

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

Date: 30 June 2022

Public Authority: National Grid Electricity System Operator
Address: Faraday House
Gallows Hill
Warwick
CV34 6DA

Decision (including any steps ordered)

1. The complainant requested copies of CION assessments carried out in respect of several connections to the national electricity grid. National Grid Electricity System Operator ("NGESO") relied on Regulation 12(5)(d) (confidentiality of proceedings) and Regulation 12(5)(e) (commercial confidentiality) to withhold the requested information – although it later admitted that it did not hold two of the assessments.
2. The Commissioner's decision is that NGESO was entitled to rely on both Regulation 12(5)(d) and Regulation 12(5)(e) of the EIR and that the public interest favours maintaining these exceptions both individually and in aggregate. In respect of the SCD1 and SCD2 interconnectors, the Commissioner accepts that NGESO does not hold the requested information and is thus entitled to rely on Regulation 12(4)(a) of the EIR to not deal with that part of the request. However, as NGESO failed to inform the complainant, within 20 working days, that it did not hold this particular information, it breached Regulation 14 of the EIR.
3. The Commissioner does not require further steps.

Request and response

4. On 12 March 2021 the complainant requested information of the following description:

"pursuant to the Regulations we request the current CION Assessments in respect of actual or potential the grid connection offers for the following projects [sic], whether under the current project name or any previous project name and notwithstanding any change in the identity of the developer:

- a. Nautilus Interconnector;
- b. Eurolink Interconnector;
- c. Five Estuaries offshore windfarm (formerly the Galloper extension project);
- d. North Falls offshore windfarm (formerly the Greater Gabbard extension project);
- e. SCD 1 Interconnector; and
- f. SCD 2 Interconnector."

5. On 31 March 2021, the complainant clarified his request:

"The information/documentation I require is that listed in the letter namely the current CION Assessments in respect of actual or potential the grid connection offers for the following projects [sic], whether under the current project name or any previous project name and notwithstanding any change in the identity of the developer: a) Nautilus Interconnector; b) Eurolink Interconnector; c) Five Estuaries offshore windfarm (formerly the Galloper extension project); d) North Falls offshore windfarm (formerly the Greater Gabbard extension project); e) SCD 1 Interconnector; and f) SCD 2 Interconnector."

6. On 20 April 2021, NGESO responded. It refused to provide the requested information. It relied on Regulation 12(5)(d) and Regulation 12(5)(e) as its basis for doing so

7. The complainant requested an internal review on 26 April 2021. NGESO sent the outcome of its internal review on 18 May 2021. It upheld its original position but it disclosed a redacted copy of the Nautilus assessment – which the complainant claimed he had not previously received.

Scope of the case

8. The complainant contacted the Commissioner on 11 August 2021 to complain about the way his request for information had been handled.

9. During the course of the investigation, NGESO confirmed that it did not actually hold assessments for the SCD1 and 2 interconnectors. The reasons for this are set out below. As the complainant has previously

received redacted copies of both the Eurolink and Nautilus assessments (which the NGESO has confirmed to be the most recent copies it held at the time of the request), the Commissioner considers that the complainant already possesses the unredacted information from these documents. The Commissioner has therefore only considered the redacted parts of these documents in his analysis.

10. The Commissioner considers that the scope of the investigation is to determine whether the NGESO holds the SD1 and SCD2 assessments and whether it is entitled to rely on the stated exceptions to withhold the remaining information.

Background

11. The developers of windfarms have to apply to the National Grid to request a connection offer. The developers choose where they wish to build their project, the technology they are investing in and when they would like to connect it to the electricity transmission network. The National Grid's subsidiaries will design the connection required to accommodate the developer's request. National Grid Electricity Transmission will provide details of the connection to its parent body and it is its role to make a connection offer to the developer and put in place a contract if the connection offer is accepted.
12. Where the project involves an offshore windfarm it is a requirement that as part of that process The National Grid undertakes a Connection and Infrastructure Options Note (CION) Assessment. NGESO describes the CION Assessment process as being a key part of the connection offer process for offshore projects, which is prescribed by the requirements of its System Operator licence and designed to discharge NGESO's statutory duty under section 9 of the Electricity Act 1989 to maintain an efficient, coordinated and economical system of electricity transmission. NGESO explained that CION assessment is essentially a tool used to assess different connection options to establish the most economical and efficient connection options available. The process is overseen and regulated by OFGEM whose role is to protect consumers' interests.

