

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 21 November 2017

Public Authority: Department for Business, Energy & Industrial Strategy

Address: 1 Victoria Street
London
SW1H 0ET

Decision (including any steps ordered)

1. The complainant has requested a full copy of a report obtained by the former Department of Energy and Climate Change (which became part of the newly formed Department for Business, Energy & Industrial Strategy in July 2016) from Evercore Partners International LLP on investment and financing considerations for new nuclear investment in Great Britain. The Department withheld the report in its entirety under regulations 12(5)(e)(confidentiality of commercial or industrial information) and 12(5)(f)(interests of the person who provided the information) of the Environmental Information Regulations 2004 (EIR). The Commissioner's decision is that BEIS correctly withheld the report under regulation 12(5)(e) and that at the time of the request the public interest balance favoured maintaining the exception. She does not therefore require BEIS to take any steps as a result of this notice.

Background

2. In November 2015, Evercore Partners International LLP (Evercore) was engaged by DECC (now part of BEIS) to prepare a report on investment and financing considerations for new nuclear investment in Great Britain. The report was finalised in March 2016. A month prior to the commissioning of the report, China General Nuclear Power Group (CGN) agreed to invest £6 billion in the project to build a new nuclear power station at Hinkley Point C (HPC) in Somerset. On 15 September 2016, four days prior to the complainant's request, the Government announced that it had approved the deal for HPC after a two month

pause following the final investment decision of the mainly state owned French energy giant EDF in July 2016. HPC will be the first new nuclear power station built in the UK since 1995 and BEIS expect it to generate around 7% of Great Britain's anticipated electricity requirement from the mid-2020s.

Request and response

3. On 19 September 2016, the complainant wrote to Department for Business, Energy & Industrial Strategy (BEIS) and requested information in the following terms:

'Please would you send me under the Freedom of Information Act 2000 a full copy of the report commissioned by DECC from Evercore on different ways to fund new nuclear programmes'.

4. BEIS responded on 19 October 2016. The Department confirmed that they held the requested information and that they had considered the request under the EIR as the information requested fell within the definition of 'environmental information'. The Department advised that the report was exempt from disclosure under regulation 12(5)(e)(confidentiality of commercial or industrial information) and regulation 12(5)(f)(interests of the person who provided the information). In considering the public interest test the Department confirmed that they had applied the presumption in favour of disclosure as required by regulation 12(2) of the EIR.
5. Following an internal review BEIS wrote to the complainant on 18 November 2016. The review upheld the original decision and the two exceptions applied.

Scope of the case

6. The complainant contacted the Commissioner on 21 November 2016 to complain about the way his request for information had been handled as he considered that the balance of the public interest favoured disclosure of the report.
7. The Commissioner has had sight of the withheld information, which comprises 166 pages in total (72 page report plus appendices). In the report Evercore state that the report was prepared *'using materials and information that were made available to Evercore by the recipient and/or information from publicly available sources'*. The Commissioner would note therefore that not all the information contained in the report is commercially sensitive and not otherwise available in the public

domain. However, the Commissioner considers that as there is no practical or proportionate way of identifying which information in the report originates from or reflects publicly available information, a redacted approach to disclosure is not appropriate in this case. Such an approach would be of very limited public interest value, since it would simply result in a heavily redacted copy of the report. In any event, the Commissioner notes that the complainant has requested a 'full' copy of the report. The Commissioner notes that the Sunday Times reported on the withheld information on 18 September 2016 (*'Ministers have commissioned a secret report on how to pay for a string of new nuclear power plants that is understood to suggest taxpayers could take direct stakes'*).

8. The scope of the Commissioner's investigation has been to determine whether BEIS correctly withheld the requested information under the exceptions applied.

Reasons for decision

9. Regulation 12(5)(e) provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect:

'The confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest'.

10. In order for the exception to be engaged, four criteria must be met:
 - The information is commercial or industrial in nature.
 - Confidentiality is provided by law.
 - The confidentiality is protecting a legitimate economic interest.
 - The confidentiality would be adversely affected by disclosure.

