

Public authorities under the EIR

Environmental Information Regulations

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Introduction

1. The Environmental Information Regulations 2004 (EIR) give rights of public access to information held by public authorities.
2. An overview of the main provisions of the EIR can be found in [The Guide to the Environmental Information Regulations](#).
3. This is part of a series of guidance, which goes into more detail than the guide, to help public authorities fully understand their obligations and promote good practice.
4. This guidance explains to organisations how to apply the definition of a public authority for the purposes of the EIR.

Overview

- The following are public authorities under the EIR:
 - Government departments and their executive agencies.
 - Bodies listed in Schedule 1 of the Freedom of Information Act 2000 (FOIA), unless they are listed for only some of the information they hold.
 - Companies wholly-owned by other public authorities under FOIA.
 - Bodies carrying out functions of public administration. A body carries out functions of public administration if it has been given special legal powers that are not available to ordinary companies.
 - Bodies that have public responsibilities, carry out functions of a public nature, or provide public services relating to the environment, and which are under the control of another public authority.

What the EIR say

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Regulation 2(2)

Subject to paragraph (3), “public authority” means -

- (a) government departments;
- (b) any other public authority as defined in section 3(1) of the Freedom of Information Act (the Act), disregarding for this purpose the exceptions in paragraph 6 of Schedule 1 to the Act, but excluding –
 - (i) any body or office-holder listed in Schedule 1 to the act only in relation to information of a specified description; or
 - (ii) any person designated by Order under section 5 of the Act;
- (c) any other body or person or person, that carries out functions of public administration; or
- (d) any other body or other person, that is under the control of a person falling within sub-paragraphs (a), (b) or (c) 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.

Regulation 2(3)

Except as provided by regulation 12(10) a Scottish public authority is not a “public authority” for the purpose of these Regulations.

Public authorities under the EIR

5. This guidance will help organisations determine whether they are a public authority for the purposes of the EIR. For many this will be straightforward. However sub-paragraphs (c) and (d) of the definition are more complex.
6. A body should consider each sub-paragraph of regulation 2(2) when determining whether it is covered by the EIR. Just

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because it is excluded from the definition in one sub-paragraph does not mean that it cannot be covered under another.

Regulation 2(2)(a) - Government departments

7. Government departments are public authorities under the EIR. Although the EIR do not define the term "government departments" it covers all central government departments including non-ministerial departments such as the Food Standards Agency and the Crown Prosecution Agency.
8. The term also includes the executive agencies that departments have established such as the Driver and Vehicle Licensing Agency which is part of the Department for Transport. In most cases these executive agencies have no independent legal status of their own and technically it is the parent department that is responsible for dealing with a request made to an executive agency. However many executive agencies have their own freedom of information staff who will deal with requests made to that agency.

Regulation 2(2)(b) - Other public authorities as defined by FOIA

9. Section 3(1) of FOIA defines public authorities for the purposes of the Act. Bodies listed in Schedule 1 of FOIA are also public authorities for the purposes of the EIR. They may be listed either individually, for example The Greater London Authority, or by a generic description, for example a local authority within the meaning of the Local Government Act 1972.
10. When new bodies are added into Schedule 1 they will also be public authorities for the purposes of the EIR. Schedule 1 can be amended either by an order being made under section 4 of the Act or by provisions in other legislation.
11. The exclusions under Paragraph 6 of Schedule 1 are disregarded for the purpose of the EIR. This means the special forces are public authorities under the EIR.

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12. Some bodies are listed in Schedule 1 only in respect of particular information. Under regulation 2(2)(b)(i) these bodies are not automatically public authorities for the purposes of the EIR. For example, under Schedule 1 the BBC is only listed as a public authority in respect of information held for purposes other than journalism, art or literature. Therefore it is not a public authority under the EIR under this heading.
13. In FOIA a body can also be designated a public authority under section 5 of the Act. However under regulation 2(2)(b)(ii) a designation under section 5 does not bring a body under the scope of the EIR.

Publicly-owned companies

14. Publicly-owned companies, as defined by section 6 of FOIA, are also public authorities for purposes of the EIR.
15. Companies are publicly-owned if they fall into one of three categories:
 - Wholly owned by the crown, including any government department.
 - Wholly owned by the wider public sector (defined as any body listed in FOIA Schedule 1) except government departments and authorities listed only in relation to particular information.
 - Wholly owned by the crown and the wider public sector.
16. Public sector ownership is explained in more detail in the guidance on [Public authorities under the Freedom of Information Act](#).

