

'Not a Public Authority' -

Complaints to the ICO under the Environmental Information Regulations 2004:

FER0107605 – Pennon Group plc (Viridor Waste management Ltd)

FER0109712 – ISS Mediclean Ltd

FER0154379 – Ove Arup & Partners Ltd

FER0156462 – E.ON UK (Powergen)

FER0157586 – E.ON UK (Powergen)

FER0158755 – Network Rail

FER0159577 – EDF Energy plc

FER0168781 – E.ON UK (Powergen)

FER0172138 – The Carbon Trust

FER0174924 – Scotia Gas Networks

FER0186803 – Rolls Royce Marine Power Operations Ltd

FER0202832 – Chartered Institute of Environmental Health

FER0230551 – C J Associates

[REDACTED]

8th July 2005

[REDACTED]

The Managing Director
Viridor Waste Management Limited
Peninsula House, Rydon Lane
Exeter, Devon,
EX2 7HR

Dear Sir,

Re: Viridor Waste Management Limited
Parkwood Landfill Site, Sheffield. S3 8AG

We act on behalf of [REDACTED]

[REDACTED] His property is close to your Landfill site at the above address.

We are instructed that Viridor Waste Management Limited's operations at the above location are causing nuisance to our client, and it is also negligent in that it is failing to prevent the following:

1. Nuisance from smells from the above landfill site.
2. Noise nuisance, including from lorries and explosions on the site.
3. Dust nuisance to his property from the landfill site.
4. Nuisance from flies from the landfill site.

We propose to include the evidence of other residents in support of this claim.

Please confirm the identity of your client's insurer.

We enclose a copy of this letter to forward to your insurer as a matter of urgency, and request that they provide confirmation that the nuisances above will cease, failing which we have instructions to commence proceedings including to seek an injunction for the same against Viridor Waste Management Limited. Our client is also entitled to claim compensation, including diminution of value of property.

Our client is also suffering anxiety and distress and inconvenience from the nuisance, given the nature of the nuisance.

We request that your insurer, replies promptly in accordance with the protocol and supplies us with copies of documents in accordance with the general protocol and under the duty to

[REDACTED]

preserve documents where litigation is contemplated, namely documents relating to the above alleged nuisances including the following:

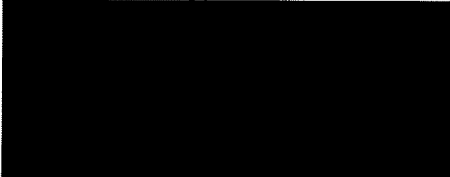
Information including emails, correspondence, notes of meetings or telephone calls, from public bodies including Sheffield City Council, Health & Safety Executive, Environment Agency or others relating to allegations of nuisance/negligence including complaints from residents, or others. This obligation is also covered by our request for environmental information relating to the same under the Environmental Information Regulations 2004 requiring the same to be disclosed within 21 days, refusal of which may be a criminal offence to be investigated by The Information Commissioner.

We are acting under conditional fee agreements with additional liabilities/success fees.

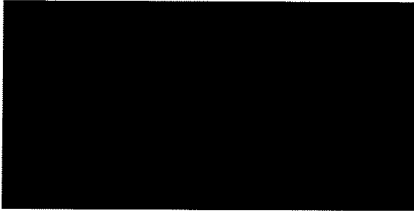
In order to try to avoid litigation, please would your insurers indicate what is your defence to the alleged nuisances above.

We look forward to hearing from you.

Yours faithfully,

A large black rectangular redaction box covering the signature and name of the sender.

Reference: FER0107605



5th June 2006

Dear 

**Environmental Information Regulations 2004
Request for information from Viridor Waste Management Limited**

We are writing further to our letter of 7th April 2006 about the above.

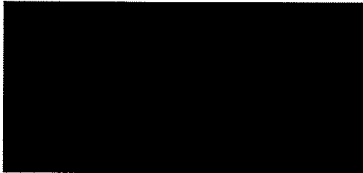
Having considered this matter our Legal Department is of the view that Viridor Waste Management Limited is not a public authority for the purposes of the Regulations. Consequently, neither your initial request to them nor your subsequent complaint to our Office can be considered valid. We are therefore unable to investigate your complaint further and we will now close your case.

You have requested copies of information between Viridor Waste Management Limited and various public bodies, such as Sheffield City Council, The Health & Safety Executive and The Environment Agency.

Although Viridor Waste Management Limited is not a public authority for the purposes of the Regulations these other bodies do fall within the scope of the legislation. You may therefore wish to redirect your request to these public authorities.

Yours sincerely,

Anthony O'Reilly
Assistant Complaints Resolution Officer



The Company Secretary
ISS Mediclean Ltd
Norfolk House
Christmas Lane
Farnham Common
Slough
Berks
SL2 3JE

22 March 2006

Dear Sir/Madam

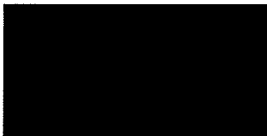
I am writing to request information under the Freedom of Information Act 2000/Environmental Information Regulations. I appreciate that you are not a designated public authority, however private organisations can be designated as public authorities if they appear to be performing functions of a public nature, or they are carrying out functions under contract with a public authority which would otherwise be up to the authority to provide. My request for information relates to the catering and cleaning services you provide on behalf of the NHS at the Maudsley Hospital, Denmark Hill, London SE5 8AZ.

In order to assist you with this request, I am outlining my query as specifically as possible. I would like a copy of all records and documentation (including meeting minutes, internal and external emails, correspondence and notes) which relate to the hygiene inspection programme carried out by Southwark Council from January 2004 until March 2006 of all food preparation areas and kitchens at the Maudsley Hospital.

I would like to receive the information in a hard copy format, sent to the postal address above.

I would be grateful if you could confirm in writing that you have received this request. I look forward to your response within 20 working days, as outlined by the statute.