BEIS' position

11. In their original response to the request BEIS advised that the confidentiality of the requested information is provided for by the common law as the information (the report) is not publicly available, relates to commercial arrangements, and was provided to the Department on the clear expectation that the information would not be disclosed externally. BEIS advised that details contained within the report are also the subject of non-disclosure agreements between the Department and third parties, and the release of the requested information would damage and adversely affect the commercial position

of the third parties, as release would reveal market sensitive information.

12. In the internal review BEIS stated that there had been no consent to the report's disclosure and they were protecting the interests of those who provided information freely and without consent to its publication. The Department stated that the release of information provided to BEIS in confidence may harm the economic interests of the parties that provided the information.
13. In detailed submissions to the Commissioner the Department, referring to the financial advice provided to the Government in the report, advised that:

'This advice reflects years of accumulated knowledge of the Evercore team involved and its release into the public domain would prejudice Evercore's commercial and economic interests by providing a document encapsulating and reflecting that knowledge to other parties. This information could be used by Evercore's competitors at a time when both they and Evercore may be assessing whether to compete for any future Government procurement processes in relation to new nuclear investment in the UK'.

14. The Department further explained that:

'The report also contains detailed information on Evercore's intellectual property in relation to financial modelling and financing of infrastructure and power generation assets generally and new nuclear generation specifically under various scenarios as well as input assumptions, key valuation outputs and cash flows. Release of this information into the public domain would allow a third party to reconstruct a nuclear asset model that generated very similar outputs and has similar functionality to the Evercore financial model which has been developed by the Evercore team. We therefore believe that disclosure of the report would prejudice the commercial interests of Evercore'.

15. In addition to the prejudicial effect which disclosure of the information would have on the commercial interests of Evercore, the Department advised the Commissioner that the report *'also provides details of engagement with two Japanese led developers (NuGen and Horizon) and highlights challenges facing each of them in developing a new nuclear project'*. The Commissioner notes that it is publicly known that Horizon Ltd and NuGen are seeking nuclear site licences in 2018 for Wylfa Newydd (Anglesey, North Wales) and Moorside (West Cumbria)¹ but the

¹ Noted in National Audit Office report 'Nuclear Power in the UK', dated 13 July 2016.

details of their discussions and engagement with the Department are not in the public domain. The Department advised that disclosure of the report would reveal details of meetings between the developers, the Government and Evercore and confidential submissions made by the developers to the Department.

16. BEIS stated that the report *'also includes confidential information on the investment to date by developers, their future capital commitments and the status of their discussions with potential partners and financiers'*. The Department contended that disclosure of such information *'could have an impact on the share prices of the entities involved and be damaging to their commercial interests'*.
17. The Department advised the Commissioner that the report also provides detailed analysis of the potential options open to the Government and would reveal information that could be used by a developer in any future negotiations. BEIS stated that, *'disclosure into the public domain would prejudice the Government's ability to commercially negotiate with a developer. Even the knowledge that the Government could be considering certain options (which may not have previously been discussed with the developers) could significantly undermine its negotiation position'*. The Department explained that:

'The quantitative analysis in the report sets out assumptions in relation to the expected return on capital requirements of the Government and the return requirements are bespoke to the project. These have been informed by discussions between Evercore and DECC and public disclosure of these figures could prejudice the Government's negotiating position by allowing counterparties to accurately assess proposals not only from their own perspective but that of the Government's to'.
18. Having had sight of the withheld information in this matter, and the detailed submissions provided by BEIS, the Commissioner is satisfied that the Evercore report is exempt from disclosure on the basis of regulation 12(5)(e). The information contained in the report is clearly commercial and industrial in nature as it concerns the investment and financing considerations for new nuclear investment in Great Britain. The information was clearly provided to the Department in the expectation that it would be treated confidentially. The Commissioner notes that the report is marked *'Strictly Private & Confidential'*.
19. The Commissioner notes that the report had been finalised and provided to the Department only six months prior to the complainant's request. The report was intended to provide financial and investment input to the Department's further consideration of its options for new nuclear power development in light of the HPC experience and the widely publicised problems and issues surrounding that particular project. That is to say, the report was intended to assist the Department with their

consideration of options for nuclear power development going forward *after* HPC, which had itself only received final Government approval four days before the complainant's request. Therefore, at the time of the request much of the information contained in the report was commercially sensitive and the Commissioner is satisfied that disclosure of the full report would have harmed the commercial interests of Evercore, the developers and (most importantly of all from the public interest perspective examined below), the Government, for the reasons provided in the Department's detailed submissions to the Commissioner.

