

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 March 2014

Public Authority: Department of Energy and Climate Change
Address: 3 Whitehall Place
London
SW1A 2AW

Decision (including any steps ordered)

1. The complainant made a request to the Department of Energy and Climate Change (DECC) for information regarding the planning permission granted for Pembroke Power Station and infringement proceedings instituted by the European Commission. DECC dealt with the request under the EIR and supplied some of the information. However some other information was withheld under the exceptions in regulations 12(5)(a) (international relations) and 13 (personal information).
2. The Commissioner's decision is that DECC has correctly applied regulations 12(5)(a) and 13 and that in the case of regulation 12(5)(a) the public interest in maintaining the exception outweighs the public interest in disclosure. The Commissioner requires no steps to be taken.

Request and response

3. On 2 April 2013 the complainant made a request to DECC for information regarding the planning permission granted for Pembroke Power Station. The request read as follows:
 1. *...the full text of the formal notice of infringement of law relating to the Pembroke Power Station.*
 2. *What contribution was made by the Wales Assembly Government to the formal response to the notice*

3. *What was the actual response sent to the Commission on the 21 December 2012*
 4. *What resulting correspondence came from the Commission*
 5. *Whether you or the Under Secretary actually approved the response*
 6. *Who in the Department recommended or gave consent to the Scheme originally*
 7. *Who in the Environment Agency gave the Department permission to proceed*
 8. *Who were the Scheme assessors and what were their qualifications to perform the assessment*
4. DECC responded to the request on 3 May 2013 when it explained that the requested information was found to be environmental information and therefore was being considered under the EIR. It confirmed that it held the requested information but said that some information was being withheld under the exceptions in regulations 12(5)(a) and 13. DECC provided answers to parts 4, 5, and 6 of the request.
 5. The complainant subsequently requested an internal review of DECC's handling of his request and it presented its findings on 5 July 2013. DECC upheld its initial response to the request and confirmed that parts 1, 2 and 3 of the request were refused under regulation 12(5)(a) and that parts 7 and 8 were refused under regulation 13.

Scope of the case

6. The complainant contacted the Commissioner on 30 July 2013 to complain about the way his request for information was handled.
7. The Commissioner agreed that the scope of his investigation would be to consider whether DECC responded to parts 1, 2, 3, 7 and 8 in accordance with the EIR.

Reasons for decision

Regulation 12(5)(a) – International relations etc

8. The information in parts 1 to 3 of the request have been withheld under the exception in regulation 12(5)(a) of the EIR. Regulation 12(5)(a)

provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect international relations, defence, national security or public safety.

9. In this case DECC has applied regulation 12(5)(a) on the basis that disclosure would adversely affect international relations with the European Commission. It argues that disclosure would prejudice the discussions currently ongoing between the UK Government and the European Commission in response to its notice of infringement regarding the Pembroke Power Station. Following a complaint from *Friends of the Earth* the European Commission sent the UK Government a notice of infringement regarding concerns that it had breached EU laws in granting permission for the power station. Where a member state of the EU fails to comply with EU law the European Commission can institute infringement proceedings which involve an initial pre-litigation phase of which the first step is sending a letter of formal notice of infringement to the member state. If a case is not resolved during the pre-litigation phase it may ultimately be referred to the European Court of Justice.
10. Regulation 12(5)(a) is designed to protect the UK's relationship with other states but also international organisations which in the Commissioner's view would include the European Commission.
11. Adversely affecting international relations can mean a negative reaction by another state or international body, or some tangible loss or harm to the UK's interests. However, it can also mean situations where disclosure makes relations more difficult or calls for particular diplomatic response to contain or limit damage which would not otherwise have been necessary.
12. The ICO interprets the wording of 'would adversely affect' in regulation 12(5) to set a relatively high threshold in terms of likelihood which has to be met in order for any of the 12(5) exceptions to be engaged. In other words it is not sufficient that disclosure may or could have some level of adverse effect, but rather that disclosure 'would' have an adverse effect. In the ICO's opinion this means that the likelihood of an adverse effect must be more substantial than remote.
13. DECC has explained that the European Commission has explicitly set out its principled position in relation to the disclosure of correspondence in infraction proceedings in the *McCarthy* case heard in the High Court where it said that it did not consent to disclosure because to do so would

undermine the principles of "genuine cooperation and mutual trust" needed in infraction proceedings.¹

