



Scottish Information
Commissioner
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Decision Notice 051/2023

Is Cromarty Firth Port Authority subject to the EIRs?

Authority: Cromarty Firth Port Authority
Case Ref: 202200311

Summary

The Applicant asked the Authority for copies of the 62 complaints which were submitted regarding the oil rig Ocean Endeavour. This decision finds that the Authority is a Scottish public authority for the purposes of paragraph (c) of the definition of “Scottish public authority” in regulation 2(1) of the EIRs. The decision also finds that the information the Authority was asked for was environmental information as defined in regulation 2(1) of the EIRs. The Commissioner requires the Authority to respond to the Applicant’s requirement for review.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 47(1) and (2) (Application for decision by Commissioner)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition of “the Act”, “applicant”, “the Commissioner”, “the Directive”, paragraphs (a), (b), (c) and (f) of definition of “environmental information” and paragraph (c) of definition of “Scottish public authority”) (Interpretation); 5(1) and (2)(a) (Duty to make environmental information available on request); 13 (Refusal to make information available); 16(4) (Review by Scottish public authority); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions)

Directive 2003/4/EC of the European Parliament and of the Council 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC Article 2(2)(a) (definition of “Public Authority”)

The Order contained in the Schedule to the Cromarty Firth Port Authority Order Confirmation Act 1973 (the 1973 Order) section 7(1) (General duties)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 9 October 2021, the Applicant made a request for information to the Authority. She asked for copies of the 62 complaints which were submitted regarding the Ocean Endeavour. In her request, the Applicant made it clear that she did not need any personal information on the complainant and was happy for that to be redacted. She stated that she was interested in the complaint itself.
2. The Authority responded on 11 October 2021. The Authority refused to disclose the requested information, on the basis that it was not information it shared externally.
3. On 2 November 2021, the Applicant wrote to the Authority, requesting a review of its decision. The Applicant stated that she was dissatisfied with the decision because the requested information related to public health and environmental impact. The Applicant considered there to be a strong public interest argument for disclosure, especially given the Environmental Health Report which recorded noise disturbance in excess of World Health Organisation (WHO) guidelines.
4. The Authority responded to the Applicant on 11 November 2022. The Authority stated that it had received 62 unspecified general noise complaints from a number of Cromarty residents, 34 of which were in connection with the Ocean Endeavour during April and May 2021.
5. On 15 March 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. The Applicant stated she was dissatisfied with the outcome of the Authority's review because:
 - (i) the Authority did not justify their continued refusal to disclose the full environmental information requested by reference to the exceptions in the EIRs
 - (ii) the response made no reference to the EIRs
 - (iii) the Authority appeared to believe it was not a Scottish public authority under the EIRs, and therefore had no obligations under the EIRs.
6. The Applicant provided a lengthy and detailed submission setting out in full why she considered the Authority to be a Scottish public authority for the purposes of the EIRs.
7. On 27 April 2022, the Authority was notified in writing that an application had been received from the Applicant.
8. On 9 September 2022, the Authority was invited to comment on the application of the EIRs to itself and the request.
9. On 23 September 2022, the Authority informed the Commissioner that it did not consider itself to fall within scope of the EIRs and had not done so since the EIRs were made and came into effect. The Authority stated that it was not a Scottish public authority as defined in regulation 2 of the EIRs, nor was it covered by FOISA.
10. The Authority explained that it provided a range of services in the exercise of powers conferred on it by the 1973 Order. The Authority submitted that it had operated as a Trust Port since 1973 and operated in accordance with its own Order and with the general law as it applied to others. It commented that it was neither publicly nor privately owned and did not receive regular public funding. It generated its own income and 100% of the profit generated

through its operations was reinvested into the improvement and development of the Port. It carried out commercial operations to support the Port.

Commissioner's analysis and findings

11. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

Is the Authority a Scottish public authority?

12. In accordance with sections 5 and 7 of the 1973 Order¹, the Authority was set up to deliver:
 - a) the improvement and conservancy of the Port;
 - b) the provision, maintenance, operation and improvement of the port and harbour services and facilities in, or in the vicinity of the Port;
 - c) the control of development in the Port, and the promotion of development in and in the vicinity of the Port.
13. If the Authority falls within any of the limbs of the definition of a Scottish public authority in regulation 2(1), it will be covered by the EIRs and will therefore be required to respond to requests it receives for environmental information.

