



Neutral citation number: [2024] UKFTT 00059 (GRC)

Case Reference: EA/2023/0338

**First-tier Tribunal
General Regulatory Chamber
Information Rights**

**Heard by: remotely by video conference
Heard on: 28 November 2023
Decision given on: 22 January 2024**

Before

**TRIBUNAL JUDGE WILSON
TRIBUNAL MEMBER PALMER-DUNK
TRIBUNAL MEMBER TAYLOR**

Between

WILLIAM SHIEL

Appellant

and

INFORMATION COMMISSIONER

Respondent

Decision: The appeal is **allowed but only insofar as it relates to stakeholder engagement and complaints procedures, policies and plans. In all other respects the appeal is dismissed**

The decision notice shall be substituted in relation to stakeholder engagement and complaint handling procedures, policies and plans so as to provide that North Sunderland Harbour Commissioners shall within 35 days provide the Appellant with a list of all stakeholder engagement and complaint handling procedures, policies and plans together with copies of such procedures, policies and plans. In all other respects the Decision Notice is upheld.

REASONS

Mode of Hearing

1. The proceedings were held by video link (CVP). The Respondent did not attend and was not represented. The Appellant was not in attendance but was represented by Mr C Holland

(Counsel). The Appellant's representative joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.

Background

2. This appeal is against a decision of the Information Commissioner (the "Commissioner") dated 21 June 2023 Ref. IC-231321-G7T7, (the "Decision Notice"). The appeal relates to the application of the Environmental Information Regulations (EIR) 2004 ("EIR"). It concerns information about North Sunderland Harbour Commissioners' (NSHC).

3. NSHC is a statutory harbour authority and a trust port. NSHC's current governing instrument is the North Sunderland Harbour Order 1931 (as amended by the Harbour Authorities (Variation of Constitution) Order 1993) ("**the 1931 Order**"). NSHC is responsible for the administration, maintenance and improvement of the harbour of North Sunderland ("the Harbour"). NSHC's jurisdiction comprises the waters enclosed by piers and a breakwater, together with the associated shore facilities, and an additional area seaward of the piers and breakwater.

4. The business of the Harbour is now primarily fishing (conventional fishing vessel traffic as well as vessels used for sea-angling) and passenger embarkation and disembarkation for tourists wishing to visit the nearby Farne Islands. There are approximately 28 commercial vessels which routinely operate from or visit the Harbour and there are approximately 12 recreational vessels kept in the Harbour. The Harbour is also home to the RNLI's Seahouses Lifeboat Station and its Shannon Class all-weather and D Class inshore lifeboats, which are both slipway-launched.

5. NSHC's current powers include powers to acquire, retain and sell lands, to undertake works, to maintain and improve existing works, to dredge, to make byelaws, and to levy rates. NSHC's latest byelaws govern navigation and berthing, mooring and anchoring, and provide for regulation of the harbour premises and generally. NSHC is a local lighthouse authority.

The Request and Decision Notice

6. On 8 November 2022, the complainant wrote to NSHC and requested information in the following terms:

"...I refer to the request made in paragraph 9.5 of my letter of 21 July for confirmation as to whether NSHC has any of the following procedures, policies and plans in place:

- concerning leadership, effectiveness, accountability and remuneration, as recommended by the Governance Guidance;
- concerning stakeholder engagement, as recommended by the Governance Guidance;
- a formal complaint handling procedure, as recommended by the Governance Guidance;
- a safety plan for marine operations, as recommend by the Safety Code.

...Accordingly, my client requests that (a) list of NSHC's published procedures, policies and plans and (b) the procedures, policies and plans themselves are emailed to him...

...NSHC are asked to provide copies of the following documents:

- the six most recent annual accounts and statements of capital expenditure produced by NSHC pursuant to articles 59(2) and (4) of the 1931 Order;
- the current register of interests for each of the current Commissioners...”

7. On 28 November 2022 NSHC responded to the request. NSHC did not consider that some of the information requested was environmental information. In particular, NSHC’s procedures, policies and plans on leadership, effectiveness, accountability and remuneration; stakeholder engagement; and formal complaints handling. NSHC did not accept that the governance of NSHC amounted to a “measure” or an “activity”. Accordingly, NSHC considered that information on the governance of NSHC in and of itself did not amount to “environmental information”. As such, regulation 5 of the EIR did not apply and the request was refused in relation to these elements.

