

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

Date: 6 December 2024

Public Authority: Department for Energy Security and Net Zero ("DESNZ")

Address: 3-8 Whitehall Place
London
SW1A 2AW

Decision (including any steps ordered)

1. The complainant has requested information relating to a government statement on the financial incentivisation of biomass electricity generators. DESNZ refused the request in reliance on the exception at EIR regulation 12(5)(e) – confidentiality of commercial information.
2. The Commissioner's decision is that in the circumstances of this case DESNZ correctly applied the exception at regulation 12(5)(e) and the public interest favours maintaining the exception.
3. The Commissioner does not require further steps.

Request and response

4. On 24 April 2024, the complainant wrote to DESNZ and requested information in the following terms:

"On 18 January 2024, the Department for Energy Security and Net Zero published a consultation on 'Transitional support mechanism for large-scale biomass electricity generators.'

It contained the following statement:

"Plant operators have indicated that without government support they are unlikely to be incentivised to continue generating electricity."

I request that you provide the evidence supporting this statement."

5. DESNZ responded on 9 May 2024. It stated that the information held was subject to the exception at regulation 12(5)(e) and was therefore withheld.
6. Following an internal review DESNZ wrote to the complainant on 14 June 2024 upholding its initial response.

Scope of the case

7. The complainant contacted the Commissioner on 16 June 2024 to complain about the way their request for information had been handled. They explained:

"I am challenging DESNZ's judgment that disclosure is outweighed by the public interest in confidentiality.

The information I requested was used by DESNZ as the primary justification to consult on a financial support arrangement that would apply to a very limited number of commercial enterprises (possibly as few as two).

Were DESNZ to proceed with the financial support arrangements proposed in the consultation, these businesses could continue to be in receipt of hundreds of millions of pounds each year from bill payers. Public interest in disclosure is therefore strong. It is strengthened because of the near monopoly position enjoyed by the intended recipients of the proposed new financial support. In addition, the financial support would, if provided, mean that there would be a further delay to the UK's intended path to decarbonise the electricity system (because unabated biomass power generation would continue beyond 2027 - longer than originally envisaged). Members of both Houses of Parliament have raised concerns about the negative climate and biodiversity impacts of large-scale biomass power, and the Committee on Climate Change made a recommendation that financial support after 2027 should be tightly controlled."

8. The Commissioner considers the scope of his investigation to be the application of regulation 12(5)(e) to the information held in the scope of the request.

Background

9. DESNZ explained that in January 2024 it launched a consultation¹ to seek views on a potential transitional support mechanism to facilitate the move from large-scale biomass electricity generation to power BECCS (Bioenergy with Carbon Capture and Storage). The consultation noted that without financial aid, large scale biomass plants may lose the incentive to operate, potentially leading to their closure and disruption to associated supply chains. It advised:

“Biomass as a generation technology is typically subject to relatively high fuel prices. This is in comparison to anticipated power prices of other generation types and other sources of generation income, such as the Capacity Market. In the absence of support, it is in most scenarios unlikely that large scale biomass plants would be incentivised to generate. This would lead to the potential retirement of the plants and loss of the associated fuel supply chains and logistics.

Without these generators the UK could lose out on the optionality of having significant volumes of negative emissions capacity through power BECCS. Given that large-scale generators make up a significant proportion of the UK’s solid fuel biomass generation capacity (7% of the UK’s total electricity generation) this would also represent a significant reduction in both generation and capacity. Losing this capacity from the network permanently would likely require the Capacity Market to procure more capacity to maintain security of supply. This could place an upward pressure on Capacity Market prices.”

¹ <https://www.gov.uk/government/consultations/transitional-support-mechanism-for-large-scale-biomass-electricity-generators>

<https://assets.publishing.service.gov.uk/media/65a8170db2f3c6000de5d4d3/transitional-support-mechanism-large-scale-biomass-generators-consultation.pdf>

Reasons for decision

Is the requested information environmental?

10. Regulation 2(1) of the EIR defines environmental information as being information on:
- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
 - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
 - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a)...as well as measures or activities designed to protect those elements;
 - (d) reports on the implementation of environmental legislation;
 - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);
11. The Commissioner is satisfied that the requested information comprises information on activities likely to affect the state of the environment falling within regulation 2(1)(b) and (c), namely energy generation policy. He has therefore assessed this case under the EIR.

Regulation 12(5)(e) – confidentiality of commercial or industrial information

12. Information may be withheld under regulation 12(5)(e) of the EIR if disclosure would adversely affect the confidentiality of commercial or

industrial information where such confidentiality is provided by law to protect a legitimate economic interest.