Public interest test

20. In keeping with all the EIR exceptions, regulation 12(5)(e) is qualified by a public interest test and therefore the Commissioner must consider whether the public interest in maintaining the exception outweighs the public interest in disclosing the requested information.
21. When determining where the balance of the public interest lies, the Commissioner must 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.
22. In her guide to the EIR², the Commissioner advises 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 in relation to environmental information is evidenced by regulation 12(2), which requires a public authority to apply a presumption in favour of disclosure.

Public interest arguments in favour of disclosure

23. In submissions to the Commissioner, the complainant stated that he did not consider that the private commercial interests of companies contracted by Government departments should outweigh the public interest '*of British citizens to know how major planning decisions are being made on secret financial advice to ministers*'.
24. During the Commissioner's investigation the complainant drew the Commissioner's attention to a report published by the National Audit

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

Office (NAO) on 12 June 2017³ (9 months after his request). The NAO report assessed the government's case for its deal to support the HPC nuclear power station, its approach to reaching the deal, and its arrangements for managing remaining risks to electricity consumers and taxpayers. The complainant contended that the report provided '*a very unflattering commentary on the way public money has been used and our national elected politicians and peers have been persistently misled by commission and omission by Government over the true costs to taxpayers of this nuclear plant*'.

25. The complainant noted that the NAO report had stated (at page 13) that the Government '*must now ensure it has the right oversight arrangements in place to manage the contract in a way that maximises HPC's value for consumers and taxpayers*' and he contended that the disclosure of the Evercore report '*would go some way to achieve this*'.
26. In their response to the request BEIS recognised that there is a public interest '*in disclosing materials received from external third parties for transparency and that there is a further public interest in the development of critical infrastructure*'. In submissions to the Commissioner the Department accepted that '*there may be some public interest in disclosure of details regarding companies involved in the future development of new nuclear programmes*'.

Public interest arguments in favour of maintaining the exception

27. In their response to the request BEIS contended that, '*it is vital to policymaking for there to be a voluntary flow of information from third parties to public authorities whenever possible and releasing information which could adversely affect the interests of the party who provided the information would risk discouraging that flow of information in future*'.
28. In the subsequent internal review the Department stated that the disclosure of the information provided confidentially and not in the public domain would adversely affect BEIS' ability to exercise its decision making powers in matters concerning any potential UK new nuclear builds and would make it less likely that companies would provide the Department with commercially sensitive information in the future.
29. The Department did not expand further on their public interest arguments in submissions to the Commissioner.

Balance of the public interest

³ 'Hinkley Point C'

30. The Commissioner recognises that there is clearly a strong and national public interest in the Government's decision to develop a new generation of nuclear power stations to meet the UK's energy needs. This public interest was addressed in some detail by the Commissioner in FER0567823 (January 2016), which concerned information relating to HPC. That project, described by the Financial Times as the '*biggest and most controversial infrastructure project in Europe*' is one of the biggest subsidy arrangements entered into by the Government on behalf of UK taxpayers, with a guaranteed strike price of £92.50 per megawatt hour of electricity being roughly twice the current cost.
31. As the complainant correctly notes, the Government's HPC deal attracted significant criticism from the NAO in their report of 12 June 2017. The NAO found that the Department did not sufficiently consider the costs and risks of its deal for consumers. The Department estimated that annual household electricity bills would be on average more than £20 higher between now and 2030 if HPC were delayed and replaced with low-carbon alternatives. However, the NAO noted that, '*this analysis does not take account of the fact that consumers are locked into paying for HPC, even if other technologies have become better value, long after 2030. The Department expects, for example, that offshore wind costs will be lower than the CfD⁴ strike price less than halfway through its 35-year term*'.
32. The NAO found that the Department's overall case for HPC had weakened since it agreed key commercial terms on the deal in 2013, and that, '*the expected future costs of more low-carbon alternatives to nuclear power have fallen more than expected*'. The NAO noted that in September 2016, HM Treasury highlighted how the value-for-money case for HPC had weakened, '*but it concluded that the legal, reputational, investor and diplomatic ramifications of not proceeding meant that it was, on balance, better to continue with the deal*'.
33. The NAO's conclusion on the value for money of HPC was that:
- 'It is a widely shared view that the UK needs some new nuclear power to ensure the lowest-cost route to decarbonisation. But the Department's deal for HPC has locked consumers into a risky and expensive project with uncertain strategic and economic benefits. While committing the developer to bearing the construction risks means taxpayers and consumers are protected from costs overrunning, consumers could end up paying more for HPC's electricity than if the government had shared these risks'*.

