

Dr Lee Moroney
Planning Director
The Renewable Energy Foundation
De Morgan House
57 – 58 Russell Square
London
WC1B 4HS

5 November 2013

Case Reference Number FER0504055

Dear Dr Moroney

I write regarding your complaint against the Institute of Acoustics (IoA).

In making your complaint, you have asked us to consider the response of the IoA to an information request.

To establish whether it was within his remit to investigate the complaint, the Commissioner has initially focused on the question of whether the IoA constitutes a public authority for the purposes of the Environmental Information Regulations 2004 (EIR).

The Commissioner's considerations are set out below.

The request

On the 23 June 2013 you submitted the following request:

"Please provide all emails, letters, correspondence, minutes and notes of meetings, reports and data relating to the recent consultation on the Good Practice Guide on the application of ETSU-R-97 for wind turbine noise assessment."

The IoA replied explaining that it is not a publicly funded body and is therefore not subject to EIR regulations. It suggested you should direct your request to the Department for Energy and Climate Change (DECC).

On 1 July 2013, you asked the IoA to conduct an internal review. You asked the IoA to reconsider your request as you believe the Good Practice Guide (GPG) was written at the behest of the Government. You state that the IoA received endorsement of the GPG from the Secretary of State for



DECC. You further state that if the IoA withholds the information requested, it would set a very uncomfortable precedent insofar as the government would be able to circumvent the responsibilities of FOI/EIR transparency by delegating planning guidance to non-government agencies.

The internal review response was provided to you on 5 July 2013. It stated that the IoA had been in contact with the Department for Business Innovation and Skills (BIS) who supports the DECC and concluded that the IoA is not a public body and therefore not subject to the EIR.

The Commissioner has considered whether IoA is a public authority and if he has the jurisdiction to consider your complaint.

Is the IoA a public authority for the purposes of EIR?

The Commissioner has to consider whether the IoA is a public authority for the purposes of the EIR. 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.'

The IoA is not a government department as set out in regulation 2(2)(a). It is also not a public authority as set out in section 3(1) of the FOIA Act, and so does not fall within the definition of a public authority as set out in regulation 2(2)(b). Additionally, the IoA does not carry out functions of public administration and therefore does not fall under the definition in regulation 2(2)(c).

You have therefore argued that the IoA falls under regulation 2(2)(d). Bodies falling within regulation 2(2)(d) are only caught by the regulations in so far as their public responsibilities, functions, or services, relate to the environment and are under the control of a public authority. In order to establish whether the IoA is a public authority under regulation 2(2)(d), a two stage test must be considered.

When looking at regulation 2(2)(d), the Commissioner must consider the following questions:

- Is the IoA publicly funded
- Does the IoA exercise statutory powers?
- Does the IoA provide a public service?
- Does the IoA take the place of central/local government?

The IoA has confirmed that it is a registered Charity funded primarily by its membership and is therefore not publicly funded. The IoA has clarified that it has no statutory powers and does not provide a public service. It has also confirmed it does not take the place of central/local government. The effect of this assessment is that the first stage of the test would not be satisfied and so the IoA would not fall within the definition provided by regulation 2(2)(d). Notwithstanding this finding, the Commissioner would consider that the complaint falls down in the second stage of the test.

The second stage considers whether the IoA is under the control of a public authority. The concept of what is meant by 'control' is not set out in the EIR itself. However, in its absence, the Commissioner has been guided by the Upper Tribunal in *Smartsources v the Information Commissioner*. In considering this case, the Upper Tribunal found helpful the following comments made by McKenna J in *Ready Mixed Concrete v Ministry of Pensions* on the term 'control':

"control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when, and the place where it shall be done".



Flowing from this, we would consider that 'control' may be exercised in one of two ways; either by contractual or regulatory arrangements. In this case, the IoA has confirmed that it was under no regulatory obligation to produce the GPG. Therefore, the remaining consideration would be to assess whether a contractual arrangement existed between DECC and the IoA and, if so, whether the degree of influence exercised demonstrated that the IoA was under the control of DECC.

The Commissioner will follow the guidance set in the case of *Smartsources v the Information Commissioner*. The Commissioner raised the issue that "there is a possibility that there might be circumstances in which some functions might be carved out of the EIR to the extent that bodies might be public authorities in respect of certain types of information". However, the Tribunal agreed with a compelling argument that "the pragmatic point that the application of regulation 2 could become time-consuming and problematic if a body was a public authority for some purposes of the EIR 2004 but not for others. More importantly, as a matter of statutory interpretation... regulation 2 did not suggest that an organisation could be simultaneously both within and without the ambit of the EIR 2004."

The Commissioner understands that there was a three way contract set up between the IoA, DECC and Parsons Brinckerhoff Ltd. However, the IoA has explained that this contract was set up to fund the role of the editor of the document. The IoA also explained that a Terms of Reference was agreed which set out the areas within the GPG which were methodology and therefore free for the IoA to determine good practice on and those which were a matter of policy which DECC retain policy control of.

It is clear that the IoA was not under the control of a public authority when producing the GPG. However, in the event that the IoA was under the control of a public authority when producing the GPG, following the guidance in *Smartsources v the Information Commissioner* the IoA does not have a public authority that has control of all its functions and therefore it clearly cannot fall within regulation 2(2)(d).

As both stages of the test are not satisfied, it confirms that the IoA cannot be a public authority under regulation 2(2)(d).

I have acknowledged your arguments as to why the IoA is a public authority under regulation 2(2)(d). However as the two stage test has not been satisfied, these arguments will not be considered in this letter.

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



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FOIA. 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)

As the Commissioner has decided that IoA is not a public authority for the purposes of the Act or the EIR, he has no powers to adjudicate in complaints made against it. Your complaint has therefore been closed.

Nevertheless, should you 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. In *Smartsources v the Information Commissioner*, the Upper Tribunal confirmed that it was within its jurisdiction to consider an appeal against the Commissioner's decision that an organisation was not a public authority (paras 15-19).

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@hmcts.gsi.gov.uk

Website: <http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm>

If you do wish to appeal against the Commissioner's decision in this case, 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 sent.



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Information Commissioner's Office

Yours sincerely



Rachael Cragg

Group Manager

Complaints Resolution

Information Commissioner's Office



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