

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

**Date:** 18 May 2016

**Public Authority:** Department for Energy and Climate Change  
**Address:** 3 Whitehall Place  
London  
SW1A 2AW

**Decision (including any steps ordered)**

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1. The complainant has requested information relating to the Department for Energy and Climate Change's (DECC) justification for state aid clearance submitted to the European Commission (the Commission) in respect of the EU's consideration of the pricing methodology for Waste Transfer Contracts (WTCs) to be concluded between the UK government and operators of new nuclear power plants.
2. DECC responded refusing to disclose the requested information citing regulations 12(5)(a) and 13 of the EIR.
3. The Commissioner's decision is that DECC has acted appropriately by refusing to disclose the requested information under regulation 12(5)(a) of the EIR. He therefore does not require any further action to be taken.

**Request and response**

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4. On 10 October 2015, the complainant wrote to DECC and requested information in the following terms:

"Please would you send me under the Freedom of Information Act 2000 the main document setting out the United Kingdom justification for state aid clearance, along with a full list of the titles of all support documents, submitted to the European Commission, in respect of the European Commission consideration the pricing methodology for waste transfer contracts to be concluded between the UK Government and operators of new nuclear power plants and its compatibility with EU state aid rules, on which the Commission reported its conclusions on 9 October 2015."

5. DECC responded on 6 November 2015. It stated that it holds the requested information but considers it is exempt from disclosure under regulations 12(5)(a) and 13 of the EIR.
6. The complainant requested an internal review on 9 November 2015.
7. DECC carried out an internal review and notified the complainant of its findings on 7 December 2015. It informed the complainant that it remained of the opinion that the requested information is exempt from disclosure under regulations 12(5)(a) and 13 of the EIR.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 9 December 2015 to complain about the way his request for information had been handled. Specifically, the complainant stated that he does not agree with the application of the exceptions cited and believes the public interest rests in disclosure.
9. DECC confirmed that the withheld information consists of the notification document for the nuclear waste transfer state aid case and a list of documents provided in support of the notification. Regulation 12(5)(a) of the EIR has been applied to all the withheld information and regulation 13 to a small amount of personal data.

### **Background**

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10. DECC explained that the government requires operators of new nuclear power plants to manage the disposal of their waste safely while ensuring that sufficient funds are available to avoid these costs being borne by the tax payer. To achieve this, the government will enter into WTCs with the prospective nuclear operator regarding the terms on which the government will take title to and liability for the operator's spent fuel and intermediate level waste (ILW) for disposal in a geological disposal facility (GDF) once the plant has been decommissioned. The method by which the price is set for the provision of this disposal service is known as the Waste Transfer Pricing Methodology. Being a first of its kind the government sought state aid clearance of its proposals in order to provide prospective nuclear operators with absolute clarity on the waste disposal arrangements.
11. DECC confirmed that these proposals and the case for state aid clearance is referred to as 'the nuclear waste transfer state aid case'. It first submitted the pre-notification of the nuclear waste transfer state

aid case to the Commission at the start of June 2012. Engagement with the Commission was then on-going with the project team submitting responses to several rounds of questions in 2012 and 2013. Engagement with the Commission stepped up following the decision on the Hinkley state aid case (UK plans to subsidise the construction and operation of a new nuclear power plant at Hinkley Point in Somerset in conjunction with EDF Energy) in October 2014 when the Commission submitted a significant amount of detailed questions to DECC between November and May 2015. The Commission case team was ultimately satisfied with the analysis and the case was notified on 10 July 2015. Following the Commission's interservice consultation (consultation with other parts of the Commission), a positive decision was adopted on 9 October 2015. The complainant's information request was submitted to DECC the same day.

12. At the time of the request the Commission had prepared a draft of the adopted decision. The official decision had not been published in the Official Journal of the European Union (OJEU) and that remained the case for some time afterwards too.

## Reasons for decision

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13. Regulation 12(5)(a) of the EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect international relations, defence, national security or public safety.
14. DECC referred the Commissioner to a previous decision notice he issued in relation to the Hinkley case and a request for very similar information to that being considered here; reference FER0571064. It referred to the Commissioner's decision to uphold the application of this exception in the Hinkley case and to the circumstances at the time of the Hinkley request being very similar to the circumstances at the time of the request the subject of this notice.
15. The Commissioner's decision notice FER0571064 can be accessed via the following link:  
  
[https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1432387/fer\\_0571064.pdf](https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1432387/fer_0571064.pdf)
16. In line with the Commissioner's decision outlined in the decision notice for FER0571064 (and also FER0219897 referred to within it), the Commissioner is satisfied that the requested information being considered here falls within the category of 'international relations' and is therefore covered by regulation 12(5)(a) of the EIR. The exception not only covers the UK's direct relations with another state but also the

UK's relationships with international organisations such as the EU and the Commission.

