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Environmental Information Regulations: Port Authorities

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Port Authority is subject to Environmental Information Regulations
Scottish Information Commissioner: Decision 051/2023
25 May, 2023

A key issue in the exercise of the legal right of access to environmental information is whether the body holding the information counts as a public authority for this purpose and is thus bound by the obligation to disclose environmental information on request (unless exceptions apply). With an endless variety of arrangements for providing services in ways that blur the public/private dividing line, this is not always straightforward. In a recent decision the Scottish Information Commissioner has decided that a Port Authority does qualify as a public authority and is subject to the provisions of the Environmental Information (Scotland) Regulations 2004.

The applicant requested information from Cromarty Firth Port Authority about noise complaints relating to an oil rig under repair in the Firth. When the request was rejected, the applicant appealed to the Commissioner (under the Freedom of Information (Scotland) Act 2002, s 47). Information about noise nuisance was held to be “environmental information” within the meaning of the Environmental Information (Scotland) Regulations 2004 but the question was whether the Port Authority was a “public authority” for the purposes of the Regulations.

The statutory test for this is different under the Environmental Information Regulations from that under the wider Freedom of Information (Scotland) Act, and rests largely on the interpretation given by the Court of Justice of the European Union in *Fish Legal v Information Commissioner* (C-279/12; (2014) 161 SPEL 11). This looks to whether a body is performing services of public interest and has special powers beyond those normally available to bodies under private law.

Although established under a private Act of Parliament, the Cromarty Firth Port Authority Order Confirmation Act 1973, the Port Authority takes the legal form of a body corporate (registered with Companies House), not a statutory body. Nevertheless, the Commissioner had no difficulty in holding that it was exercising functions in the public interest, rather than just of a commercial nature, and that it did enjoy a number of powers that would not be available to a private body, including enacting byelaws, levying fines and access to compulsory purchase powers. Accordingly, it was bound to provide the information requested.

Port authorities provide just one example of the many different ways in which functions are distributed in ways that blur any simple divide between public and private spheres. The responsibilities of the Port Authority for managing the port area and the far-ranging powers granted to it made this a fairly straightforward decision when applying the *Fish Legal* test, but other forms of privatised or partnership arrangements may not be so simple. Moreover, with the key test resting on a decision from the Luxembourg court, it is now open to any party to use the European Union (Withdrawal) Act 2020 and the Retained EU Law (Revocation and Repeal) Act 2023 argue that that interpretation should be departed from.

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