

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

**Decision notice**

**Date:** 17 August 2015

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

**Decision (including any steps ordered)**

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1. The complainant has requested copies of all the documents provided to the European Commission in support of the UK application for a state aid agreement on the Hinkley Point C nuclear project. The Department of Energy and Climate Change (DECC) dealt with the request under the EIR and initially cited regulations 12(4)(d) (material in the course of completion), 12(5)(a) (international relations) and 12(5)(e) (confidentiality of commercial or industrial information) to withhold the requested information. DECC also later introduced regulations 12(4)(b) (manifestly unreasonable requests) and 12(3) and 13 (third party personal data) to support the decision not to comply with the request. The Commissioner has determined that DECC properly applied regulations 12(4)(b) and 12(5)(a) of the EIR. With regard to the public interest test attached to both of the exceptions, the Commissioner has found that in all the circumstances the public interest favours maintaining the exceptions. He does not therefore require DECC to take any steps as a result of this notice.

**Request and response**

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2. On 3 December 2014 the complainant made the following request to DECC:

*Please would you send me under the Freedom of Information Act 2000 full documentation provided to the European Commission in support of the UK application for State Aid agreement on the Hinkley Point C nuclear project, in electronic format if possible,*

*including a report by KPMG on potential distortions of competition; a report by Oxera on market failures, proportionality and potential distortions of completion; a study by Pöyry on potential distortions to the internal market and alternatives to new nuclear; a report by Redpoint on the evolution of the UK electricity sector; & details of the Cost Discovery and Verification process, compiled by KPMG and Leigh Fisher.*

3. DECC responded on 5 January 2015 and confirmed that the request had been considered under the EIR. DECC stated that it held information specified in the request but found that this was excepted from disclosure under regulations 12(4)(d), 12(5)(a) and 12(5)(e). The exceptions are qualified by the public interest test and DECC decided on each application that the public interest favoured withholding the requested information.
4. The complainant wrote to DECC on 13 January 2015 and asked for the decision to refuse the request to be reviewed. This was done and the outcome of the review was provided by DECC to the complainant on 10 February 2015. This upheld DECC's original position for refusing disclosure.

### **Scope of the case**

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5. The complainant contacted the Commissioner on 11 February 2015 to complain about DECC's refusal of his request for information relating to Hinkley Point C.
6. DECC informed the Commissioner during his investigation that it was continuing to rely on the exceptions cited in its refusal notices but considered on reflection that regulations 12(3) and 13 of the EIR would apply to personal data contained within the requested reports. DECC also confirmed that it had revisited the way that it had originally interpreted the request and particularly the reference to 'Full documentation'.
7. DECC concluded that the request captured all of the information captured provided to the European Commission from when the UK began engaging with them in the summer of 2012. This information ran to thousands of pages and DECC considered that the diversion of resources and the work involved in deciding whether the various items of information should be disclosed or were subject to an exception in the EIR would be significant. DECC therefore decided that to carry out this exercise would be manifestly unreasonable for the purposes of regulation 12(4)(b) of the EIR.

## Reasons for decision

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### Background

8. In 2006 an energy review carried out by the Government supported, among other proposals, the development of a new generation of nuclear power stations in order to secure the UK's energy needs. Following formal backing for the new nuclear initiative in 2008, EDF Energy began a consultation with local residents in the same year about building a nuclear plant adjacent to the existing Hinkley Point B power plant in West Somerset.
9. EDF Energy's proposal to build two new nuclear reactors, known collectively as Hinkley Point C, at Hinkley Point was officially nominated by the Government in 2009. The Government accepted that it would be required to establish a price support for a private company committed to developing nuclear energy and there followed discussions with EDF about the plans for the nuclear reactors and the terms of the subsidies. The Government issued a press release in October 2013<sup>1</sup> confirming that it had reached commercial agreement with EDF on the key terms of a proposed investment contract for Hinkley Point C.
10. In December 2013 the European Commission<sup>2</sup> reported that it had opened an investigation into UK measures supporting nuclear energy. The European Commission provided the following statement to explain the need for an investigation.