8. NSHC accepted that a Marine Safety Management System, a Port Operations Manual, a Port Waste Management Plan and an Oil Spill Contingency Plan could amount to “environmental information”. NSHC confirmed it did not have an approved Marine Safety Management System. However, a Port Operations Manual, Port Waste Management Plan and Oil Spill Contingency Plan were available in draft form and copies of these documents were sent to the Appellant.

9. NSHC did not consider annual accounts and statements of capital expenditure in and of themselves amounted to “environmental information”. Accordingly, NSHC concluded that regulation 5 of the EIR did not apply. Nevertheless, NSHC indicated that recent accounts could be inspected at the Harbour Office.

10. NSHC did not consider that a register of Commissioners’ interests amounted to a “measure” or an “activity” of NSHC and thus NSHC did not accept that a register of Commissioners’ interests in and of itself amounted to “environmental information”. Accordingly, NSHC concluded that regulation 5 of the EIR did not apply. In addition, if the Register was to be categorised as environmental information, it would be excepted from disclosure under regulation 13 of the EIR (personal data).

11. Following an internal review, prompted by the Appellant’s representative letter dated 4 January 2023, NSHC wrote to the Appellant on 7 February 2023 and maintained its position.

12. The Appellant complained to the Respondent on 6 May 2023. In the Decision Notice the Commissioner decided that:

- a. The policies in question, the annual accounts and the Register of Commissioners’ Interests had no environmental purpose. The purpose of the policies is to support NSHC’s operational needs; the purpose of the accounts is to monitor NSHC’s financial condition; and the purpose of the Register of Commissioners interests is to declare any private interests that might conflict with public duties.
- b. The Commissioner was therefore satisfied that the information NSHC had withheld was not environmental information and therefore NSHC was not obliged to disclose it.
- c. The Commissioner also noted that, as NSHC had asserted, even if the Register of Commissioners’ Interests was environmental information, it was highly likely that disclosing the information to the world at large would breach the first data protection principle and so would be unlawful.

The Appellant's Position

13. The Appellant's position is set out within the schedule of relief, grounds of appeal, Appellant's reply, appeal skeleton argument, other written documents set out within the open bundle and oral submissions can be summarised as follows:

Separate Elements of the Request

- a. The grounds of appeal helpfully separates the request into three separate themes. These are characterised as follows:
 - i. Request 1 -
 - a list of NSHC's procedures, policies and plans concerning:
 - leadership, effectiveness, accountability and remuneration;
 - stakeholder engagement;
 - formal complaints handling procedure;
 - the procedures, and the procedures, policies and plans themselves.
 - ii. Request 2 - the six most recent annual accounts and statements of capital expenditure produced by NSHC pursuant to articles 59(2) and (4) of the 1931 Order;
 - iii. Request 3 - the current register of interests for each of the current Commissioners

In the interests of clarity and certainty we shall adopt the same categorisation throughout this decision and reasons and shall refer to Request 1- 3 to identify the relevant specific elements of the request. When we refer to the "the requested information" we are referring to the totality of the information requested within Requests 1-3.

The Context

- b. The relevant measures and/or activities are as identified by the Appellant's representative in paragraphs 31-33 of the Grounds of Appeal, comprising of the
 - i. the 1931 Order (a measure);
 - ii. the constitution and exercise by NSHC of its powers under the 1931 Order (measures and activities);
 - iii. NSHC's activities (activities).
- c. The Appellant asserts that this package of measures and activities can be broadly categorised as arrangements for and the undertaking of the governance, management and administration of the Harbour and all the powers and responsibilities of NSHC in relation to it. NSHC is a public authority which has been given significant powers in connection with the management, maintenance and improvement of the Harbour, including (pertinently) the powers to make significant environmental interventions including powers relating to the regulation of fishing, and matters such deepening, dredging, scouring and excavating the foreshore and the bed of the sea.
- d. The Appellant asserts that the policy and object of the General Pier and Harbour Acts, 1861 to 1915 are environmental in nature, concerning artificial harbours and further that all of NSHC's powers are conferred to protect the environment. NSHC is a self-funding single purpose vehicle whose only purpose is the protection of the environment. The Appellant

asserts that in this regard NSHC is different from, say, a local authority. Albeit it is accepted that there will be sub-measures and activities which do not affect or are not likely to affect elements of the environment and which are not designed to protect those elements. The Appellant asserts that the manner in which the line should be drawn is by exclusion on a purposive construction of the EIR

- e. The Ports Good Governance Guidance, the Port Marine Safety Code and the Guide to Good Practice on Port Marine Operation all emphasise common themes of openness, transparency and accountability in SHAs.

