

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 7 March 2016

Public Authority: Department for Energy & Climate Change
Address: 3 Whitehall Place
London
SW1A 2AW

Decision (including any steps ordered)

1. The complainant has requested information from the Department for Energy and Climate Change (DECC) relating to the Biomass Suppliers List (BSL). DECC has disclosed the information it holds within the scope of the request.
2. The Commissioner's decision is that on the balance of probabilities, DECC has now disclosed all the relevant information it holds but that disclosure of some of that information was outside the statutory 20 day time limit and accordingly DECC has breached regulation 5(2) EIR. The Commissioner does not require DECC to take any further steps.

Request and response

3. On 19 February 2015, the complainant wrote to DECC and requested information in the following terms:

"I make this FOI request relating to the Biomass Suppliers List (BSL):

1. The specific changes that have been made to the application form since and including December 2014 also identify which organisation is the initiator and date of each change.

2. The specific changes that have been made to the application process since and including December 2014 also identify which organisation is the initiator and date of each change.

3. The specific changes that have been made to the BSL documentation since and including December 2014 also identify which organisation is the initiator and date of each change.

4. The specific changes made to BSL policies and any DECC directives made to BSL since and including December 2014 also identify which organisation is the initiator and date of each change.

5. Any foreseeable and pending changes to BSL application form, process, documentation likely to occur within the next 8 years"

4. On 18 March 2015 DECC responded as follows:

The information you requested is as follows:

"1. The following declarations were introduced into the application form:

- a self-supplier boiler declaration*
- a self-supplier raw materials declaration, and*
- a self-supplier evidence declaration.*

The initiator was Gemserv, in consultation and agreement with DECC .

*These changes were released on the BSL website in January of this year. Also, a change was made to the applications portal to ask producers, traders and Producer traders to state the quantity of waste they will produce in manufacturing their product and the quantity of **waste** they will trade as a fuel. This change was released in February of this year.*

2. As 1 above. The process change meant greater accountability and transparency of evidence requirements for a self-supplier. It also improved the functionality of the self-supplier route, and enabled the applications process to run smoother, thereby improving the applicant's journey.

3. Revisions were made to the self-supplier guidance, which meant the regulatory requirements and information were easier for the applicant to understand. The initiator was Gemserv, and these changes were made in January this year. In addition, guidance about the Land Criteria was updated on the website and in Documentation. The initiator was Gemserv, and these changes were made in December 2014.

4. We are not aware of any significant policy changes over this period

5. The BSL will be re-instating 'boiler location' back into the Self-Supplier application form. A Bulk Upload Portal will be introduced as part of the BSL applications process, for traders who wish to submit multiple applications across various depots simultaneously. The BSL will be

making changes to IT and processes to ensure suppliers comply with the Land Criteria, which will come into force in July this year for suppliers. Guidance material will be designed to enable suppliers to understand what they need to do in order to comply."

5. The complainant requested an internal review on 26 March 2015, setting this out as follows:

(Complainant's comments are recorded in bold for ease of reference)

"1. The following declarations were introduced into the application form:

- a self-supplier boiler declaration, (**? specific wording, date (day/month) introduced and wording that it replaced please**)*
- a self-supplier raw materials declaration, and (**? specific wording, date (day/month) introduced and wording that it replaced please**)*

- a self-supplier evidence declaration. (**? specific wording, date (day/month) introduced and wording that it replaced please**)*

*The initiator was Gemserv, (**document management, tracked changes**) in consultation and agreement with DECC. These changes were released on the BSL website in January of this year.*

*Also, a change was made to the applications portal to ask producers, traders and producertraders to state the quantity of waste they will produce in manufacturing their product and the quantity of **waste** they will trade as a fuel. This change was released in February of this year.*

*(**please kindly define "waste"**) (I include the link Gemserv provided to me re this though this linked documentation has since been much changed, hopefully for the better)*

