

**EIR Reg 2** – Definition: Environmental information

**EIR Reg 2** - Definition: Public authority

## ***The Port of London Authority v IC & Mr John Hibbert***

**EA/2006/0083**

**31<sup>st</sup> May 2007**

### **Cases:**

#### **Facts**

Mr Hibbert requested information from the Port of London Authority (PLA) relating to the date that works at Temple Pier (which were authorised in a River Works Licence) were either started or completed. Copies of all Licences, Agreements, Constructional Drawings and correspondence were requested. PLA responded by stating that they were not a public authority for the purposes of the regulations and that the information requested went beyond environmental information as defined in Reg 2 but they would endeavour to provide information equivalent to that which he would be entitled to under EIR as a courtesy. There was some confusion over whether the PLA had ever issued such a river works licence. PLA did not therefore, provide any disclosure.

The IC issued a Decision Notice stating that the PLA was a public authority pursuant to Reg 2(2)(c) EIR as it carried out functions of public authorities in accordance with that regulation and that the information requested (including the river works licence) was in fact environmental information according to Reg 2(1)(a), (b) and (c). Consequently, the PLA did not deal with the request according to the regulations and were hence ordered to disclose the information requested.

#### **Findings**

Did the PLA perform any functions of public administration under Reg 2(2)(c) EIR?

The Tribunal considered the definition of ‘functions of public administration’ under Reg 2(2)(c). They looked to the Aarhus Convention and the DEFRA guide to interpreting the EIRs in order to assist with the definition. The DEFRA guidance maintained that the coverage of Reg 2(2)(c) would be relatively narrow as most bodies which would fall under this limb are covered by FOIA. The Aarhus guide stated that this is narrower than “public responsibilities or functions”. The Tribunal held that the PLA was established by statute and rejected the assertion that PLA was an example of an organization founded by statute which can be considered to be private.

The Tribunal had regard to the provisions of the statute to assist in determining the nature of the organisation. The Tribunal noted that PLA were assigned duties and powers and that these are functions which ought to be carried out rather than permitted. They were satisfied that were the PLA not responsible for these functions the Government would need to ensure that another organisation was tasked with them.

The Tribunal was 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.

The Tribunal rejected the contention that the PLA are subject to government control in respect of planning regulations and that this puts them in the same category as a private organisation. They held that the functions of the PLA permit them to act in a way akin to a local authority or governmental authority, as compulsory purchase of land is permitted 'as if the Port Authority were a local authority..'. They noted that the PLA referred to itself as a public authority in its own contract and that the PLA are enabled to regulate others in excess of the powers permitted to the general public or private organisations. Therefore, they concluded that the PLA carried out the functions of Public Administration.

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

The PLA contended that although that may perform some functions of public administration, they maintained that they also carry out private commercial functions which would take them outside the EIRs. The Tribunal rejected the assertion that commercial activities as a land owner for example are entirely public functions as the PLA is a non-profit making organisation and there is no separation of finances between public and 'commercial' functions. The Tribunal was therefore satisfied that any 'commercial' projects undertaken by the PLA were in order to raise revenue to conduct their statutory duties and that the public and commercial aspects of the PLA could not therefore be separated on this basis.

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

The Tribunal noted that appeals relating to the grant, terms or revocation of river works licences are governed by s.69 and Schedule 4 of "the 1968 Act" by way of an appeal to the Board of Trade. They suggested that this level of governmental overview implies that this is not a private function but a public one.

In concluding that the grant of a river works licence is a "function of public administration" the Tribunal relied 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.

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

The PLA maintained that the Temple Pier works were in fact governed by s.62 of the 1968 Act and that consequently no river licence was issued. They contended that even if the PLA fell 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 Reg 2(2)(c) EIR. However, the Tribunal noted that the works would 'improve' the asset and according to the statute, 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. Also, the fact that this would reinstate a vessel of historic interest would have the benefit of improving the revenue stream did

not take this into the private realm because the revenue generated would be used pursuant to s.46 of “the 1968 Act” in the performance of their duties and the exercise of their powers.

Was the 1988 River Licence ever issued?

The Tribunal observed that it was not their function to decide whether a Works licence should have been issued, but merely, whether it was issued. The Tribunal rejected the notion that the fact that the licence should have been issued is evidence in support of the assertion that one was issued.

On a finding of fact, the Tribunal were satisfied that any inconsistencies were adequately explained by the PLA and that River Works Licence was never issued, it never existed and consequently was not held at the time of the request by the PLA.

Should the IC have issued a Decision Notice?

The Tribunal was satisfied that the IC was under a duty to issue a decision notice and did not have a discretion available to him not to issue a decision notice. They noted that s.50(2) FOIA was not triggered to dictate that the IC not issue the Decision Notice.

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

Having made the finding of fact in relation to the RWL the Tribunal was 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?

The PLA argued that they were not bound, if as the Tribunal had found the 1988 RWL had never existed, to issue a refusal notice since none of the exemptions listed in Regs 12 or 13 applied. However, the Tribunal was satisfied that Reg 12(4)(a) apply to three scenarios:

- a) information that has never been held (which would include cases where it has never existed)
- b) 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)
- c) information which was obtained after the request was received.

The reasons for this were as follows:

- Reg 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 Reg 11,
  - e) The applicant would not be informed of the Appeal provisions under Reg 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 Reg 12(2)

The Tribunal was therefore satisfied that the exemption under Reg 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?

The Tribunal stated that in holding that no further action was required and that the PLA no longer needed to issue a refusal notice, they took into account that the issue of the RWL had been determined, and there was an appeal to the Tribunal at which all outstanding matters relating to the information request were litigated. It was for these reasons that the Tribunal were satisfied that the issue of a refusal notice would no longer serve any useful purpose.

**Conclusion**

The Tribunal upheld the Decision Notice and dismissed the appeal.