Yours sincerely,



Dear [REDACTED]

As you are aware, I have been investigating whether ISS Mediclean (ISS) is a public authority for the purposes of the Environmental Information Regulations 2004 (the "EIRs").

I am writing to inform you that after careful consideration and lengthy internal discussions on this matter the Commissioner has concluded that ISS is not a public authority in terms of the EIRs. Therefore he has no jurisdiction to issue a decision notice on this occasion. To assist you in understanding how he has reached this conclusion a summary of the reasons for reaching this conclusion are provided below.

When we last spoke in September 2007 I explained that the issues arising from your complaint had been the subject of further discussion in the office but I was hopeful that a decision notice would be drafted in the near future.

I can confirm that a decision notice was drafted and went through our internal sign off process before being finally referred to the designated signatory. It was at this review stage that the signatory concluded that ISS is not a public authority in terms of the EIRs.

The Commissioner considers the relevant part of the Regulations to consider whether ISS is a public authority is Regulation 2(d). The Commissioner broadly accepts that in respect of the functions being carried out by ISS in this case ISS is under the control of a public authority, in this case the Trust. It is also accepted that the most likely limb that it would be caught under would be Regulation 2(d) (iii) in that it is carrying out public services as opposed to exercising functions of a public nature under (ii). However the crucial issue is whether or not these services or functions *relate to* the environment. The definition of environmental information is provided in Regulation 2(1) of the EIRs.

The Commissioner is not satisfied that for the purposes of this case that the services of ISS relate to the environment as required by Regulation 2(d) (iii). Its services or functions are not in the Commissioner's view connected to or effecting the environment. The Commissioner considers that the wording "relates to" implies that there must be some direct connection to the environment. He is not satisfied that this link is strong enough in this case.

He has also considered whether it could be argued that the services or functions of ISS in this case are designed to protect the elements such as water or air and therefore fall within Regulation 2 (1)(c). The Commissioner once again takes the view that the link is not clear enough. The cleaning service is focussed on keeping services clean and free of infection and preventing disease spreading in this way and therefore it is not felt that the protection of the elements is the focus or main purpose of the service.

The Commissioner has however also considered the position of ISS under the Freedom of Information Act (the "Act"). Under section 3(2) (b) of the Act, information is held by a public authority if it is held by another person on behalf of the authority. In this case the Commissioner considers that because of the contract between the Trust and ISS, any information held by ISS about the contract for the hygiene inspection programme of the Maudsley Hospital is held by ISS on behalf of the Trust.

Therefore if a request was made to the Trust for information about this contract (if I recall correctly you did in fact do so and you were provided with some information) in responding to a request of this nature under the Act, the Trust would therefore also have to consider not only what information it physically possessed itself but also what information may be held by a contractor such as ISS on behalf of the Trust.

The difficulty arises in cases such as this where the request is made directly to the contractor as opposed to the public authority. The contractor is not a public authority under the Act and therefore has no legal obligation to comply with the Act. If this was the case then it would be obliged to consider its duties under section 16 of the Act such as directing the requestor to the body who may hold the requested information.

This issue may however be resolved in the future as the ICO is providing input into a Ministry of Justice (MoJ) consultation on the designation of additional bodies covered by the Act. You may wish to add to your own comments to this consultation exercise in relation to private bodies contracting with public bodies for services of this nature. More information about this consultation can be found on the MoJ website at:

<http://www.justice.gov.uk/publications/cp2707.htm>

However as you accept that you have been provided with all the information held by ISS in this case I have closed this complaint in accordance with the Commissioner's robust case policy. A copy of this policy can be found at <http://icoportal/FOI%20operations/documents/ARobustApproachtoFOIComplaintCases.pdf> to help you to understand the rationale for doing so. I can assure you however that the issues arising from your case have been taken very seriously and have identified the need internally for further clarification about requests of this nature should be handled.

I appreciate you are likely to be dissatisfied with the Commissioner's decision in this case. However I do hope you will take some comfort from the MoJ consultation which may ensure that bodies such as ISS will be specifically designated as public authorities under the Act and so avoid this uncertainty in future cases.

I can also confirm that I have written to ISS on the same basis as above.

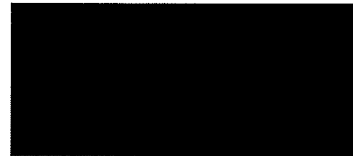
If you remain dissatisfied with the contents of this letter you do have the right to complain to my manager, Nicole Duncan who is aware of this case in some detail.

Yours sincerely,

Pam Clements
FOI Team Leader – health and transport

Ms Jenny Baster
Legal Director
Ove Arup & Partners
13 Fitzroy Street
London
W1T 4BQ

Our ref Kiln Pit Hill
Name
Phone
Fax
E-Mail



9th February 2007

Dear Ms Baster

**Wind Farm Development and Landscape Capacity Studies: Kiln Pit Hill
Freedom of Information Act 2000
Environmental Information Regulations 2004**

Under the Freedom of Information Act 2000 and the Environmental Information Regulations 2004, I would be grateful if you could provide the following information relating to the above study:

1. Minutes of any meetings held by Ove Arup & Partners Ltd (Arup) concerning the requirement for the above study, the scope of the study and the definition of the study area including meetings held with the North East Assembly (NEA), Tynedale District Council (TDC), White Consultants, The Centre for Environmental and Spatial Analysis at the University of Northumbria (CESA) and Reid Jubb Brown Partnership.
2. Study brief provided to Arup including any draft or amended versions.
3. All draft/interim reports produced by Arup.
4. All comments (whether verbal, written or electronic) received from NEA, TDC, White Consultants, CESA and Reid Jubb Brown Partnership on draft/interim reports.
5. All e-mails and associated attachments sent to and received from NEA, TDC, White Consultants, CESA and Reid Jubb Brown Partnership regarding the above study.
6. All records of telephone conversations with NEA, TDC, White Consultants, CESA and Reid Jubb Brown Partnership regarding the above study.
7. Copies of all written communication with NEA, TDC, White Consultants, CESA and Reid Jubb Brown Partnership regarding the above study.

