Freedom of Information Act 2000 (FOIA)

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 14 September 2020

Public Authority: National Grid Electricity System Operator
Address: Faraday House
Warwick Technology Park
Gallows Hill
Warwick
CV34 6DA

Decision (including any steps ordered)

1. The complainant has requested information relating to the process by which the National Grid Electricity System Operator (NG) determines the best location for the connections to be made from a number of proposed offshore windfarms to the transmission network. These are significant infrastructure projects.

2. The NG provided a limited amount of information but ultimately withheld the majority of the remaining information under the exceptions provided by regulations 12(4)(d) – material in the course of completion, 12(5)(a) – public safety, 12(5)(d) – confidentiality of proceedings 12(5)(e) –confidentiality of commercial information and 13(1) third party personal data. In addition to these exceptions a limited amount of that information was also withheld under regulation 12(4)(e) – internal communications. Finally some elements of the request were refused under regulation 12(4)(a) on the basis that the information was not held. NG initially applied regulations 12(4)(c) – request formulated in too general a manner, and 12(5)(f) - voluntary supply of information, but later withdrew its reliance on both of these exceptions.

3. The Commissioner's decision is that NG does not hold the information in respect of requests 1(e) and 2 and is therefore entitled to refuse the request under regulation 12(4)(a). In respect of the remainder of the information the Commissioner has found that each of the exceptions

provided by regulations 12(5)(d) and (e) are engaged and that the public interest in maintaining each of those exceptions individually is sufficient to outweigh the public interest in favour of disclosure. Under the EIR a public authority may aggregate the public interest arguments in favour of maintaining any number of exceptions which have been applied to the same information. It follows that the collective weight of the public interest in favour of maintaining regulations 12(5)(d) and(e) outweigh the public interest in favour of disclosure. Therefore the Commissioner has not found it necessary to consider the other exceptions that have been applied to this same body of information.

4. The Commissioner does not require the public authority to take any further action in this matter.

The public authority

5. The complainant made his request the National Grid Electricity System Operator. The Commissioner understands that since 1 April 2019 this company has been a wholly owned subsidiary of the National Grid Group Plc. It is however a distinct legal entity. It holds a licence as a System Operator under the Electricity Act 1989. By virtue of the powers it has under that licence, for example the power to compulsory purchase land, it is deemed to carry out functions of public administration and is therefore a public authority in its own right under regulation 2(2)(c) of the EIR.

6. For simplicity it has been referred to NG throughout this notice.

Request and response

7. On 17 May 2019 solicitors acting on behalf of a community group, which the complainant represents, requested information of the following description:

"Accordingly, pursuant to the Environmental Information Regulations 2004, we request on behalf of our client the following documentation and information:

1. The CION assessments for:

    a. the connection offers made to SPR to connect the EA1 and EA3 windfarms at Bramford
    b. the connection offers made to SPR to connect the EA1(N) and EA2 windfarms at Bramford

c. the connection offers made to SPR to connect the EA1(N) and EA2 windfarms in the Sizewell/Leiston area
d. the connection offers made (or to be made) to National Grid Ventures ("NGV") in respect of the proposed Nautilus and Eurolink interconnector projects
e. the connection offers made (or to be made) in respect of the expansion of the off shore windfarms known as Greater Gabbard and Galloper

2. To the extent that those CION assessments do not include the reports, advice etc upon which the CION assessments are based, including without limitation in respect of environmental matters and costs, those reports, advice etc.

3. All correspondence with SPR and any documentation (including without limitation minutes of meetings) relating to the moving of the proposed grid connections for EA1(N) and EA2 from Bramford to the Sizewell/Leiston area.

4. All correspondence with NGV and any documentation (including without limitation minutes of meetings) relating to the proposed location of the Nautilus and Eurolink interconnectors and their connection to the grid.

5. All correspondence with owners/developers of the offshore windfarms known as Greater Gabbard and Galloper and any documentation (including without limitation minutes of meetings) relating to those proposed expansion of those windfarms and their connection to the grid."

8. On 7 June 2019 NG responded. It provided some of the requested information, but withheld other information under the exceptions provided by regulation 12(5)(f) – voluntary supply of information, regulation 12(4)(d) – information in the course of completion and regulation 12(4)(b) – manifestly unreasonable.

9. The complainant's solicitors requested an internal review on 2 August 2019. They also made a fresh information request related to NG's response to part 1e of the request.

10. NG provided the outcome of its internal review on 27 September 2019. It revised its position. NG withdrew its reliance on 12(5)(f) and disclosed some additional information. However NG maintained its reliance on 12(4)(d) – information in the course of completion in respect of some of the information and applied new exceptions to withhold the remainder. Those new exceptions were regulation 13 – personal information, regulation 12(5)(e) – confidentiality of commercial information, regulation 12(5)(d) – confidentiality of

proceedings, regulation 12(5)(a) – public safety, regulation 12(4)(e) – internal communications and 12(4)(c) – request formulated in too general a manner. In respect of part 1 e of the request there was also a suggestion that NG claimed the information is not held. NG also said that it does not hold the information requested in part 2.

11. The internal review outcome did not refer to the application 12(4)(b) – manifestly unreasonable, and it is understood that it withdrew its reliance on that exception.

12. In respect of the new request that had been made, NG refused the request relying on regulation 12(4)(e) to do so and made the applicant aware of their right to seek an internal review if they were not satisfied with that response. NG's handling of that new request does not form part of this investigation.

