

Freedom of Information Act 2000 (Section 50) The Environmental Information Regulations 2004

Decision Notice

Date: 29 July 2008

Public Authority: Department for Business, Enterprise and Regulatory Reform
Address: 1 Victoria Street
London
SW1H 0ET

Summary

The complainant requested a report into an application for a grant towards a proposed biomass generation plant. This was initially refused under sections 41 (information provided in confidence) and 43 (commercial interests) of the Act. The public authority was later advised by the Commissioner that the information withheld fell within the definition of environmental information in the Regulations and that it should consider what exceptions from the EIR may apply. The public authority cited Regulations 12(5)(d) (confidentiality of proceedings of public authorities provided by law), (e) (commercial confidentiality) and (g) (environmental protection). The Commissioner finds that the information is on emissions and, therefore, Regulation 12(9) applies. As Regulation 12(9) provides that information on emissions cannot be subject to any of the exceptions provided in Regulations 12(5)(d) to (g), the Commissioner finds that the exceptions cited by the public authority are not engaged. The public authority is required to disclose to the complainant the information withheld.

The Commissioner's Role

1. The Environmental Information Regulations (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

The Request

2. The request was made on 24 February 2005 and was for the following:

“...the due diligence report, prepared by Fichtner Consulting Engineers Ltd, for the bio-energy capital grant scheme application...”

3. The response to this was dated 29 March 2005. This refused the request, with the exemption provided by section 43 (commercial interests) cited. The public authority stated that the information requested was of a commercially sensitive nature and had been provided to the public authority in confidence. The public authority also confirmed that it believed that the public interest in maintaining the exemption outweighed the public interest in disclosure. As this stage, the request was dealt with under the Act.
4. The complainant responded to this on 28 April 2004 and asked for an internal review of the handling of the request. The response giving the outcome to the review was dated 21 June 2005. This stated that the initial refusal was upheld and that the public authority now also wished to cite section 41 (information provided in confidence) on the grounds that the report requested had been disclosed to the public authority on the basis that it would remain confidential.

The Investigation

Scope of the case

5. The complainant contacted the Commissioner initially on 13 April 2005. At that stage the complainant was advised that he should request the public authority to carry out an internal review of its handling of his request prior to his complaint being considered by the Commissioner.
6. Following the completion of the internal review, the complainant contacted the Commissioner again on 9 August 2005. The basis for the complaint was the refusal to disclose the requested information under sections 41 and 43 of the Act.
7. As the public authority handled the request under the Act, the initial investigation by the Commissioner focussed on the Act. Internal discussions within the Commissioner's office established that the information requested was likely to be environmental according to the definition given in the EIR. The chronology section of this notice covers the period from which the decision was taken to consider this case under the EIR.

Chronology

8. The Commissioner contacted the public authority on 11 May 2007 and informed it that the internal policy decision was that the information requested was considered to be environmental and that this case would be considered under the EIR. Having not received a response by 31 July 2007, the Commissioner contacted the public authority again. Given that this case would now be handled on the basis that the information in question is environmental information, the public authority was asked to respond confirming which of the exceptions from the EIR were considered to be engaged if the public authority maintained that this

information should not be disclosed. The public authority was also asked to provide some background about the awarding of grants under the scheme referred to in the request.

9. The public authority responded on 24 September 2007 and cited the exceptions provided by Regulations 12(5)(d) (confidentiality of proceedings of public authorities provided by law), (e) (commercial confidentiality) and (g) (environmental protection). On 12(5)(d), the public authority stated that it believed that it owed an implied duty of confidence to companies that had applied to the Bio Energy Capital Grants Scheme ('BECGS'). The public authority stated that confidentiality of the application process is necessary to ensure that this process works effectively. In this case specific case, the public authority stated that Peninsula Power had provided to it the '*Fichtner Report*' on the understanding that it would not be disclosed.
10. On Regulation 12(5)(e), the public authority stated that BECGS applications contain commercially sensitive information and that this commercial sensitivity is enhanced due to the applications being at the research and development stage. Applicants to the BECGS had provided information on the basis that it would remain confidential and the public authority again stated that it believed that it owed an implied duty of confidence to the applicant companies. In this case, the information withheld details the proposed use of a particular technology in a new way. Peninsula Power had been consulted and had confirmed that it did not wish the information to be disclosed as it believed that such a disclosure would be unfairly advantageous to its competitors. This view was also supported by Fichtner Consulting Engineers Ltd, the original authors of the report that constitutes the withheld information here.
11. The public authority believed that Regulation 12(5)(g) is engaged in respect to the withheld information as amongst the purposes of the BECGS is the reduction of carbon dioxide emissions as a means to combat climate change. As such the public authority believed that any disclosure of information that may dissuade potential future applicants from applying to the BECGS would adversely affect the protection of the environment.
12. The public authority went on to state why it believed that the public interest favoured the maintenance of these exceptions. The public authority recognised a public interest argument in favour of disclosure where this would serve the generally high level of public interest inherent in environmental protection issues. There would also be a public interest in disclosure of information where this would ensure accountability in the spending of public funds. There was also local concern in the area of the proposed plant and the public authority had taken this concern into account when considering where the public interest balance lay in this case.
13. The public authority cited its ability to act effectively in the commercial sphere as an argument against disclosure. It also believed that any disclosure that may undermine efforts to reduce carbon dioxide emissions would be counter to the public interest.