*The new Hinkley Point C nuclear power station will require debt financing of GBP 17 billion (around €21.6 billion) and will eventually have a capital of about GBP 34 billion (around €43 billion). The construction costs are estimated at GBP 24.5 billion (around €32.1 billion). Start of operation is scheduled for 2023 with an expected operational lifetime of 60 years. The two reactors will produce in total 3.3 GW of electricity – the largest output produced by a single plant in the UK and representing 7% of UK electricity generation. The UK will need about 60 GW of new electricity generation. The UK will need about 60 GW of new electricity generation capacity to come online between 2021 and*

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<sup>1</sup> <https://www.gov.uk/government/news/initial-agreement-reached-on-new-nuclear-power-station-at-hinkley>

<sup>2</sup> [http://europa.eu/rapid/press-release\\_IP-13-1277\\_en.htm](http://europa.eu/rapid/press-release_IP-13-1277_en.htm)

*2030 due to the closure of existing nuclear and coal power plants. The Hinkley Point nuclear power station will use the EPR technology which is not yet operational anywhere in the world. There are only three projects currently under construction in France, Finland and China which will rely on this technology.*

*Public interventions in favour of companies can be considered free of state aid within the meaning of EU rules when they are made on terms that a private operator would have accepted under market conditions (the market economy investor principle – MEIP). If the MEIP is not respected, the public interventions involve state aid within the meaning of EU rules (Article 107 of the Treaty on the Functioning of the European Union – TFEU) because they confer an economic advantage on the beneficiary that its competitors do not have. The Commission then proceed to assess whether such aid can be found compatible with the common EU rules that allow certain categories of aid. Without these common rules, competition within the EU's Single Market would be distorted by a 'subsidy race' between Member States to the benefit of particular companies.<sup>3</sup>*

11. The Government responded to the Commission on 31 January 2014. The submission included the reports referred to in the request, which were prepared by external authors for DECC specifically in connection with the Government's response. The Commission subsequently carried out a public consultation from early March to early April 2014, to which a considerable number of responses (circa 42,000) were received from parties spread across the Member States.
12. DECC has explained that the Government continued to provide further submissions to the DG Competition case team in the Commission following the consultation in order to meet the Commission's remaining concerns. The Commission made on 8 October 2014 a Closing Decision that concluded the UK measures for Hinkley Point were compatible with EU rules. This was published in English on the Commission's website on 20 January 2015. The Commission's press release<sup>4</sup> stated:

*The European Commission has found revised UK plans to subsidise the construction and operation of a new nuclear power plant at Hinkley Point in Somerset to be in line with EU state aid*

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<sup>3</sup> [http://europa.eu/rapid/press-release\\_IP-14-1093\\_en.htm](http://europa.eu/rapid/press-release_IP-14-1093_en.htm)

<sup>4</sup> [http://europa.eu/rapid/press-release\\_IP-14-1093\\_en.htm](http://europa.eu/rapid/press-release_IP-14-1093_en.htm)

*rules. During the in-depth investigation (see IP/13/1277), the UK has agreed to significantly modify the terms of the project financing. As a result, the state aid provided will remain proportionate to the objective pursued, avoiding any undue distortions of competition in the Single Market. The modifications also reduce UK citizens' financial contribution to the project.*

13. According to DECC, this does not mark the end of the matter as discussions between the Government and EDF are continuing. Once the Commission's Closing Decision is published in the Official Journal of the EU, challengers to the decision also have an opportunity to begin proceedings seeking an annulment.
14. Austria recently announced that it will launch an appeal challenging the Commission's decision and Luxembourg has stated that it will be joining Austria's appeal. A group of German and Austrian renewable energy suppliers has also stated that it will be bringing a joint challenge.

#### **FOIA or the EIR?**

15. DECC considers that the requested information is environmental information and therefore should properly be dealt with under the EIR rather than FOIA.
16. During the Commissioner's investigation the complainant forcefully argued that DECC should have used FOIA with regard to the request, although he later confirmed that he no longer wished to pursue this particular point. Notwithstanding the complainant's withdrawal of this aspect of the complaint, the Commissioner considers that for completeness he should explain why he considers that the requested information about Hinkley Point C is environmental information.
17. 'Environmental information' is defined at regulation 2(1) of the EIR. In accordance with the Council Directive 2003/4/EC from which the EIR derives, it is the Commissioner's view that the definition should be interpreted widely; particularly when it is borne in mind that regulation 2(1) states environmental information is "any information [...] on" the factors described at paragraphs (a) – (f). Importantly, it is not necessary for the information itself to have a direct effect on the environment, or to record or reflect such an effect, in order for it to be environmental.
18. Using this test, the Commissioner is satisfied that the Hinkley Point C information relates to a *measure* – namely the provision of energy and energy capability – within the meaning of regulation 2(1)(c) of the EIR. The Commissioner considers that this corresponds with his findings on a separate complaint involving DECC. In the decision notice issued under

FS50466651<sup>5</sup>, the Commissioner explained that a request for correspondence relating to electricity market reforms, which significantly in the context of the present case was prompted by concerns that proposed legislation would favour nuclear power, fell within the definitions of environmental information contained at regulation 2(1)(c) and regulation 2(1)(e).