13. A summary of the exceptions applied by the end of the internal review is as follows:

Request 1(a) to (d)

- Regulation 13 – personal data
- Regulation 12(5)(a) – National security & public safety
- Regulation 12(5)(d) – confidentiality of proceedings
- Regulation 12(5)(e) - confidentiality of commercial information
- Regulation 12(4)(d) - information in the course of completion

Request 1(e)

- Regulation 12(4)(a) - information not held

Request 2

- Regulation 12(4)(a) – information not held

Request 3

1. Regulation 12(5)(a) – National security & public safety
2. Regulation 12(5)(d) – confidentiality of proceedings
3. Regulation 12(5)(e) - confidentiality of commercial information
4. Regulation 12(4)(d) - information in the course of completion
5. Regulation 12(4)(e) – internal communications – in respect of minutes of meetings
6. Regulation 12(4)(c) – formulated in too general a manner

Request 4 and Request 5

- Regulation 12(5)(a) – National security & public safety
- Regulation 12(5)(d) – confidentiality of proceedings
- Regulation 12(5)(e) - confidentiality of commercial information

- Regulation 12(4)(d) - information in the course of completion
- Regulation 12(4)(e) – internal communications – in respect of minutes of meetings
- There is also references to these requests being formulated in too general manner, but it was not clear whether the exception provided by regulation 12(4)(c) had actually been relied on.

14. During the course of the Commissioner's investigation NG confirmed that it no longer wished to rely on regulation 12(4)(c) – formulated in too general a manner, to refuse any of the requested information.

Scope of the case

15. The complainant contacted the Commissioner on 5 December 2019 to complain about the way his request for information had been handled.

16. The Commissioner considers that the matter to be decided is whether NG is entitled to rely on the exceptions cited to withhold the requested information.

17. Two elements of the overall request, request 1(e) and request 2, have been refused under regulation 12(4)(a) on the basis that the information is not held. The Commissioner will start by considering that exception before moving on to look at the exceptions provided by regulations 12(5)(a), 12(5)(d), 12(5)(e) and 12(4)(d) which have all been applied to the remainder of the withheld information. If necessary, the Commissioner will then look at the application of regulation 13(1) to requests 1(a) to (d) and regulation 12(4)(e) which has been applied to requests 3, 4 and 5.

18. In a submission that the complainant made to the Commissioner he argued that it was not legitimate for NG to rely on exceptions that it had not cited when originally dealing with the request and which it had only introduced at the internal review. However it has been established in a binding decision by the Court of Appeal in Birkett v DEFRA [2011] EWCA Civ 1606 that a public authority is able to raise a new exception either before the Commissioner or the First Tier Tribunal and both must consider any such new claims. It therefore follows that NG was entitled to raise fresh exceptions at the internal review stage.

    The complainant also raised various issues in respect of NG's compliance with the Code of Practice issued by the Secretary of State under regulation 13 of the EIR. However under regulation 18, this notice is limited to addressing whether NG has complied with its obligations under Parts 2 and 3 of the EIR. The code of practice is matter relating to Part 4 of the EIR. However to the extent that any of the matters raised by the complainant have a bearing on the

Commissioner's decision in respect of the application of the exceptions that are considered in this notice, the Commissioner has considered the complainant's comments.

Background

19. NG is responsible for the safe and reliable operation of the electricity transmission networks in Great Britain. One of its roles is to facilitate the connection of electricity generation projects onto the transmission network. Which it does by forming a commercial contract with the generation owner (in the case of these requests, the developers of the offshore windfarms) and it engages with the relevant transmission network owner (TO) who in turn provides the physical connection to their network. In England and Wales the transmission network is owned by National Grid Electricity Transmission.

20. The developers of the windfarms have to apply to NG and request a connection offer. The developers choose where they wish to build their project, the technology they are investing in and when they would like to connect it to the electricity transmission network. NG's role is to work with National Grid Electricity Transmission who will design the connection required to accommodate the developer's request. National Grid Electricity Transmission will provide details of the connection to NG and it is its role to make a connection offer to the developer and put in place a contract if the connection offer is accepted.

    Where the project involves an offshore windfarm it is a requirement that as part of that process NG undertakes a CION Assessment. The acronym stands for Connection and Infrastructure Options Note. NG describes the CION Assessment process as being a key part of the connection offer process for offshore projects, which is prescribed by the requirements of its System Operator licence and designed to discharge NGESO's statutory duty under section 9 of the Electricity Act 1989 to maintain an efficient, coordinated and economical system of electricity transmission. NG explained that CION assessment is essentially a tool used to assess different connection options to establish the most economical and efficient connection options available. The process is overseen and regulated by OFGEM whose role is to protect consumers' interests.

Reasons for decision

Regulation 12(4)(a) – information not held

21. Regulation 12(4)(a) of the EIR states that a public authority may refuse to disclosure information to the extent that it did not hold that information at the time the request was received.

22. The first element of the request to which this exception has been applied is request 1(e). This request seeks the CION Assessments the connection offers made (or to be made) in respect of the expansion of the off shore windfarms known as Greater Gabbard and Galloper.

23. NG has explained that the connection application for Greater Gabbard extension was only received just over a month before the complainant's information request was made and the application for the Galloper extension was made shortly after the request. NG advised the Commissioner that, at the time of the request, it had not yet commenced work on the CION Assessments for Greater Gabbard and Galloper.

24. In support of its position NG has provided the Commissioner with drafts of the CION Assessments that were subsequently produced. Each of these include 'version control' details setting out when the draft of the document was created. In respect of Galloper Extension the first draft of the CION Assessment was not started until February 2020 and was not completed until late April. In respect of the draft for Greater Gabbard the first draft was also not produced until late April. The Commissioner is therefore satisfied that these documents did not exist at the time the request was made.

