

ENERGY COMPANY FOUND TO BE A PUBLIC AUTHORITY UNDER ENVIRONMENTAL INFORMATION REGULATIONS

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INTRODUCTION

The Information Commissioner's Office ("ICO") has published a decision notice finding E.ON UK plc ("E.ON")^[1] a public authority for the purposes of the Environmental Information Regulations 2004 ("EIR").

The decision has potential implications for a wide range of companies operating in regulated areas, most clearly for energy suppliers who are regulated under the Electricity Act 1989 ("EA 1989") and the Gas Act 1986 ("GA 1986").

BACKGROUND

In March 2017, Fish Legal (a fishery rights group) made a request for information relating to fishing around the Rampion Offshore Wind Farm. E.ON did not respond, stating that it was not covered by the EIR. The requestor contacted the ICO arguing that E.ON was a public authority for the purposes of the EIR. The ICO served an information notice on E.ON in July 2017, launching a two year process where E.ON unsuccessfully appealed against the ICO's powers to decide its public authority status.

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When it came to determine whether E.ON was a "*body or other person that carries out functions of public administration*"^[2], the ICO applied a Fish Legal precedent^[3] which asked the following:

- Has the entity been entrusted with the performance of services?
- Are those services of public interest?
- Are those services, among other things, in the environmental field?
- Has the entity been vested with special powers that go beyond the normal rules of private law which apply to relations between any company or person?

ENTRUSTMENT

When examining the question of “entrustment”, the ICO did not consider it relevant that a statutory instrument (a Development Consent Order) granted an E.ON entity consent to develop the windfarm. However, it did consider broader statutory regulation, namely licencing under the EA 1989 and the GA 1986.

As it is an offence under the EA 1989 and the GA 1986 to carry out certain activities without being authorised by Ofgem under a licence, the ICO determined that when Ofgem was considering granting licences, it was in effect entrusting the licence holder with the performance of a public service.

At the time of the request E.ON held an electricity supply licence and an electricity generation licence under the EA 1989 as well as a gas supply licence under the GA 1986. The ICO concluded that E.ON had been entrusted with services under statute.

PUBLIC INTEREST AND ENVIRONMENTAL FIELD

Unsurprisingly, the ICO was satisfied that the generation and supply of energy are *“activities of particular importance to the citizens and economy of the UK and can therefore be considered services performed in the public interest”*[4].

The ICO also concluded that the *“the generation of electricity by whatever means, will have an environmental impact”*[5].

SPECIAL POWERS

For the “special power” test, the ICO decided that if an entity’s special powers related to services performed in the public interest, this was enough. There was no need for these services to also impact the environment.[6]

The ICO determined that the powers E.ON had by virtue of being a licence holder to (a) seek the compulsory purchase of land and (b) apply for a warrant of entry to inspect meters for safety reasons or disconnect supply both qualified as special powers.

CONCLUSION

The ICO also did a final ‘cross-check’. It stood back and considered whether having conducted all the tests above, if there was sufficient connection between E.ON’s functions and those of entities which are organically part of the state. The ICO found there was, placing particular emphasis on the importance of securing the generation and supply of energy, noting that the *“state would be compelled to step in”*[7] if supply could not be secured through the private sector.

The ICO made a similar finding about Heathrow Airport’s status as a public authority at the end of last week, confirming the well-established principle that a private company can be subject to requests for information under the EIR. The EIR are wide in scope and the grounds for refusing to disclose information relatively narrow. Those companies who exercise services in the public interest (as well as their contractors and supply chains) should give careful consideration to the management of requests, and the potential impacts of the scrutiny they give rise to.

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WATSON FARLEY & WILLIAMS

[1] ICO Decision notice, 29 January 2020 (<https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2617169/fer0678164.pdf>)

[2] Regulation 2(2)(c) of the EIR

[3] *Fish Legal v Information Commissioner & Others* (GIA/0979/2011 & GIA/0980/2011)

[4] Paragraph 29 of the Decision notice

[5] Paragraph 32 of the Decision notice

[6] Paragraph 26 of the Decision notice, supported by *Poplar Housing Association v the Information Commissioner and Peoples Information Centre* EA/2018/0199

[7] Paragraph 47 of the Decision notice

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