Reasons for decision

Is the requested information environmental?

13. 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);
14. As it is information relating to physical connections to the national electricity grid, the Commissioner believes that the requested information is information on a measure affecting the elements of the environment. For procedural reasons, he has therefore assessed this case under the EIR.

The SCD1 and SCD interconnector assessments

15. Regulation 5(1) states that: “a public authority that holds environmental information shall make it available on request.”
16. Regulation 12 of the EIR states that:
 - (1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if—
 - (a) an exception to disclosure applies under paragraphs (4) or (5); and
 - (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
 - (2) A public authority shall apply a presumption in favour of disclosure.
 - (4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—
 - (a) it does not hold that information when an applicant’s request is received;
17. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant’s evidence and arguments. He will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. Finally, he will consider any reason why it is inherently likely or unlikely that information is not held.
18. For clarity, the Commissioner is not expected to prove categorically whether the information is held, he is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.
19. NGESO explained to the Commissioner that it did not hold the specific information because:

“On further review, and as a result of a change of personnel, it has been brought to our attention that the SCD1 and SCD2 interconnector projects are system reinforcement projects and not new connections. They would not therefore have fallen within the CION assessment

process and do not have CION assessments. This environmental information does not therefore exist and cannot be given.”

20. The Commissioner notes that the wording of the request was designed to capture CION assessments about these projects, whether under the name specified in the request or a previous name and regardless of the developer pursuing the project. However, he also notes that the request was specific in seeking CION assessments only.
21. Given that NGESO has confirmed that these projects would not have fallen within the CION assessment process (and in the absence of any evidence to the contrary), the Commissioner considers it logical to assume that no CION assessment would have been carried out as none would be needed. If some equivalent assessments had been carried out, they would not fall within the scope of the request – although the complainant would be entitled to seek such documents (should they exist and notwithstanding the remaining analysis in this decision notice) via a further information request.
22. The Commissioner is therefore satisfied that, on the balance of probabilities, NGESO does not hold CION assessments for the SCD1 and SCD2 interconnector projects (under those or any other names) and was thus entitled to rely on Regulation 12(4)(a) of the EIR to refuse this section of the request.
23. Because of the manner in which the EIR are structured, Regulation 12(4)(a) is technically subject to both a public interest test and a presumption in favour of disclosure. However, the Commissioner struggles to imagine what public interest could possibly compel NGESO to provide, or presume in favour of disclosing, information it does not have.

Regulation 12(5)(d) – confidentiality of proceedings

24. The complainant has already received redacted copies of the Nautilus and Eurolink CION assessments. NGESO confirmed that it wished to maintain its previous reliance on Regulation 12(5)(d) and Regulation 12(5)(e) of the EIR to withhold the previously-redacted information. It also confirmed that it wished to rely on these exceptions to withhold the Five Estuaries and North Falls assessments in their entirety.
25. In decision notice IC-45736-F1G2, the Commissioner set out, in considerable detail, why the CION process constituted formal “proceedings”, why the confidentiality of those proceedings was provided for in statute law and why their confidentiality would be

adversely affected by disclosure of the information.¹ Given that the focus of this exception is on the "proceedings" themselves and not the information, the Commissioner considers that, although the information within the scope of his previous decision only partly overlaps with that being considered here, there is no material difference in the "proceedings" involved that would cause him to consider that the exception was not engaged.

26. The Commissioner is therefore satisfied that the exception is engaged in respect of the information described in paragraph 24 of this decision notice. He relies, for this view, on the arguments set out in paragraphs 38-62 of decision notice IC-45736-F1G2.
27. The Commissioner notes that the North Falls and Five Estuaries assessments have been withheld in their entirety. NGESO has explained that it was able to provide redacted versions of the other two assessments because details of the projects are already in the public domain and, hence, are not sensitive. NGESO has pointed out that much less detailed information about the North Falls and Five Estuaries projects are in the public domain and therefore withholding the full assessments is necessary to protect the confidentiality of the proceedings. The Commissioner agrees.

