*
- (b) *serve notice of his decision (in this Act referred to as a “decision notice”) on the complainant and the public authority.*

Sec 57(1) FOIA:

Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice”.

Sec 58(1)

- (b) *to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently.*

71. Both the Commissioner and the PLA refer to “A Robust Approach to FOI Complaint Cases” in which the Commissioner sets out his policy for determining whether it is appropriate to issue a Decision Notice. The test identified by the Commissioner in that document is that:

“[n]o useful purpose would be served by proceeding any further”. Various examples are then given. The Tribunal notes that this policy substantially overlaps with the grounds set out in Section 50(2) FOIA:

- “the alleged breach is insignificant (including minor defects in a refusal notice) with no practical consequence”, may well equate to a frivolous claim,
- “there was a delay in response to the request for information, but it is (or becomes) clear that the requested information has been provided” may well apply to a case where the complainant is happy to abandon their claim.

72. The policy notwithstanding, the Tribunal is satisfied that the only circumstances in which, having received a complaint under Sec 50 FOIA, the Commissioner is entitled to refuse to issue a decision notice in a case where the complainant wishes a decision to be made, are listed in section 50(2). The Tribunal notes in relation to the facts of this case that:

- There is no evidence before us that the PLA operates a complaints procedure which Mr Hibbert was entitled to access to seek to review their decision. Neither is it argued by any party that the Commissioner ought not to have issued a decision notice pursuant to Sec 50(2)(a).
- Similarly from the dates and contents of the correspondence between Mr Hibbert and the Commissioner (para 8 et seq above) it is clear that none of the other grounds applied in this case that would have relieved the Commissioner of his duty to issue a decision notice. The Complaint was prompt, clearly not abandoned or withdrawn by Mr Hibbert and not frivolous or vexatious (in that there was an issue of public importance involving the applicability of the EIRs to the PLA and issues of legal interpretation between the Commissioner and the PLA).

73. The Tribunal is therefore satisfied that in this case the Commissioner was under a duty to issue a decision notice and did not have a discretion available to him not to issue a decision notice.

74. The Tribunal would make the following general observations:

- that it makes no finding as to whether there may be an exercise in discretion involved in the Commissioner choosing to issue a decision notice despite one of the grounds set out in Section 50(2) being available to him.
- in light of its findings at paragraphs 72 above there is no need for this Tribunal to consider whether it has jurisdiction (under sec 58(1)(b) to consider any exercise of discretion by the Commissioner (if one exists) relating to the issue of a decision notice rather than to any exercise of discretion relating to the contents of the decision notice.

Were the PLA in breach of the regulations for failing to disclose the 1988 River Works Licence?

75. As already noted above, the Information Commissioner was not tasked to consider whether there was a sufficiency of disclosure but whether the PLA fell within the regulations. Consequently in his decision (having made no finding in relation to the existence or otherwise of the River Works Licence) he was left with the possibility that the River Works Licence existed and had not been disclosed. At the request of all parties the Tribunal has considered this issue and decided that no licence ever existed, as such it was not held and the information contained within it could not be disclosed. The Tribunal is satisfied therefore that the Commissioner's decision was not definitively that the PLA had breached regulations for failure to disclose the RWL but was subject to the caveat of the alternative position namely that (if one were not held or it was subject to an exemption) they had not provided a valid refusal notice. Having now made a finding of fact in relation to the RWL the Tribunal is now satisfied that the PLA did not breach the regulations for failing to disclose the 1988 River Works Licence.

Were the PLA in breach of the regulations for failing to issue a refusal notice under the regulations?

76. The PLA argue that there was no breach of regulation 5 since they had informed the Commissioner that one was never issued. As set out above the Commissioner did not have sufficient information before him at the time to accept that assertion and he was entitled to conclude that there may have been a breach.
77. The PLA further argue that they were not bound, if as the Tribunal has found the 1988 RWL has never existed, to issue a refusal notice since none of the exemptions listed in regulations 12 or 13 applied.
78. Regulation 12 provides;

- (1) *“Subject to paragraph (2)..., a public authority may refuse to disclose environmental information requested if-*
- (c) *an exception to disclosure applies under paragraphs (4) or (5) ; and*
 - (d) *in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.*
- (4) *For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –*
- (a) *it does not hold that information when an applicant’s request is received;..*
- (6) *For the purposes of paragraph (1), a public authority may respond to a request by neither confirming nor denying whether such information exists and is held by the public authority, whether or not it holds such information, if that confirmation or denial would involve the disclosure of information which would adversely affect any of the interests referred to in paragraph (5)(a) and would not be in the public interest under paragraph (1)(b).*

79. The Commissioner argues that regulation 12(4)(a) applies to information that has never been held (which would include cases where it has never existed) and to cases where information was held but is no longer held at the date of the receipt of the request (e.g. it has been already been destroyed). In both of these scenarios the regulation 12(1)(b) public interest test would have no meaningful application.

