

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

Date: 13 June 2016

Public authority: Northern Gas Networks Limited
Address: 1100 Century Way
Thorpe Park Business Park
Colton
Leeds
LS15 8TU

Decision (including any steps ordered)

1. The complainant has requested information on the number of gas escapes that Northern Gas Networks Limited (NGN) dealt with together with its policies for dealing with such escapes.
2. NGN did not initially respond to the request. Therefore the complainant emailed NGN and asked it to carry out a review of its handling of the request under regulation 11. NGN has no record of having received that communication. As no review was conducted the complainant raised the matter with the Commissioner at which time NGN explained that it did not consider itself to be a public authority for the purposes of the EIR. However during the course of the Commissioner's investigation, as a gesture of good will, it did disclose the information that it identified as falling within the scope of the request.
3. The Commissioner considers that NGN is a public authority for the purposes of the EIR. It follows that it was required to deal with the request in accordance with regulations 5 and 11. NGN's response to the request was outside the statutory time limit of twenty working days. This represents a breach of regulation 5(2). By not conducting an internal review, NGN breached regulation 11.
4. In respect of the breach of regulation 11 the Commissioner requires NGN to contact the complainant and determine whether, in light of

the information it has already disclosed, he still requires an internal review. If he does, NGN are required to conduct an internal review in accordance with regulation 11.

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 21 December 2015 the complainant emailed NGN explaining that he believed that they were a public authority for the purposes of the EIR and was therefore making a request under regulation 5 of that legislation for information of the following description:

“(1) The number of confirmed gas escapes for which Northern Gas Networks was responsible for attending to for the period 1 April 2015 – 31 October 2015

(2) The full content of Northern Gas Network’s current policies and procedures in respect of dealing with Gas Escapes, including cleaning up any area of soil and/or vegetation affected by such an escape.”

7. The NGN acknowledged receipt of the email the same day but did not provide any further response. The complainant has provided the Commissioner with a copy of an email which he sent to NGN on 24 January 2016 requesting it to carry out a review of the way it had handled his request. NGN has advised the Commissioner that it has no record of that email.
8. Although still preserving its position that it was not a public authority for the purposes of the EIR, NGN provided the complainant with a response, as a gesture of goodwill. This response was provided on 9 June 2016. NGN advised the Commissioner that it had provided all the information it believed it held which fell within the scope of the request.

Scope of the case

9. The complainant contacted the Commissioner on 22 March 2016 to complain about the way his request for information had been handled. As well as explaining the history of the request he set out his

arguments as to why he believed NGN was a public authority and asked the Commissioner to make a decision as to whether NGN had dealt with his request in accordance with regulations 5 and 11.

10. The Commissioner considers the scope of this case to be concerned with the question of whether NGN is a public authority for the purposes of the EIR. If he concludes that it is, he will go onto to consider the complainant's concerns regarding regulations 5 and 11.
11. In the recent case of *Fish Legal v Information Commissioner & Others* (GIA/0979/2011 & GIA/0980/2011) ("Fish Legal UT"), the Upper Tribunal Administrative Appeals Chamber (the "UT") ruled that the Commissioner has jurisdiction to both investigate and decide whether a body is a public authority.
12. The Commissioner therefore has jurisdiction to decide this question. The First Tier Tribunal (the "FTT") may also hear appeals against the Commissioner's decisions and the UT may hear appeals against the decisions of the FTT.

Reasons for decision

Regulation 2(2) public authorities for the purposes of the EIR

13. 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.
14. 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.
15. The definition of public authority is given in Regulation 2(2) of the EIR. In particular it states that a "public authority" means -
 - (a) government departments
 - (b) any other public authority as defined in section 3(1) of the Act,
 - (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.
- 16. On the facts of this case, NGN is clearly not a government department (under (a)) and is not a public authority as defined in section 3(1) of FOIA (under (b)).
- 17. In considering the question of whether NGN is a public authority for the purposes of the EIR, it must therefore be established whether NGN falls under regulation 2(2)(c) or (d) EIR, namely whether it has functions of public administration or is under the control of a public authority. Regulation 2(2)(c) and (d) EIR give effect to Article 2(2)(b) and (c) of EU Directive 2003/4 ('the Directive').
- 18. Article 2(2)(b) of the Directive defines 'public authority' as:

"any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment".
- 19. The leading decision on the interpretation of Article 2(2)(b) and Article 2(2)(c) of the Directive is the Judgment of the Grand Chamber of the CJEU in *Fish Legal & Shirley v Information Commissioner & Others* C-279/12 (*Fish Legal EU*).
- 20. The CJEU 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" [52].
- 21. The Upper Tribunal in *Fish Legal UT* (which applied the decision in *Fish Legal EU* to the question of whether various water companies were public authorities under the EIR) accepted that EU law "looks to the substance rather than the form" and that "the issue is a practical one.