Proper Application of the Relevant Law

- f. At the hearing the Appellant's counsel confirmed that the Appeal is pursued solely on the basis of regulation 2(1)(c).
- g. The Appellant asserts that the correct question is "what measure and/or activities is the requested information "on"?"
- h. The Appellant's representative submitted that Information is "on" a measure or activities if it is about, relates to or concerns the measure or activities in question. The Department for Business, Energy and Industrial Strategy v Henney and ICO [2017] EWCA Civ 8444 [39] clarified that the tribunal is not restricted by what the information is specifically, directly or immediately about. There is no requirement that the information in question is directly or immediately concerned with a measure which is likely to affect the environment [41] (or, it is submitted by extension, with a measure or activities designed to protect those elements). Nothing within the language of regulation 2(1)(c) requires the relevant measure (or activities) to be that which the information is primarily "on" [41]. What may be required is consideration of the wider context [43] (see below for relevant extract). Regulation 2(1)(c) definition "does not mean that the information itself must be intrinsically environmental" [45]. The relevant limits are identified at paragraph 52 of Henney (see below for relevant extract).
- i. The Appellant asserts that the Respondent wrongly concluded that the requested Information was not environmental information. The Decision Notice failed to identify the relevant measure and/or activities. Instead, it determined the complaint on the basis of whether the Requested Information had an "environmental purpose" [20] and decided it did not. The Appellant asserts that this is the wrong approach. The Appellant relies on Henney which provides that the statutory definition in regulation 2(1)(c) does not mean that the information itself must be intrinsically environmental [45].
- j. The Appellant asserts that the Respondent erred in that the Respondent conflated/confused the exercise at paragraph 43 of Henney set out below with the purposive approach to interpretation of the regulations as described in paragraphs 45 to 47 of Henney. Accordingly, the Respondent has failed to demonstrate that the purposive approach was adopted when interpreting and applying the EIR.

Proper Treatment of the Requests

The Appellant asserts that the Requests 1-3 should be treated as set out below:

- k. Request 1 - Is information “on” the governance, management and administration of the Harbour. In particular in relation to NSHC’s involvement, as the operators of a public facility, with members of the public. The government guidance documents emphasise the need for effective corporate governance in accordance with principles adapted from the Nolan principles (see para 3.17 of the Governance Guidance [E/8/481]), including accountability to stakeholders.
- l. Request 2 - NSHC is a self-funding entity whose statutory purpose is to protect the environment. Its annual accounts will show in high-level and overarching detail how it has utilised its resources over the accounting period in question, and what resources it has available to it in the future to perform its duties. In terms of “mixed” information, fiscal information relating to non-environmental expenditure could not be stripped out, because any decision to spend money on non-environmental matters obviously is an activity that may affect the environment in correspondingly reducing the funds NHSC has to provide for its environmental activities. Government guidance emphasises the importance of information provision to stakeholders, including recommending publication on a website “as a key way of providing transparency about their activities” (para 2.7 of the Governance Guidance [E/8/469]). The accounts should be lodged with the magistrates’ court for inspection although there is no indication that this has occurred. The inspection facility offered by NSHC without prejudice to its denial that the accounts are environmental information does not constitute compliance with the EIR.
- m. Request 3 - The keeping of a register of interests is a necessary step to identify potential conflicts between Commissioner’s private interests and the interests of NSHC and the wider public. It is information “on” the undertaking of the governance, management and administration of the Harbour. The Governance Guidance provides that (para 3.24) [E/8/482] “All trust ports need to maintain a register of interests for its board members and chairs should be prepared to answer questions from stakeholders about its contents”. It is questioned how stakeholders can ask questions about the content of the register without being able to inspect it. Suppression of the register is unlikely to improve its accuracy or completeness, and publication thus would indirectly achieve environmental benefits in addition to facilitating public participation in environmental decision-making. At the hearing, the Appellant accepted that the tribunal had no power to remit the decision as to whether the disclosure of Commissioner’s private interests would breach the first data protection principle to the Respondent, which was the relief sought by the Appellant. Accordingly, it was accepted that if the Tribunal were to find in favour of the Appellant that Request 3 was environmental information then there would need to be a separate request in relation to that information whereby the issues of breach of the first data protection principle could be fully considered and if necessary a complaint and subsequent appeal could be instigated.
- n. In general, the Appellant asserts that on a purposive construction of the EIR, the Requested Information is environmental information within the meaning of regulation 2(1)(c). The emphasis placed by the Governance Guidance on stakeholder engagement – and the connection this has with openness, transparency and accountability provided for in this document as well as the Safety Code and Operations Guidance – entirely accords with the Directive and the Aarhus Convention (and indeed are likely to have been influenced by the Directive and the Aarhus Convention). In oral submissions the Appellant’s representative expanded on this concept indicating that in broad terms that it is possible that documents

