

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

Decision notice

Date: 24 June 2019

Public Authority: UK Research and Innovation

Address: Polaris House
North Star Avenue
Swindon
SN2 1FL

Decision (including any steps ordered)

1. The complainant has requested information about Sneddon Law Community Windfarm and Craigends Borehole from the British Geological Survey, which is a component part of UK Research and Innovation (UKRI). UKRI released some information and has withheld other information – Test Reports and correspondence – under regulation 12(5)(f) of the EIR (interests of person providing the information).
2. The Commissioner's decision is that the disputed information is excepted from disclosure under regulation 12(5)(f) of the EIR, and that the public interest favours maintaining the exception.
3. The Commissioner does not require UKRI to take any remedial steps.

Background

4. UK Research and Innovation (UKRI) has explained to the Commissioner that BGS (BGS) is a component part of the Natural Environment Research Council (NERC). From April 2018 NERC became part of UKRI, which assumed the legal entity responsibility for the purposes of the FOIA, EIR and Data Protection under the Higher Education Reform Act

2018. For ease, 'UKRI' will be referred to throughout this notice in respect of the authority handling the request.

5. With regard to the specifics of this case, UKRI has told the Commissioner that BGS provides a service producing GeoReports. These reports provide site specific geological information to customers, including information such as the geology at depth and groundwater abstraction, as examples. There are two types of report, the first is 'automated' by which UKRI means they contain extracts of data only, and the second contains data and is also researched and written by a geologist/hydrogeologist with relevant expertise. The reports are priced to recover the costs of the research and writing. BGS creates around 2,200 reports for customers each year.
6. The request for information is associated with Sneddon Law wind farm, a 15-turbine development on Sneddon Law in East Ayrshire, proposed by Community Windpower Ltd (CWP). The development was halted over local residents' concerns about its effect on the water supply. A Public Inquiry into the wind farm began, the Commissioner understands, in April 2018.
7. Dr Rachel Connor commissioned BGS to provide a GeoReport, researched and written by a BGS hydrogeologist, for the site affected by the Sneddon Law wind farm. UKRI says that Dr Connor voluntarily provided BGS with information she held in order to assist this exercise. All of the information Dr Connor provided to BGS was released under EIR to the complainant after internal review, with the exception of some water quality Test Reports which had been privately commissioned by residents near to the proposed wind farm.
8. UKRI continues to withhold the Test Reports and correspondence associated with the Reports, under regulation 12(5)(f). It considers the exception applies as Dr Connor was under no legal obligation to supply the Test Reports to BGS or any other public authority, and did so voluntarily.

Request and response

9. On 25 April 2018, the complainant wrote to UKRI and requested information in the following terms:

"As per the Freedom of Information (Scotland) Act 2002, I am writing to the British Geological Survey to make the following request for information relating to Sneddon Law Community Wind Farm and the Craigends Borehole, located near Waterside, Kilmarnock in East Ayrshire.

I hereby request copies of all information, correspondence, minutes of meetings and records of phone calls that have taken place between the British Geological Survey, in particular but not limited to Dr. Brigid O'Dochartaigh, Senior Geologist at BGS Edinburgh, and the following people: Dr Rachel Connor, Mr Alexander Connolly, Greta Roberts, and Barry Berlow-Jackson, (also members of the Moscow & Waterside Community Council) for the periods of 1st January 2018 to 25th April 2018 and 1st July 2016 to 31st December 2017."

10. UKRI responded on 22 June 2018. It withheld the requested information under regulation 12(5)(f) and 13(1) (personal data) of the EIR.
11. Following an internal review UKRI/NERC wrote to the complainant on 25 September 2018. It released some of the information it had originally withheld but maintained its position with regard to the remainder.

Scope of the case

12. The complainant contacted the Commissioner on 1 November 2018 to complain about the way her request for information had been handled.
13. Having approached the complainant about the focus of her complaint, the complainant has confirmed that it centres on UKRI's reliance on regulation 12(5)(f) to withhold information, and the balance of the public interest.
14. In the course of the Commissioner's investigation, UKRI told her that it had become aware that some of the withheld information has been published via the Scottish Government Planning and Environmental Appeals Division's website¹. That information is therefore now accessible to the complainant. The Commissioner advised UKRI to communicate this fact the complainant.
15. The Commissioner's investigation has therefore now focussed on the remaining information that UKRI has withheld under regulation 12(5)(f), and the balance of the public interest.

