

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

Decision notice

Date: 12 February 2019

Public Authority: Low Carbon Contracts Company
Address: Fleetbank House
2-6 Salisbury Square
London
EC4Y 8JX

Decision (including any steps ordered)

1. The complainant requested information from The Low Carbon Contracts Company Limited ("the LCCC") as to whether a named company had made an application under a "Force Majeure" clause in a specific contract. The LCCC responded to the request under the FOIA.
2. The Commissioner's decision is that the complainant's request should have been dealt with under the EIR, because the requested information is environmental information within the definition at regulation 2(1)(c) of the EIR.
3. The Commissioner requires the LCCC to take the following steps to ensure compliance with the legislation.
 - Reconsider the request under the provisions of the EIR and issue a fresh response to the complainant.
4. The LCCC must take these steps 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.

Background to the case

5. The public authority in this case, the LCCC, is a private limited company owned by the Secretary of State for Business, Energy and Industrial Strategy ("BEIS"). It was established in 2014 to deliver key elements of the UK government's Electricity Market Reform Programme. One such element was the government's commitment to the production of renewable and other low carbon electricity.
6. One function of the LCCC is to manage Contracts for Difference (CFDs) with companies which generate low carbon energy ("generators"). The LCCC has explained that it currently manages over 50 CFDs.
7. Under the terms of a CFD, generators receive a fixed, pre-agreed level of revenue from the LCCC, known as the strike price. In the event that generators sell the electricity they generate to a supplier for less than the strike price, the LCCC makes up the difference. In the event that generators sell the electricity to a supplier for more than the strike price, the generators are required to reimburse the LCCC.
8. The request under consideration in this notice concerns a particular CFD entered into between the LCCC and a specific generator.
9. The generator intended to construct a windfarm, but was met with planning objections which has caused a delay to the project.
10. The requester wished to know whether the ensuing delay had led to the generator making an application under the *force majeure* clause in the CFD. A *force majeure* is an event beyond the control of one party to a contract and which means that, through no fault of its own, that party is unable to fulfil its obligations under the contract.

Request and response

11. On 23 January 2018, the complainant wrote to LCCC to request, under either the FOIA or the EIR, information of the following description:

"Question 1.

Under the terms and conditions for this CfD, please provide me with information kept in any form showing or tending to show whether [named company 1] or [named company 2] (the "FM Party") have applied for an extension of their target commissioning or long stop (Start of Commissioning) dates citing a 'Force Majeure' as causing

delay to construction, as defined in paragraph 69 of the Terms and Conditions, or as is defined as a Force Majeure (page 20).

Question 2.

Has the LCCC agreed to either a defined extension of time for the start of commissioning, or to an indefinite extension of time to start of commissioning, or to the long stop date for [redacted] windfarm?

Question 3.

Under the CfD Terms and Conditions 69.3:

If they did so, when did [named company 1] inform LCCC of a delay resulting from Force Majeure and did LCCC consider this to be prompt notification considering the dates set out in the summary above?

Question 4.

Under 69.4, has the FM party provided LCCC of the background detail of why it considers a FM not to be of its own failings, (which relate to the failure of [named company 1] to comply with required planning conditions) been provided?

Under 69.4 c), Has LCCC verified that information or asked the FM party for additional details of why they consider a FM to have occurred?

Question 5.

Has there been compliance with paragraph 69.5 of the terms and conditions?"

12. On 19 February 2018, LCCC responded and stated that it considered that the request should be responded to under the FOIA. It stated that information was held, but that it was withholding the information under sections 41 (information provided in confidence), 42 (legal professional privilege) and 43 (commercial interests) of the FOIA. It also provided the complainant with some clarification regarding the longstop date and target commissioning window.
13. The complainant requested an internal review on 1 March 2018. LCCC sent her the outcome of its internal review on 26 April 2018. It upheld its original position.

Scope of the case

14. The complainant contacted the Commissioner on 3 June 2018 to complain about the way her request for information had been handled.
15. The Commissioner wrote to the LCCC on 1 October 2018. She asked the LCCC to consider whether the request should have been responded to under the provisions of the EIR, since it appeared likely that the information which had been requested may fall within the definition of environmental information at regulation 2(1) of the EIR.
16. The LCCC responded to the Commissioner on 26 October 2018. It provided arguments, which the Commissioner has considered in this notice, as to why it considered that the information was not environmental.
17. It also provided the Commissioner with the withheld information for consideration which, due to some technical difficulty, was all received by 14 January 2019.
18. The scope of this case and of the following analysis is to determine whether the requested information is environmental within the definition at regulation 2(1) of the EIR.

