

**Freedom of Information Act 2000 (FOIA)  
Environmental Information Regulations 2004 (EIR)**

**Decision notice**

**Date:** 4 July 2017

**Organisation:** Metropolitan Housing Trust Limited

**Address:** The Grange  
100 High Street  
Southgate  
London  
N14 6PW

**Decision (including any steps ordered)**

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1. The complainant has requested information relating to landscaping for a specific development. The Commissioner's decision is that Metropolitan Housing Trust Limited is not a public authority in this instance for the purposes of the EIR under regulation 2(2). She does not require any steps to be taken to ensure compliance with the legislation.

**Request and response**

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2. On 13 March 2016, the complainant wrote to Metropolitan Housing Trust Limited ('Metropolitan') and requested information in the following terms:  
  
"...I would like to know you [sic] Landscape 'Improvement Programme' as mentioned to me by PINNACLE Ltd. I also wish to know your plans to replace trees lost in the Bourke Close redevelopment. I would also like to know about the future of the upper shrubbery bed opposite 30-100 Tilson House. I would also like to have the aborculturalist report on the Bourke Close trees here, keenly referred to by ALLENBUILD LTD."
3. Metropolitan responded on 4 April 2016 (with the reference IR16/034) stating that it is not a public authority either under s3(1) or Schedule 1 of the FOIA or regulation 2(2) of the EIR. However, it provided a copy of the Aborculturalist Report along with narrative information regarding

that report and the Landscape Improvement Programme and the future of the upper shrubbery bed opposite 30-100 Tilson House.

4. On 13 April 2016 the complainant expressed his dissatisfaction with the response and asked for 'the tree map for the Kings avenue development'.
5. Metropolitan provided an internal review on 14 June 2016 in which it maintained its position that it is not a public authority for either the FOIA or EIR. It said that it 'operates as an exempt charity, a registered social landlord this means that we are a not for profit organisation and responsible for our own aims, objectives, performance and management'.

### Scope of the case

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6. The complainant contacted the Commissioner on 17 November 2016 to complain about the way his request for information had been handled and specifically because Metropolitan claims it has no obligation under the FOIA or EIR.
7. Given that the request is for environmental information, the Commissioner has considered whether Metropolitan is a public authority for the purposes of the EIR. This includes consideration of whether it is a public authority for the purposes of the FOIA.

### Reasons for decision

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#### **Regulation 2(2) public authorities for the purposes of the EIR**

8. The EIR gives members of the public the right to access environmental information held by the vast majority of public authorities and places a duty on public authorities to respond to requests for environmental information.
9. The definition of public authority is given in Regulation 2(2) of the EIR. In particular it states that a "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 exceptions 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.”

### **Regulation 2(2)(a) government departments**

10. On the facts of this case, it is clear that Metropolitan is not a government department and therefore is not a public authority under regulation 2(2)(a).

### **Regulation 2(2)(b) any other public authority as defined in section 3(1) of the Act...**

11. The effect of regulation 2(2)(b) is that the public authorities listed in Schedule 1 of the FOIA and publicly owned companies are subject to the EIR.

12. Metropolitan is not listed under Schedule 1 of the FOIA.

13. In response to the Commissioner's enquiries, Metropolitan confirmed that it is not owned by either the Crown or any other public authority, and that it is not an Arms Length Management Organisation ('ALMO') that is owned by a local authority.

14. Therefore, the Commissioner is satisfied that Metropolitan is not a public authority as defined in section 3(1) of the FOIA and therefore not a public authority under regulation 2(2)(b).

### **EIR Regulation 2(2)(c) – functions of public administration**

15. In considering the question of whether Metropolitan is a public authority for the purposes of the EIR under regulation 2(2)(c), it must be established whether Metropolitan has functions of public administration.

16. When determining this issue in the Fish Legal case<sup>1</sup> the Upper Tribunal considered whether the relevant bodies are entrusted by law with the performance of services in the public interest and whether they are vested with special powers. The Upper Tribunal explained that persons 'performing public administrative functions' are:

"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".