relating to governance could affect measures on the environment as if NSHC does not perform its functions properly this may well affect the harbour.

Availability in Court Proceedings

- o. The Appellant asserts that it is irrelevant that the same information may be disclosable in judicial review proceedings. The duties imposed by the EIR are to disseminate environmental information and to provide advice and assistance to applicants. The Appellant asserts that these duties cannot be defeated/diluted because the same information may be available through disclosure in court proceedings.

Mixed Information

- p. The Appellant asserts that in the case of mixed information the proper approach is that set out in Department of Transport v. Information Commissioner and Hastings [2020] [32] that, where “mixed” information was in issue, one would rarely need to do more than apply the principles in Henney to the information as a whole, in order to see whether (in the context of the whole and applying a broad and holistic view) the dispute elements were “on” the measure in question.

Relief

- q. Within the schedule of relief, the Appellant seeks the substitution of the notice with a notice:
 - i. declaring that the requested information is environmental information within the meaning of the regulation 2(1) of the EIR.
 - ii. The exceptions to the duty to disclose environmental information asserted in relation to Request 3 (regulation 13) are not made out. This was not subsequently pursued (see above).
 - iii. specify the steps that must be taken by NSHC to comply with regulations 11 and 14 of the EIR.

The Respondent’s Position

14. The Respondent’s position as set out in the response is summarised below.

Proper Application of the Relevant Law

- a. It is accepted that the correct approach is to ask whether the requested information is “on” a measure within reg 2(1)(c).
- b. The Respondent accepts and relies upon the need for consideration of the wider context as set out in Henney [43] (see below for relevant extract). The Respondent accepts and relies upon the limitations described in Henney [52] (see below for relevant extract).
- c. it does not matter whether a decision maker started with the measure or the information” Mason v Information Commissioner and London Borough of Barnet (GIA) [2020] UKUT 56 (AAC), (para 14).

- d. The Respondent denies that it has wrongly conflated the analysis of the Court of Appeal at para 43 of its judgment in Henney with its analysis at paras 45-47

Protection of the Environment

- e. The Respondent notes that the 1931 Order makes no express reference to the protection of the environment. However, the Respondent nonetheless accepts that the management and maintenance of the harbour is likely to include a number of matters within the scope of regulation 2(1)(c).

Is the requested information is “on” a measure or activity within reg 2(1)(c)

- f. The Respondent asserts that the mere fact that the NSHC’s functions include the management of the Harbour is not sufficient to bring its governance policies and accounts within the scope of reg 2(1)(c). These are not measures which themselves either “affect” or are “likely to effect” either any of the elements in reg 2(1)(a) nor any of the factors in reg 2(1)(b). They are not concerned with the merits or substance of any particular activity undertaken by the NSHC but are directed wholly towards its constitution and financial operation. Their connection with the management of the Harbour and the broader environment is simply too remote and incidental to qualify, the Appellant’s lengthy submissions on the role of trust port boards and their functions notwithstanding.
- g. The Respondent asserts that the same is true *a fortiori* in relation to the register of commissioner’s interests. As the Respondent found in his decision notice, there was nothing in the Department for Transport’s 2018 Ports Good Governance Guidance to show that the purpose of the register was to inform the public. Instead, the Respondent was entitled to conclude on the material before him that its purpose was to inform the decisions of the Chair, the Chief Executive and other members of the Board (decision notice, para 18). Similarly, the Commissioner was entitled to accept the NSHC’s evidence that non-municipal harbour authorities were not bound to publish such registers and, indeed, that they typically did not do so. Even if there were an obligation to publish such information, moreover, it strains credulity to suggest that information of this sort is information “on” environmental measures under reg 2(1)(c).