17. The Commissioner now needs to consider whether disclosure of the requested information would adversely affect international relations. There are two elements to this request; the notification document for the nuclear waste transfer state aid case and the list of documents provided in support of the notification.
18. Dealing with the notification document first, DECC has argued that the information the government provided to the Commission and the subsequent exchanges were based on the expectation that they would remain confidential. DECC advised that the timing of the complainant's request is important and the request was made just after a positive decision had been adopted. But at the time of the request the Commission had only prepared a draft of the adopted decision and it had not been published in the OJEU. If the government was to disclose the information in the waste transfer notification at this stage it would adversely affect its working relationship with the Commission in this area making it difficult to negotiate freely in the future. It would be detrimental to the Commission's ability to discharge its investigatory functions in future cases and would be likely to risk prejudicing the government's reputation with the Commission in relation to confidentiality of information provided for other state aid investigations.
19. Furthermore, DECC argued that if the information requested was provided before the time period for bringing forward an annulment of the decision had expired, therefore potentially prejudicing the UK's position, it is likely to compound the adverse effect on relations with the Commission which was supportive of the position the UK adopted in the nuclear waste transfer state aid case.
20. In relation to the list of documents provided to the Commission in support of the notification, DECC confirmed that these documents were provided in response to questions raised by the Commission. The titles themselves would reveal a number of the Commission's key areas of investigation concerning the case and DECC confirmed that it is of the view that the same arguments apply to the list.
21. DECC stated that for the sake of completeness it wished to confirm that two of the documents in the list are publically available; the Wardell Armstrong Design Assessment for Geological Repositories 2004 and the Mott MacDonald Review of Large Public Procurement in the UK 2002. These two documents are of a more generic nature, and in contrast to the other documents in the list of titles, they were not prepared by DECC in response to points raised by the Commission or related matters.

22. DECC stated that disclosure of all other titles in the list would give an insight into aspects of the UK's discussion with the Commission and so they should be withheld. It reiterated that disclosure of this information would adversely affect the UK's relationship with the Commission regarding the consideration of future state aid cases and the timing of the complainant's request strengthens this view. To disclose the information prior to the time period for seeking an annulment of the decision has expired would adversely affect relations between the government and the Commission especially in light of the support the Commission has given the UK in this case.
23. The Commissioner considers the timing of the request is very important. In this case it is noted that a positive decision had been received from the Commission but only just and the decision itself was only in draft form. At the time of the complainant's request the Commissioner understands that a press release had been made but the official decision had not been published in the OJEU.
24. The Commissioner accepts that disclosure of the notification document and list of documents submitted in support of it at the time of the request would have made relations between the UK and the Commission more difficult. It would have adversely affected the UK government and the Commission's ability to work together effectively. A positive decision had only just been received so there was still a need to protect the confidentiality of communications between the two parties and protect the willingness of both parties to offer unfettered and detailed submissions for investigations of this nature.
25. The Commissioner also accepts that the investigation had not been concluded at the time of the request. The official decision had not been published and was only in draft form. Once the official decision is published there is then a period of 2 months plus 24 days in which proceedings to seek an annulment may be brought. If any proceedings are instigated the case continues into this stage and so there was still a need to protect and safeguard the confidentiality of the government's contact and communications with the Commission.
26. For the above reasons, the Commissioner is satisfied that disclosure would adversely affect international relations and therefore that regulation 12(5)(a) of the EIR applies in this case.
27. As this exception is subject to the public interest test, the Commissioner will now go on to consider the weight of the competing arguments for and against disclosure.
28. As his previous decision notice under case reference FER0571064 highlights, the Commissioner accepts that there is a considerable

amount of public interest in the disclosure of this information. There are clear environmental implications and safety concerns relating to the use and reliance on nuclear energy. There are also strong public interest considerations relating to the cost of potentially developing a new generation of power stations and the impact of this shift in energy policy on UK electricity consumers.

29. The Commissioner accepts that the public interest arguments in favour of disclosure are therefore weighty in this case. However, the Commissioner must now consider the public interest arguments in favour of maintaining this exception and whether the harm disclosure would cause is severe enough to tip the balance towards this.
30. As stated in paragraph 25 above, although a positive decision had been received and overall there was no prospect of this decision changing at the time of the request, the Commissioner has accepted that the investigation had not come to an end. This is because the decision had not been officially published thereby commencing the 2 months plus 24 days' timeframe for potential challenges to the decision. The importance of safeguarding the confidentiality of the UK government's contact and communications with the Commission in relation to this case still existed at the time of the request. There remained a real risk that disclosure would adversely affect relations between the two parties at the time of the complainant's request and a real risk that any parties choosing to lodge an appeal against the Commission's decision could use the material provided by the UK to their own advantage when building a challenge. The Commissioner accepts that this would be unfair, adversely affect the consideration and outcome of any such appeals and ultimately, potentially, lead to a poorer deal for the UK public.
31. Although the Commissioner acknowledges that there are strong public interest arguments in favour of disclosure, he accepts that disclosure of the information at the time of the request would have been premature. The Commissioner is of the view that there was still a need to protect the confidentiality of the requested information and the ability of both parties to continue to work effectively together at the time of the request and strong public interest arguments in favour of allowing the overall process to be completed.
32. Overall, therefore, the Commissioner has decided in this case that the public interest rests in maintaining the exception.

## Right of appeal

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33. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

34. 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.
35. 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** .....

**Mrs Samantha Coward**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**