19. The Commissioner has therefore determined that EIR applies to the request and has therefore gone on to consider the exceptions cited by DECC.

### **Application of the exceptions**

20. The Commissioner has initially examined DECC's reliance on regulation 12(5)(a) of the EIR to withhold the reports referred to in the request before going on to consider the wider application of regulation 12(4)(b).

### **Regulation 12(5)(a) – international relations**

21. DECC has applied regulation 12(5)(a) of the EIR to the five reports cited in the request. 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*

22. DECC has argued that disclosure would adversely affect international relations. It explains, and the Commissioner has previously accepted, that while 'international relations' describes relations between states, it is not only restricted to the UK's *direct* relations with another state. DECC has referred to the Commissioner to his explanation of 'international relations' provided in the guidance on regulation 12(5)(a)<sup>6</sup>. The Commissioner states that 'In the politically complex world, states often pursue their interests through membership of international organisations, such as the EU generally and the European Commission specifically. The exception also protects the UK's relationships with these organisations, which are an important means of defending and promoting the UK's political, economic and other interests.'

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<sup>5</sup> [https://ico.org.uk/media/action-weve-taken/decision-notices/2013/832610/fs\\_50466651.pdf](https://ico.org.uk/media/action-weve-taken/decision-notices/2013/832610/fs_50466651.pdf)

<sup>6</sup> [https://ico.org.uk/media/for-organisations/documents/1633/eir\\_international\\_relations\\_defence\\_national\\_security\\_public\\_safety.pdf](https://ico.org.uk/media/for-organisations/documents/1633/eir_international_relations_defence_national_security_public_safety.pdf)

23. That 'international relations' should not be interpreted restrictively is demonstrated by the Commissioner's determination that the exception applied to the UK government's response to the European Commission's Reasoned Opinion concerning a storm water pumping station (FER0219897, 20 October 2009)<sup>7</sup>. As part of the first phase of infraction proceedings that can lead to a Member State being referred to the European Court of Justice, the Reasoned Opinion acts as a formal determination that a Member State is in breach of its obligations under EU law.
24. The present case similarly involves a request for information submitted by the UK to the European Commission pursuant to legal proceedings. In accordance with the approach adopted on FER0219897, the Commissioner considers that regulation 12(5)(a) does cover the requested information. The exception will only be engaged, however, if a public authority can demonstrate that disclosure would have an adverse effect on international relations.
25. The adverse effect test requires a public authority to meet each of the following conditions:
  - Identify a negative consequence (adverse effect) of the disclosure that is significant (more than trivial) and is relevant to the exception claimed;
  - Show a link between the disclosure and the negative consequence, explaining how one thing would cause the other; and
  - Show that the harm is more likely than not to happen.
26. The Commissioner explains in his guidance that an adverse effect on international relations does not need to be measurable in terms of a tangible or material loss. Nor does it have to be immediate.
27. DECC has contended that the disclosure of the reports would be detrimental to the UK's ability to meet its duty to co-operate with the EC's state aid investigations if the material it provided in confidence was released. In DECC's view, it is vital for the UK to continue to have frank and candid discussions and exchanges of information with the Commission on all of the UK's state aid cases. Disclosure would more than likely risk both prejudicing the UK's reputation with the

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<sup>7</sup> [https://ico.org.uk/media/action-weve-taken/decision-notices/2009/484344/FER\\_0219897.pdf](https://ico.org.uk/media/action-weve-taken/decision-notices/2009/484344/FER_0219897.pdf)

Commission in relation to the confidentiality provided for investigations and the willingness of parties to offer unfettered and detailed submissions. As DECC has explained:

