

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

**Date:** 5 September 2024

**Organisation:** EDF Energy Ltd  
**Address:** 90 Whitfield Street  
London  
W1T 4EZ

**Decision (including any steps ordered)**

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1. The complainant has requested information about electricity standing charges. EDF Energy Ltd (EDF) refused to comply with the request as it did not consider the information to be environmental or that it was subject to the EIR.
2. The Commissioner's decision is that EDF is not a public authority for the purposes of the EIR and therefore it was not under an obligation to respond to the request.
3. As EDF is not a public authority, the Commissioner is unable to compel it to take any steps.

**Request and response**

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4. On 7 March 2024, the complainant wrote to EDF and requested information in the following terms:  

"I request a breakdown of the standing charge of 0.4758 per day."
5. EDF did not originally respond to the request.

## Scope of the complaint

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6. On 15 April 2024, the complainant contact the Commissioner to complain about the failure, by EDF, to respond to the request.
7. In line with his usual practice, the Commissioner noted that the request was likely to fall within the scope of the EIR and asked EDF to respond to the request within 10 working days. This was done on the basis that the Commissioner had dealt with a [previous case involving EDF](#) in which the company had disputed that the requested information was environmental, but accepted in principle that it was covered by the EIR. EDF subsequently wrote to the complainant on 30 May 2024 noting that it was not subject to FOIA.
8. The Commissioner wrote to EDF again on the same day, pointing out that the information appeared to be environmental and that EDF had a duty to respond under the EIR even if it was not covered by FOIA. EDF continued to contest that the requested information was environmental.
9. On 6 June 2024, EDF again challenged the Commissioner's view that the information was environmental, but this time also challenged whether it was in fact subject to the EIR at all. It made no reference to the previous case in which it had accepted that it was, at least in principle, subject to the EIR.
10. The Commissioner accepts that, if the requested information were not environmental it would be irrelevant whether EDF was or was not covered by the EIR. Equally, if EDF is not covered by the EIR, it is irrelevant whether the information is or is not environmental information. Given that EDF's stance in this case reverses a previous stance it has taken and for the purposes of regulatory certainty, the Commissioner has chosen in this case to focus on the question of whether EDF is or is not subject to the EIR.

## Reasons for decision

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### Would the requested information be environmental?

11. Given the findings set out below, the Commissioner does not need to make a determination of whether the information is or is not environmental. He merely notes that the standing charge for gas and electricity is influenced by a number of factors including the infrastructure costs of delivering electricity and contributions to other environmental measures such as the Smart Meter programme, Warm Homes discount and the Green Levy – which would indicate that the

information is, at least to some extent, on one or more environmental measures.

### **What is a public authority?**

12. For the purposes of the EIR, an organisation will be a public authority if it is, or is under the control of:
  - a government department; or
  - any other body designated as a public authority by FOIA; or
  - a body that carries out functions of public administration.
13. EDF is clearly not a government department. It has not been designated as a public authority by or under FOIA. Although it is owned by a holding company, EDF argues that the directors of that holding company meet infrequently and do not involve themselves in the day to day running of the company or its subsidiaries. In the absence of evidence to the contrary, the Commissioner is satisfied that EDF is not under the control of another public authority.
14. That leaves the question of whether EDF carries out functions of public administration. There are two tests to satisfy:
  - Has EDF been entrusted in law with functions relating to the environment? And, if it has;
  - Does EDF have special powers to carry out those functions?

### **Entrustment**

15. In order to be classified as a public authority, an organisation must have been entrusted in law with functions relating to the environment. In practical terms, this usually means that the state must have passed a law, requiring the organisation to carry out certain functions it would more usually carry out itself.
16. EDF is licensed as a shipper of gas. That means that it has the right to use the National Transmission System to transport gas from its producers to the point in the network where it is needed by a gas supplier – who will then go on to supply that gas to a domestic household or to a business.
17. EDF also has various subsidiaries which hold licences to supply both electricity and gas. Its subsidiaries also have licences to generate electricity. However, these subsidiaries are separate legal entities. The request was made to EDF, not a subsidiary.

18. EDF explained to the Commissioner that it did not consider the licensing regimes imposed by either the Gas Act 1986 or the Electricity Act 1989 to constitute entrustment. It argued that the market for supplying electricity and gas was a competitive one – unlike the one water and sewerage companies, which are public authorities, operate in – and therefore simply another competitive market with no special connection to the state. State regulation did not amount to the state tasking others with its functions.
19. In support of its stance, EDF pointed to [Heathrow Airport Ltd v Information Commissioner \(EA/2020/0101\)](#) in which the First Tier Tribunal found that Heathrow Airport Ltd (which operates Heathrow Airport) was not a public authority. The Tribunal argued that the mere fact that Heathrow (and airports in general) had once been operated by the UK government did not, in itself mean that the operating an airport was a power of the state.
20. The supply of gas in the UK was originally a largely private matter. The Gas Light and Coke Company, the world's first public utility company was incorporated in 1812 and began supplying gas to customers in London. However, even in the early 20th century, some county councils were in the business of supplying gas.
21. In 1948, the Attlee Government nationalised the supply of gas and set up 12 area gas boards with a monopoly of supply within their local area. In the early 1970s, these boards were all merged into a single national supplier: British Gas Corporation – owned by the British Government.
22. In 1986, British Gas Corporation was privatised and the Gas Act 1986 allowed the Secretary of State to authorise other persons to provide gas to domestic and commercial users. That authorisation subsequently became a system of licences.
23. In the Commissioner's view, the supply of energy is something that states have, at least since the second world war, done themselves – or at least retained tight control over. Indeed EDF's name is derived from *Électricité de France* – the name of an electricity company wholly-owned by the French Government.
24. Furthermore, the Commissioner notes that the recently-elected Labour Government in the UK has plans to create a new state-owned energy company. This indicates that the supply of energy is field in which the British state maintains a strong interest.
25. The Commissioner does not consider the Heathrow Airport case supports EDF's case for two reasons. Firstly, judgements of the first tier tribunal are not binding on the Commissioner. Secondly, and in any case,