25. Included in other documentation submitted to the Commissioner by NG is an email chain which the Commissioner interprets as showing that the application for the Galloper Extension was actually submitted on 15 May 2019, rather than being made just after the request. However the Commissioner is satisfied that this does not undermine the evidence from version control details of the draft CION Assessment which show that work on the draft was not started until February 2020.

26. The email chain containing the 15 May 2019 email is relatively short. The 15 May email is the second in that chain. That email and the preceding one were held at the time of the request. The later ones are all dated after the request and so fall outside the scope of this investigation. The 15 May email is from the developer and includes seven attachments. The Commissioner accepts that these two emails and the attachments are not captured by request 1(e) on the basis that, at that time, they did not form part of any CION Assessment. However the Commissioner considers they would be captured by request 5 on the basis that they all form part of the correspondence described by that request.

27. NG has argued that rather than being 'correspondence' in the normal sense of the word, they are in fact an 'application' and therefore fall outside the scope of request 5. The Commissioner does not accept this argument. The initial email and the email of 15 May 2019 are clearly pieces of correspondence. The Commissioner considers that the attachments to the 15 May email form an integral part of that email and can therefore be considered correspondence. Furthermore the Commissioner considers that even viewed in isolation from the covering email, the attachments constitute written communications and so would fall within the description of 'correspondence'. These documents will therefore be included in the Commissioner's consideration of request 5.

28. Returning to the issue of whether the CION Assessments for Galloper Extension and Gabbard were held, NG has also explained that to comply with the licence it operates under, it is obliged to make a connection offer to a developer within three months of the developer submitting its application. This may at first appear to be at odds with NG's explanation that the CION Assessments were not undertaken until April 2020. However NG has said that due to the length of time it takes to conduct CION assessments, it makes a 'preCION' offer and then sends a revised connection offer, once a CION Assessment has been carried out.

29. The Commissioner will now consider the application of regulation 12(4)(a) to request 2. Request 2 sought the reports, advice etc upon which the CION assessments are based, including reports and advice on environmental matters and costs, if not included as part of the CION Assessments themselves.

30. It is important to note that the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities when considering whether information is held. This means that the Commissioner must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or was held at the time of the request).

31. NG had advised the Commissioner that it has reviewed its files and not identified any additional reports or advice. It has told the Commissioner that when a connection offer is received an account manager is assigned to lead the offer process. All documentation relating to the connection offer process is saved in a shared, electronic, storage area. Each project is given a specific folder where all key information is stored and available for the whole connection offer team. NG has assured the Commissioner that all the folders for each of the connection offers listed in the request were reviewed as part of its handling of this request.

32. In addition all current account managers were asked for any email correspondence they might have regarding these projects. One account manager who was responsible for one of the projects has subsequently left the organisation and NG accept that his personal email account was therefore not searched, however it has said that the data relating to project was saved on the shared storage.

33. NG has advised the Commissioner that no information relevant to these connection applications has been deleted and that it has a business need to retain the information held in the shared storage area as the projects are currently the subject of contracts and its in document retention policy means that no contract documentation relating to these projects has been destroyed or deleted.

34. From her discussions with NG, its submissions and the large volume of information which it identified as being relevant to the overall request and which it provided to the Commissioner, the Commissioner understands that the CION Assessments are very comprehensive documents. To the extent that reports or advice were produced, any information would be an integral part of the relevant CION Assessment or its appendices and would be embedded within those documents.

35. In light of the above, the Commissioner is satisfied that NG has carried out searches of the relevant shared storage area. Given the importance of the information to the core business of the NG it seems entirely plausible that all relevant information would be kept centrally in that location. Nevertheless, the search has been extended to cover the personal work email accounts of account managers. No information apart from that which NG considers to form of the CION Assessments (and therefore its disclosure has already been considered under requests 1(a) to (d)) has been identified.

36. Therefore the Commissioner considers that on the balance of probabilities NG does not hold any additional reports or advice that would be captured by request 2.

Public interest test

37. All the exceptions created under regulation 12 are subject to the public interest test. The public interest test means that even where the requested information is covered by an exception, a public authority can only rely on that exception if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure. Therefore, technically, regulation 12(4)(a) is subject to the public interest. However as its application can have no meaningful application where the requested information is not held, the Commissioner has not considered the test.

Regulation 12(5)(d) – confidentiality of proceedings

38. The Commissioner will now go on to look how NG dealt with the remaining elements of the request and the exceptions that have been applied to all them i.e. to requests 1(a) – (d), 3, 4 and 5. The Commissioner will start with regulation 12(5)(d)

39. Regulation 12(5)(d) of the EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of the proceedings of that or any other public authority, where such confidentiality is provided by law.

40. The term 'proceedings' is not defined in the Regulations, but the Commissioner interprets it to include situations where an authority is formally considering an issue in order to reach a decision. There has to be a degree of formality to the process.

41. NG has explained that the CION Assessment process forms a key part of the process by which it makes a connection offer to the developers of offshore windfarms, i.e. the offer as to the location where the windfarm will be connected to the transmission network and the terms under which that connection will be made. The process is prescribed by the requirements of NG's System Operator licence, and NG has stated that the process is designed to discharge its statutory duty under section 9 of the Electricity Act 1989 to maintain an efficient, co-ordinated and economical system of electricity transmission.

42. The Commissioner therefore accepts that there is a sufficient degree of formality to the process. The Commissioner finds that the CION Assessment process can be considered as a 'proceeding' of NG for the purposes of regulation 12(5)(d).

43. The second condition that has to be satisfied when applying regulation 12(5)(d) is that the confidentiality of the proceedings in question has to be protected by law.

