A&L Goodbody

ENERGY, INFRASTRUCTURE & NATURAL RESOURCES

Utility companies and the Environmental Information Regulations

In recent years, utility companies have found themselves subject to an increasing number of information requests. Reasons for this include information being requested as part of regulatory disputes or environmental activists seeking information about a company's operations.

In most instances requests are made through the Environmental Information Regulations (**EIR**). Up until recently, utility companies were considered exempt from the majority of the provisions of the EIR. Recent decisions by the Information Commissioner's Office (**ICO**) clear the way for utility companies to be subject to having to respond to EIR requests.

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What is the EIR?

The Environmental Information Regulations 2004 (**EIR**) permit members of the public to access environmental information that is held by public authorities.

The EIR originally derived from EU law and came into effect just after the Freedom of Information Act 2000 (**FOI**), however, it is important to note that the EIR will only apply to environmental information.

The EIR provide that members of the public are entitled to make a request for environmental information to public authorities and the public authority must endeavour to make environmental information proactively.

The EIR applies to information held by public authorities in England, Wales and Northern Ireland. Environmental information held by Scottish public authorities is covered by the Environmental Information (Scotland) Regulations 2004. In the Republic of Ireland, there is an equivalent regime under the Access to Information on the Environment Regulations and the process is known as AIE requests.

What are public authorities?

Traditionally, under the EIR, public authorities included government departments, local authorities, the NHS, police forces and universities. The Regulations also cover some other bodies that do public work that affects the environment.

Does it still apply after Brexit?

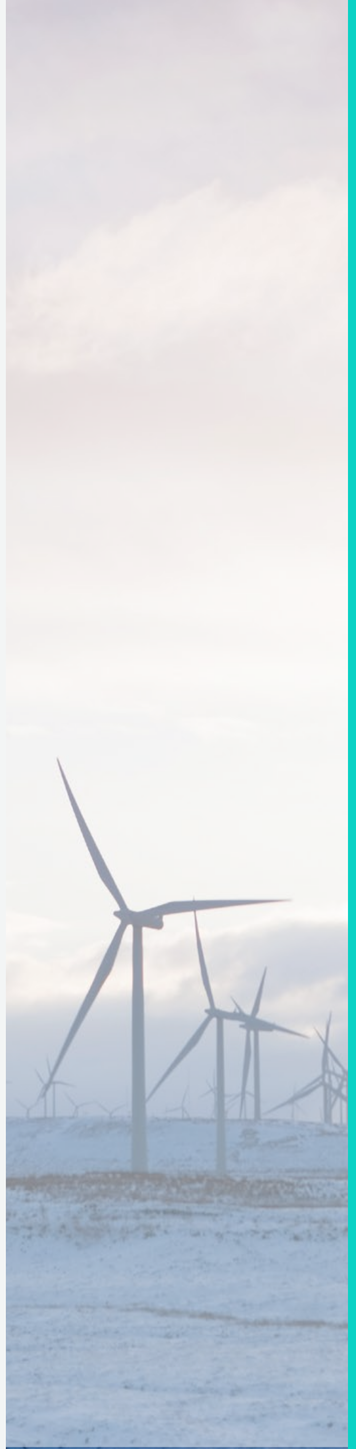
Yes. The EIR will continue to apply unless specifically repealed or amended. The regulations are set in retained UK law. Additionally, the UK has independently signed up to the underlying international treaty on access to environmental information (the Aarhus Convention).

[1] *Upper Tribunal Decision, 19 February 2015*

The growing scope of the EIR

Since the implementation of the EIR, it was widely accepted that utility companies did not fall in the remit of a "public authority". Indeed, during the initial years of the new regime, several applicants tried and failed to have utility companies respond to information requested under the EIR.[1] A turning point came in, through a series of related decisions in 2015 concerning Fish Legal (a fishery rights group) and requests made of several English water companies. Ultimately, the Upper Tribunal determined water companies were subject to the EIR, because they should be considered to be public authorities and due the "special powers" afforded to them. In the years that have gone by, it is now commonplace to find an EIR section on a water company's website.

