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FOI POLICY KNOWLEDGE BASE

FoI or EIR	Section/Regulation	Issue
FOI EIR	s3 reg 2(2)	Investigating whether a body is a public authority

Line to Take:

Where the Commissioner determines that a body to which a request has been made is not subject to the FOIA / EIR, he will issue a letter (not a DN) to this effect. Where he determines that it is a public authority, he will issue a DN requiring the authority to either comply with the request or refuse it in line with the relevant legislation.

Where the question arises in relation to the EIR, the Commissioner will generally seek to determine whether the authority would be covered by the EIR before investigating whether the information is likely to be environmental.

Further Information:

The Commissioner does not have the power to issue a s50 decision notice on a body which is not a public authority (PA). However he is entitled to investigate as a preliminary issue whether a body which has been complained about is a PA for the purposes of the FOIA or the EIR.

A parallel to this can be found in the Tribunal decision *Edem v IC & others* ([EA/2010/0083](#), [0097](#) & [0099](#)) in which the Tribunal had to consider the preliminary issue of whether the bodies in question were public authorities in order to determine whether it had jurisdiction to hear an appeal.

FOI

- If the Commissioner has found a body to be a PA, he will issue a decision notice which is appealable to the Tribunal.
- If the Commissioner finds the body is not a PA, he will issue a letter to this effect. This will be signed by a group manager in most instances, unless the complexity suggests another signatory would be better. This decision can only be appealed by way of Judicial Review.
- If the body is listed as a PA in respect of some categories of information but not others (eg the BBC), the Commissioner will always issue a DN – even if the particular information requested is not caught by FOIA. This DN is appealable to the Tribunal.

EIR

Where the body is not an authority for the FOIA, but the question has arisen as to whether it is an authority for the EIR, the Commissioner will generally address this question before going on to consider whether the information requested is environmental. This is because it is difficult to determine conclusively whether information is environmental without seeing it or without at least having the co-operation of the body holding it.

Common sense should be used here, however, and time should not be spent on this question if it is obvious from the request that the information will not be environmental.

- As with FOIA, the Commissioner will issue a formal DN if he determines that the authority is a PA, which is appealable to the Tribunal in the usual way
- As with FOIA, the Commissioner will issue a letter if he determines the body is not a PA under the EIR. However, unlike with the FOIA, the Tribunal has accepted jurisdiction in this matter and will hear appeals (see the binding Upper Tribunal decision in *Smartsources*). This is because the decision is considered to be “an adjudication” under the legislation, and because Article 6(1) of Directive 2003/04/EC (which the EIR implement) requires an appeal process which is “expeditious and either free of charge or inexpensive”.

If the Commissioner determines that the authority is a PA for the purposes of the EIR but not for the FOIA, the Decision Notice should state: "in so far as the information requested is environmental, the PA must issue a response under the EIR".

Source of Line to Take	IT / Policy	Details	Edem / IC (6 Sept 2010) Network Rail / IC (17 July 2007) Smartsource / IC (23 Nov 2010)
Related Lines to Take	LTT12, LTT206		
Related Documents	EA/2006/0061 (Network Rail) EA/2010/0083, 0097 & 0099 (Edem) GI/2458/2010 (Smartsource) HoL judgment: Sugar v BBC [2009] UKHL 9 Counsel's opinion 3.07.01.08/2009 Updated schedule 1 of the FOIA Policy guidance on public authorities for the purpose of the EIR		
Contact: KP			
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