

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

Date: 13 May 2024

Public Authority: UK Power Networks (Operations) Ltd
Address: 237 Southwark Bridge
London SE1 6NP

Decision (including any steps ordered)

1. The complainant has requested information about power surges – the number that have caused damage and any compensation paid. UK Power Networks (Operations) Ltd's original position was that the requested information isn't environmental information and so it wasn't obliged to respond to the request under the EIR. UK Power Networks (UKPN) has subsequently confirmed to the Commissioner that it considers it isn't a public authority for the purposes of the EIR.
2. The Commissioner's decision is that UKPN isn't a public authority under regulation 2(2) of the EIR and therefore isn't obliged to respond to the request under the EIR.
3. Since UKPN isn't a public authority for the purposes of the EIR, the Commissioner can't order it to take any steps.

Request and response

4. On 11 August 2023, the complainant wrote to UKPN and requested information in the following terms:

“Please provide data sets for the number of power surges that have been reported to you as having caused damage to property and the environment over the last 3 years.”

5. UKPN provided a response to the request on 20 September 2023. It advised that it didn't consider that the information requested was environmental information. In response to a point made by the complainant, UKPN said that it couldn't provide information relating to complaints received or individual cases but would be able to send a list of outages that have affected particular areas.
6. The complainant requested an internal review on 27 September 2023. They considered that the information they'd requested was environmental information as it concerns the effect that UKPN's activities have on the environment.
7. UKPN wrote to the complainant on 28 September 2023. It now referred to regulation 12(4)(c) of the EIR, advising that the complainant's request was formulated in too general a manner as it was for all information it might hold “on complaints from power surges”. UKPN also suggested that some information about complaints would be customers' personal data which is excepted from disclosure under the EIR. UKPN asked the complainant to clarify what information they were seeking.
8. On 5 October 2023, the complainant wrote to UKPN. They confirmed that they hadn't requested any personal data and that they were requesting the following:

“My questions for you are quantitative ones about your company's impact on the environment. My high level questions, (with no admission of liability on your part), on an annual basis, per year, over the last 3 year, are:

(a) how many reports of alleged physical damage have you received? - I would expect that each report will receive an incident number in an incident, database. This should be very easy for one of your colleagues to query for you.

(b) how many of those reported incidences in (a) above, have resulted in a payment for compensation, whether as a no-liability, gesture of good will, or otherwise?

These high level statistics will allow me to complete my report.”

9. On 9 October 2023 UKPN reverted to its position that the requested information isn't environmental information. It asked the complainant the basis on which they believe that the number of power surges and any damage is environmental information under the EIR.
10. In response, the complainant rightly noted that it was for UKPN to explain why it considered the requested information **isn't** environmental information not for the complainant to explain why it was. Following a telephone conversation between the two parties, on 2 November 2023 UKPN provided the complainant with information about faults (but not power surges) at a specific property. The complainant wasn't satisfied with that information.
11. On 10 November 2023 UKPN again advised that it didn't consider that the information the complainant confirmed they were seeking on 5 October 2023 was environmental information.

Scope of the case

12. The complainant submitted a complaint to the Commissioner on 5 December 2023.
13. Certain organisations are categorised as public authorities for the purposes of the EIR, but they aren't categorised as public authorities under FOIA. Organisations subject only to the EIR are obliged only to comply with requests for environmental information. UKPN had advised the complainant that the information they'd requested wasn't environmental information and so it wasn't obliged to comply with that request.
14. On 12 April 2024, the Commissioner wrote to UKPN. He explained that before he could consider whether the requested information could be categorised as environmental information, UKPN should confirm whether it considered it was a public authority for the purposes of the EIR.
15. In a submission to the Commissioner dated 29 April 2024, and in a subsequent telephone conversation, UKPN explained that it had always responded to requests for [environmental] information as though it was a public authority in order to be open and transparent, However it advised the Commissioner that it considers it isn't, in fact, a public authority under the EIR.
16. The Commissioner's investigation will first consider whether UKPN can be categorised as a public authority for the purposes of the EIR. If

appropriate, he'll then consider whether the request is for environmental information which UKPN should respond to under the EIR.

Reasons for decision

17. The definition of a public authority, for the purposes of the EIR, is broader than the definition of a public authority under the Freedom of Information Act (FOIA). The definition focuses more on the functions that the organisation performs, rather than providing a prescriptive list of public authorities as in Schedule 1 of FOIA.
18. Regulation 2(2) of the EIR defines a public authority for the purposes of the EIR as:
 - "a) government departments;
 - (b) any other public authority as defined in section 3(1) of 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 other 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."
19. UKPN isn't a government department, so it doesn't fall under regulation 2(2)(a). Nor is UKPN listed in Schedule 1 of FOIA and therefore it also doesn't fall under regulation 2(2)(b).
20. So, it's left to the Commissioner to decide if UKPN falls under the definition of a public authority according to the regulations that remain; that is, regulation 2(2)(c) or regulation 2(2)(d).