The timeframe for which this information is requested is the 1st January 2006 to the date of this letter.

We understand that under the Freedom of Information Act you may wish to charge for providing this information and I should be grateful if you would also provide me with a copy of your schedule of fees.

npower renewables
14b Redwell Court
Harmie Enterprise Park
Barnard Castle
Co. Durham DL12 8BN
T +44 (0)1833/69 59 80
F +44 (0)1833/63 13 28
I www.npower-
renewables.com

Registered office:
Npower Renewables Limited
Windmill Hill Business Park
Whitehill Way
Swindon
Wiltshire SN5 6PB

Registered in England
and Wales no. 2550622

Please can you confirm receipt of this letter on receipt. In line with the requirements of the Freedom of Information Act 2000 and the Environmental Regulations 2004, I look forward to receiving the information requested above at your earliest convenience and at the latest, within 20 days of your confirming receipt of this letter.

Yours sincerely



[REDACTED]
npower renewables
14B Redwell Court
Harmire Road
Harmire Enterprise Park
Barnard Castle
DL12 8BN

22 October 2007

Dear [REDACTED]

**Freedom of Information Act 2000 – section 50 & Environmental
Information Regulations 2004
Complaint against Ove Arup & Partners Ltd
Your Ref: [REDACTED]
Our Ref: FER0154379**

I write in relation to npower renewables' ("npower") complaint to the ICO that Ove Arup & Partners Ltd ("Arup") has failed to provide information requested under the Environmental Information Regulations 2004 (the "EIR").

Following npower's complaint, the ICO has considered the issues covered by this case at length, obtaining information from both Arup and the North East Assembly (the "Assembly"). Other relevant background information and internal discussions have also informed the outcome of this case.

To summarise, the ICO has decided that, in the particular circumstances of this case, Arup are not covered by the EIR and, therefore it does not have to provide npower with the information you have requested. The reasons for this are set out below. Please be aware that as Arup sit outside the scope of the EIR, the ICO is unable to issue a decision notice formalising the finding in this case as to do so would exceed the ICO's jurisdiction.

Whether Arup is caught by the EIR

Arup has argued that it is not covered by the scope of the EIR. Therefore in order to determine whether npower is entitled to the information requested, the ICO has had to give considerable thought to whether Arup is caught by the scope of the EIR in terms of the information requested in this case. The basis of the considerations is regulation 2(2) of the EIR. Consideration of whether the information falls within the definition in regulation 2(1) was not necessary to enable the ICO to reach a conclusion.

The ICO has therefore taken into account the provisions of regulation 2(2) of the EIR in determining this point. The full text of regulation 2(2) can be found as Annex 1 to this letter, but, put simply, regulation 2(2), sets out what constitutes a public authority under the EIR. The following bodies are considered to be public authorities:

- (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.

It is clear that Arup does not fall within the provisions of (a)-(c) above in that it is not:

- (a) a government department,
- (b) specifically listed in Schedule 1 of the Freedom of Information Act 2000 (the "Act") or designated as a public authority by Order under section 5 of the Act, or
- (c) a body that carries out functions of public administration.

The ICO has therefore focussed on whether Arup could be said to fulfil the criteria laid out in regulation 2(2)(d). In order to determine whether this is the case involves a number of tests. I have set out the factors that the ICO has taken into consideration in respect of each of the tests outlined below.

Whether Arup is 'under the control' of another public authority under the EIR

The ICO has considered this point at length and come to the conclusion that Arup are under the control of the Assembly (which is a body that carries out functions of public administration under regulation 2(2)(c), as it has functions in relation to planning in the north east of England). Although this control is not statutory, as the Assembly does not have an obligation to carry out the study which Arup produced on its behalf, the ICO is aware that control can also be exercised in other ways. In this case, the ICO considers that the Assembly exercises a decisive influence on a contractual basis.

In reaching this view, the ICO has taken into account the nature of the contractual relationship between the Assembly and Arup. The ICO has in large part relied upon the tender document put out by the Assembly. The tender document is a reasonably prescriptive document, which includes an indication of the methods to be used by the successful bidder and it also outlines the fact that the Assembly will retain control of the copyright in the report.

As the fact that a public authority exercises control over a body is not in itself enough to ensure that the body is caught by the scope of the EIR, the ICO has also gone on to consider whether the remaining elements of regulation 2(2)(d) apply to the particular facts of this case.

Whether subsections (i), (ii) or (iii) of regulation 2(2)(d) apply

On the basis of the information before the ICO in the circumstances of this case subsections (i) and (iii) do not apply to Arup. It can neither be said that in carrying out the study Arup has public responsibilities relating to the environment nor can it be said that in doing so Arup is providing any public service(s) relating to the environment.

This leaves only subsection (ii) to be considered. As this is the only element of this regulation which may apply, the ICO has focused its review on this particular point.

The ICO has concluded that Arup is not exercising functions of a public nature relating to the environment. In reaching this decision, we have taken a number of factors into account.

We first considered what is meant by the phrase "functions of a public nature". Whilst this phrase is not defined within the EIR, in determining its meaning the ICO has considered whether Arup is:

- (a) exercising statutory authority,
- (b) publicly funded,
- (c) taking the place of another public body, and/or
- (d) the proximity of Arup to the delegating public authority, i.e. the Assembly (The greater the degree to which the activities which could be private are involved in the activities of a public body, the more likely they are to be considered public activities).

Whilst in another case determined by the ICO involving the Assembly and ERM (Environmental Resources Management), ICO reference number FER0090259, found that ERM were carrying out functions of a public nature under (ii) the facts of that case differ from the present case. In the ERM case, the work commissioned by the Assembly from ERM (namely an

environmental assessment) had a clear and direct link to a statutory responsibility emanating from an EU Directive. In that case the supply of the commissioned work was vital to the Assembly's statutory responsibility in developing a Regional Spatial Strategy for the north east region. This ties in to the Assembly's statutory role as the regional planning body for that part of England.