Regulation 2(2)(c) - Bodies carrying out functions of public administration

17. Organisations perform functions of public administration if they have been given special legal powers to carry out services of public interest. Special legal powers are created in law and can only be used by the relevant body. They go beyond the normal rules of private law that apply to any company or person.

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18. Services of public interest are not defined in the EIR, and do not have to relate to the environment. The key test is not the nature of the organisation's function but the additional legal powers they can use to carry them out. This means that private companies operating within a special legal framework can be public authorities for the purposes of the EIR.
19. Private law is the civil legal system which is used to govern and regulate relationships between people or organisations. Amongst other things, it allows a person to buy and sell property, license the use of their property, voluntarily enter into contracts, and take legal action when legal or contractual obligations are breached. Bodies carrying out functions of public administration have been given special legal powers that allow them to do more than is usually permitted under private law.
20. Special legal powers are, by definition, not available to any person or organisation who might want to use them; they can only be used by the specific entities set out in the relevant law. Some special legal powers give an organisation an advantage in negotiations with another party. Special powers can also be used to give an organisation responsibility for overseeing a service or geographic area, and provide additional legal powers for that purpose.
21. The issue was considered in the following example in which the Upper Tribunal referred questions to the Court of Justice of the European Union (CJEU). Although the UK has now left the EU, pre-exit EU case law remains relevant. Where it has grounds for doing so, the Supreme Court may depart from CJEU decisions. However, the UT findings, based on the decisions of the CJEU remain binding.

Example

In [Fish Legal vs ICO and others](#), the Upper Tribunal looked at whether a group of water companies were public authorities for the purposes of the EIR. The UT referred questions to the CJEU, in order to determine the correct approach to interpreting the [Environmental Information Directive](#), which Parliament implemented via the EIR.

On the question of functions of public administration, the Tribunal said that the important test was not the nature of the

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functions but how they were carried out. It found that bodies are public authorities if they have been given special legal powers to enable them to carry out their functions. The water companies were public authorities because their powers included compulsory purchase, the right to enter property to maintain services, and the power to ask the government directly to create byelaws and criminal offences related to their functions.

22. The judgment in Fish Legal looked specifically at the powers available to water companies. Private companies that operate in other sectors do so under their own different legal frameworks. Although the Fish Legal judgment did not provide general principles in determining whether a power is a special legal power, it did indicate the types of powers likely to fall into this category.
23. In principle an organisation may only need to have one special legal power in order to be a public authority under regulation 2(2)(c), although most relevant bodies are likely to have a range of additional powers. An organisation is more likely to be a public authority under this test if they have a hold a range of powers that collectively amount to a special legal status.

Types of special legal powers

24. The summary below indicates some of the special powers that can bring a private company within the scope of the EIR, but it is not an exhaustive list.
 - **Compulsory purchase**
The power to apply directly to the Secretary of State in order to force the sale of land, and to seek special advice from the government in advance.
 - **Requiring access to and use of private property**
Powers allowing a body to carry out its functions on private land without the owner's permission.

Even if a power includes some legal oversight (such as the approval of a judge), it can still go beyond the very limited circumstances that can otherwise require someone to allow access to their property.

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- **Creating new laws and criminal sanctions**

The power to apply directly to the government and request new laws to protect the company's assets and ability to provide.

Where the new laws create a criminal offence, this goes far beyond a normal person's ability to pursue a civil legal case. Even though a law or byelaw would have to be created by parliament, the special power comes from the legal framework that establishes a special process for creating the law.

- **Special levels of influence or advisory roles**

This can include various functions created by statute that give an organisation the ability to formally advise public authorities and influence public policy. Many companies have the power to lobby or influence government through formal and informal mechanisms. For this to be a function of public administration, there would need to be a legal provision making that role a specific function of the organisation. In [FER0534921](#) the Commissioner found that the Verderers of the Forest of Dean were a public authority under the EIR because of the statutory role they have in overseeing and influencing government policy affecting the forest.

- **Susceptibility to judicial review**

If it is possible to challenge a company's decisions through judicial review (as can be the case for public authorities) this can indicate that it is carrying out a function of public administration.

25. Special powers do not have to be used frequently in order to be relevant. For example, a company might not have to use its compulsory purchase powers when negotiating with landowners because it has usually been able to reach an acceptable agreement with the other party. However, the fact that the compulsory purchase is available as a potential outcome will inevitably have an impact on the negotiations. The organisation that holds the special power has a practical advantage when acquiring land, which is not available to ordinary people. However, a power that has fallen into disuse and genuinely cannot be enforced is unlikely to indicate that a function is one of public administration.

