

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

Date: 23 November 2018

Public Authority: The Office of Gas and Electricity Markets
(Ofgem)

Address: 10 South Colonnade
Canary Wharf
London
E14 4PU

Decision (including any steps ordered)

1. The complainant has requested a number of reports submitted to Ofgem by Drax Power Limited (Drax), including annual Sustainability Audit Reports. Ofgem provided some of the requested information including redacted versions of three Annual Sustainability Audit Reports. The majority of the information redacted from these reports was withheld under the exception provided by regulation 12(5)(c) – intellectual property rights. Regulation 12(5)(e) – confidentiality of commercial information and regulation 12(5)(f) - adverse effect on the voluntary supply of information, were applied to information from different parts of the reports. Ofgem later dropped its reliance on regulation 12(5)(f).
2. The Commissioner’s decision is that regulation 12(5)(c) is not engaged in respect of the information to which it has been applied. However Ofgem can rely on regulation 12(5)(e) to withhold the information to which that exception has been applied.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose the information being withheld under regulation 12(5)(c).
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 22 September 2018 the complainant requested information of the following description:

"I would be grateful if you could provide the following information as soon as possible, and no later than 20 working days after the date of receipt, under regulation 5(2) of the Environmental Information Regulations 2004:

- Monthly sustainability reports submitted by Drax on their adherence to the land and GHG criteria for 2015, 2016 and from January to August 2017;
 - Annual Profiling Report submitted by Drax for 2015 and 2016; and
 - Annual Sustainability Audit report for Drax 2015 and 2016"
6. On 24 November 2017 Ofgem responded. The complainant is satisfied with the responses provided to the first two elements of the request. The Annual Sustainability Reports requested are produced for each financial year and therefore to cover all the information relating to both 2015 and 2016 Ofgem identified three reports as being captured by the third element of the request, i.e. the reports for financial years ending March 2015, March 2016 and March 2017. Both parties agree with this interpretation.
7. Ofgem provided redacted versions of these reports. The redacted information was withheld under the exceptions provided by:
- Regulation 12(5)(c) – intellectual property rights
 - Regulation 12(5)(e) – confidentiality of commercial information
 - Regulation 12(5)(f) – adverse effect of the interests of the person who provided the information.
8. The complainant requested Ofgem carry out an internal review of its decision to withhold information from the Annual Sustainability Reports on 19 December 2018. Ofgem sent the complainant the outcome of its internal review on 16 February 2018. It upheld its original position.

9. On 2 October 2018, during the course of the Commissioner's investigation, Ofgem disclosed some additional information. The majority of the information still being withheld is that to which regulation 12(5)(c) – intellectual property rights, had been applied. The only information being withheld under regulation 12(5)(e) is one sentence from one of the reports. Ofgem withdrew any reliance on regulation 12(5)(f) – voluntary supply of information.

Scope of the case

10. The complainant contacted the Commissioner on 28 March 2018 to complain about the way his request for information had been handled. At that stage Ofgem was still relying on all three exceptions to withhold a more substantial proportion of the reports.
11. The complainant raised five principal concerns with the approach adopted by Ofgem in applying the exceptions. Firstly it argued that Ofgem had applied the exceptions at the request of Drax, rather than making its own objective decision as to the sensitivity of the withheld information. Secondly it argued that the withheld information related to emissions and therefore under regulation 12(9) the exceptions provided by regulations 12(5)(e) – commercial confidentiality and 12(5)(f) – voluntary supply of information, cannot be relied on. Thirdly the complainant argued that the public interest in disclosing any information withheld under regulation 12(5)(e) outweighed the public interest in maintaining that exception. The complainant's fourth concern was that when citing regulation 12(5)(c) Ofgem failed to identify the intellectual property right which attached to the withheld information, or explain how any harm would arise to the Drax by the loss of control over the information. Finally the complainant argued that the public interest in favour of disclosing the information outweighed any public interest in protecting Drax's intellectual property rights.
12. Following Ofgem's disclosure of additional information on 2 October 2018 the Commissioner considers that the matter to be decided is whether the exceptions provided by regulation 12(5)(c) or regulation 12(5)(e) are engaged in respect of the information which Ofgem continues to withhold and, if so, whether the public interest in maintaining those exceptions outweighs the public interest in disclosure.