Submissions from the Applicant

14. The Applicant set out a number of reasons why she considered the Authority to be a Scottish public authority in terms of either paragraph (c) or (d) of the definition in regulation 2(1).
15. The Applicant considered the Authority to be a Scottish public authority with mixed functions in terms of [the Scotland Act 1998](https://www.legislation.gov.uk/ukpga/1998/46/contentson.gov.uk)² and therefore submitted that, on a straightforward reading of limb (c) of the definition, it was a Scottish public authority for the purposes of the EIRs.
16. The Applicant submitted that the Authority operated wholly within a defined area of Scotland and so was not a cross-border authority. She also noted that, while some of its functions (such as those relating to marine transport and navigational rights) might be reserved, those relating to ports, harbours and regulation of works which might obstruct or endanger navigation were not.
17. The Applicant also referred to the terms of the judgment in the key decision of the European Court of Justice (ECJ) in the case of [Fish Legal v Information Commissioner](https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62012CJ0279:EN:HTML)³ (Fish Legal case), specifically the comments at paragraph 52, where it identified paragraph (b) of the Directive definition as concerning “*administrative authorities defined in functional terms, namely entities, be they legal persons governed by public law or by private law, which are entrusted, under the legal regime which is applicable to them, with the performance of services of public interest, inter alia in the environmental field, and which are, for this purpose, vested with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law*”.
18. The Applicant noted that, under section 7(1) of the 1973 Order, the Authority is entrusted with certain key functions (see paragraph 12 above)

¹ https://www.legislation.gov.uk/ukla/1973/16/pdfs/ukla_19730016_en.pdf

² [Scotland Act 1998 \(legislation.gov.uk/ukpga/1998/46/contentson.gov.uk\)](https://www.legislation.gov.uk/ukpga/1998/46/contentson.gov.uk)

³ <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62012CJ0279:EN:HTML>

19. As a consequence, the Applicant asserted that it was clear that these were all services of public interest, and that the “conservancy of the Port” and “the control of development in the Port”, in particular, were services of public interest in the environmental field.
20. The Applicant referred to guidance titled “Modernising Trust Ports A Guide to Good Governance”, and stated that this contained several footnotes (which she highlighted to the Commissioner) regarding public interests Trust Ports served as harbour authorities.
21. In her submissions, the Applicant also highlighted various powers conferred on the Authority as a consequence of the 1973 Order, which she considered to be “special powers beyond those which result from the normal rules applicable to relations between persons governed by private law”.
22. As a consequence of all of these factors, the Applicant asserted that the Authority meets the Court of Justice of the European Union’s interpretation of paragraph (b) of the Directive definition and therefor fell under limb (c) of the definition in the EIRs.
23. The Applicant also made detailed submissions as to why she considered the Authority to fall within scope of part (d) of the definition in regulation 2(1). For reasons which will become clear later on, these are not detailed here.

Submissions from the Authority

24. In making its submissions, the Authority recognised that a key question, based on the decision in the *Fish Legal* case was whether it performed “public administrative functions”. The Authority acknowledged that some of the services it provided could be described as appearing to be in the public interest in certain circumstances, but did not consider that necessarily make these services “public administrative functions” in terms of the legal tests in definition (c) of Scottish public authority in regulation 2(1). The Authority stated that these services provided support for commercial operations in the Port: there might be many decisions made by organisations across the private sector that might appear to be in the public interest, but that did not mean those organisations were public authorities with public administrative functions.
25. The Authority acknowledged that there was a specific legal instrument providing for its governance structure, contains a range of powers to be used by it in performance of its operations and delivery of services in respect of the Port. However, it was not clear to the Authority why those powers would give rise to “public administrative functions” being attributed to it.
26. The Authority also provided submissions as to why it did not consider itself to come within the definition of a Scottish public authority under part (d) of the definition in regulation 2(1) of the EIRs. For reasons which will become apparent later on, these have not been set out here.

Commissioner’s conclusions

27. The Authority is the Cromarty Firth Port Authority, as defined in the 1973 Order.
28. As noted above, the Applicant set out a number of reasons why she considered the Authority to be a Scottish public authority in terms of regulation 2(1), including submissions on paragraph (c) of the definition. Paragraph (c) covers “any other Scottish public authority with mixed functions or no reserved functions (within the meaning of the Scotland Act 1998).” As

the Commissioner's guidance "[Which bodies are covered by the EIRs?](#)"⁴ states, bodies with mixed functions are those which conduct public functions assigned to them by both Holyrood and Westminster.