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26. The CJEU indicated in its consideration of the Fish Legal case that if a body is carrying out functions of public administration, in most circumstances it will be a public authority for all of the environmental information it holds.

Regulation 2(2)(d) - Bodies under the control of other public authorities

27. Bodies will be public authorities for the purposes of the EIR if they are under the control of another public authority and have public responsibilities, exercise functions of a public nature, or provide a public service, relating to the environment.
28. The definition of control requires a body to have no genuine autonomy in deciding how to perform its functions, and that the performance is determined by a public authority. This means a public authority has to do more than influence or regulate a body; instead it must control how those functions are carried out in practice.
29. Control can be exercised in various ways, and the EIR do not require it to take a particular form. The CJEU provided some examples of control, but the Upper Tribunal decided in Fish Legal that water companies were not under the control of the state using these criteria. The list is not exhaustive but included:
- the power to issue directions to a body, including by exercising rights as a shareholder;
 - the power to suspend or annul decisions taken by a body;
 - the power to appoint or remove a majority of the management board; and
 - the power to deny a body financing to the extent that it jeopardises its existence.
30. A body might be under the control of a public authority for only part of its wider functions. In these circumstances it is only required to provide environmental information held for the functions that are under the control of a public authority.
31. The concept of control must be applied to how an organisation operates in practice. It is more specific than control over a

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body's general function or purpose, but it does not have to be exercised over every aspect of day-to-day management.

32. The existence of a regulatory framework, even if it is a strict one, does not indicate control by a public authority. Businesses in many sectors are required to operate within a legal framework and can be shut down for a breach of those requirements. However, the government or regulator does not control how those businesses comply with those regulations. The test of control under the EIR is not based on what an organisation's functions are, but on how it goes about performing them.
33. Even if a regulatory body can compel action in limited circumstances (for example, by issuing a legally binding notice telling the body to cease or change a particular activity), it does not control the other body in its everyday actions. A body is only under the control of a public authority if that control is exercised at all times in respect of its public functions, not just when the business is failing to perform them appropriately.
34. Establishing that a body is controlled by a public authority is only the first part of the test under regulation 2(2)(d). It is also necessary to consider whether it has public responsibilities, exercises functions of a public nature or provides a public service. Finally these responsibilities, functions or services have to relate to the environment. These terms are not defined in the EIR, and should be looked at in the context of a body's activities.
35. In most cases it is likely to be clear if a body under the control of a public authority falls into one of those categories. If a public authority has such a high degree of control over a body, it seems inevitable that the body would perform a public service or function of a public nature – otherwise there would be no reason for a public authority to take control.
36. The Commissioner takes a broad view of 'relating to'. Therefore, a function can relate to the environment because of its environmental effect, regardless of whether the function was actually conferred for environmental purposes.

Scottish public authorities

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37. Regulation 2(3) provides that 'Scottish public authorities' are not public authorities for the purpose of the EIR. Scottish public authorities are those defined in regulation 2(1) which in turn refers to definitions in FOIA and the Freedom of Information (Scotland) Act 2002 (FOISA). Although these Scottish public authorities are excluded from the EIR they are subject to the Environmental Information (Scotland) Regulations 2004. Both FOISA and the Environmental Information (Scotland) Regulations 2004 are regulated by the [Scottish Information Commissioner](#).

Judicial and legislative functions of public authorities

Regulation 3(3)

These Regulations shall not apply to any public authority to the extent that it is acting in a judicial or legislative capacity.

38. Regulation 3(3) removes information held by public authorities in a judicial or legislative capacity from the EIR. Where a body only holds information for judicial or legislative purposes, the EIR do not apply to them and as a consequence they are not public authorities for the purposes of the EIR even if they would otherwise satisfy the criteria set out in regulation 2(2). This means that courts, for example, are not public authorities under the EIR. If a public authority only holds some information in a judicial or legislative capacity, the EIR still apply to information held for its other purposes.

Other considerations

39. This guidance relates only to the EIR. If the information is not environmental information, the EIR are not relevant and organisations will instead need to consider whether they are a public authority for the purposes of FOIA.

More information

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40. Additional guidance is available on [our guidance pages](#) if you need further information on the public interest test, other EIR exceptions or FOIA exemptions.
41. This guidance has been developed drawing on ICO experience. Because of this, it may provide more detail on issues that are often referred to the Information Commissioner than on those we rarely see. The guidance will be reviewed and considered from time to time in line with new decisions of the Information Commissioner, Tribunals and courts.
42. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.
43. If you need any more information about this or any other aspect of freedom of information, please [contact us](#), or visit our website at www//ico.org.uk.