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HR6 8DQ

12 March 2010

Case Reference Numbers FER0269130 & FER0272665

Dear Mr Linley-Adams

The Commissioner has received a number of complaints with regard to the responses received from various water utility companies to requests, made under the Environmental Information Regulations 2004 (the EIR).

In order to consider the complaints, the Information Commissioner has found it necessary to determine whether water and sewerage utility companies are public authorities for the purposes of the Environmental Information Regulations 2004.

The Commissioner has previously issued Decision Notices in respect of *Sutton and East Surrey Water Plc*, case references FER0118853 and FER0162211, which found that the water utility company was subject to the EIR.

The Information Tribunal considered the meaning of "public administration" in relation to the case of *Network Rail Limited and the Information Commissioner* (EA/2006/0061 and EA/2006/0062)¹. The Commissioner has, therefore, taken this decision into account when assessing whether these organisations fall within the scope of the EIR. The Commissioner has also considered the case of *Griffin v South West Water Services Limited* [1995] IRLR 15, referred to within the Network Rail decision.

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http://www.informationtribunal.gov.uk/Documents/decisions/networkrailtdvInfoComm_netRailinfrastructureltd17jul07.pdf



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After careful consideration and taking into account all the representations received from the information requesters and the recipients of the requests, the Commissioner's view is that water and sewerage companies (WASCs) and water only companies (WOCs) are not public authorities for the purposes of the EIR. The Commissioner's assessment is provided below.

The term 'public authority' is defined at regulation 2(2) of the EIR:

Regulation 2(2) provides that –

'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 Regulations 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 generally accepted that WASCs and WOCs are not public authorities under regulation 2(2)(a) or 2(2)(b) and the Commissioner has confined his consideration to arguments in relation to regulations 2(2)(c) and 2(2)(d).

Regulation 2(2)(c): any other body or other person, that carries out functions of public administration

The EIR were made in response to an EC Directive, 2003/4/EC, which uses the term 'performing public administrative functions' in its definition of a public authority. The Aarhus Convention 1998, from which 2003/4/EC derives, makes reference to public authorities and the Aarhus Implementation Guide 2000 addresses definitions, including the definition of 'public authority' and 'public administrative function' at page 32:

' "Public authority" also includes natural or legal persons that perform any public administrative function, that is, a function normally performed by governmental authorities as determined according to national law. What is considered a public function under national law may differ from country to country.'

In the case of *Network Rail*, the Information Tribunal considered the description 'functions of public administration' at paragraphs 24-33 of its decision and concluded that 'public administration' is a more restrictive term than 'public function'. In consequence, while Network Rail might perform a public function (the Commissioner observes that this may also be extended to other public utility companies, including WOCs and WASCs), that public function is not such that it can be classed as 'public administration'. In reaching this view, the Tribunal was assisted by the judgment of Blackburne J. in *Griffin v South West Water Services Limited* [1995] IRLR 15 [paragraphs 122-123] which stated, at paragraph 123:

" SWW is no more an 'administrative body' because it 'administers' a service (the supply of water and sewerage services) than is a company carrying on business, manufacturing and distributing sweets because such a company 'administers' that enterprise or is a firm of solicitors because it administers a service of supplying legal advice. I agree ... that SWW's primary function, as a supplier of water and provider of a sewerage service, is to be contrasted with



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administrative functions such as town planning, court administration and any of the myriad administrative functions of the civil service”.

The Commissioner also considered the judgment in *AB V South West Water Services Limited [1993] QB 507 (CA)* in which the Court of Appeal found that South West Water had not been exercising functions of an executive or governmental character when supplying water, but it had been carrying out a commercial operation.

The Commissioner is satisfied that the Information Tribunal ruling in Network Rail is applicable in the circumstances, particularly in light of the judgment of Blackburne J. in *Griffin v South West Water Services Limited*, and that, accordingly, WOCs and WASCs are not public authorities as defined by EIR 2(2)(c).

Regulation 2(2)(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.'