In this case, the Arup report is supplied to the Assembly to assist in planning but, crucially, not as part of the planning function. In view of this, it is difficult to say that Arup is either exercising statutory authority ((a) above) or taking the place of the Assembly ((c) above)

In relation to point (b), it is clear that Arup is not a publicly funded body, and therefore the ICO has not considered this point any further. In relation to (d), the fact that the report is supplied to Assembly merely to assist in planning, as already discussed above, is a useful consideration when assessing the proximity of the two bodies. As the report did not have to be obtained, it is difficult to say that the activities which Arup carried out were public (and therefore done on behalf of the Assembly). In view of this the ICO considers that (d) does not apply in this case.

Conclusion

Arup are not a public authority as defined by the EIR in the particular circumstances of this case. In view of this, **this case is now closed**. However, as each request for information should be decided on a case by case basis the ICO's view in this case does not rule out the possibility that Arup may be found to be covered by the EIR in other circumstances.

I realise that this decision is not the one which npower would have liked. However, I am also aware that given the Assembly has released the information it holds in relation to this request to npower, you are already in possession of the vast majority of information which npower requested. Of course, npower is entitled to complain about this decision, if it feels this is appropriate. In view of this, I am enclosing a copy of our internal complaints procedure.

I hope the information in this letter is useful.

Yours sincerely

Stephen Middleton
Complaints Team Leader
stephen.middleton@ico.gsi.gov.uk

Annex 1 – Relevant EIR legislation

Regulation 2(1) In these Regulations –

“the Act” means the Freedom of Information Act 2000(c);

“applicant”, in relation to a request for environmental information, means the person who made the request;

“appropriate record authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“the Commissioner” means the Information Commissioner;

“the Directive” means Council Directive 2003/4/EC(d) on public access to environmental information and repealing Council Directive 90/313/EEC;

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);

“historical record” has the same meaning as in section 62(1) of the Act;
“public authority” has the meaning given in paragraph (2);

“public record” has the same meaning as in section 84 of the Act;

“responsible authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“Scottish public authority” means –

- (a) a body referred to in section 80(2) of the Act; and
- (b) insofar as not such a body, a Scottish public authority as defined in section 3 of the Freedom of Information (Scotland) Act 2002(a);

“transferred public record” has the same meaning as in section 15(4) of the Act; and

“working day” has the same meaning as in section 10(6) of the Act.

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 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.

Please provide the information shown below. This information is requested using the Environmental Information Regulations 2004 and as such a full written response is required no later than 20 working days from the date of request ie. 30th March 2007.

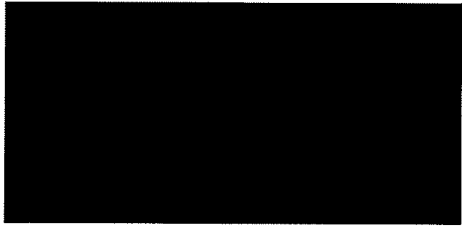
Details of all energy efficiency measures applied to social housing and funded by Powergen/Eon and/or any associated companies, using the Energy Efficiency Commitment (EEC) for all Local Authorities (LA), Registered Social Landlords (RSL) and any other organisation and/or company involved in the ownership and/or management of social housing in England, Scotland and Wales. The information should include insulation, heating improvements, energy saving lightbulbs and all other measures which are funded as a part of the utility companies statutory and regulatory obligations.

Information should be broken down by year (ie 2002/03, 2003/04, 2004/05, 2005/06, 2006/07 and estimates for 2007/08) and show, by landlord, the number of measures per year carried out, the size and type of property to which each measure refers, together with the total carbon and energy savings generated by such measures shown in tonnes of carbon and GWh of energy saved. Where differing levels of energy savings are attributed to similar measures under OFGEM regulations, results should be shown separately eg. cavity wall insulation pre and post 1976 or top up loft insulation to different levels of thickness. Where information held by the utility company is currently incomplete please provide an estimate and an indication of the date by which full and final information will become available.

Thank you.

Sent to:

Dated: 5 March 2007 at 14:19



22nd October 2008

Case Reference Number FER0156462

Dear 

Complaint against Powergen/Eon.

I write in relation to your complaint to the ICO that Powergen/Eon has failed to provide information requested under the Environmental Information Regulations 2004 (the "EIR").

Firstly may I apologise on behalf of the ICO for the time this case has taken to complete. Unfortunately your request brought up a number of very complex and difficult issues relating to the scope of the EIR's coverage of private concerns such as Powergen. The Commissioner has had to be very thorough in his investigation as a wrong decision on this matter would either exclude a major provider of electricity from the scope of the EIR, or alternatively make it subject to obligations which in law should not apply to it. It has therefore taken the ICO some time to conclude its investigation into these matters.

Following your complaint, the ICO has therefore considered the issues covered by this case at length. Relevant background information and internal discussions have also informed the outcome of this case.

To summarise the outcome of our considerations, the ICO has decided that, in the particular circumstances of this case, Powergen is not covered by the EIR and, therefore it does not have to provide you with the information you have requested. The reasons for this are set out below. Please be aware that as Powergen sits outside the scope of the EIR, the ICO is unable to issue a decision notice formalising the finding in this case as to do so would exceed the ICO's jurisdiction.

To clarify one point, Powergen has stated that it is it which is subject to EEC, the point of your request, rather than Eon. As Eon is not subject to EEC it states that it holds no information which falls within the scope of your request. Therefore the Commissioner has considered whether Powergen is caught by the Regulations rather than Eon itself.

