

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

Date: 10 May 2023

Public Authority: Department for Energy Security & Net Zero
("DESNZ")

Address: 1 Victoria Street
London
SW1H 0ET

Decision (including any steps ordered)

1. The complainant has requested information comprising a report colloquially entitled "the Arqiva Report". The request was made to the Department of Business, Energy and Industrial Strategy ("BEIS").
2. The Commissioner's decision is that DESNZ is entitled to rely on the exception at regulation 12(5)(e) - confidentiality of commercial or industrial information, to withhold the requested information with the public interest favouring maintaining the exception. However, he finds that the exception at regulation 12(4)(d) - material in the course of completion is not engaged. In regard to regulation 12(3) - third party personal data, the Commissioner accepts DESNZ's finding that the senior individuals whose names appear in the withheld information would not have an expectation of privacy. He therefore finds that the names should be disclosed. He finds that the email addresses of the same individuals are exempt from disclosure.
3. The Commissioner requires DESNZ to take the following steps to ensure compliance with the legislation.

- Provide the complainant with the senior names contained in the withheld information.
4. The public authority 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.

Request and response

5. On 23 August 2021, the complainant wrote to BEIS¹ and requested information in the following terms:

“We have had correspondence with Ofgem whereby it confirmed that it had received an interim version of the report produced by a consultant on the DCC service in North region (the Arqiva Report). We understand that BEIS has also received a copy of the Arqiva Report. We would be grateful if you could confirm that you have also received a copy of this report.

On the basis that you have received a copy of the Arqiva Report, please treat this request as a request for disclosure of the Arqiva Report under the Environmental Information Regulations 2004 (EIR). Please also let us have all other documents relating to the conditions under which the Arqiva Report was requested and/or received by BEIS, including for example, all correspondence regarding BEIS’ receipt of the Arqiva Report.

As part of your review, ScottishPower would highlight to you that the contents of the Arqiva Report are likely to be of considerable public interest, given the potential impact that the report may have on the progress of the GB smart meter rollout which is of real interest to a broad range of stakeholders.”

6. BEIS responded on 21 September 2021. It confirmed holding information in the scope of the request and stated that it was withholding the information in reliance of FOIA section 41 – information

¹ On 7 February 2023, under a Machinery of Government Change, the Department for Business Energy and Industrial Strategy (“BEIS”) began the transition into three separate departments, including the Department for Energy Security and Net Zero (“DESNZ”). The request in this decision was made to BEIS, however this notice will be served on DESNZ as the appropriate authority.

provided in confidence and EIR regulation 12(4)(d) – material in the course of completion.

7. In requesting an internal review the complainant argued that the request should be considered under the EIR and disagreed with the exception applied. Following an internal review BEIS wrote to the complainant on 16 December 2021. It stated that the request should be considered under FOIA not EIR. BEIS upheld its application of section 41 and in addition relied on section 43 – commercial interests and section 40 – personal data.
8. Having stated that the request should be considered under FOIA, the internal review then advised that:

“if some or all of the information were to be considered under the EIRs, I consider that regulation 12(5)(e) of the EIRs would be engaged.”

Scope of the case

9. The complainant contacted the Commissioner on 11 March 2022 to complain about the way their request for information had been handled. The complainant provided comprehensive submissions covering their view that the request is for environmental information and should therefore be considered under the EIR and detailing their view that regulation 12(5)(e) does not apply to the information and in any event the public interest favours disclosure.
10. The Commissioner considers the scope of his investigation is to determine the appropriate information access regime and to consider the application of the applicable exceptions or exemptions.

Background

11. The Data Communications Company (DCC) is licensed to operate the national communications network for smart metering. To do this, it has contracts in place with a number of service providers, which it manages in order to provide services to its users, including energy suppliers.
12. There are three regions of the smart meter network, 'Central', 'South' and 'North'. Arqiva is the Communications Services Provider (CSP) for the 'North' region, which covers Scotland and the North of England. The 'North' region is referred to as CSP.N.

13. The DCC and its service providers were awarded the data and communications contracts for the smart metering network following open competition, having been judged to offer the most effective solutions for providing communications services for different parts of Great Britain. The DCC is regulated by the Office of Gas and Electricity Markets (Ofgem).

Reasons for decision

Is the requested information environmental?

14. Regulation 2(1) of the EIR defines environmental information as being information 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)...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 the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);
15. On reviewing the request, DESNZ considered whether the information requested is "environmental information" within the meaning of the EIR.

It considers that the requested information is an interim report from the DCC following an internal technical review of the communications network, undertaken by one of their contractors.

