

# The Environmental Information Regulations 2004

Public authorities after *Fish Legal*

Jacqueline Lean

## *Fish Legal – the Issue*



- Are water and sewerage companies “public authorities” for the purposes of Directive 2003/4/EC and the EI Regulations 2004?
- *Smartsource Drainage & Water Reports Limited v Information Commissioner* [2011] 1 Info LR 1498: Upper Tribunal said “No”
- 5 questions referred to the CJEU under reference Case C-279/12 *Fish Legal & Emily Shirley v Information Commissioner*
- 2014 – Upper Tribunal to apply the ‘guidance’ promulgated by the CJEU

## Article 2(2) of Directive 2003/4/EC



‘Public authority’ shall mean:

- (a) government or other public administration, including public advisory bodies, at national, regional or local level;
- (b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment; and
- (c) any natural or legal person having public responsibilities or functions, or providing public services relating to the environment under the control of a body or person falling within (a) or (b).

## The decision of the *CJEU*



### Article 2(2)(b)

“...administrative authorities defined in functional terms, namely 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.”

The “special powers” test

## *The decision of the CJEU (2)*



### Article 2(2)(c)

“... any entity which does not determine in a genuinely autonomous manner the way in which it performs the functions in the environmental field which are vested in it, since a public authority covered by article 2(2)(a) or (b) of the Directive is in a position to exert decisive influence on the entity’s action in that field”

“...the mere fact that the entity in question is, [...] a commercial company subject to a specific system of regulation for the sector in question cannot exclude control within the meaning of article 2(2)(c) in so far as the [above] conditions [...] are met...”

# *Fish Legal* in the Upper Tribunal



3 issues

- (1) Jurisdiction: was a decision that a body was not a public authority an appealable decision?
  
- (1) “Special powers”: what did that mean, and is the test met in the present case?
  
- (2) “Control”: when does ‘influence’ become ‘control’?

## *Fish Legal: Jurisdiction*



- Secretary of State for the Environment, Food and Rural Affairs
  - FTT only has jurisdiction in respect of a decision notice issued under s.50(3)(b) FOIA
  - IC has no jurisdiction to serve a decision notice on the issue of whether an entity is a public authority under EIR 2004;
  - IC's decision could only be challenged by way of judicial review
- Upper Tribunal rejected that argument (paras 25-42)

## *Fish Legal: jurisdiction (2)*



“In summary, **the [IC] has jurisdiction both to investigate and decide whether a body is a public body.** That decision is one made on the application under section 50 of FOIA and so the document giving notice of that decision is a decision notice served under section 50(3)(b). Sections 50 and 51 are predicated upon the existence of 3 key concepts of request, information, and public authority on which the legislation is based. But that does not deprive the Tribunal of jurisdiction to deal with those issues. [...] When [section 50] and section 51 refer to an application, they refer to a complaint to the [IC] **that any requirement of the legislation has not been met and the [IC] can address all the reasons advanced as to why this has not occurred, including the assertion that FOIA does not apply because the request was not made to the public authority**” (para 55 – emphasis added)

# What does that mean in practice?



- Broad approach to remit of the IC (and FTT)
- Statutory right of appeal – rather than judicial review
- Caution needed if refusing a request on the basis that EIR does not apply as not a public authority

## *Fish Legal: “Special Powers”*



- IC: invited the Upper Tribunal to set out principles on which classification of a body could be made
- Water companies:
  - asked Upper Tribunal to identify which of the companies’ powers were considered to be special powers
  - argued that the companies’ powers conferred by WIA 1991 were comparable to rights or ‘powers’ enjoyed by private landowners and therefore not “special” powers
  - question of substance, not form.
- Fish Legal: 1 “special power” is enough

## *Fish Legal: “Special Powers” (2)*



Upper Tribunal:

- Declined to provide “general guidance” to the IC
- Declined to categorise the various powers enjoyed by the companies (and which were identified as potential “special powers” by the appellants) as those which were “special powers” and those which were not
- Found it did not need to decide whether 1 special power was sufficient to render a body a public authority under the EIR

## *Fish Legal: “Special Powers” (3)*



Which powers were found to be “special”?

- Power of compulsory purchase (s.155 WIA 1991) – even though it required confirmation by the Secretary of State
- Power to make byelaws – with criminal sanction for non compliance (s.157 WIA 1991)
- Power to enter onto land for the purpose of survey or exercise of works powers (s.168 WIA 1991);
- Hosepipe bans (s.76 WIA 1991)
- Q: Power to lay pipes on land other than a street (s.159 WIA read with Schedule 6)?