44. NG has advised the Commissioner that the information which it receives a result of its licensed activities is protected from disclosure to third parties by section 105 Utilities Act 2000. Under that provision it is a criminal offence for NG to disclose the information it receives.

45. The Commissioner has viewed the provision which can be accessed on the UK's official website for legislation, www.legislation.gov.uk. In broad terms section 105 of the Utilities Act states that information obtained under either the Utilities Act 2000 or the Electricity Act 1989 and which relates to the affairs of any individual or to any particular business shall not be disclosed during the lifetime of the individual or so long as the business continues to be carried out. There are some

limited exceptions to this provision, but the Commissioner is satisfied that they do not accommodate disclosures made under the EIR.

46. Although the statutory prohibition only extends to the information which NG receives, the Commissioner considers it would also cover information generated by NG itself to the extent that it reveals the information provided by a third party, in this case, that third parties are the developers of the windfarms in question. Therefore much of the analysis of the pros and cons and of where a connection is best made, which would be based on information and specifications provided by a developer, would also be protected by section 105 of the Utilities Act.

47. NG has also argued that the withheld information would be protected by a common law duty of confidence. For information to be protected by the common law duty of confidence it must have the necessary quality of confidence, it must have been provided in circumstances that give rise to an expectation that it would be treated in confidence and an unauthorised use of the information must be detrimental to the confider.

48. Consideration of whether the withheld has the necessary quality of confidence involves two elements. Firstly the information must be more than trivial and secondly the information must not be publicly available, or otherwise accessible.

49. The Commissioner is satisfied that detailed information about the proposed development of significant infrastructure projects, such as offshore windfarms and where they will be connected to the transmission network, is far from trivial information.

50. In terms of the extent to which some of the information may be in the public domain, NG initially advised the Commissioner that the information has not previously been disclosed. However NG alerted the Commissioner to the existence of, what is referred to as, the TEC register, which contains some details of contracts that have been agreed between NG and such developers. The Commissioner also carried out some rudimentary searches of the internet and identified some information relating to the proposed developments and connections, which may require the building of new substations, on the planning pages of local councils. Therefore the Commissioner challenged NG's assertion that none of the information had previously been released.

51. NG responded that certain information is required to be put into the public domain as part of industry codes and that some developers themselves may put some information into the public domain, particularly as part of promoting a scheme and any necessary planning applications. However, NG explained that any such information would

be far more limited than the range of alternatives, with full technical design aspects on how connections could be made and where potential faults or weaknesses may be, that would be contained in the information being withheld. It also said that location details in a CION Assessment are far more specific than in the TEC Register, which simply identifies the name of a connection asset. The TEC Register would not contain the precise location and the technical design detail of the connection itself. So although there may be some information in the public domain, NG maintains that the withheld information is of a very different quality and has not been disclosed.

52. Even if snippets of the withheld information have entered the public domain, NG argues that, as accepted in the Commissioner's guidance on a different exception, 'Confidentiality of commercial or industrial information (regulation 12(5)(e)' , it is possible for information to keep its quality of confidence even where some of it may have entered the public domain, if it would take time and effort to find and collate it from multiple sources.

53. NG accepts that as projects advance, developers do 'go public' and anticipated connection dates, capacity and connection routes may all be in the public domain. But even so, the technical detail on how that connection was designed, the costs and risk analysis and consideration of different options would still be very hard to find, if it was available at all.

54. Based on NG's arguments the Commissioner is persuaded that the withheld information should be regarded as maintaining its quality of confidence.

55. The Commissioner will now go on to look at whether the developers had an expectation that their dealings with NG would remain confidential.

56. The Commissioner is satisfied that the developers would consider it normal business practice for the information they provided to NG, and NG's subsequent consideration of that information, to be treated as being confidential. This expectation is based on the nature of the information and the commercial significance of the matters to which it relates. The developers, who have operated in the industry for some time, would have knowledge of the process and would recognise that many of the documents created by NG are marked as 'confidential'. The expectation of confidentiality would be reinforced by the statutory prohibition provided by section 105 of the Utilities Act.

57. Having established that the information has the necessary quality of confidence and was imparted in circumstances that would give rise to a duty of confidence, it is now necessary to consider whether an

unauthorised use of the information would be detrimental to the confider, i.e. the developers of the windfarms.

58. This issue will be considered in more detail under regulation 12(5)(e) - confidentiality of commercial information. However for the purposes of this exception the Commissioner is satisfied there would be some detrimental impact to the commercial interests of the windfarm developers. In broad terms, NG has explained that the development of these offshore windfarms involves extensive pre-build investment over a number of years which requires funding. The projects can be subject to refinancing pressures. The disclosure of the requested information, which include candid assessments of the viability of different options, identification of defect risks etc, could dent the confidence of investors.

59. Furthermore, the projects are developed by independent, commercial companies who compete with others for grid capacity, funding and the different subsidies that are available. Disclosure of the requested information could allow those competitors to reverse engineer and then copy business models or improve on them, at the cost of the developer. It has been suggested that competitors may also seek to use the information to block or delay another's project.

60. Based on these arguments, which will be expanded on when considering regulation 12(5)(e), the Commissioner is satisfied that there would be a detriment to the confiding developer if the requested information was disclosed.

61. The final consideration when applying the exception provided by regulation 12(5)(d) is that the confidentiality of those proceedings would be adversely affected by disclosing the withheld information. The term 'would be' is taken to mean that it is more probable than not that disclosing the information would harm the confidentiality of the proceedings in question; in this case the confidentiality of process for agreeing the location for the connection of a developer's windfarm to the transmission network.