Whether Powergen is caught by the EIR

Powergen has argued that it is not covered by the scope of the EIR. Therefore in order to determine whether you are entitled to the information requested, the ICO has had to give considerable thought to whether Powergen is caught by the scope of the EIR in terms of the information requested in this case. The basis of the considerations is regulation 2(2) of the EIR.

The ICO has therefore taken into account the provisions of regulation 2(2) of the EIR in determining this point. The full text of regulation 2(2) can be found as Annex 1 to this letter, but, put simply, regulation 2(2), sets out what constitutes a public authority under the EIR. The following bodies are considered to be public authorities:

- (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.

It is clear that Powergen does not fall within the provisions of (a) or (b) above in that it is not:

- (a) a government department,
- (b) specifically listed in Schedule 1 of the Freedom of Information Act 2000 (the "Act") or designated as a public authority by Order under section 5 of the Act.

The ICO has therefore focussed on whether Powergen could be said to fulfil the criteria laid out in regulation 2(2)(c) or 2(2)(d). In order to determine whether this is the case involves a number of tests. I have set out the factors that the ICO has taken into consideration in respect of each of the tests outlined below.

Regulation 2(2)(c): Whether Powergen carries out functions of public administration under the EIR?

The ICO has considered this point at length and has come to the conclusion that Powergen does not carry out functions of public administration under the EIR. Primarily his decision is based on interpreting existing case law made by the courts, and through interpreting previous decisions made by the Information Tribunal which have established some guidelines as to the meaning of this test under the EIR.

The ICO considers that the term "functions of public administration" refers to specific obligations and duties akin to administrative functions such as town planning, court administration or the administrative functions of the civil service.

The ICO's considers that Powergen provides a service in supplying electricity to its customers. It does not however carry out a function of public administration when providing this service. Although in other countries the responsibility for the delivery of electricity to customers is a function of the state, it is established in this county that this function is privately run by numerous electricity suppliers in direct competition with each other. The industry as a whole is licensed and regulated by the Office of Gas and Electricity Markets (OFGEM). OFGEM is a named government department which licences and regulates the industry as a whole. The Commissioner's view is that it, rather than the individual suppliers themselves, carries out the role or function of the administration of the electricity supply market. In short therefore, the Commissioner's decision is that Powergen does not fall within the scope of section 2(2)(c) for the purposes of the regulations.

We have therefore considered whether section 2(2)(d) is applicable.

Whether Powergen is 'under the control' of another public authority under the EIR

The ICO has considered this point at length. The Commissioner has already highlighted that his view is that Powergen carries out its functions under the directions and guidance of OFGEM, and that OFGEM is a public authority for

the purposes of the regulations. Following this, if Powergen is under the "control" of OFGEM then Powergen may, subject to the other conditions set out in regulation 2(2)(d), fall within the scope of the regulations. The Commissioner has therefore considered whether the statutory powers of licensing and regulation which OFGEM has over Powergen constitutes "control" for the purposes of the regulations.

The Commissioner has come to the conclusion that Powergen is not under the control of OFGEM. The Commissioner does not consider that the regulatory powers which OFGEM has to licence and regulate electricity suppliers' amounts to the degree of "control" necessary for the purposes of the regulations.


In reaching this view, the ICO has taken into account the nature of the relationship between OFGEM and Powergen. The power to regulate the energy supply industry as a whole does not of itself constitute control over a particular regulated body within that industry. For instance, although the Law Society licences and regulates the conduct of Solicitors firms it cannot be considered the case that it "controls" solicitors firms through this power. Similarly Powergen is able act freely within the regulatory boundaries set by OFGEM which are applicable to all such companies.

Given the finding that the first requirement of paragraph 2(2)(d) is not met it is not necessary to go on and consider the remaining criteria provided in paragraphs (i) to (iii).

Conclusion

Powergen is not a public authority as defined by the EIR in the particular circumstances of this case. In view of this, **this case is now closed**. However, as each request for information should be decided on a case by case basis the ICO's view in this case does not rule out the possibility that Powergen may be found to be covered by the EIR in other circumstances.

I realise that this decision may be disappointing to you. However the ICO must consider the direct legislation before it, and ultimately, the directive from which the regulations derive. Following the legislation as it currently stands, in this instance the Commissioner's decision is that Powergen is not caught within the scope of the regulations.


FER0156462

Once again can I apologise for the time it has taken to bring this case to a conclusion. I hope however that this information is useful to you.

Yours sincerely

Ian Walley
Senior Complaints Officer

Annex 1 – Relevant EIR legislation

Regulation 2(1) In these Regulations –

“the Act” means the Freedom of Information Act 2000(c);

“applicant”, in relation to a request for environmental information, means the person who made the request;

“appropriate record authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“the Commissioner” means the Information Commissioner;

“the Directive” means Council Directive 2003/4/EC(d) on public access to environmental information and repealing Council Directive 90/313/EEC;

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);

“historical record” has the same meaning as in section 62(1) of the Act;

“public authority” has the meaning given in paragraph (2);

“public record” has the same meaning as in section 84 of the Act;

“responsible authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“Scottish public authority” means –

- (a) a body referred to in section 80(2) of the Act; and
- (b) insofar as not such a body, a Scottish public authority as defined in section 3 of the Freedom of Information (Scotland) Act 2002(a);

“transferred public record” has the same meaning as in section 15(4) of the Act; and

“working day” has the same meaning as in section 10(6) of the Act.

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 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.

Original Enquiry

[REDACTED]

Please provide the information shown below. This information is requested using the Environmental Information Regulations 2004 and as such a full written response is required no later than 20 working days from the date of request ie. 30th March 2007.

Details of all energy efficiency measures applied to social housing and funded by Powergen/Eon and/or any associated companies, using the Energy Efficiency Commitment (EEC) for all Local Authorities (LA), Registered Social Landlords (RSL) and any other organisation and/or company involved in the ownership and/or management of social housing in England, Scotland and Wales. The information should include insulation, heating improvements, energy saving lightbulbs and all other measures which are funded as a part of the utility companies statutory and regulatory obligations.