¹ <https://www.dpea.scotland.gov.uk/CaseDetails.aspx?id=118213&T=5>

Reasons for decision

16. Regulation 12(5)(f) the EIR says that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the interests of the person who provided the information where that person:
 - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
 - (iii) has not consented to its disclosure.
17. The exception will protect confidentiality owed to a third party by a public authority where its disclosure would adversely affect the interests of the person who provided the information.
18. The exception can be broken down into a five-stage test, as recognised by the Information Rights Tribunal in *John Kuschmir v Information Commissioner and Shropshire Council* (EA/2011/0273; 25 April 2012):
 - (i) Would disclosure adversely affect the interests of the person who provided the information to the public authority?
 - (ii) Was the person under, or could they have been put under, any legal obligation to supply the information to the public authority?
 - (iii) Did the person supply the information in circumstances where the recipient public authority, or any other public authority, was entitled to disclose it apart from under the EIR?
 - (iv) Has the person supplying the information consented to its disclosure?
 - (v) Does the public interest in maintaining the exception outweigh that in disclosure?
19. Where the first four stages of the test are satisfied a public authority will owe the person that supplied the information a duty of confidence. The public interest test will then determine whether or not the information should be disclosed.
20. UKRI has provided the Commissioner with a copy of the information it is continuing to withhold and she has reviewed it. It comprises a series of water Test Reports and a small amount of correspondence to particular

residents from third parties ie neither Dr Connor nor UKRI. UKRI considers that disclosing this information would adversely affect the interests of Dr Connor and the local residents who commissioned the Test Reports in question.

i) Would disclosure adversely affect the interests of the person who provided the information to the public authority?

21. In her published guidance on regulation 12(5)(f), the Commissioner explains that in considering whether there would be an adverse effect in the context of this exception, a public authority needs to identify harm to the third party's interests which is real, actual and of substance (ie more than trivial), and to explain why disclosure **would**, on the balance of probabilities, directly cause the harm.
22. The First Tier Tribunal (Information Rights) has case noted that there is no requirement for the adverse effect to be significant – the extent of the adverse effect would be reflected in the strength of arguments when considering the public interest test. However, the public authority must be able to explain the causal link between disclosure and the adverse effect, as well as why it would occur.
23. The need to point to specific harm and to explain why it is more probable than not that it would occur reflects the fact that this is a higher test than '*might adversely affect*', which is why it requires a greater degree of certainty. It also means that it is not sufficient for a public authority to speculate on possible harm to a third party's interests.
24. Public authorities should be able to evidence the harm that would arise as a result of disclosure. In many cases this will stem from direct consultation with the person who supplied the information. This is most likely to have been at the time the information was provided. However, there may be instances in which it is necessary to consult the information provider at the time of the request.
25. UKRI provided the Commissioner with material generated at the time of the internal review that it says supports its view that disclosing the withheld information would adversely affect Dr Connor's and the local residents' interests. The Commissioner has reviewed this material.
26. UKRI explained that Dr Connor is the ex-Chair of the local Community Council and that it is aware that [at the time of the request] there was an on-going legal/planning inquiry taking place between those listed in the request, and CWP.
27. UKRI has drawn the Commissioner's attention to certain published information relating to the Public Inquiry. UKRI said that it considered

this information supported its view that releasing the disputed information 'has the potential to adversely affect the interest' of Dr Connor. UKRI said that it had reasonable grounds to think that there would be a 'substantial likelihood' that disclosing the Test Reports, against the wishes of Dr Connor, would have a real and adverse effect – by causing harm and distress to Dr Connor and the local residents involved in the Public Inquiry.