62. Not only would the disclosure have a direct impact on the commercial interests of the developers, as a consequence they would become far more guarded about what information they provided to NG and how that information was presented. This would hinder the ability of NG to identify the best site for the connection to be made. It would interfere with the safe space NG required to consider the developers' information and candidly assess the options. The Commissioner is therefore satisfied that disclosing the information would have an adverse effect on the confidentiality of the proceedings. The exception is engaged

Public interest test

63. As with all exceptions under the EIR, regulation 12(5)(d) is subject to the public interest test as set out in regulation 12(1). This means that even though the exception is engaged, the information can only be withheld if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure.

64. Furthermore under regulation 12(2) there is a presumption in favour off disclosure.

65. NG has recognised that there is a public interest in disclosing the withheld information. This includes the value in disclosing information which would inform the public debate on environmental matters such as the development of more sustainable energy sources like windfarms. It also acknowledges that there is a value in local communities being given an opportunity to understand and participate in decisions that affect their environment. Finally, NG has recognised that there is a public interest in NG itself being accountable for the decisions it takes, how it carries out its functions under its System Operator licence in respect of developing, maintaining and operating economic and efficient networks and in facilitating competition in the supply of electricity in Great Britain. It considers this public interest is heightened where those functions have a impact on the environment.

66. NG has said that to satisfy this public interest, at least in part, it already routinely publishes information about its role in developing, maintaining and operating economic and efficient networks and in facilitating competition in the supply of electricity in Great Britain to consumers and how those functions involve environmental considerations. However as noted by the complainant, this information is not that which has been requested and is of a far higher level and therefore less detailed.

67. In presenting his public interest arguments in favour of disclosure the complainant has emphasised the significant impact the infrastructure projects to which the information relates will have on the environment and local communities. The CION Assessments are used to determine where the windfarms will be connected to the transmission network. Once that has been decided the developer then has to construct the necessary infrastructure to complete that connection. This will include the cabling required to carry the electricity generated offshore to a substation and potentially the construction of a new substation. He has presented his understanding of the infrastructure required for one of the projects. This includes 5 miles of underground cabling in a trench 64 meters wide, crossing an Area of Outstanding Natural Beauty, to where a 30 acre site will be developed with structures up to 18 meters high.

68. The Commissioner assumes that the complainant has obtained these details from a planning application which the community group he represents is opposing.

69. A project on this scale will clearly have an impact on the environment, not least the Area of Outstanding Natural Beauty and the other areas of the Suffolk countryside through which the cabling will pass. The complainant argues it will also have an impact on an historic holiday village, close to the point where the cabling makes landfall as well as disruption to listed buildings, which ring the 30 acre complex, and potentially valuable archaeological and ecological sites. He suggests other issues include an increased risk of flooding and increased noise levels. The complainant goes on to say that this is the impact of just one of eight projects being undertaken in a small area of rural Suffolk.

70. The Commissioner accepts that these projects will have a significant impact on the area and therefore recognises that they may raise concerns within the local communities affected.

71. The complainant states that despite this, NG does not consult with those local communities when it is carrying out its CION Assessment. He states that the only disclosure (apart from the limited disclosure in response to his requests) is the Development Consent Order applications made by the developer in respect of the project described above in paragraph 69. The complainant describes that information as,

> "merely a high level post factum summary of how National Grid made its connection offer determinations for [the project] based on its CION Assessments."

72. In respect of that same project the complainant has raised concerns there has never been an adequate explanation of why its connection site was changed. Originally the complainant argues that the intended site was an existing substation which would allow the cabling to follow an existing route. This, the complainant believes, would have had a much less significant environmental impact than the connection offer that was subsequently made.

73. The complainant has also referred to EU directive 2003/4/EC from which the EIR are derived. This states that,

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

74. The Commissioner understands that the main thrust of the complainant's argument is that there is a significant public interest in making information available which would allow the public to understand NG's reasoning for the connection offers that were made, so that they are able to make an informed contribution to the decision making process in respect of where the onshore infrastructure required for these project is ultimately developed.

75. The Commissioner will now consider the public interest arguments in favour of maintaining the exception.

76. In line with the Commissioner's guidance on the exception 'Confidentiality of proceedings (regulation 12(5)(d))', there will always be a general public interest in protecting confidential information. Breaching an obligation of confidence undermines the relationship of trust between confider and confidant. For this reason the grounds on which confidences can be breached are normally limited. Therefore the Commissioner accepts that in addition to the other arguments discussed below, there will always be some inherent public interest in maintaining the exception provided by regulation 12(5)(d).

77. The main purpose of the exception is to protect the confidentiality of the proceedings of the public authority, in this case NG. In other words, the issue is the extent to which NG needs to maintain the confidentiality of the information it receives from the developers, and to undertake its consideration of that information in private, in order to make its decision as to where is the best place to connect a windfarm to the transmission network.

78. NG has argued that disclosing the withheld information would hinder its ability to carry out full and frank consideration of the CION assessments. This is because disclosing the information would signal to other developers that they could not trust NG to protect any commercially sensitive information they provided to it. As a consequence developers will be reluctant to provide full and frank information for inclusion in CION Assessments for fear of them being disclosed to competitors.

79. NG has emphasised the importance of developers feeling able to submit applications without fear of competitors gaining access to information such as costs of transmissions works along with identified risks to the project. NG argues that the free exchange of information between itself and developers is an essential requirement of the process. Without the free and frank exchange of information NG would not be able to undertake thorough assessments and identify the optimal economic and efficient connection point.

80. The process includes assessing strengths and weaknesses, network capacity interface points, fault levels, design flaws, risks and how to address them and at what cost. The potential for such information to be disclosed would make developers reluctant to highlight genuine risks for fear of the commercial impact and the risk of rivals mounting strategic challenges to a project.

