

Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice

Date: 29 January 2020

Public authority: E.ON UK plc
Address: Westwood Way
Westwood Business Park
Coventry
West Midlands
CV4 8LG

Decision (including any steps ordered)

1. The complainant has requested information relating to Rampion Offshore Windfarm.
2. E.ON UK plc argued that it is not a public authority for the purposes of the EIR. It has therefore refused to respond to this request under the EIR.
3. The Commissioner finds that E.ON UK plc is a public authority for the purposes of the EIR.
4. The Commissioner therefore requires E.ON UK plc to respond to this information request in accordance with its obligations under the EIR.
5. The public authority must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

6. On or around the 10 March 2017 the complainant contacted E.ON UK Plc via its website asking for an address which he could use to send an

information request to under the EIR. On 11 March 2017 E.ON UK plc advised him that it was not covered by the EIR.

7. On 14 March 2017 the complainant responded, stating he considered E.ON UK plc was a public authority for the purposes of the EIR. He went on to submit the following request for information relating to Rampion Offshore Windfarm:

“ 1. Can you please supply the latest version of the co-existence plan for fisheries?

2. Can you please supply copies of any reports, minutes, correspondence or formal decision notices which may explain why any co-existence and compensation arrangements were drawn up only in respect of commercial fishing vessels and dive boats?

3. Can you please confirm the number of individual compensation payments made to owners/operators of vessels within the scope of the co-existence plan? Please note we do not require details of the compensates nor the sums involved.

4. Can you please confirm whether Eon have received a sum from the UK government to be used towards compensation payments, and whether any such sum has any restrictions on the nature of any compensation it is to be used for?

5. Can you please confirm whether or not you hold any assessment of the economic and/or environmental impact of the construction of the wind farm on recreational sea angling, whether on-shore or off-shore? If so can you please supply this.

6. Can you please confirm whether any applications have been received from charter boat owners or skippers affected by the development for compensation, if so what number?

7. Can you confirm whether any payments of compensation have been made to charter boat skippers or owners?

8. Can you please confirm the number of wrecks within the PSSA (particularly sensitive sea area) created by the windfarm array? Can you also confirm how many will be unfishable as a result of the array either during the construction period or the operational period?

9. Can you confirm the number of A) commercial fishing and B) Charter boat fishing marks and/or anchorages lost during the construction phase of the windfarm?

8. The complainant did not receive a response to his request. Following correspondence with the Commissioner E.ON UK Plc wrote to the

complainant on the 26 May 2017 maintaining its position that it was not a public authority.

Scope of the case

9. The complainant originally contacted the Commissioner on 21 April 2017. This was after the 20 working days normally allowed for responding to requests had elapsed. He complained about the way his request for information had been handled.
10. This initiated the correspondence between the Commissioner and E.ON UK Plc which culminated in E.ON UK plc writing to the complainant on the 26 May 2017 maintaining its position that it was not a public authority.
11. The Commissioner therefore wrote to E.ON UK plc on 31 May 2017 in order to obtain the information she considered she required to make a decision as to whether E.ON UK plc was a public authority for the purposes of the EIR. In its response dated 16 June 2017, E.ON UK plc acknowledged it had received the request but explained that as E.ON UK plc did not have an interest in Rampion Offshore Windfarm it considered the request had been misdirected and suggested the complainant contact an organisation it had identified as being responsible for the windfarm. E.ON UK plc did not address the issue of whether or not it was a public authority under the EIR.
12. The Commissioner therefore relied on her powers under regulation 18 of the EIR to serve an information notice on E.ON UK plc. The information notice was served 17 July 2017 and gave E.ON UK plc 30 days to provide a full response to the Commissioner's inquiries. However E.ON UK plc appealed that notice. The appeal process continued until 21 August 2019 when E.ON UK plc provided a response to the information notice. It maintained that it was not a public authority for the purposes of the EIR and provided arguments in support of its position.
13. The Commissioner considers the scope of this case is whether E.ON UK plc is a public authority for the purposes of the EIR.
14. In the case of *Fish Legal v Information Commissioner & Others* (GIA/0979/2011 & GIA/0980/2011) ("Fish Legal"), the Upper Tribunal Administrative Appeals Chamber ruled that the Commissioner has jurisdiction to both investigate and decide whether a body is a public authority.
15. The Commissioner therefore has jurisdiction to decide this question. The First Tier Tribunal may also hear appeals against the Commissioner's

decisions and the Upper Tribunal may hear appeals against the decisions of the First Tier Tribunal.