Applicable law

15. The relevant provisions of EIR are as follows.

2(1) ...“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on—

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the

elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

....

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);

.....

5(1) ...a public authority that holds environmental information shall make it available on request.

.....

12(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –

- (a) An exception to disclosure applies under paragraphs (4) or (5); and
- (b) In all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

12(2) A public authority shall apply a presumption in favour of disclosure.

.....

16. Requests for environmental information are expressly excluded from the Freedom of Information Act 2000 (“FOIA”) in section 39 and must be dealt with under EIR.

17. It is well established that “environmental information” is to be given a broad meaning in accordance with the purpose of the underlying Directive 2004/4/EC. The definition was explained by the Court of Justice of the European Union in Case C-316/01 Glawischnig v Bundesminister für soziale Sicherheit und Generationen [2003] All ER (D) 145 as follows: “The Community legislature’s intention was to make the concept of information relating to the environment defined in Article 2(a) of Directive 90/313 a broad one, and it avoided giving that concept a definition which could have had the effect of excluding from the scope of that directive any of the activities engaged in by the public authorities ... Directive 90/313 is not intended, however, to give a general and unlimited right of access to all information held by public authorities which has a connection, however minimal, with one of the environmental factors mentioned in Article 2(a). To be covered by the right of access it establishes, such information must fall within one or more of the three categories set out in that provision.”

18. The definition was considered by the Court of Appeal (CA) in Department for Business, Energy and Industrial Strategy v Henney and ICO [2017] EWCA Civ 8444.

- a. The Regulations, the Directive, and the Aarhus Convention “are to be construed purposively. Determining on which side of the line information falls will be fact and context specific.”
- b. The CA went on to provide some general guidance. The CA used as a starting point the recitals to the Aarhus Convention and the Directive – “They refer to the requirement that citizens have access to information to enable them to participate in environmental decision-making more effectively, and the contribution of access to a greater awareness

of environmental matters, and eventually, to a better environment. They give an indication of how the very broad language of the text of the provisions may have to be assessed and provide a framework for determining the question of whether in a particular case information can properly be described as "on" a given measure."

- c. At paragraph 43 the CA went on to say that it is permissible to look beyond what the information is directly or immediately concerned with: "...identifying the measure that the disputed information is 'on' may require consideration of the wider context, and is not strictly limited to the precise issue with which the information is concerned ... It may be relevant to consider the purpose for which the information was produced, how important the information is to that purpose, how it is to be used, and whether access to it would enable the public to be informed about, or to participate in, decision-making in a better way. None of those matters may be apparent on the face of the information itself."
- d. At paragraph 52 of its judgment, the CA warned against an "overly expansive reading that sweeps in information which on no reasonable construction can be said to fall within the terms of the statutory definition."

19. The Upper Tribunal in Department for Transport v Information Commissioner and Cieslik [2018] UKUT 127 (AAC), put the point as follows: "...the principle established by the Court of Appeal in *Henney* and in *Glawischnig* [is] that information which has only a minimal connection with the environment is not environmental information. The principle must apply not only in deciding whether information is on an environmental matter but whether a measure or activity has the requisite environmental effect."

Issues and evidence

20. The parties accept that NSHC is subject to the EIR, but not FOIA. Therefore, NSHC is only obliged to disclose information to the extent that it's environmental information.

21. At the hearing the Appellant's representative accepted that if the tribunal were to find that the register of Commissioner's interest was environmental information then the issue of whether disclosure would breach of the first data protection principle could not be remitted to the Respondent. As this was the relief sought it was agreed that this was not an issue in dispute for this Tribunal (see above)

22. Accordingly, there is a sole issue for determination by this tribunal. That is whether each of the Requests 1 -3 is "on" a measure or activity as provided for within regulation 2(1)(c) and as such is environmental information.