Public interest test

28. Given the detailed consideration given in his earlier decision notice and the detailed explanations provided in its responses to the complainant, the Commissioner did not consider it proportionate to seek a further detailed submission from NGESO on the application of this exception. However, he did offer NGESO the opportunity to provide any additional arguments it felt were relevant.
29. NGESO explained to the Commissioner that the arguments that were set out in decision notice IC-45736-F1G2 were applicable to the current case. Although it noted that, because the projects were at an earlier stage, the public interest arguments would apply even more strongly to the North Falls and Five Estuaries projects.
30. Having considered the matter, the Commissioner is satisfied that the assessment he made of the balance of the public interest in maintaining

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2618342/ic-45736-f1g2.pdf>

this exception in decision notice IC-45736-F1G2 (paras 63-92) also applies to the information being withheld in this case.

31. The Commissioner is therefore satisfied that the balance of the public interest favours maintaining this exception.
32. NGESO also put forward some further reasoning as to why it considered that the public interest in maintaining the exception had, if anything, swung further towards maintaining the exception since the previous decision notice – however it asked the Commissioner to keep this reasoning confidential.
33. Given that he is satisfied that the balance of the public interest favours maintaining this exception anyway and given his findings below on aggregating the public interest, the Commissioner has disregarded these further arguments. He considers that having regard to these arguments would be unnecessary and it would thus be unfair to the complainant if he (the Commissioner) were to rely on reasoning that he (the complainant) would not be able to understand or engage with.

Regulation 12(5)(e) – commercial confidentiality

34. Once again, the Commissioner is satisfied that the information being withheld engages Regulation 12(5)(e) of the EIR. He relies, for this view, on the same analysis as set out in decision notice IC-45736-F1G2 (paras 93-120).
35. The Commissioner has considered whether there has been any shift in the balance of the public interest since the request that formed the basis of decision notice IC-45736-F1G2 was dealt with. He concludes that nothing of significance has changed and therefore he considers that the balance of the public interest favours maintaining this exception – for the reasons given in decision notice IC-45736-F1G2 (paras 121-130).

Aggregation of public interest

36. The Commissioner is satisfied that both exceptions cited above have been correctly engaged and that the public interest favours maintaining each exception individually. However, in *Office of Communications v Information Commissioner* [2010] UKSC 3, the Supreme Court (having consulted the Court of Justice of the European Union) held that, when two or more exceptions from disclosure are applied, a public authority can aggregate the public interest arguments both in favour of and against disclosure.
37. Given that the arguments in favour of disclosure are the same for both exceptions (namely transparency, accountability and the ability to participate in environmental decision-making), the Commissioner

considers that “aggregating” these arguments makes no overall difference to the public interest in disclosure.

38. Conversely, NGESO is entitled to consider both the public interest in protecting the confidentiality of its proceedings and the confidentiality necessary to protect the economic interests of the organisations that supplied the withheld information.
39. The Commissioner is therefore satisfied that aggregating the public interest only increases the public interest in withholding the information.

Procedural Matters

40. The EIR do not require a public authority to issue an explicit confirmation or denial that the requested information is held – although as a matter of good practice the Commissioner encourages them to do so where that is possible.
41. However, where a public authority does not hold a piece of information that has been requested, the correct course of action is to rely on Regulation 12(4)(a) of the EIR in respect of that information.
42. Regulation 14 requires a public authority relying on any exception to issue a refusal notice, citing the exceptions from disclosure being relied upon, within 20 working days of receiving the request.
43. NGESO issued its refusal notice within 20 working days, but that refusal notice did not cite Regulation 12(4)(a) in respect of the SCD1 and SCD2 interconnectors. The Commissioner therefore considers that NGESO breached Regulation 14 in dealing with this request.

Right of appeal

44. 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

45. 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.
46. 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

Roger Cawthorne
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