Reasons for decision

16. The EIR gives members of the public the right to access environmental information held by the vast majority of public authorities and places a duty on public authorities to respond to requests for environmental information.
17. If a public authority receives a request for environmental information they are legally obliged to provide it, usually within 20 working days, unless any of the exceptions contained within the EIR apply. If a public authority believes an exception does apply to the information that has been requested, then the public authority must explain why the exception applies.
18. The definition of public authority is given in Regulation 2(2) of the EIR. In particular it states that a "public authority" means the vast majority of public authorities as defined in Section 3 of the FOIA and:
 - (c) any other body or other person, that carries out functions of public administration; and
 - (d) any other body or other person that is under the control of a public authority and:
 - (i) has public responsibilities relating to the environment;
 - (ii) exercises functions of a public nature relating to the environment; or
 - (iii) provides public services relating to the environment.
19. In considering the question of whether E.ON UK plc is a public authority for the purposes of the EIR, it must therefore be established whether E.ON UK plc has functions of public administration or is under the control of a public authority.
20. The Fish Legal case is relevant here. This considered the issue of whether water companies are public authorities for the purposes of regulation 2(2)(c) or (d) of the EIR.
21. The Upper Tribunal in the Fish Legal case therefore considered whether the relevant bodies are entrusted by law with the performance of services in the public interest and whether they are vested with special powers. It also considered control of the companies and their autonomy.

22. In this case the Commissioner will start by looking at whether E.ON UK plc is a public authority by virtue of regulation 2(2)(c), i.e. whether it has functions of public administration. In the Fish Legal case the Upper Tribunal explained that persons 'performing public administrative functions' are:
- "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".*
23. The Commissioner interprets the reference to bodies being entrusted with the performance of a service under the legal regime applicable to them, as meaning that the body in question must be empowered with a relevant function under statute.
24. The request relates to Rampion Offshore Windfarm. A website for the windfarm (<https://www.rampionoffshore.com/about/>) explains that E.ON was originally granted exclusive rights to develop the area off the Sussex Coast in which the windfarm is located in 2010. Consent for the development of the windfarm was granted by a statutory instrument. That statutory instrument named E.ON Climate & Renewables UK Rampion Offshore Wind Limited as the undertaker of the development. The undertaker was granted certain powers under the statutory instrument to facilitate the construction and operation of the windfarm.
25. However the Commissioner understands that the name of the undertaker was changed in August 2015 to Rampion Offshore Wind Limited. E.ON UK plc has advised the Commissioner that Rampion Offshore Wind Ltd is a different entity to E.ON UK plc and that E.ON UK plc does not have any shareholdings in it. Although E.ON UK plc has not explained what its relationship with E.ON Climate & Renewables UK Rampion Offshore Wind Limited was, the Commissioner is satisfied that by the time of the request E.ON UK plc was no longer the owner or operator of the windfarm. Therefore the Commissioner does not consider the provisions of the statutory instrument are relevant to the issue of whether E.ON UK plc is a public authority for the purposes of the EIR.
26. The Commissioner has therefore considered whether E.ON UK plc has any other functions which have the potential to bring it within the scope of regulation 2(2)(c) of the EIR.
27. The UK energy industry is subject to statutory regulation, primarily through the Electricity Act 1989 (EA.89) and the Gas Act 1986 (GA.86). Both these Acts set out the roles and responsibilities of the Secretary of State and the Gas and Electricity Markets Authority (Ofgem). Under both

pieces of legislation the principal objective of the Secretary of State and Ofgem is to protect the interests of the current and future consumers, including (under the GA.86) the security of the supply gas and (under the EA.89) the security of the supply of electricity.