Do the powers give the body an ability that confers on it a practical advantage relative to the rules of private law" [106].

22. With respect to the second part of the definition in Article 2(2)(b), the Upper Tribunal in *Cross v Information Commissioner & The Cabinet Office* [2016] UKUT 0153 concluded that the relevant functions or services must include something of an environmental nature [86].
23. Article 2(2)(c) of the Directive defines 'public authority' as:

"any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a person falling within (a) or (b)."
24. The CJEU in *Fish Legal EU* also set out the test for 'control' [68-69]. It explained the test applies to the manner in which functions are performed, not the functions themselves. For example, a body is not under control of the Government merely because its powers derive from statute.
25. The Upper Tribunal in *Fish Legal UT* interpreted the decision of the CJEU in *Fish Legal EU* as laying down a single test with two elements – in order for a body to be under the control of a public authority, it must:
 - (i) operate in a non-autonomous manner; and
 - (ii) do so because a public authority is in a position to exert 'decisive influence' on its action in the environmental field [134].
26. In other words, although the public authority need not actually be exercising its powers of control, the existence of the powers must have a real constraining effect on the body in question.
27. Furthermore, the CJEU decided that the test requires consideration of the body's overall manner of performing its services: it would not be enough to find control in 'one or two marginal aspects' of its business.
28. The UT in *Fish Legal UT* pointed out that 'no legitimate business has complete freedom of action'. It explained that as all operate in a framework of legal and commercial constraints, something more is needed before one can say that they have lost their autonomy.
29. The Commissioner has focussed his investigation on whether NGN is a public authority under regulation 2(2)(c) of the EIR, which as explained above gives effect to Article 2(2)(b) of the Directive. He has considered firstly whether NGN is entrusted with services in the public interest and, if so, whether it has any special powers.

Services in the public interest

30. NGN is the owner and operator of the gas distribution network in the North of England. It is licensed under section 7 of the Gas Act 1986 as amended (the Gas Act) as a public gas transporter. As such it has an obligation under section 9 of the Gas Act to develop and maintain an economic and efficient gas pipeline through which gas suppliers can deliver their gas to customers. Under section 10 it has a qualified duty to connect premises to its pipe network.
31. The Commissioner finds that the services which NGN is responsible for under the Gas Act are services delivered in the public interest. The Commissioner also considers that the transportation of a source of energy is itself an issue concerning the environment as are the practical and physical implications of maintaining and developing a pipe network. Therefore the Commissioner is satisfied that the transportation of gas is a service performed in the environmental field.

Special powers

32. It is further necessary to consider whether, in order to carry out its functions as a gas transporter, NGN is vested with any special powers over and above those which exist under private law. Private law is the civil legal system which regulates an individual's powers to buy and sell property, license the use of property, to enter into contracts and the right to take legal action for breach of contract. Special powers are those conferred under national law that go beyond those enjoyed under private law and which confer on the body holding the power a practical advantage relative to the rules of private law.
33. Although the Upper Tribunal in the Fish Legal UT case did not provide general principles in determining whether a power is a special legal power, it is worth noting that, with respect to the water companies, the UT concluded that the companies exercised special powers which included:-
 - Compulsory purchase powers;
 - The right to access and use private land of a third party;
 - Creation of new byelaws and criminal sanctions; and
 - Laying of pipes.
34. NGN acknowledges that it has certain powers derived from the Gas Act including;