28. The Commissioner is aware that the relationship between CWP and the Community Council and Dr Connor had become strained. She nonetheless approached UKRI for further explanation as to why disclosing the information in question **would** adversely affect Dr Connor (and the residents).
29. UKRI explained that it was felt that disclosing the information would increase CWP's knowledge, and strengthen its position and arguments in the public inquiry that was ongoing at the time of the request. This, it considered, would adversely affect Dr Connor's interests. In addition, UKRI provided the Commissioner with correspondence it received from Dr Connor in August 2018 and May 2019. The Commissioner does not intend to detail that correspondence in this notice but the correspondence persuades her that Dr Connor was concerned about the potential release of the information in question under the EIR and did not consent to its disclosure. On the basis of this, the Commissioner is satisfied that, if the disputed information was to be released, Dr Connor's interests would be adversely affect because disclosure against her wishes would cause her distress.
30. The situation is less certain with regards to the residents who commissioned the Test Reports that Dr Connor voluntarily passed to BGS, but the Commissioner is inclined to the view that disclosure would distress at least some of those residents. They had commissioned the Reports privately, the Reports concern their private properties, and they would have had the reasonable expectation that the Reports would not be released to the wider world under the EIR.
31. The Commissioner is therefore satisfied that the first stage of the test has been met. She has gone on to consider the second stage.
 - ii) Was the person under, or could they have been put under, any legal obligation to supply the information to the public authority?
32. In its submission UKRI has said that there was no obligation on the individual named in the request (Dr Connor) to provide BGS with the information – the Test Reports – in support of her GeoReport request and that this action was purely voluntary. As such, and also taking

account of the background information UKRI has provided, the Commissioner finds the second stage of the test has been met.

iii) Did the person supply the information in circumstances where the recipient public authority, or any other public authority, was entitled to disclose it apart from under the EIR?

33. In considering the third stage of the tests, UKRI argues that the information was provided to it in confidence and therefore it was supplied in such circumstances that UKRI is not entitled to disclose it.
34. In common law, following the case of *Coco v Clark [1969] RPC 41*, when determining if disclosure would constitute a breach of confidence, the Commissioner considers that an authority will usually need to consider;
 - whether the information has the quality of confidence,
 - whether it was imparted in circumstances importing an obligation of confidence, and
 - whether disclosure would be an unauthorised use of the information to the detriment of the confider.
35. The Commissioner considers that confidence can be explicit or implied, and may depend on the nature of the information itself, the relationship between the parties, and any previous or standard practice regarding the status of information.
36. In its submission UKRI simply maintains that there are no circumstances, other than EIR, where UKRI (BGS) would be entitled to disclose the disputed information.
37. The Commissioner has considered the withheld information. It comprises water Test Reports that Dr Connor voluntarily passed to BGS in order to help BGS produce the GeoReport she had commissioned from it, and a small amount of correspondence to residents, associated with the Test Reports. The Test Reports were given to Dr Connor by the local residents who had commissioned the Reports.

Does the information have the necessary quality of confidence?

38. Information will have the necessary quality of confidence if it is more than trivial and if it is not otherwise accessible.
39. The Commissioner is satisfied that the withheld information has the necessary quality of confidence. The information is more than trivial because it is associated with the quality and reliability of the water being supplied into local residents' homes. UKRI has released certain

information to the complainant in response to her request, and other relevant information has subsequently been published. However, the Commissioner is satisfied that the information UKRI continues to withhold is not otherwise accessible to the wider public.

Was the information imparted in circumstances importing an obligation of confidence?

40. The Commissioners' guidance says that there are essentially two circumstances in which an obligation of confidence may apply:
- The confider has attached explicit conditions to any subsequent use or disclosure of the information (for example the wording of a letter); or
 - The restrictions on use are obvious or implicit from the circumstances, for example information between a client in therapy and their counsellor.
41. The Commissioner considers that the second circumstance applies here. She considers that those individuals who privately obtained and paid for the water Test Reports – who are local residents and so simply members of the public – would have the reasonable expectation that this information would not be disclosed to the world at large but would only be used, having been voluntarily passed to Dr Connor, to assist with the preparation of the GeoReport. Similarly, Dr Connor voluntarily provided the information to BGS in order to assist in the preparation of the GeoReport, which she herself had commissioned. In the Commissioner's view, Dr Connor would have had the reasonable expectation that the Test Reports would not then be put in the public domain.