81. A reduction in quality and quantity of such information would undermine the ability of NG to ensure that its CION Assessment process achieves best value for the consumer through the identification of optimal connection locations. Flawed decisions on where connections should be made could ultimately lead to higher electricity prices being charged to customers. NG therefore argues that there is a clear public interest in ensuring that the flow of information is not inhibited by concern that it might be disclosed to the public at large.

82. NG has also emphasised its statutory duties under the Electricity Act 1989 which includes facilitating competition in the supply and generation of electricity. It argues that disclosing a developer's commercially sensitive information would be contrary to the performance of that duty.

83. In addition, NG argues that disclosure would prejudice the "safe space" it and the developer needs to formulate and develop the content of the CION Assessment. NG considers it needs to develop CION Assessments free from concern about the need to justify and explain its work before the connection process is complete, and that it needs to be free from concern that its work could be undermined or distracted by debating evolving methodologies and data in public whilst the development of its CION Assessments is ongoing.

84. In his submissions to the Commissioner the complainant was very sceptical about the extent to which the CION Assessments could be considered to be 'ongoing' work. Having viewed the withheld information the Commissioner also noted that, on the face of it, there appeared to be set stages to the production of these assessments and so challenged NG directly as to the extent the assessments were live documents. In doing so she suggested that, for example, it was surely the case that consideration of some of the connection options that appeared to have been rejected at an early stage in the process, could no longer be thought of as being live.

85. NG responded by saying that it did not agree that the stages in the process are as distinct in practice as they may at first appear. The point at which the CION Assessment process could be said to be concluded varies on a project to project basis. The Commissioner had cited an example of one assessment, which as they all do, contain version control information, and which showed that a 'Final Version' of

that assessment had been produced some time in the past and that there had been an 18 month gap before any further work was done. The Commissioner explained to NG that this suggested there were distinct stages to the process. NG countered that this was actually an example demonstrating that even after a lengthy hiatus, circumstances may dictate the need to repeat the assessment. The need to revisit an assessment remained even where contracts had been signed. NG explained that there could be a significant change in design or capacity on the developer's side and until the final design solution is agreed and has sufficiently progressed such that the risk of revision is negligible, a CION Assessment could be re-opened.

86. The Commissioner is left with the clear understanding that there is potential for any CION Assessment to be revisited, almost until the commencement of the actual infrastructure works.

87. If NG's ability to undertake robust CION Assessments was undermined it would impact on NG's ability to comply with its legal obligations in facilitating competition in supplying and generating electricity and ultimately in delivering a secure, reliable and economic electricity supply to consumers.

88. In balancing the competing public interest arguments the Commissioner recognises the environmental impact that these projects have and the value in local communities being able to influence decisions on where the infrastructure is built. The Commissioner notes that there does not appear to be any opportunity for the public to participate in the CION Assessment. However it is evident from the complainant's own submission that there are opportunities to put forward concerns over the environmental impact of a project during the planning process.

89. The Commissioner places weight on the fact that process for developing the CION Assessments is protected by a statutory duty of confidence which recognises the importance of NG being able to obtain the information it needs from developers in order to make sound decisions on the most economic location for a connection to be made. The CION Assessment appears to be one element which feeds into the final decision as determined under planning legislation as to where that infrastructure is sited.

90. It is important that the CION Assessments undertaken by NG are thorough and this requires the provision of full information by the developers. Even though the Commissioner acknowledges that it can be argued that developers have an incentive to cooperate with the CION assessment process, without which their projects could not come to fruition, she is satisfied that if commercially sensitive information was disclosed developers would become reluctant to share information

with NG and that this would seriously undermine that process. Furthermore it would be contrary to NG's duty to promote competition within the sector if it disclosed information that would disadvantage developers.

91. Therefore, on balance and after taking account of the presumption in favour of disclosure, the Commissioner finds that the public interest favours maintaining the exception. NG is entitled to rely on regulation 12(5)(d) to withhold the information requested under requests 1(a) – (d) and requests 3, 4 and 5.

92. Having reached this decision it is not strictly necessary for the Commissioner to go onto look at the other exceptions that NG have applied. However the analysis of regulation 12(5)(d) has involved consideration of the extent to which disclosure would have an adverse effect on the commercial interests of the developers. Therefore the Commissioner considers it is important to examine that issue more fully under the application of regulation 12(5)(e). Furthermore, if that exception is engaged, the public interest arguments in favour of its maintenance could be aggregated with those in favour of maintaining regulation 12(5)(d) and their collective weight then balanced against those in favour of disclosure as is explained later.

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

93. Regulation 12(5)(e) provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest. As with the other exceptions, regulation 12(5)(e) is subject to the public interest test.

94. The Commissioner considers that in order for this exception to apply there are a number of conditions that have to be met. She has considered how each of the following conditions apply to the facts of this case:

- Is the information commercial or industrial in nature?
- Is the information subject to confidentiality provided by law?
- Is the confidentiality provided to protect a legitimate economic interest?
- Would the confidentiality be adversely affected by disclosure?

95. The Commissioner's published guidance on section 12(5)(e) advises that for information to be commercial in nature, it will need to relate to

a commercial activity; either of the public authority or a third party. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services, usually for profit. Not all financial information is necessarily commercial information.

96. The Commissioner has viewed the withheld information itself and considered NG's submissions which describe the commercial environment in which offshore windfarms are developed. Having done so, the Commissioner is satisfied that the information is of both a commercial and industrial nature.