⁴ Contract for Difference

34. The NAO noted that the economics of nuclear projects are quite different to renewables such as wind and solar power, in that, *'they have higher upfront outlays, take longer until revenues are generated, and have unique requirements for funding decommissioning'*. The NAO noted that Flamanville, in France, the closest comparator to HPC, has been subject to ongoing delays and costs are escalating. *'Planned to start service in 2012, it is now running at least six years late and is more than three times over its original budget of 3.3 billion euros'*.
35. As the NAO report makes clear, there are serious questions and concerns surrounding the high profile and controversial HPC deal. However, the Commissioner notes that the withheld information in this case, the Evercore report, does not specifically focus upon or deal with the HPC contract. Rather, it provides advice to the Government on options for new nuclear power development in the light of HPC and the particular issues and problems which that project presented. Therefore, it is not the case, as contended by the complainant, that the report would *'go some way'* to providing transparency and accountability of Government oversight arrangements in respect of HPC.
36. The Commissioner would of course recognise that there is a strong and specific public interest in transparency and accountability of the HPC deal, but that public interest has been appropriately addressed by the findings of the NAO report.
37. That said, the information contained in the Evercore report clearly carries significant and legitimate public interest. The Department has acknowledged that there is public interest in the development of critical infrastructure and the disclosure of details regarding companies involved in the future development of new nuclear programmes.
38. As the Commissioner noted in FER0567823, 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. The move towards, and promotion of, nuclear by Government represents a significant shift in UK energy policy and carries considerable controversy. There are long standing and serious safety concerns with regard to nuclear energy (the Fukushima incident in 2011 being the most notable in recent years) and the huge cost (the Commissioner notes that as of March 2015 the estimated cost of cleaning up the Sellafield nuclear reprocessing site in West Cumbria stands at £53bn) of dealing with the resultant nuclear waste, which, as the NAO report notes, *'remains radioactive for millennia and it is not yet possible to guarantee complete decontamination'*.
39. Clearly, where Government decisions are taken (as with HPC) about such massive nuclear energy and infrastructure projects which will

impact and affect the UK's ability to meet increasing electricity demands and the cost to the taxpayer and consumers of the same (through bills and decommissioning costs), there is a strong and compelling public interest in transparency and accountability. At a time of austerity, there is a strong public interest into the costs of funding new nuclear programmes and whether such costs are justified or proportionate to the contribution which nuclear can make to the UK's energy portfolio and the longevity of nuclear power stations (the technology of which can often be outdated or obsolete by the time they are constructed and come online).

40. However, the Commissioner notes that the withheld information in this case does not concern or address such decisions already taken or policies implemented, but provides detailed analysis of the potential nuclear financing and investment *options* open to Government. The report was provided to the Department only six months prior to the complainant's request and was clearly still being considered by Government at that time. Since the report's contents concern options available to Government in this area rather than decisions already taken or further contracts agreed, the Commissioner considers that the information was clearly commercially sensitive at the time of the request for the reasons explained by the Department. Disclosure of the report would reveal confidential information on the investment by developers and the status of their discussions with potential partners and financiers. Disclosure would also prejudice the Government's ability to commercially negotiate with a developer and secure the best value-for-money deal for taxpayers and consumers.
41. The complainant has contended that the private commercial interests of companies contracted by Government departments should not outweigh the public interest of citizens knowing how major planning decisions are being made on '*secret financial advice to ministers*'. However, the Commissioner would note that the reality is that the commercial interests of companies or developers in such matters are not as divisible from the public interest benefits as the complainant would contend.
42. In the NAO report 'Nuclear Power in the UK', dated 13 July 2016, the NAO noted that, '*the government relies on the private sector to build new capacity, which means it is exposed to market conditions that influence investor confidence. If investor confidence falls there could be less competitive pressure to minimise costs, resulting in consumers paying more*'.
43. With regard to the particular value-for-money considerations for nuclear power compared to other electricity generating technologies, the NAO observed that, '*the greater complexity and risk of nuclear power projects also could lead investors to require a higher return than for other low-carbon technologies. This means careful consideration is*