23. By way of evidence and submissions we had the following, all of which we have taken into account in making our decision:

- a. an agreed bundle of open documents [515 PDF pages]
- b. a closed bundle [35 pdf pages].
- c. Appellant's bundle of authorities [320 pdf pages]
- d. the Appellant's representatives' oral submissions made at the hearing which are fully set out in the record of proceedings and have been considered.

Discussion and Conclusions

24. In accordance with section 58 of FOIA, our role is to consider whether the Commissioner's Decision Notice was in accordance with the law. As set out in section 58(2), we may review any finding of fact on which the notice in question was based. This means that we can review all of the evidence provided to us and make our own decision. We deal in turn with the issues.

Is the Requested information "on" a measure or activity as provided for within regulation 2(1)(c)

25. Firstly, for the avoidance of doubt, we place no weight upon the fact that the 1931 Order makes no reference to protection of the environment. In this regard we note the Respondent accepts that the management and maintenance of the harbour is likely to include a number of matters within the scope of regulation 2(1)(c). Having made this general point now turn to each of the individual Requests 1-3.

26. Request 1, relates to a list of NSHC's procedures, policies and plans concerning leadership, effectiveness, accountability and remuneration; stakeholder engagement; formal complaints handling procedure and the procedures, policies and plans themselves.

27. It is useful to separate the information requested. We consider the information relating to leadership effectiveness accountability and remuneration first. The Appellant's representatives characterise this information as "on" the governance management and administration of the harbour. The Appellant's representatives highlight that government guidance emphasises the need for effective corporate governance in accordance with principles adapted from the Nolan principles including transparency and accountability to stakeholders. We accept that there may be external policy drivers including government guidance based upon Nolan principles which encourage/mandate good governance principles and transparency and accountability to stakeholders. However, the question we must resolve is whether the Requested information is "on" a measure or activity as provided for within regulation 2(1)(c). It is apparent that the procedures policies and plans comprised in Request 1 are not specifically directly or immediately about or concerned with measures or activities as provided for within regulation 2(1)(c). A consideration of the wider context is required. In our judgement the information relating to leadership effectiveness accountability and remuneration is inward facing and produced and used for the purpose of ensuring effective internal management. There is nothing to indicate that access to this information will enable the public to be informed about or to participate in decision-making in a better way. Any arguable connection to the measures or activities provided within regulation 2(1)(c) is limited by the fact that they are the internal governance documents of an entity that manages a physical intervention into the environment and exercises functions that affect the environment. We find that that to categorise such documents as environmental information would constitute the overly expansive construction that sweeps in information which on no reasonable construction can be said to fall within the terms of the statutory definition as envisaged by Henney [52]. Even applying the purposive approach, which is considered below, there is nothing to suggest that the disclosure of this information would be consistent with or would further the objectives of the Aarhus Convention or Directive. For all these reasons we find that the procedures, policies and plans concerning leadership effectiveness accountability and remuneration are not "on" a measure or activity as provided for within regulation 2(1)(c). It follows that we find that they are not environmental information.

28. However, the information can be contrasted with the stakeholder engagement and formal complaints handling procedures, policies and plans. It is apparent that the stakeholder

engagement and formal complaints handling procedures and policies in Request 1 are not specifically directly or immediately about or concerned with measures or activities as provided for within regulation 2(1)(c). Again, a consideration of the wider context is required. These documents can be considered outwards facing. Whilst they are governance documents, their purpose is to govern the interaction between NSHC and its stakeholders and those who feel sufficiently aggrieved to raise a complaint against NSHC for either action or inaction. If we take a typical example of a power exercised by those responsible for managing a harbour such as dredging; measures and activities relating to dredging will engage the elements and factors referred to in 2(1) (a) & (b). A stakeholder engagement and complaints policy/procedure is more likely than not to extend to measures and activities relating to dredging or the lack thereof. The stakeholder engagement and complaints policy and procedure will dictate the mechanisms through which the public will be informed/consulted about dredging and the public will be able to participate in decision-making in a better way. Taking a purposive approach, which is considered below, it is clear that disclosure of stakeholder engagement and complaints procedures, policies and plans is consistent with and will further the objectives of the convention and directive as awareness of this information will better enable the public to inform and participate in environmental decision making. For all these reasons we find that the stakeholder and complaints procedures, policies and plans are “on” a measure or activity as provided for within regulation 2(1)(c). It follows that we find that stakeholder and complaints procedures, policies and plans are environmental information.