*The documents were produced specifically to respond to the Commission's question and concerns on the case, including where they had misunderstood material facts presented in the UK's Notification and disclosing them would be to reveal the content of our discussions with the Commission, which should not be exposed to public scrutiny in the interests of maintaining good relations.*

28. The Commissioner stated in the decision notice served on FER0219897 that looking at whether disclosure would make relations more difficult serves as a useful standard when trying to determine whether disclosure would have an adverse effect. With regard to the parallel with FER0219897, the Commissioner also considers that the following findings apply in this case:

*35. The Commissioner is aware that in government cases there will often be an element of controversy connected to an ongoing dispute or decision-making process. A critical part of the Commissioner's then, has dwelt on judging what importance should be attached to the government having the opportunity to negotiate freely on behalf of the UK, with the EC. The timing of the request is therefore important. The Commissioner has concluded that to release the requested information at this time would adversely affect the ability of the UK government and the EC to work together effectively.*

29. The Commissioner considers that the risk of the harm arising is more likely than not. He has therefore found that each of the conditions in the adverse effect test are met, which means that the requested information engages 12(5)(a) of the EIR. The exception is qualified by the public interest test and the Commissioner has gone on to consider the weight of the competing arguments for and against disclosure.

### **The public interest test**

30. When determining where the balance of the public interest lies, it is necessary to consider the circumstances at the time the request was made. A public authority can also only take into account the arguments that are directly relevant to the interests that the exception protects.



31. The Commissioner advises in his guide<sup>8</sup> to the EIR that, in addition to the general public interest in transparency and accountability, there is a further public interest in disclosing environmental information because it supports the right of everyone to live in an adequate environment, and ultimately contributes to a better environment. The importance of openness placed on openness in relation to environmental information is evidenced by the inclusion of regulation 12(2), which requires a public authority to apply a presumption in favour of disclosure.

*Public interest arguments in favour of disclosure*

32. There is no doubt that there is a considerable public interest in the proposals relating to Hinkley Point C. The UK's plans with regard to its energy portfolio will determine how successfully future energy needs can be met and the extent to which the UK can rely on sustainable and renewable energy sources. As reported in the Commission's published decision, the UK 'made clear in several parts of their submission that the aim of the measure is to incentivise or unlock investments into low-carbon generation, in particular into new nuclear' (point (i) paragraph 195)<sup>9</sup>.
33. In relation to Hinkley Point C and the possibility of a new generation of power stations, there are wider safety and cost concerns over nuclear energy and its resultant radioactive waste. These concerns have a long history and recent events, such as the accident at the Fukushima Daiichi reactors in March 2011, have served to keep nuclear topical in the UK.
34. The Commissioner recognises that the public interest in transparency is very strong not only because of the environmental implications and the ramifications of what would be the UK's first nuclear plant in 20 years but also because of the financial impact and consequences to UK electricity consumers. The use of nuclear represents a significant shift in energy policy and it is unsurprising that there have been widespread calls for greater scrutiny of the UK's decision to commit to a state subsidy scheme that recent reports have valued at around £25 billion.
35. It is argued that the public have a right to know more about a commitment that was made at a time of austerity and involves a subsidy up to 2058 at the earliest, when the technological landscape will

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<sup>8</sup> <https://ico.org.uk/media/for-organisations/guide-to-the-environmental-information-regulations-2-2.pdf>

<sup>9</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:L:2015:109:FULL&from=EN>

in all likelihood look very different from how it does now. It is clear then that the arguments for disclosure are compelling.

*Public interest arguments in favour of maintaining the exception*

36. DECC has acknowledged there is a significant public interest in disclosure due to the importance of transparency in relation to an extremely wide-reaching and controversial government policy. It considers though there is equally a strong public interest in Member States, such as the UK, being able to exchange information freely with the Commission, in order to ensure that the Commission can fulfil its functions.
37. In weighing up where the balance of the public interest lies, DECC considers that the timing of the request is critical. DECC argues that at the point in question the Commission still required space in which to carry out its investigatory functions effectively, which involves gathering information and carrying out state aid investigations on the basis of candid and detailed submissions. DECC has concluded that the public interest in safeguarding the Commission's decision-making processes outweighs any public interest in the documentation and information in the reports at that time.

