

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

Date: 9 July 2024

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

Address: 3-8 Whitehall Place
London
SW1A 2AW

Decision (including any steps ordered)

1. The complainant has requested information relating to Ricardo plc's application for a grant to design, install and operate a combined heat and power demonstrator plant. DESNZ initially refused the request in reliance of EIR regulation 12(5)(e) – confidentiality of commercial or industrial information. Some information related to emissions was disclosed at internal review. During the Commissioner's investigation DESNZ also relied on regulation 12(5)(c) – intellectual property rights and regulation 13(1) – personal information.
2. The Commissioner is satisfied that no further information in the scope of the request is held, namely the access keys to the model input files. The Commissioner's decision is that regulation 12(5)(e) applies to some of the withheld information but not all of the information withheld in reliance of this exception, regulation 12(5)(c) has been correctly applied to some information and regulation 13(1) has been correctly applied to limited information.
3. The Commissioner requires DESNZ to take the following steps to ensure compliance with the legislation.
 - Disclose the information identified in the annex attached to this notice.

4. The public authority must take these steps within 30 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 4 April 2023, the complainant wrote to the Department for Business, Energy & Industrial Strategy¹ ("BEIS") and requested information in the following terms:

"Please could you provide copies of all information as at the date of this letter in relation to the matters listed below, which is held by the Department for Business, Energy and Industrial Strategy ('BEIS'). For the purpose of this request, information shall include, but not be limited to:

- Type of information : includes all media, such as paper, electronic and micro-fiche;
- Source of information : includes that generated by BEIS or received from or generated by all third parties;
- Form of information : includes all records such as letters, memos, briefs, file notes (of meetings, telephone conversations or otherwise), emails, scanned documents, recommendations, forms, reports, presentations and photos.

For the avoidance of doubt, information shall include, but not be limited to, internal correspondence and meetings with other BEIS officials, ministers, special advisors, employees and their agents.

The information subject to this request relates to all aspects of Ricardo plc's application for and BEIS's award of a £3 million grant to design, install and operate a combined heat and power demonstrator plant at Holmsted Farm, Staplefield Road, West Sussex, RH17 5JF. This is referred to in the press release, which can be found at:

¹ On 7 February 2023, under a Machinery of Government Change, BEIS began the transition into three separate departments, one of which being DESNZ. The request in this decision was addressed to BEIS, however it was responded to by DESNZ and this notice will be served on DESNZ as the appropriate authority.

https://cdn.ricardo.com/ricardo/media/campaign/ricardo-innovative-negative-carbon-technology-to-support-national-energy-security_1.pdf

To the extent that you feel you have any other information, which may be directly or indirectly related to the above areas and should be reasonably disclosed to permit a better understanding of information already disclosed, please do so. Should there be any areas you wish to discuss, please do not hesitate to contact me."

6. DESNZ responded on 27 April 2023 advising that the information was withheld under EIR regulation 12(5)(e) – confidentiality of commercial or industrial information.
7. On 12 May 2023 the complainant requested an internal review comprehensively setting out their reasoning for this and public interest considerations. The complainant questioned the application of regulation 12(5)(e) in regard to any information on emissions. He advised:

"...under 12(9), this exemption is not available for information on emissions."
8. Following an internal review DESNZ wrote to the complainant on 7 July 2023 acknowledging the error regarding emissions information and therefore providing some information whilst advising that it was upholding its initial application of regulation 12(5)(e).

Background

9. The government considers that Greenhouse Gas Removals ("GGR") are essential to achieving its Net Zero targets. Government committed to developing and deploying GGR technologies at scale in the Net Zero Strategy.
10. The project which is the focus of the request is BIOCCUS which is led by Ricardo plc and is one of fourteen projects which were successful in obtaining funding under the Direct Air Capture ("DAC") and GGR innovation competition which is part of the Net Zero Innovation Portfolio ("NZIP") run by DESNZ.
11. DESNZ explained that this portfolio is crucial in delivering the UK Net Zero targets. BEIS issued an Invitation to Tender for the DAC and GGR programme Phase 2 December 2021 and Ricardo UK Ltd was successful with its application being awarded £3 million to build and demonstrate their pilot solution. The funding under the NZIP will end in March 2025 at which time the projects will close. Throughout the programme period Ricardo will be developing the route to commercialisation.

12. The project is being funded to undertake research and development to build a pilot project which can capture up to 1000 tonnes of carbon dioxide (CO₂) per year from the atmosphere. The quantity of CO₂ removal needs to be verified through the data collected during the operation. In this project the CO₂ is captured into a product called biochar (a charcoal like substance) which has been verified through published research as holding the carbon in its structure indefinitely and can be defined as "carbon capture and storage".
13. The project is in the development stages and therefore will not be completely constructed and operational for capturing CO₂ and producing biochar until March 2025. The project will be capturing the emissions put into the atmosphere from other sources and will capture them into a storage product. At this development stage no emissions data has been captured. After March 2025 the project is expected to develop at a commercial scale without government funding.
14. Each project funded provides a report for publication at the end of each phase of the programme. The reports from the DAC and GGR programme Phase 1 including the Ricardo design study are available online². The reports from Phase 2 will be publicly available once the programme is concluded in 2024.

Scope of the case

15. The complainant contacted the Commissioner on 31 July 2023 to complain about the way their request for information had been handled. They explained:

"Given its propensity to withhold disclosable information, I consider it likely that DESNZ/BEIS holds other information, which it still has not disclosed.