The key issue here is one of 'control' and what can be said to constitute 'control' in the context of the EIR.

It has been argued that WOCs and WASCs operations are controlled by means of close regulation. The water and sewerage industry has a number of different regulators, for example, in England and Wales Ofwat is the commercial regulator. The Drinking Water Inspectorate regulates water quality and The Environment Agency regulates water abstraction and pollution. The actual level of regulation has, however, also been described as 'arms length supervision'.



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The guidance provided by DEFRA indicates that in order for regulation 2(2)(d) to apply, the level of control needs to be sufficient to exert a "decisive influence". The Commissioner would agree with that interpretation.

Having considered the regulatory responsibilities of the various bodies referred to above (and their Scottish and Northern Irish equivalents), the Commissioner accepts that the statutory regulation imposed does not constitute control of the utility company, but provides a supervisory framework in which it can be ensured that governmental objectives are met, for example in terms of the provision of quality services and protection against the possible abuse of a monopoly position. The Commissioner notes, for example, that Ofwat, has only limited powers to intervene and direct the operation of the water utility company, or require it to undertake certain actions, and that these exist only in circumstances where the company is judged to have breached its licence, or controlling legislation.

Although these various regulators set out frameworks within which the water companies must operate, including pricing restraints, the companies remain commercial, profit making organisations operating in a competitive market. There is no suggestion that the companies are not free to make their own commercial and management decisions, without interference or participation by the regulatory bodies. The companies are privately-owned, with shareholders, directors and run on commercial principles in order to make a profit. They are free to make their own financing, borrowing and investment decisions. The analogy is drawn with any other commercial business within the UK, which may also be subject to various statutory and regulatory constraints, for example by Companies House, or various professional licensing bodies, but would not be considered to be subject to 'control' as a result.

Subject to minor provisions relating to the appointment of non-executive directors, no public body has the right to appoint, or veto the appointment of, a director or representative to the board of a water utility company and directors are obliged to act in conformity with the company's Memorandum of Association, in the best interests of the business. There is therefore no suggestion that a public authority may exert a controlling influence on a water company through majority representation on its board.



For these reasons, the Commissioner is satisfied that WOCs and WASCs enjoy a high level of commercial freedom, and independence from decisive regulatory interference, such that they should not be considered to be under the control of any licensing or regulatory body. As these are the possible routes to 'control of a [public authority]' for the purposes of regulation 2(2)(d) the Commissioner also finds that the water utility companies are not public authorities as defined by EIR 2(2)(d).

Summary.

The Commissioner is satisfied that WOCs and WASCs are not public authorities by virtue of performing functions of public administration, nor are they under the control of a public authority, therefore they do not constitute public authorities for the purposes of the EIR.

The Commissioner acknowledges that position reached in the *Sutton and East Surrey Water* decisions was therefore not correct and he has not used these decisions as precedent in his adjudication on the present cases. The Commissioner notes that in those cases the body concerned did not contest that it was a public authority under the EIR and the issues were never fully argued.

Jurisdiction.

The Commissioner's role in determining appeals under the EIR is derived from regulation 18 which, in turn, relates directly to the provisions of the Freedom of Information Act 2000 (the Act). The Commissioner's powers to adjudicate complaints derive from section 50 of the Act, which states:

*"Any person (in this section referred to as "the complainant") may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a **public authority** has been dealt with in accordance with the requirements of Part I."* (my emphasis)



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As the Commissioner has decided that the various water utility companies are not public authorities for the purposes of the EIR, he has no powers to adjudicate in complaints made against these companies under the EIR.. Nevertheless, should either party wish to pursue this matter further and, should the Information Tribunal be approached with a view to adjudicating on the matter, the Commissioner would not seek to take issue with the Tribunal's jurisdiction to consider whether a body is a public authority for the EIR.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Steve Wood', with a long horizontal flourish extending to the right.

Steve Wood
Assistant Commissioner, FOI Policy

Information Tribunal contact information

Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

If you wish to appeal, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this letter is served.