14. The public authority also described the background to this case, stating that the planning application made by Peninsula Power for the proposed plant had been controversial and the subject of widespread opposition in the area where the plant was to be built. The application for planning permission had been refused. Following the refusal of planning permission, the grant undertaking given to Peninsula Power by the public authority was withdrawn. Despite this, the public authority stated that this information remained commercially sensitive as the associated technology continued to be developed by Peninsula Power.
15. The Commissioner contacted the public authority again on 11 December 2007. It was noted that the website of the South West Regional Development Agency includes information about Peninsula Power's submission under the BECGS, including technical details of the proposed plant. The public authority was asked to respond addressing why the requested information should continue to be withheld given that this information is already in the public domain.
16. The public authority responded to this on 6 February 2008, confirming that the information available on the website of the South West Regional Development Agency had been reviewed. The public authority stated that most of the information available covered the economic and environmental aspects of the proposed plant, but that a document titled "*Technical Review of the Winkleigh Biomass Electricity Generation Project*" did provide an in depth technical assessment. The public authority maintained that the availability of this information in the public domain did not impact on the arguments for withholding the information requested by the complainant as, whilst this was a technical assessment, it did not cover how the proposed technology would be engineered and applied in this case.
17. The public authority included with its response a letter sent to it by Peninsula Power dated 1 February 2008 in which Peninsula Power set out its reasoning as to why it believed that the information in question here should not be disclosed. It was stressed that confidentiality agreements had been signed between Peninsula Power and partner companies and that legal action would result were these agreements breached. It also stated that the DTI had indicated that information provided to it relating to the BECGS would remain confidential. Peninsula Power went to detail why it believed that the information in the public domain differed significantly from that withheld.

Findings of fact

18. The BECGS was operated by the then Department for Trade and Industry. A publicly available paper on this scheme describes its purpose as "*...to promote the efficient use of biomass for energy, and in particular the use of energy crops by stimulating the early deployment of biomass fuelled heat and electricity generation projects.*"
19. Peninsula Power applied under the BECGS for a grant towards an intended biomass generation plant close to Winkleigh, Devon. This application was initially successful, but the undertaking to provide the grant was later withdrawn following the failure to secure planning permission for the plant.

20. The information withheld here, the *'Fichtner Report'*, is an independent consultant's report commissioned by Peninsula Power for the purpose of the BECGS application and carried out by Fichtner Consulting Engineers Ltd.

Analysis

Procedural matters

Regulation 5

- 21 In failing to make environmental information available on the basis of exceptions that this notice finds were applied incorrectly, the public authority breached Regulation 5(1). In failing to disclose the information requested within 20 working days of receipt of the request, the public authority breached Regulation 5(2).

Regulation 14

22. The initial refusal of the request was made under the provisions of the Act, with exceptions from the EIR cited only following the intervention of the Commissioner. As the complainant was not informed of which exceptions from the EIR were believed to apply and was not informed of his right to make representations to the public authority under Regulation 11 or of the enforcement and appeal provisions of the Act applied by Regulation 18, the public authority failed to comply with Regulations 14(3)(a) & (b) and 14(5)(a) & (b).

Environmental information?