Background

13. Among Ofgem's statutory functions are the administration of government environmental schemes including 'Renewables Obligation'. This scheme requires electricity suppliers to source an increasing

proportion of the electricity they supply from renewable sources and provides financial support to do so. Ofgem's role is to assess and accredit Renewable Obligation applications. In order to benefit from the incentives available under the scheme operators of the accredited electricity generating stations have to submit Annual Sustainability Audit Reports to Ofgem which demonstrate that are complying with the sustainability requirements. The withheld information is contained in three such reports, submitted by Drax.

Reasons for decision

Regulation 12(5)(c) – intellectual property rights

14. Regulation 12(5)(c) states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect intellectual property (IP) rights.
15. Ofgem has applied this exception to all the information it is continuing to withhold apart from one sentence contained in the report for year ending March 2017 which has been withheld under regulation 12(5)(e) – confidentiality of commercial information.
16. The information withheld under regulation 12(5)(c) is a description of the method Drax adopts when calculating how the biomass it burns to generate electricity complies with the sustainability criteria in order to report on its compliance to Ofgem.
17. As set out in the Commissioner's guidance - Intellectual property rights (regulation 12(5)(c)), in order to establish that disclosing the information would have an adverse effect on IP rights a public authority must demonstrate that:
 - the material is protected by IP rights;
 - the IP right holder would suffer harm. It is not sufficient to show that IP rights have merely been infringed;
 - the identified harm is a consequence of the infringement or loss of control over the use of the information; and
 - the potential harm or loss could not be prevented by enforcing the IP rights.
18. IP rights arise when owners are granted exclusive rights to certain tangible assets. In this case Ofgem has claimed the redacted information is protected by copyright. Copyright subsists in any original literary work. It automatically arises with the creation of the work and is usually owned by the work's author. However where the work is

produced in the course of someone's employment the copyright will belong to the employer. In this case the information in question was produced by employees of Drax and so Drax own the copyright. The Commissioner accepts that the written description of the methods adopted by Drax when reporting on its sustainability, is an original piece of literary work. That written description is a tangible asset and does attract copyright.

19. Therefore the next issue is whether disclosing the methodology would harm the interests of the copyright holder, i.e Drax. When considering this it is important that the arguments put forward by Ofgem reflect the genuine concerns of Drax. It is clear from Ofgem's submission that it has consulted with Drax and has provided correspondence from Drax which sets out its concerns.
20. From Ofgem's submissions it is understood that the methodology described in the reports was developed and fine-tuned by Drax over, what is said to have been, a substantial period of time. It was further refined over a period of seven months following consultations with Ofgem. The product of all this work is a method that, according to Drax, allows it to effectively and efficiently meet its reporting obligations. This saves employee time and also benefits Drax's suppliers by providing them with an efficient means of providing Drax with the data Drax requires from them. Ofgem has argued that if this methodology was disclosed Drax's rivals in the production of renewable energy would adopt the same approach when reporting on their compliance with sustainability criteria and so undermine the commercial advantage Drax believes the use of the methodology provides to it.
21. As Ofgem's submissions had referred to the methodology being further developed over a seven month period in light of discussions between itself and Drax, the Commissioner challenged whether the development of the methodology was solely the work of Drax, or whether it represented a collaborative approach, or the result of negotiations between the two parties. Ofgem has stated that as part of the discussions it raised issues about the proposed methodology which were then considered and addressed by Drax. The point being that it was Drax which came up to the solutions and therefore Ofgem argues the final methodology is a product, solely, of Drax's work.
22. The Commissioner also sought further clarification on the competitors who would seek to adopt the methodology. Ofgem has acknowledged that the methodology would be of most value to the energy suppliers it regulates and who are therefore required to meet the same reporting requirements as Drax. It has however said that a recent European directive proposes similar requirements for energy suppliers in other member states, so widening the potential number of energy suppliers who may seek to benefit from adopting the methodology. However the

Commissioner is not persuaded by this argument. This is because Ofgem has not provided sufficient detail regarding the similarity of the reporting requirements that would be imposed across the European Union, or explained how such energy suppliers compete with Drax, or whether Drax's operates solely within the UK.