29. Request 2 relates to the six most recent annual accounts and statements of capital expenditure. The Appellant asserts that NSHC is a self-funding entity whose statutory purpose is to protect the environment. Its annual accounts will show how it has utilised its resources over the accounting period in question, and what resources it has available to it in the future to perform its duties. In terms of “mixed” information, fiscal information relating to non-environmental expenditure could not be stripped out because any decision to spend money on non-environmental matters obviously is an activity that may affect the environment in correspondingly reducing the funds NHSC has to provide for its environmental activities. Government guidance emphasises the importance of information provision to stakeholders, including recommending publication on a website “as a key way of providing transparency about their activities” (para 2.7 of the Governance Guidance [E/8/469]. The accounts should be lodged with the magistrates’ court for inspection although there is no indication that this has been done. The inspection facility offered by NSHC does not constitute compliance with the EIR. Firstly, we accept that the offer of inspection would not constitute compliance with the EIR if the accounts/capital expenditure were to satisfy the requirements of environmental information. The existence of external policy drivers such as government guidance emphasising the importance of the provision of this information to stakeholders and a separate requirement to lodge accounts at magistrates courts are not relevant to our consideration. The question that the tribunal must ask itself is whether the requested information is “on” a measure or activity as provided for within regulation 2(1)(c). Again, it is apparent that accounts and capital expenditure statements comprised in Request 2 are not specifically, directly or immediately about or concerned with measures or activities as provided for within regulation 2(1)(c). Again, a consideration of the wider context is required. Accounts will contain mixed information. Even where the accounts and capital expenditure schedules document spending in relation to elements or factors which could be considered to fall within 2(1)(a) and 2(1) (b) it is still necessary to consider the purpose of accounts. Again, we find that the accounts are produced for internal governance reasons. They are produced for fiscal responsibility and budgetary responsibility reasons. The accounts are used for these purposes. It cannot be said that the accounts, even where they disclose spending which may be in connection to the environment such as dredging, would enable the public to be informed about or to participate in

decision-making in a better way. The figures contained within an account or schedule provides no context or meaningful information to enable the public to be informed or participate in decision-making. For the same reasons, adopting the purposive approach, considered below, disclosure cannot be said to be consistent with or to further the objectives of the convention or directive. Again, any arguable connection to the measures or activities provided for within regulation 2(1)(c) is limited to the fact that the accounts and capital expenditure information relate to an entity that manages a physical intervention into the environment and exercises functions that affect the environment. In these circumstances we find that to consider the accounts and capital expenditure schedules environmental information would constitute an overly expansive construction that sweeps in information which on no reasonable construction can be said to fall within the terms of the statutory definition as [Henney [52]]. For all these reasons we find that the accounts and capital expenditure information are not “on” a measure or activity as provided for within regulation 2(1)(c). It follows that we find that they are not environmental information.

30. Request 3 relates to the current register of interests for each of the current Commissioners. The Appellant asserts that the keeping of a register of interests is a necessary step to identify potential conflicts between Commissioner’s private interests and the interests of NSHC and the wider public. The Appellant asserts that it is information “on” the undertaking of the governance, management and administration of the Harbour. The Governance Guidance provides that (para 3.24) [E/8/482] “All trust ports need to maintain a register of interests for its board members and chairs should be prepared to answer questions from stakeholders about its contents”. The Appellant questions how stakeholders can ask questions about the content of the register without being able to inspect it. The Appellant asserts that suppression of the register is unlikely to improve its accuracy or completeness, and publication thus would indirectly achieve environmental benefits in addition to facilitating public participation in environmental decision-making. Again, the existence of external policy drivers such as government guidance which may promote the benefits of transparency are not relevant to our consideration. The question that the tribunal must ask itself is whether the requested information is “on” a measure or activity as provided for within regulation 2(1)(c). It is apparent that the register of Commissioners interest comprised in request 3 is not specifically, directly or immediately about or concerned with measures or activities as provided for within regulation 2(1)(c). A consideration of the wider context is required. We find that the purpose and the use of the register of Commissioner’s interests is to ensure robust internal governance arrangements and decision-making which is free from conflict of interest. The purpose of the document and its use is not to inform the public. For the same reasons, adopting the purposive approach, considered below, disclosure cannot be said to be consistent with or to further the objectives of the convention or directive. There is nothing to suggest that this information would enable the public to be informed about or to participate in environmental decision-making in a better way. For the same reasons, adopting the purposive approach, considered below, disclosure cannot be said to be consistent with or to further the objectives of the convention or directive. For all these reasons we find that the register of commissioner’s interests is not “on” a measure or activity as provided for within regulation 2(1)(c). To make such a finding would result in an overly expansive construction that sweeps in information which on no reasonable construction can be said to fall within the terms of the statutory definition as envisaged by Henney [52]. For all these reasons we find that the register of commissioner’s interests is not “on” a measure or activity as provided for within regulation 2(1)(c). It follows that we find that the register of commissioner’s interests is not environmental information.