80. The PLA argued that regulation 12(4)(a) had no applicability in the circumstances of this case and suggested that regulation 12(4)(a) might apply to information which was obtained after the request was received, and that this construction is supported by the inclusion of a mandatory public interest test in 12(1)(b).

81. The Tribunal is satisfied that regulation 12(4)(a) would include all 3 of the above scenarios and specifically the situation that arises here (namely that the information is not held because it has never existed) for the following reasons:
- Regulation 12(6) makes specific provision for a public authority not to confirm or deny that information **either exists or is held** if to do so would adversely affect, international relations, defence, national security or public safety,
 - This implies that in all other cases a Public Authority is expected to confirm whether information exists or is held,
 - If the Public Authority were not required to issue a refusal notice in cases where they assert that the information has never been held by them:
 - a) There would be no mechanism to require a public authority to respond to the applicant at all,
 - b) The applicant would be deprived of the reason why the information has not been disclosed,
 - c) The applicant would not be in the position to challenge the thoroughness of any search or the accuracy of any assertion that the information had never or no longer existed,
 - d) The applicant would be deprived of the opportunity to seek a review under regulation 11,
 - e) The applicant would not be informed of the Appeal provisions under regulation 18,
 - f) The applicant would have no way of progressing or challenging his request.
 - The above consequences would appear to be at odds with the general presumption in favour of disclosure of environmental information set out in regulation 12(2)
82. For the reasons set out above, the Tribunal is therefore satisfied that the exemption under Regulation 12(4)(a) would have applied to the PLA on the facts that it has found (namely that the 1988 River Licence has never

existed), and that they were therefore in breach of the regulations for failing to comply with their obligation to issue a refusal notice.

Should the Commissioner have required the PLA to issue a refusal notice in the decision notice?

83. The contents of a decision notice are specified to the extent set out below

- Sec 50(4) *Where the Commissioner decides that a public authority –*
- (a) *has failed to communicate information, or to provide confirmation or denial, in a case where it is required to do so under regulation 12(6) or 13(5) (as amended by regulation 18.5 EIRs)*
 - (b) *has failed to comply with any of the requirements of regulations 6, 11 or 14 (as amended by regulation 5(1) EIRs)*
*the decision notice **must** specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken.*
 - (5) *A decision notice must contain particulars of the right of appeal conferred by section 57*
 - (6) *[A decision notice must states the time limit for complying with the steps in 50(4)(b) above].*

84. Mr Hibbert's complaint to the Commissioner on 8th August 2005 related only to the PLA's claim to be exempt from the EIRs. From this and the ensuing correspondence between the parties (para 8 above) it is apparent that the Commissioner was not at that stage investigating whether the disputed information:

- Existed,
- Was subject to an exemption under the regulations,
- Had been disclosed in full,
- Was definitively environmental information.

85. In their correspondence with Mr Hibbert and the Information Commissioner the PLA stated the following (the remarks in italics are the comments of the Tribunal):

- 15th July 2005 “your assertion that a River Works Licence was granted in December 1988 in respect of Temple Pier **appears** incorrect.” (*the use of “appears” is equivocal and not conclusive*).
- 1st August 2005 “On 21 December 1988, the PLA entered into a contract with Crescent Shipyard Limited for the construction and placement of an extension to Temple Pier. The works were started on site on 22 February 1989....” (*this does not clarify that the contract was not a River Works Licence*)
- 2nd August 2005 “..the PLA will provide information when requested as far as other legislation and regulation allows and subject also to such requests being reasonable and in such a form and extent as would be considered compliant with the regulations.. I consider that the information requested goes beyond environmental information as defined in regulation 2. ...”(the PLA appear to be conceding that they will provide information as long as they consider it to be environmental information and not subject to an exemption under the EIRs)
- 29th June 2006: “..[we] view that the information requested by Mr Hibbert goes beyond the proper scope of environmental information... we consider that one or more of the exceptions provided in the Regulations is likely to be applicable to certain information.(the PLA does not itemise the information that they assert is not environmental information, neither do they specify which exemptions apply and to what information)
- 17th July 2006 “I can confirm that we have not withheld any information requested by you, **which would have been available to you under the**

Regulations” (*this could mean that information was withheld because it was not considered by the PLA to be “environmental” or because of the application of an unspecified exemption*).