29. It is clear from reading the 1973 Order that the Authority is responsible for some functions which are reserved to Westminster (such as marine transport and navigational rights), but that it also carries out a number of functions which are not (such as the regulation of works which may obstruct or endanger navigation, amongst others). Accordingly, it appears to be a body with mixed functions.
30. As the guidance referred to in paragraph 28 above has noted, paragraph (c) does not appear, on first sight, to be a direct transposition of any of the limbs of the definition of public authority in the [Directive](#)⁵ (see also Appendix 1). However, the EIRs are intended to implement the Directive in Scots Law and must be interpreted in line with the Directive. In the Commissioner's view, paragraph (c) is intended as a counterpart to paragraph (b) in the definition in the Directive:

"any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment"
31. As mentioned above, the Applicant made submissions on this basis, referring to the key decision in the Fish Legal case, with particular focus on the content of paragraph 52, as set out in paragraph 17 above.
32. Given the statutory Order under which it was established, the Authority would appear to be a distinct form of legal person. Given that statutory scheme, and the functions and services described at paragraph 12 above, it would appear to be intended that these would be services performed in the public interest (rather than simply for the purpose of commerce). Although not essential for this part of the definition to apply, some of these functions would appear to be environmental in nature.
33. Furthermore, the Commissioner agrees with the Applicant that the Authority is also a Harbour Authority, with responsibility for improving, maintaining or managing the Port as prescribed in the 1973 Order, which satisfies the definition of a harbour authority under the Harbours Act 1964. These functions are clearly carried out in the public interest and are environmental in nature (and are devolved).
34. Having read the 1973 Order, the Commissioner also agrees with the Applicant that the Authority has been granted powers which go beyond those resulting from normal rules which would be applicable to persons governed by private law. For example, the Authority, is, amongst other things, entitled to:
 - (i) enact byelaws (sections 46 and 47)
 - (ii) levy fines (sections 24, 46 and 47)
 - (iii) grant licences for works (section 15)
 - (iv) enter and inspect vessels in the Port (section 23) and

⁴ [EIRBriefingsBodiesCovered.pdf \(itspublicknowledge.info\)](#)

⁵ <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF>

(v) apply to the Secretary of State to acquire land under compulsory purchase legislation (section 9).

35. To a large extent, albeit for civilian rather than military purposes, the Authority would appear to have inherited the public regulatory functions in relation to the Port and navigation in the Firth (a substantial area of water, which can hardly be regarded in its entirety as simply a private commercial fiefdom) formerly exercised by the Queen's harbour master of the dockyard port of Cromarty, under the 1913 Order in Council made pursuant to the Dockyard Ports Regulation Act 1865.
36. In all the circumstances, the Commissioner finds that the Authority is properly considered to be a Scottish public authority within the meaning of paragraph (c) of the definition in regulation 2(1) of the EIRs.
37. As the Commissioner is satisfied that the Authority is a Scottish public authority for the purposes of the definition in part (c) of regulation 2(1) of the EIRs, he will not go on to consider whether it would also be covered by the definition in part (d) of regulation 2(1) of the EIRs.

Did the Applicant request environmental information?

38. In her request, the Applicant asked for information about complaints made about the oil rig Ocean Endeavour.
39. In her application, the Applicant explained that the complaints covered by her information request related to noise nuisance as a consequence of work being carried out on the oil rig, which had been under repair in the Cromarty Firth.
40. The Authority provided submissions where it recognised, in general terms, that information making reference to the state of elements of the environment, or factors affecting or likely to affect elements of the environment would appear to be covered by the definition of environmental information in the EIRs. The Authority also commented that, if such material were to be held by a body falling within scope of the EIRs in the form of complaints held by that body, then it could be requested under the EIRs.
41. Having considered the terms of the request, the Commissioner is satisfied that this is a request for environmental information: any noise nuisance is likely to be a factor affecting or likely to affect the state of the elements of the environment (such as air), involve measures affecting or likely to affect those elements and factors, and also (in having such effects) impact on the state of human health and safety. This is therefore information which would fall within scope of parts (a), (b), (c) and (f) of the definition of environmental information in regulation 2(1) of the EIRs.
42. As the Commissioner is satisfied that the Applicant did request environmental information and that the Authority is a Scottish public authority for the purposes of the EIRs, he will go on to consider whether the Authority handled and responded to the Applicant's request and requirement for review in line with the EIRs.

Handling of the request

43. Regulation 5(2)(a) of the EIRs gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request to comply with a request for information. This is subject to qualifications which are not relevant in this case.

44. Regulation 13 of the EIRs details the information that should be contained in any refusal to make the requested information available.
45. Whilst the Authority provided a response to the Applicant within 20 working days, this response did not (in not dealing with the request under the EIRs) fulfil the requirements of regulation 13 of the EIRs. The Commissioner finds that it failed to comply with regulations 5(2)(a) and 13 of the EIRs.
46. Regulation 16(4) of the EIRs gives Scottish public authorities a maximum of 20 working days following the date of receipt of the requirement to comply with a requirement for review.
47. Whilst the Authority provided a response to the Applicant within 20 working days, this response did not (in not dealing with the requirement for review under the EIRs) fulfil the requirements in regulation 16 of the EIRs. The Commissioner finds that it failed to comply with regulation 16.
48. The remainder of regulation 16 sets out the process for carrying out a review. The Commissioner must require the Authority to conduct a review now, meeting the requirements of regulation 16.