14. DECC also said that it had sought the views of the European Commission over the disclosure of the information in this particular case. They confirmed that they would object to the disclosure of the infringement notice as well as the government's response and consider that were the information to be released it would "affect the climate of mutual trust between the authorities of the member state [the UK] and the Commission, which is required to enable them to resolve the case without having to refer it to the Court of Justice".
15. DECC also said that it would not be possible to release the Welsh Government's contribution to the response. This is because, it explained, the response to the Commission was agreed in full between the UK Government and the Welsh Government, so that those parts of the response which might be said to be based on the Welsh Government's contribution were fully adopted by the UK Government. Therefore it would not be possible to release the Welsh's Government's contribution to the response without also releasing information contained within the response itself, and this would be in defiance of the Commission's objections.
16. Given that disclosure would very obviously not be welcomed by the European Commission and given that negotiations between the UK Government and the Commission were at an early and delicate stage the Commissioner is satisfied that disclosure at the time of the request would adversely affect international relations both in this case and in future cases. Therefore the Commissioner has decided that the regulation 12(5)(a) exception has been applied correctly.

Public interest test

17. The regulation 12(5)(a) exception is subject to the public interest test. Therefore it is necessary to balance the public interest in the disclosure of the information against the public interest in maintaining the exemption.

Public interest arguments in favour of disclosure

¹ McCarthy & Ors, R (On the Application of) v Secretary of State for the Home Department [2012] EWHC 3368 (Admin) (28 November 2012)

18. As regards the public interest in disclosure, the Commissioner accepts that there are clear arguments for releasing the information given concerns over public safety. Disclosure would help further public understanding of the potential effects of the power station on the environment and increase transparency and accountability in government decisions.

Public interest arguments in favour of maintaining the exception

19. In favour of maintaining the exception DECC explained that discussions with the European Commission on the complaint made regarding the grant of consent to construct the Pembroke Power station are ongoing (and were ongoing at the time of the request). It said that if the current discussions are unsuccessful in resolving the complaint to the satisfaction of the Commission, it is likely that the next stage in the process would be for the case to be considered by the European Courts.
20. Given the Commission's objections to disclosure there is a risk, DECC argues, that the Commission would be more likely to move to Court action without any, or a much more constrained attempt at, bilateral negotiation to find a solution. It does not consider that it is in the public interest for the Commission to either abandon or to constrain the discussion phase of proceedings and refer the issue to court without exploring every possibility of agreeing a non-judicial solution for the UK.
21. DECC also explained that at this stage in the process the Commission is still considering the arguments put forward by the UK. Disclosure of the allegations and preliminary positions could be misinterpreted by the public or media leading to the parties becoming more defensive or adopting entrenched positions which would make it more difficult to compromise or reach agreement.

Balance of the public interest arguments

22. The Commissioner accepts that the public interest would be served by disclosure insofar as this would lead to greater transparency and accountability. The Commissioner has also given due weight to the EIR's presumption in favour of disclosure.
23. However, the Commissioner finds that there are also compelling arguments for maintaining the exemption which must attract significant weight when balancing the public interest. The timing of the request is crucial as the Commission had only recently (in December 2012) sent the UK Government notice of infringement containing its concerns that the granting of consent for the power station had breached EU laws. Discussions between the parties were still ongoing and at an early stage.

Disclosure would have seriously undermined those discussions and, as DECC explained, made it that much harder to reach agreement or compromise.