23. The Commissioner also notes that it is not clear what approach Drax's UK competitors already take when reporting sustainability criteria to Ofgem. It is understood that Ofgem does not have to agree the methodologies used. This is done by independent auditors engaged by the energy suppliers themselves. It is understood that the methodology is only contained in the reports prepared by Drax because, as a market leader, and therefore under greater public scrutiny, Drax has chosen to be more transparent with Ofgem as to how it reports its sustainability requirements. As a consequence Ofgem does not know whether Drax's competitors are in fact already using similar or very similar methods of calculating the returns required in the sustainability reports. Furthermore although Drax has argued that the methodology would be of some use to a competitor regardless of its size, it accepted that larger scale energy suppliers would reap more practical benefits from adopting the methodology compared to smaller operators.
24. In light of this the Commissioner considers any harm caused is limited to that which would result from Drax's competitors within the UK energy market adopting the methodology described in the reports. The extent of the harm is harder to determine. Nevertheless the Commissioner is satisfied that Ofgem has made a case for finding that disclosing the methodology would undermine Drax's commercial position, at least to some extent.
25. The bigger issue however is whether the harm which Ofgem considers would result from disclosing this information is one which would be a result of infringing Drax's copyright, in other words it is a harm which can be protected against by copyright.
26. Copyright protects an original literary work from unauthorised use. The original literary work in this case is the description of the reporting method adopted by Drax. It will prevent others from copying how that methodology is expressed; the specific text used to describe the method. It will not however protect the actual ideas or methodology being described. This makes sense when it is remembered that copyright is usually used to protect information that has already been published.
27. In this case Ofgem's concerns are based on the possibility of Drax's rivals becoming aware of the reporting method used by Drax and adopting it for their own purpose, rather than any prejudice to Drax's

interests by rivals just copying the description of that method when submitting their own reports to Ofgem.

28. It is also important to recognise that the initial disclosure of the information containing the methodology would not infringe Drax's copyright. As explained in the Commissioner's guidance 'Intellectual property rights and disclosures under the Freedom of Information Act', this is because section 50 of the Copyright Design and Patents Act 1988 provides that where the copying or publishing of information is specifically authorised by an Act of Parliament, copyright will not be infringed. Disclosing information in response to a request made under the EIR constitutes an act specifically authorised by Parliament. Consequently disclosing information under the EIR will not infringe copyright.
29. Once the information was disclosed under the EIR, Drax's methodology would be in the public domain. There would be no need for a competitor of Drax to copy the description of the methodology as set out in the disclosed information to learn of the approach being taken, or to consider whether it provided a more efficient approach compared to the one it currently used.
30. In light of the above the Commissioner finds the identified harm is not a consequence of the infringement of Drax's copyright. The third test set out in paragraph 17 is not met. Therefore the Commissioner finds the exception is not engaged and that Ofgem is not entitled to withhold the information under regulation 12(5)(c).
31. It is clear to the Commissioner that the exception provided by regulation 12(5)(c) does not protect Drax from the harm which Ofgem considers disclosing the methodology would cause. Where a public authority seeks to apply an exception to protect a third party's commercial interests the exception provided by regulation 12(5)(e) – confidentiality of commercial information, is a more obvious route. However regulation 12(9) explicitly states that this exception cannot be applied to information on emissions, such as that on the release of greenhouse gasses. It would undermine the purpose behind regulation 12(9) if commercial interests could be protected in the exact same way as regulation 12(5)(e) would have done if the information had not been on emissions, simply because the information attracted copyright. Although the Commissioner has viewed the withheld information she has not addressed the issue of whether it is information on emissions as it was necessary to do so when considering the application of regulation 12(5)(c). However it is clear to the Commissioner that Ofgem and Drax have both thoroughly considered which are the most appropriate exceptions to apply and that both are aware of regulation 12(9) and in particular its interaction with the commercial confidentiality exception, 12(5)(e). It is also recognised by the Commissioner that Ofgem and

Drax are clearly experts in understanding the nature of the information captured by the request. It is therefore apparent to the Commissioner that Ofgem has taken a very deliberate decision as to which exceptions it believes are available to it and claimed those it considers apply best to the different elements of the withheld information. Therefore the Commissioner did not consider it appropriate to question why Ofgem did not seek to rely on regulation 12(5)(e) to withhold the information on the methodology.