- Powers of entry onto land and premises to inspect gas equipment and fittings on a safety basis and for the purpose of performing other duties (Schedule 2B of the Gas Act);
 - Compulsory purchase powers to acquire rights in or on land connected with its obligation to develop a pipeline system (Schedule 3 of the Gas Act); and
 - Powers to lay pipes within streets and associated rights to maintain, repair and renew them, including breaking up streets (Schedule 4 of the Gas Act).
35. The Commissioner considers that all three of these powers have the characteristics of special powers; they are not rights which a private individual could rely on when conducting their business. The very existence of these powers provides NGN with an advantage over those it deals with. For example, even though it may not need to rely on its compulsory purchase powers, the fact that it has this power will strengthen its position when negotiating the acquisition of land under civil law.
36. NGN has explained that these statutory powers are often qualified by limitations and safeguards and gave the example of its rights to enter private property being subject to The Rights of Entry (Gas and Electricity) Act 1954, which means that in most cases it requires a justice's warrant to gain access. NGN therefore contends that these powers should not be regarded as special powers.
37. The Commissioner finds that even where its statutory powers are the subject of some legal oversight or qualified in some other way, they still go beyond those that a private person enjoys. As a consequence NGN is able to compel third parties to take actions or accommodate NGN's actions in a way that a private person could not.
38. NGN has pointed out that it does not have powers to make byelaws and is not subject to judicial review. This may be so, however the important point is that NGN has at least three powers at its disposal which enable it to perform its obligations under the Gas Act which are not available to the ordinary individual under civil law. The Commissioner finds that these powers are sufficient to meet the test.
39. The Commissioner is satisfied that those powers listed at paragraph 34 above provide NGN with a practical advantage when delivering its services compared with the powers that are available to ordinary persons and as such they constitute special powers. As already discussed, the Commissioner is also satisfied that the services provided by NGN are in the public interest. The Commissioner

therefore concludes that NGN is a public authority under regulation 2(2)(c) of the EIR in respect of any environmental information it holds. NGN is therefore obliged to provide responses to requests for such information in accordance with the EIR

40. As the Commissioner has found that NGN is a public authority under regulation 2(2)(c) of the EIR he has not gone on to consider the application of regulation 2(2)(d). He will however go on to consider whether NGN dealt with the complainant's request in accordance with regulations 5 and 11.

Regulation 5 – making available environmental information

41. Regulation 5(1) requires that where a public authority has received a request for information it shall, subject to a number of qualifications such as the application of exceptions, make that information available.
42. Regulation (5)(2) requires the information to be made available no later than twenty working days after the date the request is received.
43. The request was made on 21 December 2015. NGN did not respond to it within the twenty working days and so breached regulation 5(2).

Regulation 11 - representations and reconsiderations.

44. In broad terms, regulation 11 provides that a person who has made a request to a public authority may make representations to that public authority if appears to them that the public authority has failed to comply with its obligations under the EIR in respect of that request. On receiving such representations, the public authority has forty working days to reconsider how it dealt with the request and notify the applicant of its decision. This provides the public authority with an opportunity to remedy any failings in how it dealt with the request originally. This is commonly referred to as an internal review.
45. In this case the complainant has provided the Commissioner with a copy of an email dated 24 January 2016 in which he advises NGN that, as he has not yet received a response to his request, it appeared to him that NGN had failed to comply with regulations 5(1) and (2). NGN has advised the Commissioner that it has no record of this communication. However having viewed a copy of the email in question the Commissioner notes that the email address to which it was sent is the same as that to which his original request was sent. The Commissioner is satisfied that on the balance of probabilities NGN did receive the request for an internal review. It would be understandable that if NGN did not consider itself to be a public

authority for the purposes of the EIR, it did not recognise the significance of the email and did not retain it.

46. In light of the above the Commissioner finds that NGN failed to provide the complainant with an internal review as requested. This constitutes a breach of regulation 11.
47. Since requesting an internal review in January 2016 circumstances have changed and the complainant has been provided with a substantive response to his request. The matters raised in the original request for a review appear to have been addressed. However it is possible that the complainant may not be satisfied with the response he has now received. Therefore the Commissioner considers it appropriate that NGN contact the complainant with a view to ascertaining whether there are any outstanding matters. If there are, NGN are required to carry out a review in accordance with the provisions of regulation 11.

Other matters

48. The Commissioner is grateful for the constructive approach adopted by NGN which cooperated fully with his investigation.

Right of appeal

49. 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@hmcts.gsi.gov.uk

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

50. 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.
51. 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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