16. DESNZ explained:

"Unlike the Project Assessment Review in Department for Business, Energy and Industrial Strategy v The Information Commissioner and Alex Henney [2017], the report is not looking at the Government's Smart Metering Programme. The Department does not consider the requested information to be information on the Smart Metering Programme or on activities or measures likely to affect, or designed to protect, the environment. Nor is it a report on the implementation of environmental legislation.

Accordingly, the Department considers the request as falling under the Freedom of Information Act 2000 ('the Act'), rather than the EIRs."

17. The complainant holds the opposite view:

"We believe the Henney case is very much in point for the Arqiva Report. The Smart Metering Programme is an environmental measure for the purposes of regulation 2(1)(c) of the EIR. We believe the Arqiva Report is information "on" or "about" the Smart Metering Programme because we understand it contains information on the communications services in the North Region of the smart metering ecosystem, in particular on the capacity and state of the network. We also believe that any documents related to the Arqiva Report are also "environmental information" for the same reasons.

In Henney it was acknowledged that, while the Project Assessment Review being requested focused on the communications and data component of the Smart Meter Programme, 'it could nonetheless be described as also being about the wider Smart Meter Programme, because the communications and data component is integral to the programme as a whole. It would be unnecessarily narrow and artificial to draw a distinction between a Project Assessment Review on the communications and data component and a Project Assessment Review on the Smart Meter Programme. The communications and data component is not an incidental aspect of the Smart Meter Programme: the former is critical to the latter's success and thus fundamental to it.' We would similarly argue that the Arqiva Report on communications and technical data relating to the Smart Metering Programme in the North Region is crucial to the success of the Programme in that area and therefore fundamental to it."

18. The Commissioner considers that the requested information falls within regulation 2(1)(c) as it concerns a measure, that being the Arqiva Network in the CSP.N Region which forms part of the Smart Meter Programme, and activities affecting or likely to affect the elements and factors referred to in 2(1)(a).
19. The Commissioner therefore considers that the appropriate legislation in this case is the EIR.

Regulation 12(4)(d) – material in the course of completion

20. DESNZ relied on this exception in its initial response to the complainant and although the internal review did not cover the EIR exceptions, save for the comment reproduced in paragraph 8 , BEIS did briefly reference this exception in its submissions to the Commissioner. For this reason the Commissioner has considered this exception.
21. Regulation 12(4)(d) provides that a public authority may refuse to disclose information to the extent that the request relates to material which is still in the course of completion, to unfinished documents, or to incomplete data.
22. The exception is class-based, which means that it is engaged if the information in question falls within its scope. If the information falls into one of the three categories, then the exception is engaged. It is not necessary to show that disclosure would have any particular adverse effect in order to engage the exception.
23. If engaged, regulation 12(4)(d) is a qualified exception, so the public authority must consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
24. The exception sets out three distinct categories, or limbs, and the information must fall within one of these for the exception to be engaged.
25. The Commissioner has considered whether the withheld information comprises material in the course of completion. The ICO's published guidance on this exception² explains that, in some cases, information which is being gathered in the process of a public authority formulating

² <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/regulation-124d-eir/>

its policy, or deciding how to proceed in relation to a particular matter, can be said to form part of that overall, larger, "end product" which is in itself still in the course of completion.

26. In this case DESNZ argues that the requested report comprises an incomplete and unfinished report because it was missing key elements of the evidence required to draw conclusions and was one "incomplete input into a number of analyses contributing towards the Scaling and Optimisation Plan project work" and culminating in the CSP North Scaling and Optimisation Phase 1 Report.

27. DESNZ argued that disclosure of the Arqiva Report would not provide a complete or correct understanding of the overall position of the Arqiva Network and would potentially serve to create misunderstanding. It maintained that :

"...outputs were due to be made available to DCC Users in 2022, providing a fuller, rounder picture of the DCC service in the North at that point in time."

28. The Commissioner has seen the Arqiva Report and considers it to be a complete document. This technical review report commissioned by DCC contains conclusions and proposed next steps. The Commissioner notes that Arqiva had not endorsed the report, however, he does not consider this results in the report being incomplete data. The Commissioner understands that the report was used in further discussions between BEIS, DCC and Arqiva and therefore can be said to inform the report "CSP North Scaling and Optimisation Phase 1 Report". Notwithstanding this the Commissioner considers the requested information is not material in the course of completion.

29. The Commissioner notes that although DCC Users would be provided with copies of the CSP North Scaling and Optimisation Phase 1 Report this is a limited disclosure and not disclosure to the public at large.

30. The Commissioner's decision is that the exception at regulation 12(4)(d) is not engaged. He has therefore not considered the public interest.

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

31. Information may be withheld under regulation 12(5)(e) of the EIR if disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.