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

32. Regulation 12(5)(e) of the EIR states 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.
33. The Commissioner considers that in order for this exception to be applicable there are a number of conditions that need to be met. She has considered how each of the following conditions apply to the facts of this case:
 - 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?
34. The information withheld under regulation 12(5)(e) is limited to one sentence contained in the Annual Sustainability Audit Report for year ending March 2017. Having viewed the information the Commissioner is satisfied that it relates to Drax's supply chain for the provision of biomass fuel for its electricity generating stations. It is clearly information of a commercial and industrial nature.
35. As to whether the information is subject to confidentiality provided by law, Ofgem has argued that it is protected under a common law duty of confidence. For such a duty of confidence to exist Drax must have provided the information to Ofgem in circumstances that would have given rise to an expectation of confidence. The Commissioner accepts that where a private company shares information with a regulator, it does so in the expectation that the information will remain confidential. It is also noted that page 1 of the reports do contain a reference to at least some of the information being regarded as commercially sensitive and confidential.

36. Having viewed the information the Commissioner also recognises that the information could not be described as trivial as it relates to the terms of Drax's relationship with its suppliers. Ofgem has also reassured the Commissioner that the information is not in the public domain and remains private. The Commissioner is therefore satisfied that the information retains the necessary quality of confidence.
37. Whether disclosing the information would be detrimental to the confider's interests, i.e. Drax's, this point will be looked at under the third bullet point from paragraph 33.
38. It is not possible to go into any detail about how disclosing the information would prejudice Drax's legitimate commercial interests without revealing something of the information itself. The Commissioner can say that it has a bearing on the relationship between Drax and those supplying it with fuel and that having viewed the information she is satisfied that Drax has a legitimate interest in the information remaining private.
39. Having established that the information is of a commercial or industrial nature, that it is subject to a common law duty of confidence imposed to protect Drax's legitimate economic interests it naturally follows that disclosing that information would adversely affect that confidentiality. The fourth and final test set out in paragraph 34 is met and the so the exception is engaged.
40. Ofgem has also argued that the information is subject to a statutory obligation of confidence imposed by section 105(1) of the Utilities Act 2000. It is understood that this provision provides a statutory bar to disclosing information provided to Ofgem for the purposes of a number of its regulatory functions including information provided under Part 1 of the Electricity Act 1989. Drax provided the sustainability order to show compliance with its Renewable Obligations in accordance with the Renewables Regulations Order 2015, which was itself made under powers conferred under the Electricity Act 1989. Having found that in any event the information would be protected under a common law duty of confidence, she has not considered it necessary to establish whether the statutory bar on disclosure contained in the Electricity Act 1989 would also apply to the information.
41. As already referred to, in accordance with regulation 12(9), the exception provided by regulation 12(5)(e) cannot be applied to information which is on emissions. In line with her published guidance, 'Regulation 12(9): Information on emissions', the Commissioner considers that regulation 12(9) only prevents the use of 12(5)(e) where the information in question is directly linked to emissions. Although the reports do relate in broad terms to the burning of fuels in the generation of electricity and some of information contained in the reports is very

clearly information on emissions, the Commissioner finds that the specific information being withheld under the commercial confidentiality exception is not directly on emissions. Instead it is on the terms of Drax's relationship with its suppliers of fuel. Therefore the Commissioner finds that regulation 12(9) does not prevent the application of regulation 12(5)(e).

Public interest test

42. Regulation 12(5)(e) is subject to the public interest as set out in regulation 12(1). This means that although the exception is engaged the information must still be disclosed unless, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure.
43. The Commissioner considers that if the information was disclosed it would make it more difficult for Drax to manage its relationships with its suppliers and could undermine Drax's negotiating position with them.
44. The Commissioner also recognises that the principle of confidentiality is an important one and that there will be a public interest in preserving confidences.
45. In terms of the public interest in favour of disclosure the Commissioner considers there is always some public interest in transparency. The reports set out how Drax is meeting the sustainability requirements of its Renewable Obligations. There will always be some public interest in fully understanding how electricity generating stations are effecting the environment, how public money is being used to incentivise the increased provision of energy from renewable sources and how well Ofgem is performing as a regulator of that industry.

However account has to be taken of the actual information in dispute and the extent that it can be said to contribute to those debates. Having viewed the information the Commissioner does not consider disclosing the information would further the public's understanding of those issues to any significant degree. Therefore even after the presumption in favour of disclosure, contained in regulation 12(1)(b), is taken into account, the Commissioner considers the public interest in preserving Drax's position with its suppliers is sufficient to outweigh the limited public interest in disclosure. The Commissioner finds that Ofgem is entitled to rely on regulation 12(5)(e) to withhold the one sentence from page 7 of the Sustainability Audit Report for year ending March 2017.

Right of appeal

46. 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

47. 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.
48. 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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