*Balance of the public interest*

38. The Commissioner considers that the balance of the public interest is finely balanced.
39. In his guidance on the public interest test<sup>10</sup> the Commissioner observes that as well as the general public interest in transparency, which is always an argument for disclosure, there may also be a legitimate public interest in the subject the information relates to. If a particular policy decision has a widespread or significant impact on the public, for example changes to the education system, there is a public interest in furthering debate on the issue. So, this can represent an additional public interest argument for disclosure.
40. It is fair to say that the UK's approach to nuclear energy, and the cost and safety implications that arise from this, will have a widespread and significant impact on the public. The importance of energy policy to the public means that the additional interest argument is considerable. The Commissioner also considers that it is necessary to return to the

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<sup>10</sup> [https://ico.org.uk/media/for-organisations/documents/1183/the\\_public\\_interest\\_test.pdf](https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf)

Commission's closing decision and the statement published on 8 October 2014 which said that its positive conclusion was based on modifications made by the UK which meant any undue distortions of competition were avoided and also reduced the public's financial exposure to the project. The Commissioner considers that it is in the public interest to know more about the concessions made the UK as part of the investigatory process.

41. The Commissioner must therefore decide whether the harm he accepted would arise through disclosure was of such severity that the countervailing arguments against disclosure tipped the balance in favour of maintaining the exception. In his view, it is.
42. In FER0219897 the Commissioner found critical in finding that the public interest favoured maintaining the exception the 'knowledge that the EC has initiated a legal process to ensure that the UK government properly safeguards the locations in question. To influence the process at this stage may undermine the ability of the EC to expedite an outcome in line with its original aim. Consequently, the Commissioner is not convinced that the release of the information would ensure a more advantageous or speedy resolution to the issue.' In other words, the Commissioner considered that the investigatory space required by the EC should be respected.
43. At the point at which the present request was made (3 December 2014) the Commission had already made its Closing Decision (8 October 2014) on whether the state funding was compatible with EU rules, albeit the decision was not published in English on the Commission's website until after the request was made. It could therefore reasonably be argued that this marked the end of the investigatory process proper, which would weaken to a significant extent DECC's claim that it still required space in which to have free and frank discussions with the Commission.
44. As stated, however, DECC would consider these arguments to be based on a misunderstanding of the status of the Commission's involvement. To repeat, DECC has explained that once the Commission's Closing Decision is published in the Official Journal of the EU, potential challengers have 2 months (plus 24 days) to begin proceedings seeking an annulment. It therefore considers that it would be wrong to consider the investigation had been concluded at the time the request was made. DECC argues that the importance of safeguarding the confidentiality of its contact with the Commission remained because there still existed a real risk that any parties choosing to lodge an appeal against the Commission's decision could use the material provided by the UK to their own advantage when building a challenge. This would be unfair and potentially lead to a poorer deal for the UK public.

45. DECC has also pointed to the future ramifications of disclosure. It considers that to release material relating to its discussions with the Commission at a moment when the central issues remained subject to appeal would affect its good relations with the Commission. DECC further claims that disclosure of the material may also have an adverse effect on the positive relations that the UK had built up with other Member States which actively supported the case.
46. The Commissioner considers there is insufficient evidence to find that disclosure would adversely affect the UK's relations with the Commission or other Member States. He does though accept that the UK's proposals on state funding were at a critical junction when the request was made. He considers that until the implementation of the state aid proposals had been agreed, based on an independent review by the European Commission, the disclosure of the information would be premature.
47. The Commissioner acknowledges the argument which says that any negotiations that ultimately relate to the use of public finances should not go on behind closed doors. He has also reminded himself, however, that the Commission's investigation was initiated to ensure that the UK was abiding with rules designed to benefit all the Member States. In the Commissioner's view, it is advantageous to allow this process to be completed.
48. Consequently, while he recognises that public interest arguments for disclosure are extremely strong, the Commissioner has found that on balance the public interest ultimately favours maintaining the exception.