## *Fish Legal: What makes a power a special power?*



- Does the statutory power confer an advantage which is not generally available (eg in the private law context)?
  - Para 107 (compulsory purchase – “the leverage which the power confers in commercial negotiations”. See also para 121)
  - Para 109 (byelaws – “the characterisation of the powers to which the CJEU refers ... is not limited to activities or outcomes but includes the means by which they may be secured”)

## *Fish Legal: What makes a power a special power?*



- Para 122/123 (“private law rules operate on the basis of assumed consent or acquiescence... the element of compulsory allows the companies effectively to override the individuality that can be a feature of the exercise of private law powers.”)
- Para 125 (power of entry for survey/works – “some of the powers given to the companies operate outside any existing relationship and without any practical limit.”)

## Where are we now?



*“The extent to which the CJEU’s judgment will result in bodies being classified as public authorities is unclear and undecided, but potentially wide. As Judge Jacobs noted in his reference, the reasoning in these cases is potentially relevant to other privatised, regulated industries that deliver a once publicly owned service: electricity, gas, rail and telecom. It will have to be applied to those and other bodies as and when cases arise.”*

*(Fish Legal para 110)*

## Post Fish Legal



- Limited number of cases referred to ICO / Tribunal on this issue since February 2015
  - Northern Gas Networks Limited (FER0621831)
  - Great Yarmouth Port Authority (FER0602952)
  - H.M. Verderers of the Forest of Dean (FER0534921)
  - Geoplace LLP (FER0557711)
- Upper Tribunal decision in *Attorney-General for the Prince of Wales v Information Commissioner & Michael Bruton* [2016] UKUT 0154 (AAC)
- Upper Tribunal decision in *Cross v Information Commissioner & The Cabinet Office* [2016] UKUT 0153 (AAC)

## *Cross v Information Commissioner*



- Mrs Cross applied to the Information Officer of the Royal Household, seeking minutes of meetings of the “Social Responsibility Committee”
- Request denied – not a public authority. Upheld by ICO.
- UT considered post *Fish Legal*, with judgment delivered after that in *AG of Prince of Wales v ICO*.
- Royal Household not a public authority under Article 2(2)(b) and not under the control of another public authority for the purposes of Article 2(2)(c).

## Cross v Information Commissioner



- Some important preliminary points:
  - “The general approach of the Directive and the EIR is to give a right to request *environmental information* from a defined class of entities, namely *public authorities*”;
  - “So although ... the Directive, and so the EIR, is intended to have a wide reach they nonetheless were not intended to give a right to request *environmental information* from *anyone* simply because they hold it. This is the case even if it can be said that the environmental information relates to the exercise of powers or responsibilities concerning an iconic building [...] or a large estate in respect of which it can be said there is a strong public interest in favour of the disclosure of environmental information”

## *Cross v Information Commissioner*



Further guidance on the meaning of “public authority” for the purposes of Article 2(2)(b) of the Directive

“...applying the description or test in para 52 of Fish Legal:

- (i) The special powers also have to be vested in the entity by the legal regime applicable to the entity; and
- (ii) It is the vesting of special powers that makes a service of public interest and administrative function that counts or qualifies in determining whether an entity is an administrative authority (and so a public authority under the functional definition)”

### Article 2(2)(b)

“...administrative authorities defined in functional terms, namely 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.”

## *Cross v Information Commissioner: Issues*



*Fish Legal* (CJEU and Upper Tribunal);

- (i) Did not have to consider whether Regulation 2(2)(c) of the EIR was wider than the Directive because “the other body or person” in Reg 2(2)(c) does not have to be a legal person entrusted with environmental functions and/or whether they must have special powers directed to such environmental functions as are entrusted to them or which they have, and
- (ii) Proceeded on the basis that, in the case of the water companies, no point arose on the different structure of the EIR and the Directive, and so the CJEU guidance on Article 2(2)(b) applied to Regulation 2(2)(c)

## Article 2(2) v Regulation 2(2)(c)



### Article 2(2)(b)

“any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment”

### Regulation 2(2)(c)

“any other body or other person, that carries out functions of public administration”.

## *Cross v Information Commissioner: Issues*



The parties in *Cross* did not argue that:

- (i) To be a public authority under the functional test the entity had to be entrusted with special powers for the purpose of the performance of services of public interest in the environmental field; or
- (ii) The reference in para 52 of the CJEU judgment to “this purpose” linked to the need for special powers to only the services of public interest in the environmental field.

## *Cross v Information Commissioner: Issues*



Basically, if a body is entrusted with “special powers” for the performance of services of public interest, they can be a public authority under EIR. They do not have to be entrusted with “special powers” for “the performance of services of public interest in the environmental field”.

The Tribunal proceeded on this basis, which it describes as “common ground” – although it seems they did not entirely agree with that approach.