97. The next test that has to be met is that the information has to be protected by confidentiality provided by law. The Commissioner has already considered the issue of confidentiality under regulation 12(5)(d). For the same reasons as set out in respect of that exception, the Commissioner is satisfied that the information provided by the developers to NG, together with the analysis and consideration of that information by NG, is protected both by a statutory duty of confidence under section 105 of the Utilities Act and a common law duty of confidence.

98. The next test is whether that confidentiality is provided to protect a legitimate commercial interest. For this test to be satisfied the disclosure of the confidential information would have to adversely affect a legitimate economic interest of the confider of the information. The Commissioner has already discussed in general terms the impact that disclosing the withheld information would have on the economic interests of the developers. She will now expand on those points.

99. It is not enough that disclosure might cause some harm to an economic interest. A public authority needs to persuade the Commissioner that it is more probable than not that disclosure would cause some harm.

100. Generation projects such as offshore windfarms are undertaken by independent commercial organisations which have to compete amongst one another to supply electricity to the transmission network. They also have to compete against one another for funding from private investors and for the government subsidies that are available to promote renewable energy sources. NG argues that it is vital to the interests of developers that rivals do not get access to information which would undermine their commercial bargaining position in future negotiations.

101. When considering arguments around the harm that would be caused to the commercial interests of a third party (in this case the developers) the Commissioner would expect the public authority to demonstrate that the issues raised genuinely reflected the concerns of that party. In

this case NG has obtained statements from the developers in question which set out their reasons for wanting the information withheld. Although one statement is quite brief and focusses on the impact of disclosing information on costs, the others are more detailed and discuss how disclosing various details about the project could be used by competitors. The Commissioner is therefore satisfied that NG's arguments represent the views of the developers.

102. The CION Assessments and the other withheld information contain detailed cost breakdowns of the projects, identify risks to the project, relevant surveys, technical details such as outage periods, defect risks, and technical details of the design for the connection. The developers and NG have explained a number of ways in which this information could be used to the developers' disadvantage if it was placed in the public domain.

103. The Commissioner understands that the developers compete with one another to offer economically generated electricity to supply to the transmission network. There is a limit to the overall capacity that is required and also competition for the available support that is offered by the government through such schemes as the Contracts for Difference, a scheme to promote renewable energy managed by the Low Carbon Contracts Company. In order to be successful in both securing access to the transmission network and financial support from the government, developers have to be able to generate electricity efficiently and demonstrate that they have a viable project. Delays in connecting their projects to the transmission network may allow rivals to outcompete them for capacity and government funding.

104. NG considers that even though some elements of the information in isolation may not at first glance appear to be commercially sensitive, in combination, details such as dates, capacity and location could enable a competitor to reverse engineer a developer's business model so that they could replicate and potentially improve on the developer's approach to a scheme, including its technical solutions to the provision of energy from an offshore windfarm and its connection to the transmission network. This information could then be used by a rival in a future project.

105. One of the developers was particularly concerned that disclosing its cost data and technology choices would allow a competitor to calculate Contracts for Difference bid pricing and so disadvantage it in a forthcoming auction for those contracts.

106. The withheld information would also allow competitors to better understand where vulnerabilities in the connection design and the network capacity may be and this may encourage a competitors'

interest in developing their own projects in given areas in direct competition to the developer's.

107. A rival may seek to advance a project of their own which, if capable of progressing at a faster pace and with greater certainty, would impact on regional capacity, consent success prospect and Offshore Transmission Owner (OFTO) bid potential. The OFTO bid is the process by which the Government awards licences to developers for the development of offshore windfarm through competitive auctions.

108. NG also argues that competitors have an incentive to obstruct a developer's project as a delay or modification would not only have cost implications for the developer, but would also render the developer's project less attractive when bidding for capacity or government funding. The Commissioner recognises that the withheld information includes candid assessments of a project's vulnerabilities, but as NG has not developed this point in any great detail she has placed only limited weight on the argument that competitors could actively use the information to strategically delay a project.

109. In their supporting statements however the developers do raise more practical grounds for believing disclosing the information would result in delays to their projects. These include the potential that information on proposed cable routes could alert landowners to whether there was any scarcity of options which may affect the strength of the developer's negotiating position with those landowners. The information may also give a false impression of the risks or vulnerabilities of a project, which would be difficult to rectify and would make it more difficult when promoting a project, for example, during the planning process.

110. Also developers would not wish rivals to have access to information on cable routes or their landfall studies which they had invested time and money in and which may promote the interest of rivals in developing their own schemes in competition to the developers'.

111. So far NG's arguments have focussed on how a developer's competitors may seek to the use the withheld information if it was disclosed. Another argument raised by NG is the impact disclosure could have on a developer's ability to finance a project. As explained earlier the development of offshore windfarms require a large amount of investment even before any actual construction work takes place. The planning of these projects and the negotiation of all the necessary contracts and the securing of various consents and permissions may take several years. During this development stage projects are subject to ongoing and refinancing pressures. It is therefore important that developers are able to maintain the confidence of their investors.

112. The Commissioner understands that there is a general concern that if any information was disclosed which could be used by competitors to undermine a project, or jeopardise its viability by risking a delay, this would in turn damage the confidence of investors.

113. The extent to which any project is vulnerable to the adverse effects described above will depend on the stage which the project had reached at the time of the request. Clearly there is greater vulnerability during the early stages and potentially at other given points, such as the point at which Contracts for Difference are auctioned. Generally however, as a project nears completion the risk of harm is reduced and an individual project may be free from the risks described above once all the necessary infrastructure has been completed and the windfarm has been successfully connected to the transmission network. However the Commissioner notes that the developers' concerns relate not only to the particular projects identified in the request, but the impact disclosure would have on bids for funding etc in respect of other, current and future, projects. As the disclosure would reveal information about their business models and costings, disclosure could have an adverse effect that endured beyond the completion of any particular project. That is not to say that the sensitivity of the information would not eventually wane over time.

