

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

Decision notice

Date: 10 October 2016

Public Authority: The Governing Body of the University of East Anglia

Address: Norwich Research park
Norwich
NR4 7TJ

Decision (including any steps ordered)

1. The complainant has requested information relating to a biomass energy scheme at the University of East Anglia ('the University'). The University confirmed that it held a relevant report caught by the scope of the request and disclosed this subject to some redactions made under the 'internal communications' (regulation 12(4)(e)) and 'confidentiality of commercial or industrial information' (regulation 12(5)(e)) exceptions to disclosure in the EIR. The Commissioner has found that neither regulation 12(4)(e) nor regulation 12(5)(e) are engaged. She therefore requires the University to disclose the report with the exception of any personal data, which the complainant has confirmed can be redacted.
2. The public authority must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

3. The complainant initially contacted the University on 22 September 2015 and submitted the information requests set out below:

1. All internal communications regarding the biomass energy centre at UEA, including technical reports on performance, efficiency, carbon emissions, pollutant emissions and costs

2. All communications between UEA and the consultant(s) advising on the biomass energy centre

3. All communications between UEA and the contractors who supplied/installed the biomass energy centre

4. All internal communications relating to the biomass energy centre at Generation Park

4. The University responded on 27 October 2015 and explained that the EIR had been found to apply to the requests. The University further advised that the information specified was considered to be excepted from disclosure under regulation 12(4)(b) (manifestly unreasonable requests), 12(4)(e) (internal communications), regulation 13 (third party personal data) and regulation 12(5)(e) (confidentiality of commercial or industrial information).

5. In light of this refusal, the complainant decided to make on 2 November 2015 a revised request to the University. This asked for information in the following terms:

All relevant communications and reports that informed the decision to stop using biomass as a fuel source for power generation at the UEA energy centre.

6. The complainant clarified that she was not seeking to 'elicit personal data beyond that which might be incidentally disclosed as a consequence of supplying the requested data, e.g. The names of report or email authors. I am quite happy for you to delete such personal data before supplying this data.'

7. The University replied on 23 December 2015 and stated that it was still unable to fulfil the revised request, saying that the requested information was subject to regulation 12(4)(e) (internal communications) and regulation 12(5)(e) (confidentiality of commercial or industrial information) of the EIR. This prompted the complainant to ask the University on 9 January 2016 to reconsider its response, arguing that there was a strong public interest in accountability.

8. Accordingly, the University carried out an internal review, the outcome of which was provided to the complainant on 14 March 2016. The reviewer began by stating that there had not been a decision to 'stop using biomass as a fuel source for power generation' and therefore a literal interpretation of the request would have resulted in an

information not-held response. However, the reviewer confirmed that the request was instead interpreted more flexibly to mean 'all relevant communications and reports that informed any decisions which resulted in biomass not being used as a fuel source in the existing system for the time being.' Using this interpretation, the reviewer found that one document fell within scope. It was explained that this report was produced for consideration by senior management of the University in relation to the commissioning of the gasifier in the biomass energy centre.

9. The reviewer stated that the report was covered by regulation 12(4)(e) (internal communications) and regulation 12(5)(e) (confidentiality of commercial or industrial information) of the EIR. However, in an effort to determine whether any information could be released, the University had contacted the supplier of the biomass fuel system. On the basis of this consultation, the University decided to release information that was considered to be outside of regulation 12(5)(e). In making this disclosure, the reviewer advised that the University had decided not to exercise the application of regulation 12(4)(e) in respect of the same information.

Scope of the case

10. The complainant contacted the Commissioner to complain about the University's decision to withhold elements of the report into the commissioning of the gasifier in the biomass energy centre.
11. The University has informed the Commissioner that it considers regulation 12(4)(e) and regulation 12(5)(e) of the EIR were relied on correctly with regard to the redactions made in the report. The Commissioner's analysis of the application of these exceptions follows in the body of this notice.

Reasons for decision

Background

12. In 2007 it was announced that the University was set to commission its own power station. This would convert wood chips into electricity and was meant to cut the University's carbon emissions by one-third. The capital costs of the power station were reported to be £10.5 million, and the University received a £1 million government grant.

13. In 2016 it was reported in the media that the power station had not worked properly ever since it was built. A University spokesman quoted in the Guardian¹ said that the unit had provided energy, but using gas rather than woodchip.

It has not been possible to commission the woodchip/gasification component of UEA's new CHP [combined heat and power] unit. However, the unit has been supplying both heat and power since 2008, using natural gas, and the university continues to make a return on its investment.

14. The University has provided parts of a report that reviewed the decision-making relating to the commissioning and operation of the power station to the complainant. It has also confirmed to the Commissioner that it is prepared to make an additional disclosure of some further items in the report. The Commissioner has therefore considered whether the remaining withheld information should be released at the same time.

The withheld information

15. The University considers that the disputed information in the report is subject to both regulation 12(4)(e) and regulation 12(5)(e) of the EIR. The Commissioner's analysis begins by looking at the application of regulation 12 (5)(e).