## Cross v Information Commissioner



*“[85] As we have said there is a hierarchy to the provisions [...] it is clear that, at the first tier, the intention was that it did not matter whether entities that are organically administrative authorities were performing functions relating to the environment and that if such entities held environmental information it could be requested [...]”*

*[86] At the next tier, it seems to us that the natural meaning of the language of Article 2(2)(b) of the Directive “performing public administrative functions under national law, including specific duties, activities or services relating to the environment” is not referring to those duties by way of example...Rather, the meaning (and it seems to us) the intention of that language is that to satisfy the functional test the relevant entity under national law must be performing “specific duties etc relating to the environment”*

## *Cross v Information Commissioner*



*“[90] Also, if at the functional stage an entity does not have to be performing services of public interest in the environmental field it is not clear to us why the control test at the next tier must be over functions etc. relating to the environment whether it exists only over those functions or arises because of control of the relevant entity.*”

*[91] More generally, it seems to us that when you move from an organic description to a functional one, or one based on control, in respect of a Directive designed to give access to environmental information it is natural to provide that, at the second and third stages, the relevant entity has to have relevant public interest functions in the environmental field”*

## AG for Prince of Wales v IC & Bruton



- Applied the ‘common ground’ approach in *Cross*
- Applied the “test” set out in para 106 of *Fish Legal*: “Do the powers give the body an ability that confers on it a practical advantage relative to the rules of private law”
- Addressed the “hybridity” issue for the first time (i.e. the 5<sup>th</sup> question referred to the CJEU)
  - “whether Article 2(2)(b) and (c) of Directive 2003/4/EC must be interpreted as meaning that, where a person falls within that provision in respect of some of its functions or services, that person constitutes a public authority only in respect of the environmental information which it holds in relation to those services.”

## *AG for Prince of Wales: Outcome*



- The Duchy of Cornwall does not have a legal personality (unless it is being used as a reference to the Duke of Cornwall) and is not a person, body or entity that has a separate personality of its own;
- The Duke of Cornwall, in his capacity as harbour and lighthouse authority for St Mary's, Scilly, is a public authority for the purposes of the Directive and EIR; and
- The Duke of Cornwall's obligation to provide environmental information as a public authority are limited to the environmental information he holds as Harbour Authority.

## *AG for Prince of Wales : A de minimis test?*



*“... if the hybridity principle does not apply to limit the obligations of the Duke, it seems to me there is room for a de minimis principle and that in all the circumstances approach should be taken into account. So factors to be taken into account on its application would include a comparison between:*

- (i) The obligations imposed on the person or body who satisfies the functional test if they are limited to the environmental information held as a result of the exercise of those functions; and*
- (ii) The obligations that would be imposed if they extended to all environmental information held by that person or body.”*

## *Where does that leave us??*



- The body must be a legal person governed by public or private law
- The legal regime applicable to it must have entrusted it with the performance of services of public interest
- The “special powers” relied on have to be vested in it by that legal regime
- It is the vesting of those special powers that makes a service of public interest and administrative function that counts or qualifies in determining whether a body is a public authority (under the functional test)

## *Where does that leave us?? (2)*



- The “services of public interest” do not have to be in the environmental field (although this is open to doubt)
- The obligation to supply environmental information only relates to those capacities in which the body is found to be acting as a public authority (applying the ‘hybridity’ principle)
- Alternatively, there may be scope for a ‘de minimis’ test – which could mean a body was not found to be a public authority under the functional test.

## *Northern Gas Networks Limited*



- NGN is the owner and occupier of the gas distribution network in the North of England, and licensed under s.7 of the Gas Act 1986 as a public gas transporter.
- Request for “the number of confirmed gas escapes for which [NGN] was responsible for attending to between 1 April 2015 – 31 October 2013” and full content of current policies and procedure in the event of the same

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- Services delivered in the public interest? Yes

# *Northern Gas Networks Limited*



- Special powers? Yes
  - Powers of entry onto land and premises to inspect gas equipment and fittings for safety and for performing other duties
  - Compulsory purchase powers to acquire rights in or land connected with its obligation to develop a pipeline system;
  - Powers to lay pipes in streets (and repair/maintain etc)
- “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”
- “[those powers] provide NGN with a practical advantage when delivering its services compared with the powers that are available to ordinary persons.”