24. The Commissioner's view is that it is in the public interest for the UK Government and the European Commission to be able to engage in a free and open discussion on this issue without either side prejudicing its position. It would not be in the public interest for the matter to be referred to the Courts without the parties being able to pursue a negotiated solution. Court action is likely to take much longer, be more complicated and more expensive. It could also have potential consequences for the development of future energy generation capacity in the UK. Therefore, the prejudice caused by disclosure would be severe and extensive and so the public interest in maintaining the exception must carry significant weight.
25. For the reasons given above, and in all the circumstances of the case, the Commissioner finds that the public interest in maintaining the regulation 12(5)(a) exception outweighs the public interest in disclosure.

Regulation 12(3) and 13 – Personal information

26. The information in parts 7 and 8 of the request have been withheld under the exception described in regulations 12(3) and 13 of the EIR. This exception provides that where requested information is the personal data of someone other than the applicant, it shall not be disclosed except in accordance with regulation 13.
27. Regulation 13 provides that personal data of someone other than the person making the request shall not be disclosed where either one of two conditions are satisfied. The first condition, which is relevant here, is that disclosure would contravene one of the data protection principles in the Data Protection Act 1998 (DPA) or would contravene section 10 of the DPA. In this case DECC has argued that disclosure would contravene the first data protection principle which requires that data be processed fairly and lawfully.
28. Parts 7 and 8 of the request asked for details of who in the Environment Agency gave permission to proceed with the scheme and who were the scheme assessors. For part 7 of the request DECC has explained that the Secretary of State was the decision maker for the application for consent under section 36 of the Electricity Act 1989 for the Pembroke Power Station. Therefore, it said that strictly speaking, no one in the Environment Agency needed to give "the Department permission to proceed". However, if the request is interpreted more broadly then DECC has said that it is aware of the officer within the Environment

Agency who dealt with correspondence in connection with the application for section 36 consent for the Pembroke Power Station. DECC also holds details of the name and qualifications of the DECC official who carried out an assessment of the scheme.

29. In deciding whether or not this information has been withheld correctly, the first thing to consider is whether the information is personal data. Given that the complainant has requested the names of officials the Commissioner is satisfied that the information is clearly the personal data of the individuals concerned within the Environment Agency and DECC as disclosure of this information allow them to be identified.
30. The next step is to consider whether disclosure would contravene one of the data protection principles. In considering whether disclosure would be unfair, and thus contravene the first principle, the Commissioner takes into account the expectations of the individuals concerned and the possible effects of disclosure. The Commissioner understands that the officials in this case would have a reasonable expectation that their information would not be disclosed in this context. Both officials are junior staff (below Senior Civil Service level) and do not occupy public facing roles. In the Commissioner's view disclosure would also have possible negative consequences in that it could draw them to the attention of those opposed to the Pembroke Power Plant.
31. Despite the reasonable expectations of individuals and the fact that damage or distress may result from disclosure, it may still be fair to provide the information if there is an overriding legitimate interest in disclosure to the public. Under the first principle, the disclosure of the information must be fair to the data subject, but assessing fairness involves balancing their rights and freedoms against the legitimate interest in disclosure to the public.
32. The Information Commissioner has always taken the view that it is not in the public interest for accountability for decisions to be seen as passing from the minister, the elected representative, answerable to Parliament, to the unelected official. Moreover, in this particular case, disclosure would not add any value to, or increase public understanding of, the decision making process regarding Pembroke Power Station. Anyone wishing to understand the reasons behind the decision can do so by reading the Decision Letter which sets out the reasoning and is publicly available.
33. The Commissioner does not consider that there is any real legitimate interest in disclosure except in a general sense that disclosure of any public information promotes transparency and accountability. When balanced against protecting the rights and freedoms of data subjects the

Commissioner finds that it would not be fair to disclose the information falling within the scope of parts 7 and 8 of the request and that to do so would contravene the first data protection principle.

34. The Commissioner finds that the regulation 13 exception is engaged. There is no public interest test to apply.

Right of appeal

35. 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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

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

36. 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.
37. 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

**Pamela Clements
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**