17. It appears to the Commissioner that the provision of affordable housing and care and support services is a service provided in the public interest. Therefore, at least initially, the Commissioner will focus on whether Metropolitan is entrusted with these services by law and whether it has any special powers.

18. As explained in the Commissioner's guidance on this subject<sup>2</sup>, services of public interest are not defined in the EIR, and do not have to relate to the environment. The key test is not the nature of the organisation's function but the additional legal powers they can use to carry them out. This means that private companies operating within a special legal framework can be public authorities for the purposes of the EIR. Special legal powers are, by definition, not available to any person or organisation who might want to use them; they can only be used by the specific entities set out in the relevant law.

19. The Commissioner's guidance gives examples of the types of special powers which would suggest that a body has functions of public administration. These are listed in paragraph 23 of the guidance and include:

- compulsory purchase powers,
- the right to require access to and/or use of private property,
- the power to create new laws and criminal sanctions,
- special levels of influence or advisory roles, these are powers over and above the right to lobby government enjoyed by everyone, for example a statutory right to advise government on particular issues,
- susceptibility to judicial review.

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<sup>1</sup> Fish Legal v the Information and Others (GIA/0979/2011 & GIA/0980/2011).

<sup>2</sup> <https://ico.org.uk/media/for-organisations/documents/1623665/public-authorities-under-eir.pdf>

20. In her enquiries, the Commissioner asked Metropolitan to set out any and all powers that it has over and above those normally enjoyed by private individuals and companies.
21. Metropolitan confirmed that it has no powers over and above those normally enjoyed by private individuals and companies.
22. Given the above, and especially Metropolitan's lack of special powers, the Commissioner is satisfied that Metropolitan is not a public authority under regulation 2(2)(c).

**Regulation 2(2)(d) – under the control of another public authority**

23. As explained in the aforementioned Commissioner's guidance, bodies will be public authorities for the purposes of the EIR under regulation 2(2)(d) if they are under the control of another public authority and have public responsibilities, exercise functions of a public nature, or provide a public service, relating to the environment.
24. On the face of it, it seems likely that Housing Associations such as Metropolitan would have public responsibilities, exercise functions of a public nature, or provide a service, relating to the environment. Therefore the crux of any decision on whether Metropolitan is a public authority under regulation 2(2)(d) will be whether Metropolitan is under the control of another public authority.
25. Control is taken to mean something more than mere influence or regulation; control must be such that the body in question has no genuine autonomy in deciding how it performs its functions in practice. The controlling public authority can exercise its control in various ways including:
  - the power to issue directions to the body in question, including by exercising rights of a shareholder,
  - the power to suspend or annul decisions taken by the body,
  - the power to appoint or remove a majority of the management board, and
  - the power to deny the body financing to the extent that it jeopardises its existence.
26. In her enquiries, the Commissioner asked Metropolitan whether it can determine in a genuinely autonomous manner the way in which it performs its functions, or is a public authority in a position of decisive influence.

27. Metropolitan explained that it operates as an independent charitable organisation and is responsible for its own aims, objectives, performance, management, and the way in which it performs its functions. It also said that there is no statutory authority that provides any local or public authority with the power or functions to control Metropolitan or its operations and there is no statutory authority designating Metropolitan as a public authority.
28. The Commissioner also asked Metropolitan whether there is a contract between it and any local authorities.
29. Metropolitan said that in some areas, it has successfully bid for contracts with local authorities to provide care and support services. However, it explained that such local authorities do not have any control over how it provides those professional services to customers but they pay for the services delivered under the terms of the contract.
30. The Commissioner enquired as to whether Metropolitan is publicly funded and if so, whether it has to account to a public body for the use of public funds.
31. Metropolitan said that it has received social housing grants from its regulatory body, the HCA and its predecessors, and also from local government or quasi-government organisations, as a form of 'equity' investment. It explained that grants are governed by legally binding agreements clearly stating the terms and conditions and that this grant funding is linked to the provision of services and social housing (i.e. subsidised housing) for those in need. Depending on the grant type and the terms under which it was received, the grant may be repayable when the qualifying properties are sold. However, Metropolitan stated that the grant awarding authorities have no control over its operation.
32. In addition, Metropolitan explained that it has funding provided by the capital markets, and from banks and other financial institutions. This funding is provided at commercial rates and terms and is based on legally enforceable loan agreements. It also generates funding from its commercial activities, e.g. from the sale of properties, and any surplus generated by the business is reinvested in the development and maintenance of its property portfolio.
33. The Commissioner considers the receipt of social housing grants can be seen as a form of public funding and that as the grants are governed by legally binding agreements clearly stating the terms and conditions, it can be considered to have to account for the use of public funds. However, the issue of funding is not the crux of whether Metropolitan is a public authority under regulation 2(2)(d); that crux is whether Metropolitan is under the control of another public authority.