Would disclosure be an unauthorised use of the information to the detriment of the confider?

42. The Commissioner's published guidance on regulation 12(5)(f) establishes that case law now suggests that "*any invasion of privacy resulting from a disclosure of private and personal information can be viewed as a form of detriment in its own right*".
43. The Commissioner considers that the information Dr Connor voluntarily provided to BGS was, in turn, voluntarily provided to her by local residents who had obtained and paid for the Test Reports privately. As has been discussed, at the time of the request releasing the Reports may well have caused those individuals – both Dr Connor and the residents – a degree of damage or distress. As referenced, it is not necessary for there to be any detriment to the confiders in terms of tangible loss, for this information to be protected by the law of confidence. Therefore the Commissioner has not considered this

particular issue further and has found the third stage of the test to have been met.

iv) Has the person supplying the information consented to its disclosure?

44. With regard to the fourth stage, UKRI has confirmed that neither Dr Connor nor the local residents have consented to the information's disclosure, and it has provided the Commissioner with evidence to support that position, with regard to Dr Connor. The Commissioner is satisfied that this stage of the test has been met.
45. The Commissioner has found that the first four stages of the test at paragraph 18 have been satisfied and that, as such, UKRI owes the person that supplied the information – Dr Connor and the local residents – a duty of confidence. She has gone on to consider the final stage – the public interest test.

v) Public interest test

46. In a submission to the Commissioner, the complainant has argued that the GeoReport produced by BGS was used as evidence in the Public Inquiry and that a decision from the Inquiry is still awaited. In the complainant's view it is in the public interest that the withheld information is released in order to fully appreciate and understand the correspondence between the BGS and the parties named in the request, during the process of producing, reviewing and issuing the BGS GeoReport that was later relied on in the Public Inquiry.
47. UKRI has acknowledged that there is a public interest in it demonstrating that it is open and accountable.
48. Against this, UKRI has argued that there is a stronger public interest in maintaining the confidentiality of information for individuals who contact BGS. It considers that if this confidentiality is compromised this is likely to have a negative impact on BGS's reputation and the service it provides. UKRI has advised that BGS creates around 2,200 GeoReports for customers per year. It says that the purpose of regulation 12(5)(f) is to encourage the voluntary flow of environmental information from third parties to public authorities. It argues that if BGS is seen to breach the confidence of third parties, this may limit the future voluntary flow of environmental information from the public. UKRI has concluded that the public interest is better served by maintaining the exception in order to maintain public confidence in BGS so that information will be passed freely to the authority in the future.

Balance of the public interest

49. Having considered the matter, the Commissioner's view is that, in this case, there is greater public interest in maintaining the regulation 12(5)(f) exception. It is more important that UKRI maintains the confidence of the public that information that the public may – directly or indirectly - voluntarily pass to UKRI or BGS, will not necessarily be disclosed to the wider world under the EIR. As UKRI has said, this ensures that the public will continue to be prepared to pass information to it in the future.
50. In addition, the Commissioner can see value and public interest in the final GeoReport in question but she considers that the wider public interest in an appreciation and understanding of the material that was drawn on to produce the GeoReport, and related correspondence to residents, is slight. Certainly, any wider public interest there may be does not outweigh the public interest discussed above.
51. Finally, the Commissioner has noted the Public Inquiry into the Sneddon Law wind farm proposal, which commenced in April 2018. She considers that, at the time of the request, the public interest was being satisfied through this Inquiry and the related information the Inquiry was publishing. This was, in the Commissioner's view, the appropriate route through which any safety concerns associated with the proposed wind farm would be considered and, if necessary, addressed.
52. Since the five stages of the test at paragraph 18 have been met, the Commissioner is satisfied that UKRI has correctly applied section 12(5)(f) to the information it is withholding.

Right of appeal

53. 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@justice.gov.uk

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

54. 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.
55. 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

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