### **Regulation 12(4)(b) – manifestly unreasonable requests**

49. Regulation 12(4)(b) of the EIR provides that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable.
50. The Commissioner considers that the inclusion of 'manifestly' in regulation 12(4)(b) indicates Parliament's intention that, for information to be withheld under the exception, the information request must meet a more stringent test than simply being 'unreasonable'. 'Manifestly' means that there must be an obvious or tangible quality to the unreasonableness of complying with the request.
51. The exception will typically apply in one of two sets of circumstances; either where a request is vexatious or where a compliance with a request meant a public authority would incur an unreasonable level of costs, or an unreasonable diversion of resources.
52. Unlike FOIA and specifically section 12, the EIR does not contain a provision that exclusively covers the cost and time implications of

compliance. The considerations associated with the application of regulation 12(4)(b) of the EIR are, instead, broader than with section 12 of FOIA. This means that there are other considerations that should be taken into account when deciding whether the exception applies to environmental information. These include the following:

- Under the EIR there is no statutory equivalent to the “appropriate limit” – the cost limit beyond which a public authority is not obliged to comply with a request – described at section 12 of FOIA.
  - The proportionality of the burden that compliance would place on the public authority’s workload, bearing in mind the size of the public authority and its ability to allocate resources to dealing with an information request.
  - The importance of the requested information, and the underlying issue to which the request relates, and the extent to which responding to the request would illuminate that issue.
53. The Commissioner considers that public authorities may be required to accept a greater burden in providing environmental information than other information. Unlike section 12 of FOIA, regulation 12(4)(b) of the EIR is also subject to the public interest test.
54. DECC has provided the Commissioner with copies of the bundle that comprises the requested information, which is voluminous. DECC explains that work in bringing all the relevant documents in the bundle together was conducted in part by its external advisors with DECC’s assistance and the costs for the legal advisors to do this was estimated to be around £5,400 for preparing the file and a further £1,600 for making additional checks. This did not include the time required by DECC to sift through all of the documents to identify which information would need to be redacted under another exception in the EIR. DECC considers this analytical exercise would likely involve several weeks of full time work.
55. DECC has stated its awareness that while the cost factor in terms of staff time may be a contributory factor when deciding whether regulation 12(4)(b) is engaged, it is not the only factor that must be considered. To support its reliance on the exception, DECC has argued the following:

*Dealing with this request will place a strain on resources and disrupt DECC’s continued work in relation to the State aid case including preparations for the expected challenge to the Commission’s decision seeking its annulment. Two staff members*

*directly work on the Hinkley Point C state aid case, including preparing for an expected legal challenge (as referenced above) and they also work on advising on European Commission and Member State engagement for renewable projects who are seeking State aid approval in order to take final investment decisions. Sifting through the large number of identified documents would take resource away from delivering on other priority work for this department.*

*We would also need to ask EdF to consider the information that is covered by DECC's non-disclosure agreement with them in greater detail than they have already, as it is their commercial interests that would be effected by disclosure, as well as it being to the commercial detriment of DECC for the reasons cited [in the responses to the complainant and the Commissioner]. Due to the volume of information, it would require a great deal of effort on EdF's part to consider the information covered by the non-disclosure agreement and provided to the Commission to assist with their investigation.*

56. The Commissioner considers that the costs of considering if information is exempt can be taken into account as relevant arguments under the exception. This is also the case with section 14(1) of FOIA, which covers vexatious requests, but not section 12 because this limits the activities that can be considered as part of the application. Broadly speaking, the Commissioner's approach to the inclusion of redaction costs in regulation 12(4)(b) and section 14 will be the same.
57. On pages 18 and 19 of the Commissioner's guidance on dealing with vexatious requests (section 14)<sup>11</sup>, he explains that section 14(1) may apply where a public authority is able to make a case that the amount of time required to review and prepare the information for disclosure would impose a grossly oppressive burden on the organisation.
58. The Commissioner goes on to advise, however, that there is a high threshold for refusing a request on such grounds. The guidance states that an authority is most likely to have a viable case where:
  - The requester has asked for a substantial volume of information AND

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<sup>11</sup> <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>