Information should be broken down by year (ie 2002/03, 2003/04, 2004/05, 2005/06, 2006/07 and estimates for 2007/08) and show, by landlord, the number of measures per year carried out, the size and type of property to which each measure refers, together with the total carbon and energy savings generated by such measures shown in tonnes of carbon and GWh of energy saved. Where differing levels of energy savings are attributed to similar measures under OFGEM regulations, results should be shown separately eg. cavity wall insulation pre and post 1976 or top up loft insulation to different levels of thickness. Where information held by the utility company is currently incomplete please provide an estimate and an indication of the date by which full and final information will become available.

Yours sincerely

[REDACTED]

06/03/07



22nd October 2008

Case Reference Number FER0157586

Dear 

Complaint against Powergen/Eon.

I write in relation to your complaint to the ICO that Powergen/Eon has failed to provide information requested under the Environmental Information Regulations 2004 (the "EIR").

Firstly may I apologise on behalf of the ICO for the time this case has taken to complete. Unfortunately your request brought up a number of very complex and difficult issues relating to the scope of the EIR's coverage of private concerns such as Powergen. The Commissioner has had to be very thorough in his investigation as a wrong decision on this matter would either exclude a major provider of electricity from the scope of the EIR, or alternatively make it subject to obligations which in law should not apply to it. It has therefore taken the ICO some time to conclude its investigation into these matters.

Following your complaint, the ICO has therefore considered the issues covered by this case at length. Relevant background information and internal discussions have also informed the outcome of this case.

To summarise the outcome of our considerations, the ICO has decided that, in the particular circumstances of this case, Powergen is not covered by the EIR and, therefore it does not have to provide you with the information you have requested. The reasons for this are set out below. Please be aware that as Powergen sits outside the scope of the EIR, the ICO is unable to issue a decision notice formalising the finding in this case as to do so would exceed the ICO's jurisdiction.

To clarify one point, Powergen has stated that it is it which is subject to EEC, the point of your request, rather than Eon. As Eon is not subject to EEC it states that it holds no information which falls within the scope of your request. Therefore the Commissioner has considered whether Powergen is caught by the Regulations rather than Eon itself.

Whether Powergen is caught by the EIR

Powergen has argued that it is not covered by the scope of the EIR. Therefore in order to determine whether you are entitled to the information requested, the ICO has had to give considerable thought to whether Powergen is caught by the scope of the EIR in terms of the information requested in this case. The basis of the considerations is regulation 2(2) of the EIR.

The ICO has therefore taken into account the provisions of regulation 2(2) of the EIR in determining this point. The full text of regulation 2(2) can be found as Annex 1 to this letter, but, put simply, regulation 2(2), sets out what constitutes a public authority under the EIR. The following bodies are considered to be public authorities:

- (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.

It is clear that Powergen does not fall within the provisions of (a) or (b) above in that it is not:

- (a) a government department,
- (b) specifically listed in Schedule 1 of the Freedom of Information Act 2000 (the "Act") or designated as a public authority by Order under section 5 of the Act.

The ICO has therefore focussed on whether Powergen could be said to fulfil the criteria laid out in regulation 2(2)(c) or 2(2)(d). In order to determine whether this is the case involves a number of tests. I have set out the factors that the ICO has taken into consideration in respect of each of the tests outlined below.

Regulation 2(2)(c): Whether Powergen carries out functions of public administration under the EIR?

The ICO has considered this point at length and has come to the conclusion that Powergen does not carry out functions of public administration under the EIR. Primarily his decision is based on interpreting existing case law made by the courts, and through interpreting previous decisions made by the Information Tribunal which have established some guidelines as to the meaning of this test under the EIR.

The ICO considers that the term "functions of public administration" refers to specific obligations and duties akin to administrative functions such as town planning, court administration or the administrative functions of the civil service.

The ICO's considers that Powergen provides a service in supplying electricity to its customers. It does not however carry out a function of public administration when providing this service. Although in other countries the responsibility for the delivery of electricity to customers is a function of the state, it is established in this county that this function is privately run by numerous electricity suppliers in direct competition with each other. The industry as a whole is licensed and regulated by the Office of Gas and Electricity Markets (OFGEM). The Commissioner's view is that it, rather than the individual suppliers themselves, carries out the role or function of the administration of the electricity supply market. In short therefore, the Commissioner's decision is that Powergen does not fall within the scope of section 2(2)(c) for the purposes of the regulations.

We have therefore considered whether section 2(2)(d) is applicable.

Whether Powergen is 'under the control' of another public authority under the EIR

The ICO has considered this point at length. The Commissioner has already highlighted that his view is that Powergen carries out its functions under the directions and guidance of OFGEM, and that OFGEM is a public authority for the purposes of the regulations. Following this, if Powergen is under the "control" of OFGEM then Powergen may, subject to the other conditions set out in regulation 2(2)(d), fall within the scope of the regulations. The Commissioner

has therefore considered whether the statutory powers of licensing and regulation which OFGEM has over Powergen constitutes "control" for the purposes of the regulations.

The Commissioner has come to the conclusion that Powergen is not under the control of OFGEM. The Commissioner does not consider that the regulatory powers which OFGEM has to licence and regulate electricity suppliers' amounts to the degree of "control" necessary for the purposes of the regulations.

In reaching this view, the ICO has taken into account the nature of the relationship between OFGEM and Powergen. The power to regulate the energy supply industry as a whole does not of itself constitute control over a particular regulated body within that industry. For instance, although the Law Society licences and regulates the conduct of Solicitors firms it cannot be considered the case that it "controls" solicitors firms through this power. Similarly Powergen is able act freely within the regulatory boundaries set by OFGEM which are applicable to all such companies.

Given the finding that the first requirement of paragraph 2(2)(d) is not met it is not necessary to go on and consider the remaining criteria provided in paragraphs (i) to (iii).