31. We have reminded ourselves that we must take a purposive approach to the interpretation of the regulations in light of the requirements and recitals of the Aarhus Convention and Directive.

Both the Convention and Directive refer to requirements that citizens should have access to information to enable them to participate in environmental decisions resulting in greater awareness of environmental matters, more effective contribution and eventually resulting in a better environment. For the reasons set out above, except for the stakeholder engagement and complaints procedures, policies and plans, we do not consider that disclosure of the documents would advance the purposes of the Convention or Directive.

Respondent's Approach

32. In written and oral submissions, the Appellant's representative asserts that the Respondent's approach to the assessment of whether the requested information is environmental information is flawed in two ways. In the interests of completeness, we address those submissions below.

33. Firstly, the Appellant's representative asserts that the decision notice fails to identify the relevant measure and/or activities. Instead, the Decision Notice determined the complaint on the basis of whether the requested information had an environmental purpose and decided it did not. The Appellant asserts that this was the wrong approach as Henney clarifies that the statutory definition of regulation 2(1)(c) does not require the information itself must be intrinsically environmental. We do not agree with the Appellant's submission. When the decision notice is read as a whole it is clear that the Respondent had in mind the correct test which was whether the Requested information was "on" a measure or activity as provided for within regulation 2(1)(c) [Decision Notice 17]. We find that the context in which the Respondent considered the purpose of the documents was the wider consideration exercise set out in Henney at [43]. Accordingly, we find that the respondent adopted the correct approach in considering the purpose of the documents as part of the overall application of the legal test of whether Requested information was "on" a measure or activity as provided for within regulation 2(1)(c).

34. Secondly, the Appellant's representative asserts that the Respondent erred in that the Respondent conflated the exercise at paragraph 43 of Henney set out above with the purposive approach to interpretation of the regulations as described in paragraphs 45 to 47 of Henney. The decision notice is confusing in this respect. When referring to Henney the decision notice states, "The Court also stressed the importance of taking a purposive approach – that is, to consider the purpose for which the information was created, the purpose for which it was held and whether it had a direct purpose in understanding environmental decision-making". On a black letter reading there is some confusion as to "purpose" which is relevant to the exercise set out at paragraph 43 of Henney and purposive approach. The latter being a statutory interpretation tool to ensure that the regulations are interpreted in a manner which is consistent with and advances the objectives of the Convention and directive. However, as set out above, even adopting the purposive approach we find that other than the stakeholder engagement and complaints policies and procedures disclosure of the requested information would neither be consistent with nor advance the objectives of the Convention or Directive.

35. The sole issue in dispute between the parties is whether the requested information is "on" a measure or activity as provided for within regulation 2(1)(c) such that it is environmental information. Other than the stakeholder engagement and complaints policies and procedures we have found that the requested information is not "on" a measure or activity as provided for within regulation 2(1)(c). It follows that we find that other than the stakeholder engagement and complaints policies and procedures the requested information is not environmental information.

36. We allow the appeal but only insofar as it relates to the stakeholder engagement and complaints policies and procedures. In all other respects the appeal is dismissed and the Decision Notice is upheld.

Signed G Wilson

Date: 15 January 2024

Judge of the First tier Tribunal