[2] *ICO Decision notice, 29 January 2020*



E.ON UK plc 2020

Whilst there was an anticipation following this decision, that a similar expansion could happen to energy companies, this did not occur until 2020. At the start of last year, the ICO published a decision involving E.ON which potentially lays the groundwork for how the EIR will now encompass energy companies operating in Northern Ireland.[2]

E.ON through one of its offshore wind farms, found itself being another recipient of correspondence from Fish Legal. It was sent an EIR request and initially did not provide the information on this basis that it was not subject to the EIR. Fish Legal complained to the ICO, which then launched a two-year investigation, including an unsuccessful appeal by E.ON, which argued the ICO could not determine its public authority status.

When it came to determine whether E.ON was a "body or other person that carries out functions of public administration", the ICO applied the following test:

a. Has the entity been entrusted with the performance of services?
b. Are those services of public interest?
c. Are those services, among other things, in the environmental field?
d. Has the entity been vested with special powers that go beyond the normal rules of private law which apply to relations between any company or person?

In considering "entrustment" the ICO determined as it is an offence under the Electricity Act 1989 and the Gas Act 1986 to carry out certain activities without being authorised by Ofgem under a licence, the ICO ruled that when Ofgem was considering granting licences, it was in effect entrusting the licence holder with the performance of a public service.

Unsurprisingly, the ICO was satisfied that the generation and supply of energy are "*activities of particular importance to the citizens and economy of the UK and can therefore be considered services performed in the public interest*". The ICO also concluded that the "the generation of electricity by whatever means, will have an environmental impact".

It was clarified by the ICO, that to satisfy the “special power” test, they would need to find that the entity’s special powers related to services performed in the public interest. There was no need for these services to also impact the environment.

The ICO determined that the powers E.ON had by virtue of being a licence holder to (a) seek the compulsory purchase of land and (b) apply for a warrant of entry to inspect meters for safety reasons or disconnect supply both qualified as special powers.

The decision has potential implications for a wide range of companies operating in regulated areas, most clearly for energy suppliers who are regulated under the Electricity Act 1989 and the Gas Act 1986. Directly equivalent legislation creates the regulatory framework in Northern Ireland. At face value, all of the relevant factors that were used to establish the public authority status of E.ON – could be met by energy companies in Northern Ireland.

As would be expected the E.ON decision was highly publicised and it is expected that an energy company will seek a challenge to the application of the EIR it in the future. Until such time as the courts do confirm the application to energy companies, it is suggested that companies should take a cautious approach to responding to any EIR requests.

Responding to EIR requests

Responding to requests can be difficult for companies who will not be completely aware of the scope and application of the EIR. However, it is useful to consider the EIR code of practice, which sets out recommendations to follow when meeting the obligations required under the Regulations.

It is important to note the following in relation to responding to such requests;

- **Form of request -** There is no right or wrong way for an individual to submit a request. Requests can be submitted orally or in writing, therefore if an individual made a phone call to the relevant company, this would have to be treated as a legitimate request.
- **Be prepared** – Identify all the relevant information that has been requested and provide this information in a clear format. If you can rely on an exception, make a good note of the reasons for relying on this.
- **Extensions** – Usually, the amount of time to respond is limited to 20 days. However, where a request proves to be complex or voluminous then a 40 day time limit will be permitted
- **Costs** - It is permissible to recover the full cost of providing information as there is no threshold for fees charging.
- **Exceptions** - It is permissible to apply exceptions (not exemptions) which are all subject to the public interest test.
- Emissions information has special status and normally must be supplied on request.

In addition, we have reviewed ICO decisions since the expansion to water and energy companies concerning EIR requests. Companies have been able to successfully argue that disclosure may adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest (Regulation 12(5)(e). Another useful exception which could legitimately be argued is under Regulation 12(4)(e) which relates to disclosure of internal communications. Public authorities are supposed to have the enjoyment of a safe space for discussing ideas in confidence. For example, if a company is sharing internal ideas about future plans and proposals, then this exception could potentially be relied upon.

Whilst the EIR is designed to promote access to environmental information is not intended to allow individuals to have unfettered access to a company's information. It is perfectly reasonable for a company to push back on the size and scope of any request if it is deemed necessary to do so.

Conclusion

Whilst the expansion of the EIR to energy companies is a new development in the UK, the regime in Ireland is also in transition. The Irish government recently concluded a consultation into the existing regime and to potential introduce new regulations.

Should you wish to discuss whether your company falls under the EIR and how it can prepare itself to respond to such a request please contact Micaela Diver, Mark Stockdale and Stephen Abram.

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