13. The Commissioner interprets the wording of 'would adversely affect' in regulation 12(5) to set a relatively high threshold in terms of likelihood which has to be met in order for any of the 12(5) exceptions to be engaged. It is not sufficient that disclosure may or could have some level of adverse effect, but rather that disclosure 'would' have an adverse effect.
14. As set out in the Commissioner's guidance², the exception can be broken down into a four-stage test. All four elements are required in order for the exception to be engaged:
 1. The information is commercial or industrial in nature.
 2. The confidentiality is provided by law.
 3. The confidentiality is protecting a legitimate economic interest.
 4. The confidentiality would be adversely affected by disclosure.

Is the information commercial or industrial in nature?

15. For information to be commercial in nature, it needs to relate to a commercial activity, either of the public authority or a third party. The essence of commerce is trade. A commercial activity generally involves the sale or purchase of goods or services, usually for profit.
16. DESNZ explained that the information held in the scope of the request comprises a document produced following a meeting between DESNZ, other government departments and the biomass generator, Drax. The information relates to the commercial operations of the large-scale biomass generator and includes the prices at which it acquired biomass fuel and its future cost projections relevant to upcoming fuel supply negotiations. The information also details fixed operating and capital expenditure costs. DESNZ considers that disclosure of this information would competitively disadvantage Drax, including in future government support contract negotiations.

² <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/regulation-12-5-e-commercial-or-industrial-information/#:~:text=Practical%20points-,What%20does%20the%20EIR%20say%3F,protect%20a%20legitimate%20economic%20interest>

17. The Commissioner has seen the withheld information and is satisfied that the information withheld under regulation 12(5)(e) is commercial in nature.

Is the information subject to confidentiality provided by law?

18. The Commissioner considers this to include confidentiality imposed on any person by the common law duty of confidence, contractual obligation, or statute. The exception can cover information obtained from a third party, or information jointly created or agreed with a third party, or information created by the public authority itself.
19. With regard to the common law of confidence, there are two issues that need to be considered:
- Does the information have the necessary quality of confidence? In the Commissioner's view if the information is not trivial nor in the public domain, it has the necessary quality of confidence.
 - Was the information shared in circumstances creating an obligation of confidence?
20. DESNZ explained that the withheld information was shared with DESNZ on the explicit understanding that it would not be disclosed. DESNZ stated that the information was provided to it in confidence and its confidentiality is protected by the common law duty of confidence. DESNZ also advised the Commissioner that particular information is protected by a Non-Disclosure Agreement.
21. The Commissioner is satisfied that the points set out in paragraph 19 have been met. He considers that the information has the necessary quality of confidence because the information is not in the public domain and is clearly not trivial. The information was shared in circumstances with an expectation of confidentiality.

Is the confidentiality provided to protect a legitimate interest?

22. The First-tier Tribunal confirmed in *Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd*³ that, to satisfy this element of the test, disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. It is not enough that disclosure

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[https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i479/%5b2011%5dUK_FTT_EA20100106_\(GRC\)_20110104.pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i479/%5b2011%5dUK_FTT_EA20100106_(GRC)_20110104.pdf)

might cause some harm to an economic interest. The public authority needs to establish that, on the balance of probabilities, ie more probable than not, disclosure would adversely affect an economic interest.

23. DESNZ advised the Commissioner that the legitimate economic interests being protected are those of Drax.
24. The Commissioner's guidance⁴ advises public authorities that if a third party's interests are at stake it should consult with them, unless it has prior knowledge of their views. It is not sufficient to speculate about potential harm to a third party's interests. The Commissioner understands that DESNZ consulted twice with Drax when responding to the complainant and is confident in stating that its position has not changed at the time of the Commissioner's investigation.
25. The Commissioner notes the content of the withheld information which includes information on price and margins which he accepts would more likely than not adversely affect Drax' economic position across its businesses, benefitting competitors.
26. Furthermore DESNZ advised that disclosure of the information would also impact its own legitimate interests regarding negotiations with other biomass generators. It explained its view that those generators would not have confidence in sharing confidential commercial information if that information was subsequently disclosed. This potentially would result in inhibiting the free flow of market sensitive information thereby hindering the forthcoming negotiations to the detriment of the policy making process.
27. The Commissioner accepts, as a general principle, that disclosure of information that would harm a party's commercial position in the context of future or existing business is a legitimate commercial interest. Based on the submissions provided by DESNZ he considers that there is a real and genuine risk that disclosure of the information would adversely affect the legitimate economic interests of Drax.
28. The Commissioner is therefore satisfied that this limb of the test is met.

Would the confidentiality be adversely affected by disclosure?