<http://biomass-suppliers-list.service.gov.uk/>

*2. As 1 above. The process change meant greater accountability and transparency of evidence requirements for a self-supplier. It also improved the functionality of the self-supplier route, and enabled the applications process to run smoother, thereby improving the applicant's journey. (**There are other changes that are not detailed and should be in the response**). (**document management, tracked changes**)*

*3. Revisions were made to the self-supplier guidance, which meant the regulatory requirements and information were easier for the applicant to understand. (**non specific vague? specific wording please before/after, date (day/month) introduced**) The initiator was Gemserv, and these changes were made in January this year. In addition, guidance about the Land Criteria was updated on the website and in documentation. **? specific wording, date (day/month) introduced and wording that it replaced**)*

The initiator was Gemserv, and these changes were made in December 2014.

4. We are not aware of any significant policy changes over this period. (Decc directives element not answered? non significant "changes"?)

5. The BSL will be re-instating 'boiler location' back into the Self-Supplier application form. (copy of all prior forms and copy of revised form please)

A Bulk Upload Portal will be introduced as part of the BSL applications process, for traders who wish to submit multiple applications across various depots simultaneously. The BSL will be making changes to IT and processes to ensure suppliers comply with the Land Criteria, (please kindly provide "land criteria") which will come into force in July this year for suppliers. Guidance material will be designed to enable suppliers to understand what they need to do in order to comply."

6. On 27 March DECC acknowledged the request for internal review but set out that it considered that the review request constituted a fresh request for information and a response would be issued by 27 April 2015. This new request was then given a new reference number.
7. On 31 March 2015 the complainant sought clarification of the situation as he did not agree that DECC could treat the request for a review as a new request for information
8. DECC replied on 1 April 2015 setting out its position regarding the fresh request for information and seeking clarification of one element of this new request.
9. The complainant wrote again to DECC on 2 April 2015 asking that it confirm that it will take the correspondence as a request for a review rather than a fresh request for information.
10. DECC continued to treat the correspondence as a fresh request for information. On 24 April 2015 DECC issued a response to the new request. DECC set out that it was open to the complainant to seek an internal review of this response.

Scope of the case

11. The complainant contacted the Commissioner to complain about the way his request for information had been handled. Upon seeking clarification

of the nature of the complaint, the complainant set out to the Commissioner that he felt that his request for information had not been met. He specifically complained about DECC's response with regard to 'specific changes' which had not been detailed in the response and 'to dates' with answers being generic. He also complained that DECC "*unilaterally and somewhat covertly*" decided to treat his appeal as a fresh request for information.

12. The Commissioner considers the scope of the complaint is to determine if DECC has disclosed all of the information it holds in relation to the request. With regard to the specific complaint about the internal review being treated as a new request, this will be covered under the 'other matters' section of this notice.

Appropriate Legislation

13. The Commissioner must first determine whether the request should be considered under the Freedom of Information Act (FOIA) or the Environmental Information Regulations (EIR).
14. Regulation 2 provides the definition of environmental information for the purposes of the Regulations. It defines environmental information as:

"any information in written, visual, aural, electronic or any other material form on-

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

15. The request is about the BSL. The BSL is a list of Renewable Heat Incentive (RHI) eligible wood fuels, and biomass suppliers may register

their wood fuels on the BSL. The scheme is funded by DECC and administered on its behalf by the appointed contractor, Gemserv Ltd.

16. Information about the BSL falls squarely into Regulation 2(c). The Commissioner therefore accepts that the request was correctly considered by DECC under the EIR.