114. Returning to the potential impact on those projects identified in the request, NG argues that the commercial details within the CION Assessments that existed at the time of the request and the other withheld information was still highly sensitive. NG does however accept that it cannot be aware of all project information or background actions of the developer and therefore cannot necessarily say with certainty whether some pieces of information are more sensitive than others.

115. It has advised the Commissioner however that all the information was still considered to be live, in that none of the CION Assessments could be considered fully complete at the time of the request. This issue was discussed in more detail in paragraph 87.

116. NG also maintains that even where projects may be past, what could be considered as, the higher risk stages of development, if connection dates are affected and delayed, the developer would want to control the timing of the release of any information in order to minimise or mitigate impacts on subsidies or funding.

117. NG has advised the Commissioner that at the time of the request most of the projects (for which CION assessments had been drafted) had been contracted. By this the Commissioner understands that contracts agreeing the connection location had been signed. However NG maintained that, even in respect of these projects, in practice there was still the potential for contracts to be amended and for there to be

changes to the connection site. Therefore the commercial risks still applied even after contracts are signed and the concerns of financing and investment considerations remain relevant right up to the actual time of the connection.

118. Based on NG's submissions, supported by the statements from the developers themselves, the Commissioner is satisfied that it is more probable than not that disclosing the withheld information would have an adverse effect on the commercial interests of the developers. The third test set out in paragraph 96 has been met.

119. Once the first three tests are met the Commissioner considers it is inevitable that the final element will also be satisfied. Disclosure of truly confidential information into the public domain would inevitably harm the confidential nature of that information by making it publicly available, and would also harm the legitimate economic interests as described above.

120. The Commissioner therefore finds that the exception provided by regulation 12(5)(e) is engaged. It is however subject to the public interest test.

Public interest test

121. The public interest arguments in favour of disclosing the information have already been discussed in paragraphs 67 to 76 above.

122. The Commissioner will now consider the public interest in maintaining the exception and preventing the adverse effect that she accepts would be caused to the developers' economic interests if the information was disclosed.

123. As with regulation 12(5)(d), there will always be some inherent public interest in maintaining commercial confidences. Third parties would be discouraged from confiding in public authorities if they did not have some assurance that confidences would be respected.

124. The main public interest arguments in favour of maintaining the exception relate to the extent of the damage that disclosure would cause to the commercial interests of the developers.

125. It is clear from NG's submissions that the developers of offshore windfarms operate in a highly competitive environment. There are limited opportunities to supply capacity to the transmission network and a limited amount of government funding to support the development of these facilities. From NG's submissions and the supporting statement of the developers themselves, the Commissioner understands that the success of one project can impact on the viability of others.

126. It is also apparent that rivals are alert to the projects being developed by others and would seek to use the withheld information to their own benefit, including analysing the information so that they could better understand a developer's business model. This would allow the rival to make informed estimates of how the developer may bid for OFTO licences or for Contracts for Difference. Rivals could also reap other benefits from the withheld information, it may encourage their interests in a particular location in direct competition with a developer and allow the rival access to commercially useful information without having to incur the same costs which the developer had.

127. The Commissioner also accepts that the information could impact negatively on the progress of the scheme by hindering a developer's promotion of their project or undermining the confidence of investors.

128. The Commissioner is satisfied that the disclosure of the information would not only have an adverse effect on the economic interests of the developers, but that that effect could be potentially be significant. This is the case even though some of the projects were at a more advanced stage than others. This means there is significant weight to the public interest in favour of maintaining the exception and preventing that harm

129. The Commissioner recognises that the licence under which NG acts as a System Operator places a duty upon it to facilitate competition in the supply of electricity in Great Britain. There is a clear public policy to promote commercial enterprise within the industry as a means of ensuring the efficient and economic supply of energy at prices that are affordable to consumers. Therefore there is a recognised public interest in allowing competition within the industry. To adversely affect the commercial interests of some of the companies operating in the industry and distorting the competitive nature of the industry, would work against that public policy.

130. In light of the above the Commissioner finds that, even after taking account of the presumption in favour of disclosure, in all the circumstances of the case, the public interest in maintaining the exception provided by regulation 12(5)(e) outweighs the public interest in disclosure. NG is entitled to rely on regulation 12(5)(e) to withhold the information requested under requests 1(a) – (d) and requests 3, 4 and 5.

Aggregation of the public interest

131. Under the EIR, where the same piece of information engages more than one exception, the public interest in maintaining all those exceptions can be aggregated to give a combined weight. This combined weight can then be balanced against the public interest in

favour of disclosure. In this case the Commissioner has found that both regulations 12(5)(d) and (e) are engaged. The Commissioner also found the public interest in maintaining both of those exceptions separately was sufficient to outweigh the public interest arguments in favour of disclosure. It follows that when the public interest factors in favour of maintaining each of the exceptions are combined, their collective weight very clearly outweighs the public interest in disclosure.

132. After considering two of the exceptions that have been applied to the information captured by requests 1(a) – (d) and requests 3, 4 and 5 and finding that, individually and collectively, they can be relied on to withhold the information, the Commissioner does not consider there is any merit in looking at the application of the other exceptions cited by NG.

133. The Commissioner does not require NG to take any further action in this matter.

Right of appeal

134. 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

135. 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.

136. 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

Rob Mechan
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Wycliffe House
Water Lane
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