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

16. Regulation 12(5)(e) of the EIR allows 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. If the exception to disclosure is found to be engaged, the public authority is then required to consider the balance of the public interest in disclosure.
17. With regard to the legitimate economic interests that are protected by the exception, the Commissioner's guidance² says that legitimate

¹ <https://www.theguardian.com/environment/2016/mar/03/uea-abandons-ambitious-biomass-scheme>

² https://ico.org.uk/media/for-organisations/documents/1624/eir_confidentiality_of_commercial_or_industrial_information.pdf

economic interests could relate to retaining or improving market position, ensuring that competitors do not gain access to commercially valuable information, protecting a commercial bargaining position in the context of existing or future negotiations, avoiding commercially significant reputational damage, or avoiding disclosure which would otherwise result in a loss of revenue or income.

18. It is understood that the construction of the exemption can be read as imposing a four-stage test. All four of the following conditions must be satisfied for the exception to be engaged.

(i) The information is commercial or industrial in nature.

(ii) Confidentiality is provided by law. This will include confidentiality imposed on any person by the common law of confidence, contractual obligation, or statute.

(iii) The confidentiality is protecting a legitimate economic interest

(iv) The confidentiality would be adversely affected by disclosure. Although this is a necessary condition, previously Information Tribunal decisions have accepted that the disclosure of truly confidential information into the public domain would invariably harm the confidential nature of that information.

19. The Commissioner addresses in turn each of the tests built into the exception.

- *(i) Is the information commercial or industrial in nature?*

20. The University has argued that the requested information relates to an industrial activity, namely the generation of energy from sustainable sources. It also concerns the commercial activities of both a third party and the University, insofar as it concerns the parties' respective abilities to sell power. The Commissioner is satisfied that the various items of withheld information are either 'commercial' or 'industrial' in nature.

- *(ii) Is confidentially provided by law?*

21. The Commissioner's guidance explains that confidentiality in this context will include confidentiality imposed on any person by the common law of confidence, contractual obligation, or statute. The University has argued in this case that the common law of confidence would apply and also, where the information specifically relates to a third party, a contractual obligation of confidence. The guidance further clarifies that in contrast to section 41 of FOIA, there is no need for public authorities to have obtained the information from another – the exception can cover

information obtained from a third party, or information jointly created or agreed with a third party, or information created by the public authority itself.

22. With regard to the common law of confidence, two principal questions will arise when assessing whether it applies.
23. Firstly, does the information have the necessary quality of confidence? This will involve confirming that the information is not trivial and is not in the public domain. The University has stated that both of these points are fulfilled with respect to the contents of the report.
24. Secondly, was the information shared in circumstances importing an obligation of confidence? This can be explicit or implied, and may depend on the nature of the information itself and the relationship between the parties. A test used by the Commissioner is whether a reasonable person would have considered that the information had been provided to them in confidence.
25. The University considers that the information was produced and shared in circumstances that created an implicit obligation of confidence, although the University has not specified why it believes this to be the case. Reflecting the purpose for which the report was produced - which involved a review of a commissioning decision – the Commissioner is however satisfied that a reasonable person would consider that an obligation of confidence was attached to the report. This is further supported by the report itself, which refers to the sensitive and confidential nature of the review.
26. As stated, it would appear that the University also considers that parts of the report would be subject to a contractual obligation of confidence, although it has not provided any evidence to support this position. This has not though affected the Commissioner's finding on this stage of the test, which the Commissioner has determined is met by virtue of the application of the common law of confidence.
 - *(iii) and (iv) Is the confidentiality protecting a legitimate economic interest?*
27. To satisfy this stage of the test, disclosure of the disputed information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. It is not enough that disclosure *might* cause some harm. Rather, a public authority is required to demonstrate that the risk of some harm occurring is *more probable than not*.
28. The University has argued that the disclosure of the different items of withheld information contained in the report would adversely affect

either its own legitimate economic interests or otherwise those of the supplier.

29. Where the interests of a third party are at stake, it will not be sufficient for a public authority to speculate on the nature of the harm that would arise through disclosure. Instead, the public authority must be satisfied that the arguments put forward genuinely reflect the concerns of the third party. In most cases, this will mean that a public authority is required to consult with the third party about the request.
30. The University considers that disclosure of information relating directly to the performance of the supplier poses a very real reputational risk, which would have a resultant effect on its commercial activities. In this context, the University considers important the fact that the supplier has not had the opportunity to comment upon the report or to correct any inaccuracies – a concern borne out by the supplier in an email sent to the University upon being made aware of the request.
31. The supplier does not, however, explain the specific way in which an adverse effect could arise and the Commissioner considers that the general strength of this argument is anyway undermined by the supplier's claim that it did not have the time or resources to provide additional information on the nature of the harm. In the Commissioner's view, the supplier would invariably have engaged with the University to a greater extent if the severity of the prejudice was as described by the University. In any event, the Commissioner also observes that the supplier's comments state the technology referred to in the report has moved on after a number of years of continual research and development. In her view, the commercial harm that is argued could occur is far less likely than might have been the case had the same technology still been in use. For these reasons, the Commissioner has rejected the University's claim that the release of the withheld information would adversely affect the legitimate economic interests of the supplier.
32. The Commissioner has next considered the University's arguments relating to the adverse effect on its own legitimate interests. The thrust of these are reproduced below:

There is a competitive market amongst higher education institutions for funding by and cooperation with private sector organisations for funding of non-research projects and initiatives in line with strategic objectives. Securing such funding and cooperation is essential to the development of new initiatives and the infrastructure of any institution but also to the enhancement of their reputation as an innovative organisation. The willingness of the private sector in participating in joint ventures with any

higher education institution directly impacts upon the economic interests of that institution as it provides an alternative source of funding and expertise to be deployed by the institution.