Reasons for decision

17. Regulation 5 of the EIR requires public authorities to provide environmental information within 20 working days of receipt of a request.
18. In this case the complainant asserted that not all of the information had been disclosed. Specifically the complainant's letter dated 26 March 2015 had referred to 'other changes' which had not been detailed in the response. DECC had requested clarification of this point but asserts that no clarification was received.
19. In scenarios where there is some dispute about the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
20. In other words, in order to determine such complaints, 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).
21. To assist with this determination, the Commissioner approached DECC with a number of questions regarding the process by which it determined that no further information is held.
22. Upon receiving a letter setting out the scope of the Commissioner's investigation, DECC reviewed its handling of the request and amended its position. The Commissioner's letter had set out the nature of the change referred to in the complainant's letter dated 26 March 2015 and DECC stated that this allowed it to respond accordingly. A letter sent to the complainant on 11 January 2016 addressed this specific point and disclosed the requested information.
23. The Commissioner notes that DECC did not receive clarification of the complainant's assertion set out in the letter dated 26 March 2015. He

also notes the complainant's position that were he to have responded on this point it may have endorsed DECC's position that the review request had correctly been dealt with as a new request and therefore he elected not to respond.

24. With regard to the remainder of the request, DECC set out in its submission to the Commissioner that all relevant document locations were searched and Genserv was also consulted. DECC explained that this process meant that a detailed response was provided as a result of the search activity. DECC asserted that the response to the original request set out all the changes that it was able to locate in respect of processes and documentation from December 2014 to the date of processing the request.
25. The records held were in the form of emails and therefore the most appropriate course of action was to search all relevant drives and folders with emails checked rather than using specific search terms to interrogate a database.
26. DECC acknowledged in its submission that it is possible that some relevant emails may have been deleted during the normal course of business prior to the request but has assured the Commissioner that no records relevant to the request had been destroyed or deleted since the request was received.
27. DECC has set out that it approached the requests in good faith and did not wittingly withhold any information falling within the scope of the request. It disclosed all of the information it had located at the time of the request.
28. The Commissioner accepts that on the balance of probabilities, DECC has disclosed all of the information it holds falling within the scope of the request. However, he notes that almost 11 months had passed between the original request and disclosure of part of the information. The Commissioner therefore considers that DECC has breached Regulation 5(2) EIR in disclosing the information outside of the statutory 20 day time scale. However, although that part of the information fell within the scope of the original request, the Commissioner appreciates that DECC did not possess the clarification which would have allowed it to more easily identify this prior to the Commissioner's involvement in the matter.

Other matters

29. With regard to the issue of whether the correspondence, which was treated as a fresh request, was correctly treated as such or whether it should have been handled as an internal review, the Commissioner's position is set out below.
30. The purpose of an internal review is to allow a public authority the opportunity to review its previous decision, including by considering any further representations made by the requester.
31. In this case DECC has submitted that it gave careful consideration as to how best to handle the email of 26 March 2015 requesting an internal review. DECC accepts that its response dated 18 March 2015 provided the background for the correspondence dated 26 March 2015 but asserts that this correspondence represented a significant change from the original request. Rather than asking simply about changes, the correspondence additionally sought details of specific text prior to, and after each change. It also sought new information regarding the definition of 'waste' and the Land Criteria.
32. Although DECC agrees that the general subject matter was the same, it asserts that the correspondence dated 26 March 2015 demonstrated that the nature of the new information requested was sufficiently different and therefore DECC considered it appropriate to treat the request as a fresh request.
33. The Commissioner's position is that the substance of the letter dated 26 March 2015 has been fully considered by DECC and that whether it was dealt with as an internal review or a fresh request, DECC's consideration and conclusion would have been the same.
34. Had DECC handled the correspondence as an internal review, the Commissioner would have accepted this in terms of handling the complaint but similarly he accepts DECC's rationale for treating the request as a fresh request.
35. The Commissioner does not consider that the complainant has been disadvantaged by the handling of the correspondence as a fresh request for information. The response was issued on 24 April 2015 and therefore within the statutory time frame for issuing a response. Had DECC treated the correspondence as an internal review, the response time would still have been in accordance with the Commissioner's guidance. DECC's response made the complainant aware of the internal review process, the complainant did not seek a review and neither the

Commissioner nor DECC insisted upon this process being followed in these specific circumstances.

36. The Commissioner accepts that DECC has not unilaterally disposed of the initial request but that the subsequent correspondence about that request was sufficiently different to constitute a fresh request for information.

Right of appeal

37. 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 123 4504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

38. 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.
39. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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