23. The public authority processed the request for information under the Act. However during the course of the investigation and in the light of further experience dealing with complaints, the Commissioner indicated to the public authority that he in fact considered the information constituted environmental information and therefore that it should have been dealt with under the Environmental Information Regulations 2004. The public authority provided submissions regarding the exceptions, similar to those it had applied within the Act, that it felt applied to the report.
24. Regulation 2(1) states that,
- "environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form 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) and (b) 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)".
25. The Commissioner considers that the phrase "any information... on..." should be interpreted widely and that this is in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC¹. Therefore 'any information on' will usually include information concerning, about or relating to a particular measure, activity, or factor in question. In other words information that would inform the public about the matter under consideration and would therefore facilitate effective participation by the public in environmental decision making is likely to be environmental information. This approach was informed by the Information Tribunal case *Ofcom v Information Commissioner and T-Mobile UK Limited* (EA/2006/0078).
26. In order to define information as environmental under 2(1)(e):
- the information itself must be on "cost benefit and other economic analyses and assumptions" and
 - the "cost benefit and other economic analyses and assumptions" must be used within the framework of the measures and activities referred to in 2(1)(c).
27. A measure or an activity referred to in regulation 2(1)(c) (not the information in question) must affect or be likely to affect the elements and factors in 2(1)(a) and (b), or be designed to protect the elements in (a).
28. The Commissioner has assessed the withheld report using the test described above and has concluded that it constitutes environmental information by virtue of

¹Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment.

regulation 2(1)(e). He has set out the reasoning behind his conclusion below.

29. The withheld information is an independent consultants report on the application made by Peninsula Power for a grant under the Bio-energy Capital Grants Scheme. It contains a review of the application and comments on whether the technical and commercial claims are achievable. The parameters include consideration of assumptions and proposed capital costs as well as the estimated output and efficiency of the proposed facility that Peninsula Power has put forward.
30. A cost-benefit analysis can generally be defined as a process by which expected costs are weighed against expected benefits to determine the best (or most profitable) course of action. Having viewed the contents of the withheld report he does not consider that it falls strictly within this description. However, regulation 2(1)(e) also refers to, "other economic analyses and assumptions". In this case the Commissioner has concluded that the report sits comfortably within this part of the regulation. As mentioned above, it contains assessments of economic assumptions and performance of the power plant Peninsula Power is seeking the bio-energy grant for.
31. Having reached this conclusion it is then necessary to ensure that the report fits within the framework of a measure as outlined in 2(1)(c) and that there is the necessary link back to 2(1)(a).
32. The report is used within the framework of the BECGS. It is required as part of the evidence considered by the DTI when assessing an application and deciding whether or not to award a grant. The Commissioner believes that it is reasonable to conclude that the BECGS and decisions about whether to offer grants under it constitute a measure which would both be likely to affect the elements and factors referred to in 2(1)(a) and (b) and that it has been designed to protect those elements.
33. He wishes to point out that where the measure in question is a plan for the future the relevant consideration will be whether, if it were to go ahead, it would be likely to affect the elements and factors referred to in 2(1)(a) and (b). He does not consider the likelihood of the plan coming to fruition to be relevant. This interpretation is informed by the Convention on Access to Information, Public Participation on decision-Making and Access to Justice in Environmental Matters, known as the "Aarhus Convention" which is the source of the EC directive that the Regulations implement. Aarhus seeks to involve the public during the preparation of plans and programmes relating to the environment, and the Directive acknowledges the connection between access to environmental information and effective participation in environmental decision-making. Therefore the Regulations should not be interpreted to only consider information to be environmental at the point at which a plan is likely to go ahead. This would effectively exclude information relevant to participation at the preparation stage of plans relating to the environment.
34. When reaching a decision about the likely effect of the measure and decisions made under it the Commissioner has taken into account the following information

about the purpose and intended outcomes of the BECGS. A document produced by the former Department for Trade and Industry entitled *“Preliminary Information on the Bioenergy Capital Grants Scheme”* lists the outcomes that should be achieved by projects supported by the scheme. These include, amongst others, the following:

“Contribute to the UK’s international undertaking, under the Kyoto protocol (agreed in 1997) to reduce basket of six greenhouse gases by 12.5% below 1990 levels in the period 2008-2012 (EU burden sharing agreement)”

“Contribute to the UK’s more challenging domestic policy goal of reducing emissions of carbon dioxide (CO₂), the most important greenhouse gas, by 20% below 1990 levels by 2010.”