29. Although this is a necessary element of the exception, once the first three elements are established, the Commissioner considers it is inevitable that this element will be satisfied. Disclosure of truly confidential information into the public domain would inevitably harm

⁴ Ibid

the confidential nature of that information, and would also harm the legitimate economic interests that have already been identified.

30. For the reasons set out above the Commissioner accepts that regulation 12(5)(e) applies to the withheld information.

Public interest test

31. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions.

32. The complainant explained their view of the public interest when requesting an internal review:

"There is a very significant public interest in disclosure in this case. The information I requested was provided by biomass generators seeking to influence government policy to favour their own commercial interests. This information was evidently instrumental in DESNZ developing proposals to award financial support for biomass generators from 2027 onwards.

If taken forward, the proposals would result in considerable sums of public money (hundreds of £millions) being committed to support biomass generators. Financial support for electricity generation from woody biomass is already very controversial. The Committee on Climate Change's 2023 Progress Report had this recommendation "Ensure that large-scale unabated biomass power plants are converted to BECCS as early as feasible, and are not given extended contracts to operate unabated at high load factors beyond 2027". This recommendation was acknowledged in the Transitional support mechanism consultation. Over the past decade, many scientists have written numerous articles and letters pointing out that electricity generation from woody biomass is harmful to the climate and calling for an end to financial support mechanisms.

Accountability for spending public money is an important factor in favour of disclosure. I submit that in this instance, the very significant amounts involved argue for full disclosure of the submissions made by biomass generators, which led to the financial support proposals currently being consulted on."

33. As set out in its responses to the complainant, DESNZ recognises the public interest in the disclosure of information which can help lead to greater transparency in government decision making.
34. However, DESNZ considers there to be a stronger public interest in ensuring that the commercial interests of businesses are not damaged or undermined by information which is not in the public domain and

which would adversely impact the economic interests and future business of those companies. DESNZ also considers that there is a strong public interest in not undermining the government's commercial position as it continues to assess the case for providing transitional support to large-scale biomass generators. As DESNZ stated in its internal review, it requires the sharing of accurate commercially sensitive information:

"If this exchange of information is impaired, that will limit the ability of government to secure value for money for billpayers should a support agreement ultimately be negotiated.

It is vital to policymaking for there to be a voluntary flow of information from third parties to public authorities. Releasing information which would adversely affect the interests of the business which provided the information would discourage that flow of information in future."

35. The Commissioner considers that there is always a public interest in promoting transparency and accountability to promote greater public awareness and understanding.
36. The Commissioner understands the complainant's concern that biomass generators may influence government policy in order to favour their own commercial interests and accepts that such a concern is a factor in favour of that public interest in disclosure. However, although it appears to be in the interests of Drax or others to obtain transitional support from government and therefore, it could be argued, to provide information to government, DESNZ has stated that such information enables government to secure value for money in the spending of public money. The Commissioner also notes that the government often requires input from companies when determining policy. Notwithstanding this he accepts that there is a public interest in the spending of public money in support of companies, such as biomass generators. The withheld information provides details on biomass fuel costs and pricing for biomass generation, factors impacting on these and the effect on the security of supply. Such information would aid public understanding on DESNZ's reasons for conducting a consultation in circumstances where the financial support would benefit a very limited number of recipients. The Commissioner understands that government, at the time of the request and currently, is analysing feedback from the consultation referenced above in paragraph 9 and decisions have yet to be concluded regarding transitional support for large-scale biomass generators.
37. The Commissioner considers that there is a strong public interest in DESNZ having access to information from companies, in this case Drax, containing market sensitive information which can be taken forward with further consultation and independent analysis to develop policy. There is

also an underlying public interest in ensuring that the confidentiality of commercial information is protected.

38. The Commissioner acknowledges that there is also a public interest in disclosure of the information to allow the public having greater involvement in this consultation process. The Commissioner has taken note of the complainant's comments regarding the Committee on Climate Change's 2023 Progress Report as mentioned above in paragraph 32 and the significant importance of climate change. In this case, were the information not so clearly market sensitive he would likely have found the public interest to favour disclosure.
39. The Commissioner has deliberated on the arguments provided by the complainant and DESNZ. He has also noted the complainant's comments regarding the Committee on Climate Change recommendation that financial support after 2027 should be tightly controlled for biomass power generation. He therefore acknowledges the importance of government decision making in this matter and finds that the public interest is considerably weighty. Notwithstanding this he has decided that the public interest favours maintaining the exception.
40. Whilst the Commissioner has been informed by the presumption in favour of disclosure, he is satisfied that, for the reasons given above, the exception has been applied correctly and the public interest favours maintaining the exception.

Right of appeal

41. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

42. 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.
43. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Susan Hughes
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