28. The GA.86 and the EA.89 make it an offence to carry out certain activities without being authorised to do so by Ofgem under a licence. Therefore the Commissioner considers that when fulfilling its regulatory duties by considering and granting licences relating to the supply of either gas or electricity to consumers, Ofgem is, in effect, entrusting the licence holder with the performance of a public service. At the time of the request E.ON UK plc held an electricity supply licence under the EA.89 and an electricity generation licence under the same legislation. It also held a gas supply licence under the GA.86. Therefore the Commissioner finds that E.ON UK plc has been entrusted with services under statute.
29. The Commissioner has gone onto consider whether the performance of those services are in the public interest. What constitutes a service in the public interest is not well defined. However the Commissioner is satisfied that the generation and supply of energy, whether that be gas or electricity, are activities of particular importance to the citizens and economy of the UK and can therefore be considered services performed in the public interest.
30. It has been established by the Upper Tribunal in *Cross v Information Commissioner and the Cabinet Office* [2016] UKUT 0153 (AAC), that in order for a body to be deemed a public authority under the EIR, at least some of the services they are entrusted with have to relate to the environment (see paragraph 86 that decision), but not necessarily all those services.
31. For a function to relate to the environment the Commissioner considers it is only necessary that the delivery of that service has an impact on the environment. The service or function does not have to be one which is granted specifically to manage the environment.
32. E.ON UK plc held a licence as an electricity generator up until September 2019. The Commissioner is satisfied that the generation of electricity by whatever means, will have an environmental impact.
33. The supply of electricity and gas to consumers is also an activity which will impact on the environment. The supply of gas and electricity is dependent on the network of pipes and pylons. The construction and maintenance of this infrastructure impacts on the environment. The actual transmission of the electricity involves the emission of extremely low frequency radiation.

34. Furthermore, as previously stated, Ofgem's principal objective is to protect the interests of consumers and this extends to consumers' interest in the reduction of green house gasses and the increase in renewable energy. In accordance with this objective electricity and gas suppliers have responsibilities in relation to decreasing energy consumption by following best practice in the adoption of energy efficiency measures. They also have responsibilities in respect of the introduction of smart meters which provide consumers and suppliers with detailed and accurate information about energy use, which in turns allows consumers to contribute to energy efficiency and suppliers to improve the efficient operation of the energy supply markets.
35. The final test which has to be met in order for a body to be a public authority for the purposes of the EIR under regulation 2(2)(c) is that it is vested with special powers which go beyond the normal rules of private law which apply to relations between any company or person.
36. These special powers have to have been given to the body in order that it can perform at least one of the services of public interest which it has been entrusted with. However there is no requirement for the special powers to facilitate the performance of those public interest services which impact on the environment. If the special powers relate to any of the services that the body performs in the public interest, this will be sufficient for the body to be a public authority under the EIR. The Tribunal's decision in Poplar Housing Association v the Information Commissioner and Peoples Information Centre EA/2018/0199 supports this approach (see paragraph 128).
37. At the time of the request E.ON UK plc held a licence as an electricity generator. As the holder of a generation licence, E.ON UK plc has certain powers under section 10 and Schedules 3 and 4, together with Conditions 14 and 15 of the EA.89. These include, under Schedule 4 and Condition 15, the power to carry out certain street works, alteration works, acquisition of wayleaves, felling and lopping tress and the power to enter on to land for purposes connected with licensed activities.
38. Holders of a generation licence have the power to compulsory purchase land (under Schedule 3 and Condition 14). The power only extends to the purchase of land required for any purpose connected with the carrying on of activities authorised under the licence. E.ON UK plc make the point that this power is limited in that although it can initiate the compulsory purchase of land, any acquisition requires the authorisation of the Secretary of State. The Commissioner is satisfied that this does not detract from the fact that by virtue of it being a licence holder, E.ON UK plc has a very real advantage in any negotiations that that it might enter into for the purchase of land it may require for the purposes of electricity generation.