Reasons for decision

Regulation 2: environmental information

19. Regulation 2(1) of the EIR provides the following definition of environmental information:

"...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;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c);

and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);"

20. It is important to ensure that requests for information are handled under the correct access regime. This is particularly important when refusing to provide information, since the reasons why information can be withheld under FOIA (the exemptions) are different from the reasons why information can be withheld under the EIR (the exceptions). In addition, there are some procedural differences affecting how requests should be handled.
21. The Commissioner recognises that it can sometimes be difficult to identify environmental information, and has produced guidance¹ to assist public authorities and applicants. The Commissioner's well-established view is that public authorities should adopt a broad interpretation of environmental information, in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact.
22. The LCCC's position is that it does not consider that information which relates to the triggering of a clause in a specific CFD is environmental information. It explained that a CFD behaves in a similar way to a financial instrument. While it is true that the generator in this case was intending to construct a windfarm, the LCCC has argued that the

1

https://ico.org.uk/media/fororganisations/documents/1146/eir_what_is_environmental_information.pdf

information in a financial contract cannot be considered as environmental information.

23. The LCCC has argued that the request is not for information directly relating to the construction of the windfarm, nor directly about the planning objections and subsequent enforcement notice, appeal and enquiry, but rather relates only to the contract itself.
24. In summary, the LCCC argued that *"the fact that the public planning appeal process may or may not trigger certain provisions in a private law financial law contract between the parties does not mean that information concerning that financial contract is environmental information"*.
25. Regulation 2(1) of the EIR refers to information *"on"* the different subsections of regulation 2(1), including, at subsection 2(1)(c), information on *"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)..."*
26. The Commissioner's guidance, referenced previously, explains that *"The test that public authorities should apply is whether the information is on or about something falling within the definitions in regulations 2(1)(a)-(f), and not whether the information directly mentions the environment or any environmental matter"*.
27. The guidance also states that *"Public authorities should interpret 'any information on' broadly. Information that would inform the public about matters affecting the environment or enable them to participate in decision making, and help to achieve that purpose is likely to be environmental information, even if the information itself does not directly mention the environment"*.
28. The role of the LCCC is to assist in delivering the government's aim of ensuring that the UK can produce renewable, clean energy. More specifically in this case, the Commissioner notes that the purpose of the CFD which is referred to in the request is to secure revenue for a generator which was intending to generate electricity using wind turbines.
29. The Commissioner notes the LCCC's argument that the request relates to whether or not an application has been made under a specific clause in a financial contract. However, she does not agree that this is, therefore, necessarily separate from matters affecting, or likely to affect, the elements and factors of the environment.

30. Following the recent decision of the First-tier Tribunal in *Lancashire Fire and Rescue v ICO* (EA/2018/0084, 6 December 2018)², the Commissioner has first considered whether she can identify a measure which falls within the definition at Regulation 2(1)(c). In that case, the measure which had been identified was a 'fracking' operation.
31. In this case, the Commissioner has determined that the construction of the windfarm, and the generating of electricity by the turbines, is a measure within the definition at Regulation 2(1)(c) since it is clearly an activity which affects the elements and factors of the environment.
32. She has therefore considered whether the withheld information in this case, which relates to the *force majeure* clause in the CFD, is information "on" this measure. In reviewing the information, the Commissioner has had in mind the broad approach taken in a large number of previous decision notices, and the First-tier Tribunal in the Lancashire Fire and Rescue case referenced above.
33. She is aware that the terms of the CFD do not regulate the construction of the windfarm itself. However, they set out the terms for the payment of the strike price by the LCCC to the generator once it is carrying out its function: generating low-carbon electricity.
34. The Commissioner's view is that it would be inappropriate to detail the withheld information. It is not in the public domain whether an application was made under the provisions of the *force majeure* clause, and to detail what has been withheld may lead to speculation on this point.
35. However, she is satisfied that the withheld information both falls within the scope of the request and is information "on" the measure which she has identified in paragraph 31 of this notice.
36. The Commissioner's decision is that the withheld information falls within the definition of environmental information at regulation 2(1)(c) of the EIR, and she orders the LCCC to make a fresh response to the complainant's request of 23 January 2018 under the provisions of that legislation. To the extent that the LCCC withholds any of the information, it should issue a refusal notice that complies with regulation 14 of the EIR.

2

<http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2346/013%20061218%20Final%20Decision%20-%20EA.2018.0084.pdf>

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 1234504

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

Ben Tomes
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