needed of the allocation of risks between the government and investor, such as including gain-share mechanisms'.

44. The Commissioner notes the critical importance of investor confidence in matters of major infrastructure build. In their report of March 2016⁵, the House of Commons Energy and Climate Change Committee noted that there had been a dip in investor confidence since the General Election in May 2015, *'most clearly illustrated by the UK's position in the EY Renewable Energy Country Attractiveness Index, which fell from 8th place in June 2015 to 11th place in September 2015'*. The Committee identified a number of factors which had combined to damage investor confidence, including that *'there has been insufficient consideration of investor impacts, exemplified by insufficient consultation and engagement ahead of policy decisions'*.
45. The Commissioner considers that the withheld information in this case constitutes the kind of careful consideration and consultation that the NAO has recommended and the type of *'engagement ahead of policy decisions'* which the Committee identified in their report. If such commercially sensitive and confidential information were to be disclosed, this would not only prejudice the private commercial interests of the companies and developers concerned (including Evercore), but would have consequential adverse effects on investor confidence and engagement with the Department.
46. The Commissioner recognises, as the Department has contended, that it is vital to policymaking, particularly in the nationally important area of electricity generation, for there to be a voluntary flow of information from private sector third parties (both those giving financial and investment advice and potential developers). If developers and potential investors could not have confidence that their commercially sensitive information would be protected by the Department, whilst such information remains market sensitive, they would be less willing to engage with or share such information with BEIS. Since such private sector engagement and investment is integral to the Government's efforts to build new nuclear capacity, and thus meet the UK's future electricity system demands and challenges, the Commissioner considers that any action which would discourage or undermine such investment and engagement would clearly not be in the public interest.
47. Similarly, if information were to be disclosed which would prejudice the Government's negotiating position with nuclear developers or other parties, then this could jeopardise or undermine the Government's

⁵ 'Investor confidence in the UK energy sector', Third report of Session 2015-16, HC 542

attempts to secure the best value-for-money deal for taxpayers and consumers. The Commissioner considers that this would clearly not be in the public interest.

48. The Commissioner recognises the public interest concerns which the controversial HPC deal has generated, and the serious questions and criticisms of that deal's value-for-money for taxpayers and consumers (most notably in the recent NAO report). However, the lessons of HPC emphasise the need for care and due consideration by Government of the best value-for-money options available in the field of nuclear capacity expansion.
49. Central to the determination of the public interest balance in cases of this nature is the timing of the request and at what stage the various commercial discussions and negotiations had reached at that point in time. As previously noted, at the time of the complainant's request the information contained in the Evercore report was only six months old and the Government remained in discussions and negotiations with nuclear developers. The Commissioner therefore considers that disclosure of the full report, at a time when the information remained commercially sensitive and subject to Government negotiation and engagement with nuclear developers, would have been premature and would clearly not be in the public interest, since the transparency and accountability benefits of such disclosure (important and significant though they are) would be outweighed by the damage done to the Government's attempts to secure the most cost-effective and economical way forward in building new nuclear capacity and learning appropriate lessons from the experience of HPC.
50. The Commissioner has thus found that at the time of the request, the balance of the public interest favoured maintaining the exception to the withheld information.
51. Having found the withheld information is exempt from disclosure under regulation 12(5)(e) of the EIR, the Commissioner has not gone on to consider the Department's application of regulation 12(5)(f).

Right of appeal

52. 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

53. 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.
54. 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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