Decision

The Commissioner finds that the Authority failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant. In particular, the Authority (having failed to recognise that it was a Scottish public authority in terms of regulation 2(1) of the EIRs, asked for environmental information by the Applicant) failed to respond to the Applicant's request and requirement for review in line with regulations 5(2), 13 and 16(4) of the EIRs.

The Commissioner requires the Authority to respond to the request received from the Applicant in this case, in line with the requirements in the EIRs (in particular, by carrying out a review in accordance with regulation 16) by **10 July 2023**.

Appeal

Should either the Applicant or the Authority wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Enforcement

If the Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

Daren Fitzhenry
Scottish Information Commissioner

25 May 2023

Appendix 1: Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -
 - (a) a notice under section 21(5) or (9); or
 - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

- (2) An application under subsection (1) must -
 - (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
 - (b) state the name of the applicant and an address for correspondence; and
 - (c) specify –
 - (i) the request for information to which the requirement for review relates;
 - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c); and
 - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).

...

The Environmental Information (Scotland) Regulations 2004

2 Interpretation

- (1) In these Regulations –
 - “the Act” means the Freedom of Information (Scotland) Act 2002;
 - “applicant” means any person who requests that environmental information be made available;
 - “the Commissioner” means the Scottish Information Commissioner constituted by section 42 of the Act;
 - “the Directive” means Directive 2003/4/EC of the European Parliament and of the Council on public access to environmental information and repealing Council Directive 90/313/EEC;
 - “environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on

-

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;
- ...
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

“Scottish public authority” means –

- ...
- (c) any other Scottish public authority with mixed functions or no reserved functions (within the meaning of the Scotland Act 1998); and
- ...

5 Duty to make available environmental information on request

- (1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.
- (2) The duty under paragraph (1)-
 - (a) shall be complied with as soon as possible and in any event no later than 20 working days after the date of receipt of the request; and

...

13 Refusal to make information available

Subject to regulations 10(8) and 11(6), if a request to make environmental information available is refused by a Scottish public authority in accordance with regulation 10, the refusal shall-

- (a) be given in writing as soon as possible and in any event no later than 20 working days after the date of receipt of the request for the information;

- (b) specify the reasons for the refusal including, as appropriate, any exception under regulation 10(4) or (5) or provision of regulation 11 and how the Scottish public authority has reached its decision with respect to the public interest under regulation 10(1)(b);
- (c) state the basis on which any exception relied on under regulation 10(4) or (5) or provision of regulation 11 applies if it would not otherwise be apparent;
- (d) if the exception in regulation 10(4)(d) is relied on, state the time by which the authority considers that the information will be finished or completed; and
- (e) inform the applicant of the review provisions under regulation 16 and of the enforcement and appeal provisions available in accordance with regulation 17.

16 Review by Scottish public authority

...

- (4) The Scottish public authority shall as soon as possible and no later than 20 working days after the date of receipt of the representations notify the applicant of its decision.

...

17 Enforcement and appeal provisions

- (1) The provisions of Part 4 of the Act (Enforcement) including schedule 3 (powers of entry and inspection), shall apply for the purposes of these Regulations as they apply for the purposes of the Act but with the modifications specified in paragraph (2).
 - (2) In the application of any provision of the Act by paragraph (1) any reference to -
 - (a) the Act is deemed to be a reference to these Regulations;
 - (b) the requirements of Part 1 of the Act is deemed to be a reference to the requirements of these Regulations;
- ...
- (f) a notice under section 21(5) or (9) (review by a Scottish public authority) of the Act is deemed to be a reference to a notice under regulation 16(4); and
- ...

Directive 2003/4/EC of the European Parliament and of the Council 28 January 2003 on public access to environmental information and repealing Directive 90/313/EEC

2 Definitions

For the purposes of this Directive:

...

2 "Public authority" shall mean:

- (a) government or other public administration, including public advisory bodies, at national, regional or local level;
- (b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment; and
- (c) any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within (a) or (b).

Member States may provide that this definition shall not include bodies or institutions when acting in a judicial or legislative capacity. If their constitutional provisions at the date of adoption of this Directive make no provision for a review procedure within the meaning of Article 6, Member States may exclude those bodies or institutions from that definition.

...

The Order contained in the Schedule to the Cromarty Firth Port Authority Order Confirmation Act 1973

7 General duties

- (1) It shall be the duty of the Authority, subject to the provisions of this Order, to take all such action as they consider necessary or desirable for or in connection with -
 - (a) the improvement and conservancy of the Port;
 - (b) the provision, maintenance, operation and improvement of port and harbour services and facilities in, or in the vicinity of, the Port;
 - (c) the control of development in the Port, and the promotion of development in and in the vicinity of the Port.

...