- The authority has real concerns about potentially exempt information, which it be able to substantiate to do so by the ICO AND
  - Any potentially exempt information cannot easily be isolated because it is scattered throughout the requested material.
59. The Commissioner considers on any measure that the requested information is substantial. This comprises 126 separate documents, including the reports specified in the request. As evidenced by his findings on the application of regulation 12(5)(a), the Commissioner is also satisfied that DECC has real concerns about exempt material contained within the information. The overarching view of DECC is in fact that the majority of the information should be withheld under one or more of the exceptions cited elsewhere. Although DECC has focused on the reports in respect of the application of these exceptions, the Commissioner considers that it is reasonable to expect there will be other excepted information given that it all forms part of a bundle produced for the Commission.
60. The Commissioner considers that the combination of these factors is sufficient to demonstrate that compliance with the request would be unreasonable. As stated, however, the exception will only be found to be engaged if there is an obvious or tangible quality to the unreasonableness that means it hits the higher mark of being a 'manifestly unreasonable' request and not simply an 'unreasonable' request.
61. On the issue of redaction in the context of section 14, the First-tier Tribunal (Information Rights) in *Salford City Council vs ICO and Tiekey Accounts Ltd* (EA/2012/0047, 30 November 2012)<sup>12</sup> balanced the impact of a request against its purpose and value. The Tribunal considered there was 'likely to be very little new information of any value coming into the domain as a result of the disclosure' and allowed Salford City Council's appeal based on the disproportionately high costs associated with complying with the request. This patently differs from the present case, however. As reiterated throughout this notice, the public interest in Hinkley Point is considerable. In the Commissioner's view, this public interest extends to all the documents captured by the request, and not simply, say, to the reports, because they were all selected by the UK as supporting submissions for the Commission.

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<sup>12</sup><http://www.informationtribunal.gov.uk/DBFiles/Decision/i873/20121030%20Decision%20amended%2031-10-12%20EA20120047.pdf>

62. Against this, however, is the Commissioner's appreciation that significant parts of the requested information are likely to be excepted information under the EIR. This follows from his findings on the application of regulation 12(5)(a) to the reports specified in the request and which form an integral part of the information supplied to the Commission. While it would not be appropriate for the Commissioner to speculate on the exact redaction exercise that would need to be carried out, he observes that the various documents are on a theme and considers it likely that regulation 12(5)(a) is likely to be given a fairly wide application.
63. Insofar as DECC has a reasonable expectation that significant parts of the requested information is excepted information, the Commissioner considers that this strengthens its position that to go through a process of separating out any disclosable information, if there is any, would not only be unreasonable but would be manifestly unreasonable. The Commissioner has therefore decided that regulation 12(4)(b) of the EIR is engaged and has therefore gone on to consider the public interest test.

*Public interest arguments in favour of disclosure*

64. The Commissioner considers that the arguments for disclosure, and the strength of these arguments, should be afforded the same weight as presented in relation to the public interest test considered under regulation 12(5)(a) of the EIR.

*Public interest arguments in favour of maintaining the exception*

65. DECC has argued that, although there is a public interest in the requested information, there is already a considerable amount of information regarding the state aid application. This was enhanced by the Commission's investigation process itself, which would result in the publication of a detailed judgement. DECC has further pointed out that an additional publication of contract terms and analysis by the Government will take place in the event that a deal is concluded.
66. DECC considers that to review each of the documents separately, and all the information within each document, to identify if any information was suitable for disclosure would be disproportionate when viewed in the light of the relatively limited amount of information, if any, that would be suitable for release.



*Balance of the public interest*

67. In the guidance<sup>13</sup> produced by the Commissioner on the exception, he explains that the public interest in maintaining the exception lies in protecting public authorities from exposure to disproportionate burden or to an unjustified level of distress, disruption or irritation in handling information requests. The Commissioner continues by acknowledging that dealing with manifestly unreasonable requests can place a strain on resources and get in the way of public authorities delivering mainstream services or answering other requests.
68. A public authority should, however, expect to bear some costs when complying with a request and this expectation must adjust to the importance of the environmental information to the public. For the sake of the public interest test, the key issue is whether in all the circumstances the cost that must be borne is disproportionate.
69. The Commissioner considers it is vital not to downplay the significance of the requested information. He does, though, accept that to require DECC to divert resources at the time the request was made would be unwarranted bearing in mind the fact that the state aid issue remained live and the relatively limited amount of information that was likely to be disclosed. On this basis, he considers that compliance would meet the test of disproportionality.
70. From a review of the information in question and taking into account his findings on DECC's application of regulation 12(5)(a), the Commissioner has concluded that in all the circumstances the public interest in maintaining the exception outweighs the public interest in disclosure.
71. In the light of his findings on regulation 12(5)(a) and regulation 12(4)(b), the Commissioner has not been required to consider the other exceptions cited by DECC.

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<sup>13</sup> <https://ico.org.uk/media/for-organisations/documents/1615/manifestly-unreasonable-requests.pdf>

## Right of appeal

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72. 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@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

73. 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.
74. 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 .....**

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