39. In light of the above the Commissioner is satisfied that as an electricity generator, E.ON UK plc satisfied the tests set out in the Fish Legal case and therefore, subject to a 'cross-check' which will be discussed later, it was carrying out functions of public administration and was therefore a public authority under the EIR. However the Commissioner notes that by the time E.ON UK plc ultimately responded to the information notice, it had applied to Ofgem to have its electricity generation licence revoked. Ofgem issued a Notice of Revocation on 9 August 2019 and as of 9 September 2019 E.ON UK plc ceased to be the holder of an electricity generation licence.
40. Therefore, whilst the Commissioner is satisfied that E.ON UK plc was a public authority for the purposes of the EIR at the time of the request, she has gone on to look at its position as a holder of a licence for the supply of electricity and as a holder of a licence for the supply of gas.
41. The Commissioner recognises that the powers enjoyed as a licence holder for the supply of either electricity or gas under the EA.89 and GA.86 respectively are more limited to those E.ON UK plc enjoyed as an electricity generator. From E.ON UK plc's submission it would appear that its powers are limited to those set under section 2 of the Rights of Entry (Gas and Electricity Boards) Act 1954 which provides that gas and electricity suppliers can apply to the Magistrates' Court for a warrant of entry in certain prescribed circumstances. A warrant of entry is sought for the purpose of inspecting a meter for safety reasons or to disconnect the supply where appropriate.
42. E.ON UK plc has argued that the power of entry is required simply because the provision of gas and electricity is different to the products or services provided by other industries in that the supply of gas or electricity cannot be ceased remotely. In other words gas and electric supplies cannot be cut off without access to the meter. Therefore the right to obtain a warrant to access a property merely remedies a disadvantage not suffered by those who supply other networked services, such as telephone or internet connection, when they seek to protect their commercial interests. E.ON UK plc therefore argues its right of entry should not be regarded as a special power.
43. The Commissioner does not accept this argument. In line with the Tribunal's comments in Poplar (paragraphs 124 to 127), the Commissioner does not accept that for a power to be 'special' it has to provide the body in question with a net advantage over other bodies, or individuals, who don't also enjoy that power. Nor is it relevant whether the public interest task with which it has been entrusted puts the body at a disadvantage which then has to be addressed by the special power. The issue is simply whether the body in question has access to a power which is not available under private law. If it does, that power will qualify as a 'special' power.

44. E.ON UK plc argues that any warrant would be issued by the Magistrates' Court, rather than itself and that therefore the power of entry is no different to any order issued on application to any individual or person. The Commissioner accepts that ultimately it is a magistrate that grants the warrant. However the right, or power to apply for such a warrant is given the holder of gas or electricity supply licence.
45. The Commissioner does not accept that non licence holders enjoy similar rights or powers. For example the Commissioner does not accept that the power to enter a property to disconnect a gas meter is similar to a warrant of execution in order to seize property in repayment of a private debt which can be obtained against someone who has missed a payment under a county court judgement.
46. In Cross the Upper Tribunal applied the tests established in the Fish Legal case. Having done so, the Upper Tribunal went on to consider whether the resulting conclusion gave effect to the underlying objectives and purpose of the EU Directive which the EIR implemented. It explained, at paragraph 100, that this 'cross-check' involved standing back and looking at whether having conducted all the tests above, there is sufficient connection between the functions of the body under examination and those which entities that organically are part of the administration or executive of the state do. This approach was later adopted by the First Tier Tribunal in Poplar.
47. When applying this cross-check the Commissioner has had regard for the particular importance of securing the generation and supply of energy to both individuals and the wider economy. This is reflected in the fact after the second world war both these industries were nationalised. They remained under state control until being re-privatised through the GA.86 and the EA.89. The Commissioner considers that although privatisation allows free market forces to encourage the efficient supply of energy, the high degree of regulation imposed upon energy generators and suppliers clearly demonstrates the state's interest in ensuring the provision of gas and electricity. The Commissioner is satisfied that the supply of gas and electricity is of such importance that if their supply could not be secured through the private sector, the state would be compelled to step in. There is a sufficient connection between E.ON UK plc's function as an electricity generator, electricity supplier and as a gas supplier and the functions undertaken by the state.
48. In light of the above the Commissioner is satisfied that even as the holder of a licence as a gas or electricity supplier, E.ON UK plc is entrusted with the performance of activities in the public interest, at least some of which are in the environmental field and that in order to perform those public interest activities, it is provided with special powers. The Commissioner finds that E.ON UK plc is carrying out

functions of public administration and therefore is a public authority under regulation 2(2)(c) of the EIR.

49. As the Commissioner has found that E.ON UK plc is a public authority under regulation 2(2)(c) she has not gone on to consider its position under regulation 2(2)(d).

Right of appeal

50. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

51. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
52. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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