35. A key aim of the measure is to reduce carbon emissions and thus contribute to minimising the potential damage to the elements of the environment resulting from climate change. The report in this case is used to influence a decision about whether or not to award a grant under the scheme. The decision to offer a grant or not is likely to affect the reduction of carbon emissions via the production of energy from renewable sources. Therefore the Commissioner considers that first and foremost the measure is designed to protect all of the elements referred to in 2(1)(a) by reducing factors within 2(1)(b), namely emissions, which impact on those elements.
36. Moreover, the Commissioner also notes that if a grant were offered it would facilitate the construction of a substantial power plant at a disused RAF base. This would also be likely to impact emissions more directly and immediately. This is because a power plant would in fact create waste and emissions in the vicinity of Winkleigh that did not previously exist and which would affect the air and atmosphere. This is both because of the emissions from the plant and because of the need to transport fuel in the form of forestry residue, willow and other wood waste to the facility.
37. The Commissioner also recognises that it could be argued that the BECGS also affects the elements in 2(1)(a) directly rather than via 2(1)(b) because a grant would enable the construction of the power plant which would impact on the land and landscape significantly, as would the need to grow substantial fuel crops in the local vicinity to supply the facility.
38. The Commissioner considers that his interpretation of the link between measures and factors in this case is consistent with the approach taken by the Information Tribunal in the case of *DBERR vs Information Commissioner and Friends of the Earth (FoE) (EA/2007/0072)*. In that case the Tribunal found that information related to energy, supply, demand and pricing policy did constitute environmental information. It agreed with the interpretation which was put forward by FoE. FoE argued that policies on energy pricing are often specifically designed to affect factors which themselves affect or are likely to affect the elements of the environment. In support of its argument FoE provided the following example, “national policy on supply, demand and pricing of different energy sources (e.g., nuclear, renewable, coal, gas) has potentially major climate change implications

and is at the heart of the debate on climate change. Similarly, national policy on land use planning or nuclear power has significant effect on the elements of the environment or on factors (e.g. radiation or waste) affecting those elements.” In this case the national BECGS is likely to significantly affect emissions which in themselves affect climate change and therefore all of the elements in regulation 2(1)(a).

Exceptions

Regulation 12(9)

39. Having concluded that the withheld report constitutes environmental information under regulation 2(1)(e) the Commissioner must go on to consider the effect this has on the exceptions cited by the public authority.
40. The public authority cited the exceptions provided by Regulations 12(5)(d), (e) and (g). Its arguments as to why these exceptions are engaged are given above at paragraphs 9 to 11. The Commissioner’s analysis has focussed on Regulation 12(9).

Regulation 12(9) states that:

“To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs 5(d) to (g)”.

41. In the Commissioner’s view the inclusion of the phrase ‘relates to information’ in Regulation 12(9) means that its application is not restricted to cases where information falls within the definition of environmental information only by virtue of regulation 2(1)(b). He believes that regulation 12(9) can apply where information is environmental under another part of regulation 2(1) provided that it links back to 2(1)(a) via 2(1)(b). Further, regulation 2(1)(b) must be relevant because of emissions. So, in this case because the framework that the report is used within is a measure likely to affect emissions, which in turn affect the elements of the environment, the Commissioner considers that regulation 12(9) is applicable. The report relates to information on emissions as it relates to a measure that will affect emissions. If however the measure was directly linked to 2(1)(a) because it was likely to affect elements such as land and landscape but not via emissions then 12(9) would not be relevant.
42. The Commissioner also wishes to point out that in his view the emissions referred to in regulation 12(9) are not limited to emissions that have already taken place and could include past, present and future emissions. He has considered the wording of the EIRs, the European Directive 2003/4/EC and the Aarhus Convention, and is satisfied that the wording of these documents does not limit the definition of emissions under 12(9) to those which have already occurred. In particular Article 4.2 of the Directive states that Member States may not, “provide for a request to be refused where the request relates to information on emissions into the environment”.

43. In this case the report is used within the framework of a measure which is likely to affect future emissions, both by contributing to the funding for a facility that would generate emissions, and in the long run reduce the volume of carbon emissions. In view of all of the above the Commissioner is satisfied that regulation 12(9) applies to the entirety of the withheld report and that therefore the public authority cannot rely upon the exceptions in regulations 12(5)(d), (e) and (g) that it has sought to apply.

The Decision

44. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the EIR in that it incorrectly withheld the information requested under Regulations 12(5)(d), (e) and (g). The Commissioner also finds that the public authority failed to comply with the procedural requirements of the EIR in failing to comply with Regulations 5(1), 5(2), 14(3)(a) & (b) and 14(5)(a) & (b).

Steps Required

45. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

Disclose to the complainant the information withheld.

46. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

47. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

48. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

49. Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 29th day of July 2008

Signed

**Steve Wood
Assistant Commissioner**

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