Conclusion

Powergen is not a public authority as defined by the EIR in the particular circumstances of this case. In view of this, **this case is now closed**. However, as each request for information should be decided on a case by case basis the ICO's view in this case does not rule out the possibility that Powergen may be found to be covered by the EIR in other circumstances.

I realise that this decision may be disappointing to you. However the ICO must consider the direct legislation before it, and ultimately, the directive from which the regulations derive. Following the legislation as it currently stands, in this instance the Commissioner's decision is that Powergen is not caught within the scope of the regulations.

Once again can I apologise for the time it has taken to bring this case to a conclusion. I hope however that this information is useful to you.

Yours sincerely

Ian Walley
Senior Complaints Officer

Annex 1 – Relevant EIR legislation

Regulation 2(1) In these Regulations –

“the Act” means the Freedom of Information Act 2000(c);

“applicant”, in relation to a request for environmental information, means the person who made the request;

“appropriate record authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“the Commissioner” means the Information Commissioner;

“the Directive” means Council Directive 2003/4/EC(d) on public access to environmental information and repealing Council Directive 90/313/EEC;

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);

“historical record” has the same meaning as in section 62(1) of the Act;

“public authority” has the meaning given in paragraph (2);

“public record” has the same meaning as in section 84 of the Act;

“responsible authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“Scottish public authority” means –

- (a) a body referred to in section 80(2) of the Act; and
- (b) insofar as not such a body, a Scottish public authority as defined in section 3 of the Freedom of Information (Scotland) Act 2002(a);

“transferred public record” has the same meaning as in section 15(4) of the Act; and

“working day” has the same meaning as in section 10(6) of the Act.

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 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.

Our ref: CM/KEP

24 February 2006

[REDACTED]
TWA Manager
Network Rail
3rd Floor,
1 Eversholt Street
London
NW1 2DN

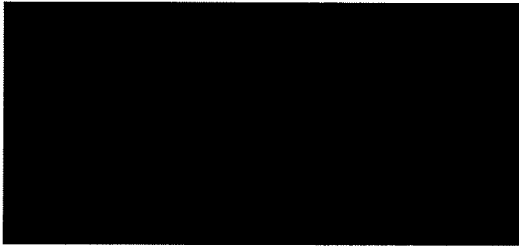
Dear [REDACTED]

Re: **WC Reference No:** [REDACTED]
Network Rail (West Coast Mainline) Order 2003
Stowe Hill Tunnel Pressure Relief Shaft

[REDACTED]
As you are aware, the original scheme for 140 mph trains has been abandoned in favour of 125 mph trains. In accordance with Compulsory Purchase Circular 02-03, please provide me with a copy of the appraisal showing the need for the additional shaft.

Yours sincerely

[REDACTED]



4th May 2007

Case Reference Number FER0158755

Dear 

Your information request to Network Rail.

Thank you for your correspondence dated 20 April 2007 in which you make a complaint about Network Rail's decision not to release the information you requested.

Network Rail is not subject to the Freedom of Information Act 2000, but we will consider whether the information you requested might be subject to the Environmental Information Regulations 2004.

Your case has been allocated to one of our case resolution teams who will contact you as soon as possible to explain how your case will be progressed. Due to the volume of complaints we are receiving at present it may be several months before you hear from us.

If you need to contact us about any aspect of your complaint about Network Rail, please contact our Freedom of Information Helpline on 08456 306060, or 01625 545745 being sure to quote the reference number at the top of this letter.

Yours sincerely,

pp
Mr Paul Arnold
Head of Customer Service
Fol Case Reception Unit
The Information Commissioner's Office



15 August 2007

Case Reference Number FER0158755

Dear 

I refer to previous correspondence in which it was explained that Network Rail was not subject to FOIA but that we would consider whether it was subject to Environmental Information Regulations 2004 (EIR). The issue of whether Network Rail Ltd (NRL) was a public authority for the purposes of EIR has now been considered in an appeal to the Information Tribunal by Network Rail. This was following the Commissioner's decision in another complaint he received that it was subject to EIR.

Network Rail had previously advised you that it was not subject to the requirements of EIR.

I can advise you that the Information Tribunal has allowed the appeal by NRL and has decided that NRL and Network Rail Infrastructure Ltd (NRIL) functions are not functions of administration, whether public or private and are not in any event public functions. Therefore NRL and NRIL are not public authorities within the meaning of EIR Reg 2(2). A copy of the IT decision will be available on its website at:

<http://www.informationtribunal.gov.uk/ourDecisions.htm>

The Tribunal did however comment that:

“Notwithstanding our decision on the issue of law arising from these appeals and not wishing to cast any doubt on the environmental credentials of the Appellants, we have some concerns as to its implications.....DEFRA and/or the Dept of Transport may wish to consider whether, by whatever route, NRIL should be brought within EIR (rather than FOIA) so that it is required to supply environmental information. We recognise that there may be no convenient way to achieve this within the existing regulations but believe that the present position is clearly unsatisfactory.”

The Commissioner has decided not to appeal the decision of the Information Tribunal. However he has noted the comments in the final paragraph by the Tribunal and will be raising the issue with Defra.

In view of the above the Commissioner has no power to consider your complaint under EIR and I have therefore now closed your case.

I appreciate you will be disappointed by this Decision, particularly in view of the length of time it has taken to reach this point. However I trust you will understand the reasons why we cannot proceed with your complaint.

Yours sincerely

Pam Clements
FOI Team Leader – health and transport

[REDACTED]

From: [REDACTED]
Sent: 07 February 2007 09:56
To: [REDACTED]
Cc: [REDACTED]
Subject: RE: EEC-2 data request

Dear [REDACTED]

Thank you for your email and suggestion that we contact Ofgem. We have already contacted them and they have supplied us with quarterly, summary data for various installations under EEC-2, as you suggested they might. However, this data did not provide any geographical breakdown or the level of detail we were hoping for; hence we are also contacting individual suppliers.