# Great Yarmouth Port Authority



- Request for information relating to sea and river depth data
- GYPA refused on grounds it was not a public authority
- ICO upheld the complaint
  - GYPA is a body created by statute (Harbours Act 1964)
  - Functions are for the benefit of the public
  - Special powers? Yes (Unsurprising in light of *AG for Prince of Wales v ICO*)

# Great Yarmouth Port Authority



- Special powers?
  - Statutory obligation to keep the river port open as a safe navigable thoroughfare
  - Powers to close quayside lands to public and suspend rights of way
  - Powers to make byelaws
  - Power to remove wrecks and unfit vessels
  - ‘Competent harbour authority’ with additional responsibilities regarding pilotage (including prosecution, collecting dues, power to prohibit entry)
  - Further ‘unusual powers’ – eg right to board ships, detaining a vessels

## *Great Yarmouth Port Authority*



- GYPA argued that it had “few” statutory powers compared to other port authorities (eg Port of London)
- ICO referred to her own guidance ‘Public authorities under the EIR’ (available on the ICO website) – “in principle, an organisation may only need to have one special power in order to be a public authority under the Regulations.”
- In addition “the Commissioner also considers that special powers do not have to be used frequently in order to be relevant to the determination”

## *ICO Guidance*



Para 22:

“In principle an organisation may only need to have one special legal power in order to be a public authority under regulation 2(2)(c), although most relevant bodies are likely to have a range of additional powers. An organisation is more likely to be a public authority under this test if they hold a range of powers that collectively amount to a special legal status”.

<https://ico.org.uk/media/1623665/public-authorities-under-eir.pdf>

## *ICO Guidance*



- Point not determined in *Fish Legal* (or thereafter)
- How does this square with the potential *de minimis* test mooted by Charles J in *AG for Prince of Wales v ICO*?

## *HM Verderers of the Forest of Dean*



- Request for information relating to feral boar in the Forest of Dean
- Verderers said they were not a public authority – and maintained that position post *Fish Legal* (UT)
- ICO disagreed
  - Website stated that fulfilment of Verderers role was associated with 3 Acts of Parliament;
  - Legislation has abrogated the role of ancient forest law, “but the functions of Verderers remained. This provides evidence that the Verderers have what could be regarded as powers.”

## *A move away from identifying special powers?*



“In practice, their function is primarily to advise and to make representations to other public bodies such as the Forestry Commission, local authorities and DEFRA and they have the power to influence decision making and make decisions themselves” (para 38)

“The Commissioner considers the functions the Verderers perform are public administrative functions relating to the environment and they appear to hold powers that go beyond the normal powers that other private landowners are able to enjoy. The UT in the Fish Legal case also noted that powers may have a force even when they are not deployed; in this case the Commissioner observes that the Verderers benefit from a level of influence derived from their function.” (para 41)

## *Geoplace LLP*



- Role “to create and maintain the National Address Gazetteer Database and the National Street Gazetteer Database for England and Wales, providing definitive sources of publicly-owned spatial address and street data”
- C requested that GeoPlace provide him with information on whether a particular street/alley was adopted
- GeoPlace refused: not a public authority

## *Geoplace LLP*



- ICO agreed
- Not a public authority under Article 2(2)(b):
  - No statutory / legislative obligation to maintain the information – cf obligation on a highways authority to make available a List of Streets (s.36(6) HA 1980)
  - No legislative power to compel local authorities to provide it with information
  - Not required to do anything by legislation that goes beyond what is usually required of businesses and limited liability partnership

## Geoplace LLP



- Not a public authority under Article 2(2)(c) (“control”):
- Test set down by UT in *Fish Legal*
  - Test applies to manner in which functions are performed, not functions themselves
  - Body must operate in a non autonomous manner; and
  - Do so because a public authority is in a position to control it
- Not the case here
  - LLP jointly owned and controlled by Ordnance Survey and the Improvement and Development Agency for Local Government (trading as LGID)
  - LGID not a public authority
  - Did not receive any public funds

## *Special power – where does that leave us?*



- ICO Guidance (para 23)
  - Compulsory Purchase
  - Requiring access to and use of private property
  - Creating new laws and criminal sanctions
  - “Special levels of influence or advisory roles” (*HM Verderers of the New Forest*)
  - “Susceptibility to judicial review”

## *Special power – where does that leave us?*



- In addition:
  - Powers to close lands to public or restrict entry
  - Power to suspend rights of way
  - ‘Unusual powers’ relating to specific functions

## *Who is a public authority?*



- Water & sewerage companies (*Fish Legal*)
- Gas distributors and transporters (*Northern Gas*)
- Harbour/Port authorities (*AG for Prince of Wales; Great Yarmouth Port Authority*)
- Drainage Commissioners (see eg *Danvm Drainage Commissioners* FER0604321)
- Verderers of the New Forest

## *Who is a public authority?*



- Telecoms?
- Electricity companies?
- Airport operators?
- Railway operators?
- National Trust?
- Conservators of the River Cam?
- Garden committees of communal gardens?

## *Who is a public authority? Outstanding issues*



- Is one power enough?
- Do the functions in the public interest have to relate to the environmental field, or is the ‘common ground’ approach in *Cross / AG for Prince of Wales* the right one to apply?
- De minimis?