- The first specific assertion by the PLA to Mr Hibbert that no River Works Licence dated 21st December 1988 had ever been issued was in the letters to the Commissioner dated 25th July 2006 and 19th September 2006. These stated in essence that no River Works Licence was granted, and that the pier was constructed under s.62 or section 60 of the Port of London Act 1968. There was a factual inconsistency between the letters as to which section was relied upon as the statutory basis for no river works licence having been issued.

86. The Commissioner did not and the Tribunal is satisfied that he could not on the evidence before him have made a finding as to whether or not the 1988 Licence had ever existed, or was held by the PLA. This is in light of:

- the lack of clarity in the earlier answers given by the PLA,
- the conflict relating to the statutory basis for their assertion that they had never issued the River Works Licence,
- the fact that there had been no investigation by the Commissioner as to whether the PLA’s assertion that no River Works Licence was ever issued was correct,
- the appearance that all disclosures had been made with regard to whether the information was “environmental” and with regard to exemptions but no details provided.

87. If that information was held by the PLA:

- it had not been disclosed to Mr. Hibbert, and no exemption under regulation 12 EIR had been claimed;
- consequently there had been a breach of regulation 5 (failing to disclose the 1988 Licence); or
- a breach of regulation 14 (failing to serve a proper refusal notice itemising the exemption relied upon).

If that information was not held by the PLA (because it had never existed)

- there had been a failure to serve a proper refusal notice complying with regulation 14.

Consequently pursuant to Section 50(4) the Commissioner was obliged to detail the remedial steps that the PLA had to carry out to progress the complaint.

88. The PLA further contend that the Commissioner ought not to have required them to issue a refusal notice in these circumstances because they assert that they have complied substantially. They point to the fact that Mr Hibbert knew that they stated that the information had never existed and that he had already complained to the Commissioner under regulation 18/Sec50 FOIA. The Tribunal considers Regulation 14 EIR which provides:

(1) *If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal **shall** be made in writing and **comply with the following provisions** of this regulation...*

(3) *The refusal shall specify the reasons not to disclose the information requested, including –*

(a) *any exception relied on under regulations 12(4), 12(5) or 13; ..*

(5) *The refusal shall inform the applicant -*

i. that he may make representations to the public authority under regulation 11; and

ii. of the enforcement and appeal provisions of the Act applied by regulation 18.

89. The Tribunal is satisfied that the correspondence between the PLA and Mr Hibbert did not constitute substantial compliance as the correspondence did not contain the following mandatory particulars:

- specify the statutory exemption relied upon (regulation 12.4)
- provide details of the review procedure under regulation 11

- provide details of the appeal procedure available under regulation 18.

In light of the apparent contradictions in the details provided by the PLA at the time of the decision notice a refusal notice was the next step in progressing the case. Since the Commissioner's decision had not investigated the existence or otherwise of the 1988 River Works Licence a refusal notice should have enabled Mr Hibbert to seek an internal review upon that point, and if still not satisfied he would then be entitled to make a fresh complaint to the Commissioner.

90. In holding that no further action is required and that the PLA need no longer issue a refusal notice the Tribunal takes into account that the issue of the RWL has now been determined, and there has been an appeal to this Tribunal at which all outstanding matters relating to this information request have been litigated. It is for these reasons at this stage in proceedings that the Tribunal is satisfied that the issue of a refusal notice would no longer serve any useful purpose.

Other matters

91. The Tribunal would like to thank all parties for their clearly presented arguments and their accommodation of the tight time-limits imposed by the Tribunal to enable the paper determination to go ahead in its listed slot. In particular the Tribunal would like to extend its thanks to the PLA who compiled and served the authorities bundle at such short notice.

Signed

Fiona Henderson

(Deputy) Chairman

Dated this 31st day of May 2007