As per my original email to [REDACTED] I am therefore writing to further enquire about the possibility of obtaining data from EDF, as this was not clear from your previous response. As explained in the original email, we are seeking data on the total number of installations and subsequent energy savings, to date under EEC-2, broken down by measures for priority and non-priority groups, for England. We would ideally like this information at a regional level but we understand that this may require additional work due to the current structure for scheme reporting. Please find below some information that we hope may assist you in processing this request and alleviate any concerns you may have.

We believe the information we are requesting is covered by the Environmental Information Regulations 2004 which enforces the Freedom of Information Act 2004 for environmental data. It is our understanding that:

- Data on energy efficiency measures (including EEC data) is covered by the Regulations; and
- EDF are a 'public authority' and as such covered by the Regulations.

The EIR 2004 also state that responses to requests for information should be fulfilled within 20 working days, where feasible.

[REDACTED]

[REDACTED]

For more information on the EIR 2004 please see: <http://www.opsi.gov.uk/si/si2004/draft/20040331.htm>

CSE would be very grateful of any information you are able to supply in support of this project. If you would like to discuss this request further, please do not hesitate to contact me (details below). In the meantime, I would be very grateful if you could acknowledge this request, with an indication of how you may be able to proceed with it.

Kind regards,

[REDACTED]

Centre for Sustainable Energy
The CREATE Centre, Smeaton Road, Bristol BS1 6XN
[REDACTED] (direct)
0117 929 9950 (switchboard)
0117 929 9114 (fax)

www.cse.org.uk
Promoting sustainable energy policy and practice

26/04/2007

[REDACTED]
Centre for Sustainable Energy
3 St Peter's Court
Bedminster Parade
Bristol
BS3 4AQ

22nd October 2008

Case Reference Number FER0159577

Dear [REDACTED]

Complaint against EDF.

I write in relation to your complaint to the ICO that EDF has failed to provide information requested under the Environmental Information Regulations 2004 (the "EIR").

Firstly may I apologise on behalf of the ICO for the time this case has taken to complete. Unfortunately your request brought up a number of very complex and difficult issues relating to the scope of the EIR's coverage of private concerns such as EDF. The Commissioner has had to be very thorough in his investigation as a wrong decision on this matter would either exclude a major provider of electricity from the scope of the EIR, or alternatively make it subject to obligations which in law should not apply to it. It has therefore taken the ICO some time to conclude its investigation into these matters.

Following your complaint, the ICO has therefore considered the issues covered by this case at length. Relevant background information and internal discussions have also informed the outcome of this case.

To summarise the outcome of our considerations, the ICO has decided that, in the particular circumstances of this case, EDF is not covered by the EIR and, therefore it does not have to provide you with the information you have requested. The reasons for this are set out below. Please be aware that as EDF sits outside the scope of the EIR, the ICO is unable to issue a decision notice formalising the finding in this case as to do so would exceed the ICO's jurisdiction.

Whether EDF is caught by the EIR

EDF has argued that it is not covered by the scope of the EIR. Therefore in order to determine whether you are entitled to the information requested, the ICO has had to give considerable thought to whether EDF is caught by the scope of the EIR in terms of the information requested in this case. The basis of the considerations is regulation 2(2) of the EIR.

The ICO has therefore taken into account the provisions of regulation 2(2) of the EIR in determining this point. The full text of regulation 2(2) can be found as Annex 1 to this letter, but, put simply, regulation 2(2), sets out what constitutes a public authority under the EIR. The following bodies are considered to be public authorities:

- (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.

It is clear that EDF does not fall within the provisions of (a) or (b) above in that it is not:

- (a) a government department,
- (b) specifically listed in Schedule 1 of the Freedom of Information Act 2000 (the "Act") or designated as a public authority by Order under section 5 of the Act.

The ICO has therefore focussed on whether EDF could be said to fulfil the criteria laid out in regulation 2(2)(c) or 2(2)(d). In order to determine whether this is the case involves a number of tests. I have set out the factors that the ICO has taken into consideration in respect of each of the tests outlined below.

Regulation 2(2)(c): Whether EDF carries out functions of public administration under the EIR?

The ICO has considered this point at length and has come to the conclusion that EDF does not carry out functions of public administration under the EIR. Primarily his decision is based on interpreting existing case law made by the courts, and through interpreting previous decisions made by the Information Tribunal which have established some guidelines as to the meaning of this test under the EIR.

The ICO considers that the term "functions of public administration" refers to specific obligations and duties akin to administrative functions such as town planning, court administration or the administrative functions of the civil service.

The ICO's considers that EDF provides a service in supplying electricity to its customers. It does not however carry out a function of public administration when providing this service. Although in other countries the responsibility for the delivery of electricity to customers is a function of the state, it is established in this county that this function is privately run by numerous electricity suppliers in direct competition with each other. The industry as a whole is licensed and regulated by the Office of Gas and Electricity Markets (OFGEM). OFGEM is a named government department which licences and regulates the industry as a whole. The Commissioner's view is that it, rather than the individual suppliers themselves, carries out the role or function of the administration of the electricity supply market. In short therefore, the Commissioner's decision is that EDF does not fall within the scope of section 2(2)(c) for the purposes of the regulations.

We have therefore considered whether section 2(2)(d) is applicable.

Whether EDF is 'under the control' of another public authority under the EIR

The ICO has considered this point at length. The Commissioner has already highlighted that his view is that EDF carries out its functions under the directions and guidance of OFGEM, and that OFGEM is a public authority for the purposes of the regulations. Following this, if EDF is under the "control" of OFGEM then EDF may, subject to the other conditions set out in regulation 2(2)(d), fall within the scope of the regulations. The Commissioner has therefore considered whether the statutory powers of licensing and regulation which OFGEM has over EDF constitutes "control" for the purposes of the regulations.