21. The Commissioner has discussed regulation 2(2)(c) in his decision in a similar case, paragraphs 26-32 of IC-136902-T1T8¹. That case concerned National Grid and one of its subsidiary companies, National Grid Metering Ltd (NGM). The Commissioner found that NGM wasn't a public authority under the EIR.
22. There are two key tests in relation to regulation 2(2)(c) and whether an organisation is a public authority. First, the organisation must have received an express delegation of statutory functions under the legislation applicable to the organisation and, second, the organisation must have been granted 'special powers' (under the applicable legislation) in order to carry out those powers.
23. As has been noted, in its submission to the Commissioner UKPN has now confirmed that it considers that it's not a public authority for the purposes of the EIR and that it doesn't itself hold any licences under the Electricity Act 1989 (EA 1989). UKPN has provided the following explanation:

"UKPN is a subsidiary of UK Power Networks Holdings Limited (UKPNH) and provides network management services under contract to other subsidiaries of UKPNH. These are licence holders under EA 1989, such as South Eastern Power Networks PLC. Such companies are known as Distribution Network Operators (DNOs). They are (or are successors to) companies which have applied successfully for licences to distribute electricity. These companies own and operate the system of cables and towers distributing electricity."
24. UKPN has discussed Directive 2003/4/EC ('the Directive'). The Directive seeks to implement the United Nations Economic Commission for Europe's (UN/ECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998 ('Aarhus'). The EIR has to be interpreted in a way that is consistent with the purpose of the Directive.
25. UKPN has discussed Article 2(2) of Aarhus, which provides the definition of 'public authority' under regulation 2(2) of the EIR.
26. UKPN goes on to state that neither UKPNH or any of its associated companies come within the definition of such entities and that none perform public administrative functions. Such responsibilities in respect

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4021542/ic-136902-t1t8.pdf>

of distributing electricity that may be conferred on companies under EA 1989 are by virtue of the company successfully obtaining a licence (or succeeding to a company which has done so). This is no different from any other private company operating in a regulated industry.

27. UKPN has referred to the First-tier Tribunal decision in **Poplar Housing v ICO Appeal Reference: EA/2018/0199**². That decision refers in turn to paragraph 34 of **Farrell v Whitty [2017] EUECJ C-413/15, [2018] Lloyd's Rep IR 103** in which the Court of Justice of the European Union (CJEU) provides three tests for what may be a public authority:

"Such organisations or bodies can be distinguished from individuals and must be treated as comparable to the State, either [1] because they are legal persons governed by public law that are part of the State in the broad sense, or [2] because they are subject to the authority or control of a public body, or [3] because they have been required, by such a body, to perform a task in the public interest and have been given, for that purpose, such special powers." [These three tests align with the tests outlined at paragraph 22.]

28. UKPN says that if one applies each of the three tests to ask whether a company having by application (or succession) secured possession of a licence pursuant to the EA 1989 is "a public authority" for EIR purposes the answer is clearly: No. Such a company isn't a legal person governed by public law and part of the State in the broad sense; isn't subject to the authority or control of a public body; and hasn't been required by such a body to perform a task in the public interest and been given special powers for that purpose.
29. UKPN has told the Commissioner that any company which distributes electricity under a licence granted under the EA 1989 has made a commercial decision to apply for and to hold such a licence. It hasn't been obliged, delegated, or required by the state or any public authority to do so. UKPN says it has examined the Commissioner's relevant guidance. The guidance concentrates very much on the approach to "special powers" which UKPN says is of limited relevance to the present case. The issue of special powers isn't triggered in this case because regulated electricity companies don't fulfil the primary tests for being "a

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[https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2376/Poplar%20Housing%20Association%20&%20Regeneration%20Community%20Association%20\(HARCA\)%20EA-2018-0199%20\(20.02.19\).pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2376/Poplar%20Housing%20Association%20&%20Regeneration%20Community%20Association%20(HARCA)%20EA-2018-0199%20(20.02.19).pdf)

public authority.”

30. Referring to the decision in *Attorney-General for the Prince of Wales v the IC and Mr Michael Bruton* [2016] UKUT 0154 (AAC), UKPN says that the Upper Tribunal warned that the Fish Legal questions should not be applied in a rigid, box-ticking fashion without an overall ‘sense check’.

“42. It follows that the CJEU test should not be applied rigidly or without reference to, and a cross check with, both the words of the Directive and the EIR and their underlying objectives and purposes. That cross check involves standing back and asking whether in all the circumstances of the case the combination of what are, or are arguably, the factors identified by the CJEU in its test result in the relevant entity being a functional public authority.