although the Tribunal found that Heathrow Airport Ltd had not been entrusted with functions of public administration, it noted the “obvious difference between the provision of water, sewerage, **gas, and electricity** and the provision of an airport; the former are essential to everyday life but the latter is not in the same category.” [emphasis added]

26. The Commissioner is satisfied that, by operating a system of licences, (as opposed to a market which any provider can enter at any time) the Government is entrusting EDF and other shippers of gas with a function it might otherwise carry out itself. The first test is therefore met.

### **Special Powers**

27. As well as having been entrusted with functions in law, in order to be a public authority for the purpose of the EIR, an organisation must also have been granted special powers in order to carry out those functions.
28. In [Fish Legal and Shirley v Information Commissioner and Others C-279/12](#), the Court of Justice of the European Union ruled that a public authority must have been granted special powers “beyond those which result from the normal rules applicable in relations between persons governed by private law.”
29. Ordinary private citizens and companies are able to enter into contracts with each other on a voluntary basis and, where necessary, to enforce those contracts through legal action. For example, if Person A supplies goods or services to person B, but person B refuses to pay for them, person A can ask a court to enforce their rights. Ultimately that might result in the court ordering bailiffs to seize sufficient of person B’s assets to enable their debt to be paid.
30. To qualify as “special powers” an organisation must have other powers beyond the right to ask a court to enforce a contract. For example an organisation might have the right to make and enforce byelaws on land that it owns; the power to compulsorily purchase land for its own use or the power to require access to private property.
31. The Upper Tribunal in [Fish Legal and Shirley v Information Commissioner and Others \[2015\] AACR 33](#) stated that the test for whether a power was a “special power” or not could be addressed by asking the question “Do the powers give the body an ability that confers on it **a practical advantage** relative to the rules of private law?”
32. In [Information Commissioner v Poplar HARCA \[2020\] UKUT 182 \(AAC\)](#), the Upper Tribunal agreed with a previous decision of the First Tier Tribunal that a provider of social housing had not been entrusted in law with any functions.

33. However the UT went on to say that, had it needed to do so, it would have disagreed with the FTT's finding that Poplar HARCA had special powers. The provider had certain powers to evict its tenants that would not be available to private landlords. However the Upper Tribunal concluded that these powers arose as a result of the different types of tenancies offered by private landlords and social housing providers. Whereas a private landlord could secure an eviction via civil litigation, social housing providers did not have the same ability to do so. The Upper Tribunal therefore concluded that the powers available to Poplar HARCA **mitigated a disadvantage** it had relative to private landlords, rather than provided it with a "practical **advantage**."
34. EDF noted that, as a shipper of gas, it did not have the power to compulsorily purchase land, make byelaws or exercise any special influence over decision-making.
35. EDF did accept that it had the power to require entry to private property without the consent of the owner, but with a warrant.
36. However, EDF argued that this did not amount to a special power because it could only exercise this right in respect of its own customers – who had voluntarily chosen it as their supplier – and could not exercise the power in respect of customers considered to be vulnerable.
37. More pertinently, EDF argued that this power remedied a disadvantage it had relative to other utility providers – as opposed to giving an advantage.
38. For most residential properties, gas is piped directly to the house and will flow whenever an appliance within the house, that uses gas, is turned on. EDF cannot control when appliances are or are not turned on and it has no mechanism to disconnect an individual household from the network remotely. Short of turning off gas to an entire street, the only way EDF can prevent gas from reaching a particular property is to disconnect the supply manually via the meter.
39. If a person signs up to a magazine subscription, but then stops paying the fee, the publisher can simply stop sending magazines to their address. If a customer stops paying for their cable TV or internet, the provider can sever the connection electronically and the customer can no longer access the internet or watch TV.
40. However, if a customer stops paying EDF for their gas, EDF cannot prevent gas from continuing to flow into that property without accessing that property and safely disconnecting it from the network. Therefore without the power to acquire a warrant to enter premises, EDF would be

unable to prevent non-paying customers from continuing to receive gas – even though they weren't paying for it.

41. The Commissioner therefore accepts that this power merely remedies a disadvantage that EDF has relative to the suppliers of similar products. Given the judgement of the Upper Tribunal in the Poplar HARCA case, the Commissioner is satisfied that this power does not confer any practical advantage. As EDF has not identified any other special powers that it has, the Commissioner is drawn to conclude that it fails the second test and consequently it is not a public authority for the purposes of the EIR.

## **Right of appeal**

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42. 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

43. 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.
44. 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**

**Roger Cawthorne**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**