32. There are several conditions that need to be met for this exception to be engaged. They are as follows –

- Is the information commercial or industrial in nature?
 - Is the information subject to confidentiality provided by law?
 - Is the confidentiality provided to protect a legitimate economic interest?
 - Would the confidentiality be adversely affected by disclosure?
33. With the benefit of having seen the requested information comprising the Arqiva Report and accompanying letter; the Commissioner has considered the above four conditions in respect of that information. The information concerns the operation and technical details of the Arqiva Network. He is therefore satisfied that the information is commercial in nature.
34. DESNZ explained that the information was provided to it by DCC. The report is identified as confidential with an accompanying letter clearly stating the limited recipients and not for wider distribution. BEIS contacted both DCC and Arqiva in response to the request. They confirmed the confidentiality and did not give consent for its disclosure. DESNZ concluded that disclosure of the report would constitute a breach of confidence.
35. The Commissioner is satisfied that the report was shared in circumstances creating an obligation of confidence, it is not trivial and it is not otherwise in the public domain. He is therefore satisfied that the information is subject to confidentiality provided by law.
36. To satisfy the third element of the test, disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect.
37. The timing of the request and whether the commercial information is still current are key factors in determining whether disclosure would cause harm to economic interests. In this case the report is dated August 2021 and the request was made days later in the same month. Clearly the information was current at the time of the response from BEIS.
38. The complainant considers that BEIS failed to establish what legitimate economic interest is being protected. They cite the Commissioner's guidance on this exception in support of their position.
39. DESNZ maintains that disclosure of technically sensitive details of the Arqiva Network would undermine and harm Arqiva's commercial position with suppliers in relation to securing technical solutions. It also considers that disclosure would be damaging to the relationship between

DCC and its current or future contractors in securing the best and most efficient wide-area network solution to meet its requirements, which in turn would damage the ability of DCC to deliver its function as the Smart Meter Licence holder under Section 6 of the Electricity Act 1989.

40. The Commissioner's guidance³ sets out examples of legitimate economic interests:
- retaining or improving market position;
 - ensuring competitors do not gain access to commercial valuable information;
 - protecting a commercial bargaining position in the context of existing or future negotiations;
 - avoiding commercially significant reputation damage; and
 - avoiding disclosures which would otherwise result in a loss of revenue or income.
41. The Commissioner cannot reproduce here specific examples from the Arqiva Report to demonstrate why Arqiva's commercial interests would be harmed by disclosure of the report, as to do so would disclose the information itself. However, the Commissioner is satisfied that DESNZ has provided appropriate submissions for him to conclude that one or more of the above examples applies in this case and therefore the third condition is met with regard to Arqiva and DCC's interests.
42. Although not in scope of the request, DESNZ provided the Commissioner with the CSP North Scaling and Optimisation Phase 1 Report which contains more information than the content of the Arqiva Report, including detailed technical analysis necessary to provide an accurate assessment of network challenges, not provided in the Arqiva Report. The report is the output from a triparty working group (Arqiva, DCC and BEIS) considering how the network in the North region could be future-proofed. The Commissioner is aware that the complainant already has access to the CSP North Scaling and Optimisation Phase 1 Report, although the report is not in the public domain.
43. Regarding the fourth condition set out in paragraph 32 the Commissioner accepts that disclosure of truly confidential information

³ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/commercial-or-industrial-information-regulation-12-5-e/>

into the public domain would inevitably harm the confidential nature of that information, and would also harm the legitimate economic interests identified.

44. As the four tests have been satisfied the Commissioner finds that regulation 12(5)(e) is engaged.

Public interest test

45. As with the other exceptions under the EIR, when regulation 12(4)(e) is engaged the public authority must carry out the public interest test in order to decide whether the information should be withheld. Under regulation 12(1)(b), the public authority can only withhold the information if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. Furthermore, under regulation 12(2), it must apply a presumption in favour of disclosure.
46. DESNZ noted the general public interest in public authorities being transparent, accountable and open to scrutiny. It acknowledged that disclosure could increase public awareness and add to public scrutiny of the smart meter data communications network.
47. The complainant explained:

"We do not agree with BEIS' view of the position. Decisions of this nature should be subject to public scrutiny and the public should be made aware of the impact of this change. There is a clear public interest in understanding the current position.

...if the smart communications network in the North Region is not ready in accordance with project planning this will have a significant impact on delivery of the Smart Meter programme. This would also have a significant impact on the cost to deliver the programme; increasing the costs that will need to be met, in the first instance, by energy suppliers and ultimately by energy consumers. This would be coming at a time when the cost of energy to British consumers has recently suddenly increased to very high levels, and is likely to remain at a high level for the foreseeable future."