Information such as contained with the report is clearly considered and treated as confidential by the UEA. Should other firms, regardless of the position of [name of supplier] in this specific matter, be persuaded that technical details and assessments of propriety technology is subject to release to the public, then it is not unreasonable to assume that they will be much less willing to participate in joint ventures.

In the present case, we have the added factor that the assessment [...] is clearly disputed by [name of supplier] so that not only are basic technical details exposed to public scrutiny but also what the firm contends is misleading and damaging information regarding its work and projects. This would only add to the reluctance of future private sector organisations to participate with UEA in joint ventures where innovative technology is involved.

33. The Commissioner accepts that a public authority should not be prevented from exploiting commercial opportunities in order to improve its financial standing. The Commissioner however must be satisfied that the disclosure of the requested information would have this effect. In her view, this link has not been made out.
34. Firstly, the Commissioner considers that a private sector organisation entering into a contractual arrangement with a public authority would do so knowing that the authority was subject to FOIA and the EIR and that there would be a greater degree of public scrutiny than might be the case in the private sphere. Secondly, and leading on from the first point, a decision to release information in one situation is not precedent-setting and would not therefore compel the public authority to disclose information pertaining to future arrangements. Thirdly, the Commissioner considers that the University's arguments rest on the principle that the disclosure would be generally unhelpful rather than connecting the adverse effect to the information that is actually under consideration.
35. The Commissioner has therefore found that this stage of the engagement test for regulation 12(5)(e) is not satisfied, which means the exception does not apply. She has therefore gone on to consider the University's reliance on regulation 12(4)(e) of the EIR.

Regulation 12(4)(e) – internal communications

36. The University has informed the complainant that the report in its entirety engaged the exception to disclosure set out at regulation 12(4)(e) of the EIR. However, it nevertheless decided that parts of the report could be disclosed. The focus of this decision notice is therefore on the remainder of the report which the University has continued to withhold under the exception.
37. Regulation 12(4)(e) of the EIR states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of 'internal communications'. If the exception is found to be engaged on the basis that the requested information falls within the definition of an internal communication, a public authority will be required to assess the public interest test.
38. There is no definition of what is meant by 'internal' contained in the EIR. In the absence of one, therefore, a judgment on what is an internal communication must be made by considering the relationship between a sender and recipient, the particular circumstances of the case and the nature of the information in question. Typically, however, communications sent between officials within a single organisation are the clearest example of records that will be covered by the exception.
39. In this case the report was produced by an independent panel of experts assembled by a limited company, Adapt Commercial. This immediately raises a question about whether the exception could be used, as the production of the report would not obviously satisfy the essential requirement that it stayed within one public authority. The University has though maintained that regulation 12(4)(e) would apply. It explains that Adapt Commercial is a wholly owned subsidiary of the University and has been regarded as an integral part of the University for governance, financial and compliance purposes since its inception.
40. The Commissioner however disagrees with the University's analysis that its relationship with Adapt Commercial means that the report could be considered an internal communication. Most importantly, the Commissioner considers that wholly owned companies are separate legal entities and separate public authorities under the EIR. The effect of this is that communications between a public authority and a wholly owned company are not accepted as 'internal' communications.
41. A further significant consideration is the fact that the report was written by an independent panel of experts. In general, communications

between a public authority and an external adviser will not constitute internal communications. The Commissioner's guidance³ explains that there may be some exceptions to this rule – citing as an example the circumstances considered by the Information Tribunal in *DfT v Information Commissioner* (EA/2008/0052, 5 May 2009)⁴ – but there is no evidence to suggest that an exception of this nature applies here.

42. Although this has not been specifically raised by the University, the Commissioner considers it is possible that included within the report are references to information contained within earlier internal documents. For completeness, it is important to note that once an internal communication is shared with someone outside the authority, in this case the independent panel and Adapt Commercial, it will cease to be internal.
43. For the reasons set out above, the Commissioner has concluded that regulation 12(4)(e) of the EIR is not engaged.

³ https://ico.org.uk/media/for-organisations/documents/1634/eir_internal_communications.pdf

⁴ [http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i307/Sec%20of%20State%20for%20Transport%20v%20IC%20\(EA-2008-0052\)%20-%20Decision%2005-05-09.pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i307/Sec%20of%20State%20for%20Transport%20v%20IC%20(EA-2008-0052)%20-%20Decision%2005-05-09.pdf)

Right of appeal

44. 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

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

45. 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.
46. 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