43. The key issue on that approach is whether there is a sufficient connection between what is relied on to satisfy the functional test and what entities that are organically part of the administration or the executive of a state do.”

31. UKPN says that in answering this question posed by the sense check one should consider what was said in Parliament when the bill which would privatise the general supply of electricity (which included its distribution) was introduced. The Secretary of State for Energy (Mr Cecil Parkinson) made a statement about the future of the electricity industry in England and Wales (*Electricity (Privatisation) HC Deb 07 March 1988 vol 129 cc49-128*) in which he made clear the following:

“In our manifesto, we promised to bring forward proposals to privatise the industry. Our purpose is to give the customer and the employees a better deal and a direct stake in the industry. I believe that the industry will achieve more if it is moved into the private sector, freed from Government interference, and made accountable to its customers and shareholders, including its employee shareholders.

In framing my proposals, I have adopted six principles. Decisions about the supply of electricity should be driven by the needs of customers. Competition is the best guarantee of the customers' interests. Regulation should be designed to promote competition, oversee prices, and protect the customers' interests in areas where natural monopoly will remain. Security and safety of supply must be maintained. Customers should be given new rights, not just safeguards. All who work in the industry should be offered a direct stake in their future, new career opportunities and the freedom to manage their commercial affairs without interference from Government.”

32. UKPN considers that it's clear beyond doubt that the EA 1989 was expressly introduced to ensure that entities supplying electricity were not "organically part of (what) the administration or the executive of a state do."
33. It says that the supply and distribution of electricity isn't a function which is quintessentially a role of public authorities. In many other areas of the world beyond the UK it's also carried out by private companies. Many industries are heavily regulated by the state (such as banks and financial institutions, or the housing association sector) but that regulation does not make the regulated entities into public authorities (for example Poplar Housing v ICO Appeal Reference: EA/2018/01992).
34. The statement the responsible Secretary of State made above makes very clear that the purpose of the EA 1989 was to remove the supply of electricity (in its widest sense, including distribution) from the public sector and government control. UKPN argues that broadening the application of the EIR to private companies simply because they operate in regulated industries would unintentionally capture a very wide range of different entities and would go well beyond the purpose and intent of the Directive.

The Commissioner's conclusion

35. As in IC-136902-T1T8, key to the question of whether UKPN carries out functions of public administration are whether it is itself licenced under the relevant legislation – the EA 1989 – and has associated delegated statutory functions, and whether UKPN possesses 'special powers' to compel a specific action, such as the compulsory acquisition of land, or to carry out street works.
36. In a telephone conversation with UKPN on 2 May 2024, UKPN clarified that its role is to manage licenced DNOs. It confirmed that DNOs are licensed under the EA 1989 but UKPN itself isn't. As such, while the DNOs may possess special powers, UKPN itself doesn't possess any such powers.
37. The Commissioner has considered UKPN's submission and his previous decision. He's satisfied that UKPN isn't an organisation that carries out functions of public administration and so can't be categorised as a public authority under regulation 2(2)(c) of the EIR.
38. Finally, regulation 2(2)(d) isn't relevant in this case as UKPN isn't under the control of another public authority as defined under 2(2)(a), (b) or (c).
39. The Commissioner's decision is therefore that UKPN isn't a public authority under regulation 2(2) of the EIR. As UKPN isn't a public

authority, it was under no obligation to respond to the complainant's request. UKPN responded to the request voluntarily, advising that the requested information wasn't environmental information.

Other matters

40. The Commissioner has found that UKPN isn't a public authority for the purposes of the EIR and so wasn't obliged to provide a response to the request under the EIR. As such, it's not necessary for the Commissioner to consider whether the requested information is environmental information.
41. However, for the complainant's benefit, the Commissioner advises that if he had made a formal decision on whether the requested information was environmental information, he would have found that it wasn't.
42. Environmental information is information "on" the various elements, factors and other measures stated under regulation 2(1) of the EIR.
43. First, the Commissioner doesn't consider that electricity – the flow of electric charge – is an element of the environment.
44. Second, the requested information is the number of power surges and the offers of compensation. The Commissioner considers that this information has no environmental purpose. If UKPN created and holds this information, it would hold it for the purpose of monitoring the performance of its electricity network (number of power surges) and for financial purposes (offers of compensation). The information wouldn't inform the public about matters affecting the environment or enable them to participate in decision-making ie it wouldn't be held for the purpose of understanding decisions made about the environment.
45. The Commissioner doesn't consider there's a sufficiently close link between the requested information in this case and the measures under regulation 2(1).

Right of appeal

46. 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

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

47. 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.
48. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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