48. DESNZ advised the Commissioner that in this case there is a significant public interest in respecting confidentiality where it is protecting a legitimate economic interest and where disclosure of the requested information would have adverse impacts on Arqiva; negatively impact the relationship between BEIS and key private sector delivery partners in Arqiva and the DCC; and undermine long-term contractual relationships.

49. The Commissioner agrees with both parties regarding the importance of the public interest in transparency and accountability of public authorities. He notes the complainant's comments regarding the public interest in understanding the "current position" and their suggested reasoning and potential impact on energy consumers.
50. He is aware of the complainant's personal reasons for requesting the Arqiva Report, however, these reasons cannot be a primary consideration in the public interest in disclosure particularly as they are in receipt of the subsequent report.
51. The Commissioner has balanced the benefits of disclosure of the report considering the information contained there and its ability to inform energy consumers, against protection of the legitimate interests of the parties involved in the report.
52. The Commissioner recognises and gives weight to the importance of accountability for spending public money in implementing the smart meter programme. He also notes the significant number of people likely to be affected by the functionality of the north region network.
53. As he determined earlier, the Arqiva Report stands alone as a finished document but was superseded by the CSP North Scaling and Optimisation Phase 1 Report which provides greater balance, clarity and input from Arqiva. He is not convinced that the Arqiva Report without the later addition of the subsequent report, would provide the general public energy consumers with information to allow for useful scrutiny of the north region smart meter communications network.
54. The Commissioner gives weight to preserving the principle of confidentiality and notes that DESNZ has explained its concerns regarding undermining its relationship with DCC and Arqiva. He accepts that it serves the public interest for there to be a fruitful relationship in addressing the competency of the north region network which will ultimately benefit energy consumers. He considers that harm caused to the legitimate economic interests of Arqiva would ultimately not serve the public interest.
55. The Commissioner's decision is that the public interest in maintaining the exception outweighs that in disclosure, and therefore the public authority was entitled to rely on regulation 12(5)(e) of the EIR to refuse to provide the withheld information.

Regulation 12(3) – third party personal data

56. Regulation 12(3) provides that third party personal data can only be disclosed in accordance with regulation 13, which sets out the detail of the exception. Regulation 13(1) provides that information is exempt

from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in regulation 13(2A), 13(2B) or 13(3A) is satisfied.

57. BEIS relied on FOIA section 40(2) at the time of the internal review to withhold "names and email addresses of members of staff or third parties who received the report".
58. At the time of its submissions to the Commissioner DESNZ advised that the personal data related to Senior Civil Service officials and third parties. It explained:

"As senior persons in their respective organisations, the Department does not consider they would have a expectation of privacy as regards release of their names. However, the Department considers that disclosure of their full email addresses would not be fair, lawful and transparent."
59. The Commissioner confirmed with DESNZ that the senior individuals concerned should not have an expectation of privacy due to their professional role and level of seniority. He therefore orders disclosure of the previously withheld names on that basis. He has gone on to consider the regulation 12(3) exception only with regard to the email addresses contained in the requested information.
60. In this case the relevant condition is contained in regulation 13(2A)(a). This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
61. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data, then regulation 13 of the EIR cannot apply.
62. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.
63. Section 3(2) of the DPA defines personal data as: "any information relating to an identified or identifiable living individual". The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
64. In this case the withheld email addresses include the names of individuals which clearly identify those individuals and therefore comprise personal data.

65. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under EIR. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
66. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

67. Article 5(1)(a) of the GDPR states that:

'Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject'.

68. In the case of an EIR request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
69. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

70. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states: 'processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child' ⁴
71. In considering the application of Article 6(1)(f) of the EIR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:-
 - i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;

⁴ Article 6(1) goes on to state that:- 'Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks'. However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:- 'In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted'.

- ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
72. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

73. In considering any legitimate interest(s) in the disclosure of the requested information under the EIR, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
74. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
75. In the circumstances of this case, the Commissioner accepts that there is a legitimate interest in the disclosure of professional email addresses. However, he is not persuaded that there is a particularly strong or compelling interest in disclosure.

Is disclosure necessary?

76. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so a measure would not be necessary if the legitimate aim could be achieved by something less. Disclosure under the EIR must therefore be the least intrusive means of achieving the legitimate aim in question.
77. In the Commissioner's view it is not sustainable to argue that disclosure of the email addresses is necessary; disclosure of such information would not add to the public's understanding of the Arqiva Report or the north region network.
78. Given this finding the Commissioner has concluded that disclosure of the email addresses would not be lawful and therefore article 6(1)(f) of the GDPR is not met. Disclosure would therefore breach the first data protection principle and consequently such information is exempt from disclosure on the basis of regulation 12(3) of the EIR.

Right of appeal

79. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

80. 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.

81. 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

Susan Hughes
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