34. The Commissioner also asked Metropolitan to more generally explain the statutory framework under which Housing Associations such as it operates.
35. Metropolitan said that it is regulated by the Homes and Communities Agency ('HCA') under registration number L0726. It explained that it is subject to regulatory engagement in accordance with guidance produced by the HCA<sup>3</sup>. Metropolitan also explained that it is registered under the Co-operative and Community Benefit Societies Act 2014 under registration number 16337R and is authorised and regulated by the Financial Conduct Authority for certain activities under reference number 723654.
36. As stated in her guidance on the subject, the Commissioner considers that the existence of a regulatory framework does not indicate control by a public authority. Many businesses operate within a legal framework but a body is only under the control of a public authority if that control is exercised at all times in respect of its public functions, not just when a business is failing to perform them in accordance with regulation.
37. Taking the above into consideration, the Commissioner is satisfied that Metropolitan is not a public authority under regulation 2(2)(d).

## **Conclusion**

38. The above analysis concludes that Metropolitan is not a public authority by virtue of any definitions in Regulation 2(2). Therefore, the Commissioner is satisfied that it is not a public authority for the purposes of the EIR.
39. However, the Commissioner noted that Metropolitan's website includes the following information:

### **"Environmental Information Regulations 2004 (EIR)**

We process requests for information relating to the elements in accordance with the Environmental Information Regulations 2004 and our Policies. You have a right to request access to any information held by Metropolitan that is related in any way to the elements (fire, water, air & land).

Information requested under EIR does not need to be in the form of a written request but can be requested verbally by calling our Customer

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<sup>3</sup> <https://www.gov.uk/government/organisations/homes-and-communities-agency>

Service Centre on **020 3535 3535**. Nevertheless we recommend that you write or email with a request so that you have your own record of it.

You will receive the information (unless an exception applies) within 20 working days."

40. The Commissioner therefore asked Metropolitan to explain why the above features on its website if it maintains that it is not a public authority for the purposes of the EIR.
41. Metropolitan said that the information on its website is misleading. It explained that the EIR request statement was previously corrected to reflect the position, as is stated in its paragraph regarding FOI requests (which states the following: "As Housing Associations are not Public Bodies the Freedom of Information Act 2000 doesn't apply directly to us, however in the spirit of transparency as per our Policies we will try our best to disclose as much as we possibly can.") but it would appear that the previous incorrect statement has either been reinstated in error or the changes requested were missed and it has asked its communications team to correct the position. It further explained that although it is not statutorily bound by the legislation, it is committed to being open and transparent with its customers and it does respond to requests for information but only in the spirit of the FOIA and EIR. That is the message it has tried to convey to its customers. It said that its responses to requests generally make it clear that it is not responding under the legislation, but under its commitment to be open and transparent, and that it does not want to deter its customers from asking for information or asking questions about its policies which impact upon them and that it is customer focussed.
42. Given the above explanation, the Commissioner does not consider that the statement on its website referred to in paragraph 39 alters the decision that Metropolitan is not a public authority for the purposes of the EIR.



## Right of appeal

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43. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

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

Tel: 0300 1234504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

44. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
45. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed** .....

**Andrew White**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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