Notwithstanding Regulation 12(9) DESNZ/BEIS furthermore effectively withheld information on 7 July 2023 by claiming it does "access keys" for it. It seems unlikely that it does not hold the access keys but for which there would have been no purpose for the related information being held or generated.

Whilst now accepting that information referred to in the Appendix to my complaint dated 12 May 2023 is in the public domain and thus disclosing

² <https://www.gov.uk/government/publications/direct-air-capture-and-other-greenhouse-gas-removal-technologies-competition#history>

it, DESNZ/BEIS does not consider the impact of this on its grounds for withholding other information still in its possession under Regulation 12(5)(e) of the EIR.

I previously rejected this ground in my complaint. Namely, the expectation of non-disclosure is not legitimate; there is already extensive commercial information in the public domain; DESNZ has not demonstrated that it is more probable than not that commercial interests would be damaged; and DESNZ has not demonstrated that the information's retention outweighs the public interest."

16. During the course of the Commissioner's investigation DESNZ located information (Monitoring Reporting and Verification Report) which had been provided by Ricardo and was intended for public disclosure at a future date. DESNZ advised that this information was not held at the time of the initial request, however, it was held at the time of the internal review. DESNZ agreed to disclose this information to the complainant as it considers that the report assists in explaining the content of the redacted BIOCCUS Reporting Case Study ("BRCS") template, which was also provided at the same time. A redacted copy of Ricardo's Application to the Direct Air Capture and Greenhouse Gas Removals Innovation Programme was also disclosed. DESNZ relied on regulation 12(5)(c) – intellectual property rights and regulation 13(1) – personal information in addition to regulation 12(5)(e) to redact the information provided. This information was provided to the complainant on 22 April 2024.
17. The Commissioner considers the scope of his investigation to be whether further information is held and the application of regulations 12(5)(e), 12(5)(c) and 13(1) to withhold the remaining information in the scope of the request.

Reasons for decision

Is the requested information environmental?

18. 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);
19. The Commissioner is satisfied that the requested information comprises information on activities likely to affect the state of the environment falling within regulation 2(1)(b) and (c), namely noise, emissions and plans and activities. He has therefore assessed this case under the EIR.

Regulation 12(9) information on emissions

20. Regulation 12(9) states:

"To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse that information under an exception referred to in paragraphs (5)(d) to (g)."

21. In its initial response to the complainant DESNZ did not separately identify any of the information in the scope of the request as information on emissions. In requesting their internal review the complainant stated:

"Emissions are relevant to the Request.

Emissions to air from the Plant are identified in the AQAR [Air Quality Assessment Report³] publicised by Ricardo. They include Nitrogen Dioxide, Particulates, Carbon Monoxide, Benzene, Hydrogen Cyanide, Formaldehyde, Acetaldehyde, Ammonia, Mono-ethanolamine and N-nitrosodimethylamine). These substances include toxins and carcinogens. The Plant will also emit biochar, which may be disposed of by spreading it across the surrounding land. Separately, the noise impact assessment report submitted with the planning application identifies that noise emissions will occur. The Plant will also emit heat to the atmosphere. The various reports submitted by Ricardo claim that the Plant will lead to a net reduction in emissions of carbon dioxide. Notwithstanding this, as noted in Ricardo's Operating Techniques and BAT [Best Available Technique] assessment⁴, the Plant will vent carbon dioxide to air. This is also stated in the Phase 1 report, to which DESNZ has already referred."

22. In providing its internal review DESNZ provided some information related to emissions. Some of the information was already in the public domain, which the complainant had referenced in their request for internal review, however, the majority of this information comprised BIOCCUS Air Quality Assessments "Model input files". DESNZ explained that this latter category of information comprised files which cannot be opened without access keys. DESNZ does not hold the access keys. The files are therefore useless without the access keys.
23. The complainant understandably expected to be provided with the access keys for the model input files provided. The Commissioner asked DESNZ to explain why it holds information on emissions which it cannot access. DESNZ explained:

"The model input files were provided to DESNZ as part of a block of deliverables to evidence work completed as part of an invoice submission. There was sufficient evidence provided through other deliverables not related to emissions, to give confidence of the progress achieved to release payment of the invoice.

3

<https://onedrive.live.com/?authkey=%21ADb9e29gKhLccp8&id=5E0E580F03BEE80D%21126946&cid=5E0E580F03BEE80D&parId=root&parQt=sharedby&o=OneUp>

4 https://consult.environment-agency.gov.uk/psc/rh17-5jf-ricardo-uk-limited/supporting_documents/Application%20bespoke%20RFI%20response%20revised%20Permit%20Application%20NonTechnical%20Summary%20v2.1%2020042023.pdf

In order for Ricardo to claim funding for work done (i.e. a milestone payment) in their project plan they are required to provide evidence that certain deliverables have been completed. In this instance the evidence required was that Ricardo had been granted planning and permitting for their activities and had been granted a licence by the Environment Agency.

To apply for the permit Ricardo needed to provide several reports for assessment by the Environment Agency which is the competent regulatory authority which assesses applications for permitting. The Air Quality Assessment Report was one of the reports required for assessment by the Environment Agency. DESNZ did not need to ask for the Access Keys because it is not the competent authority to assess such reports or models and Ricardo has no obligation to provide additional information.

We understand that this data is needed for the dispersion modelling, the output of which is included in the Air Quality Assessment Report⁵, which is in the public domain and published by the local authority as part of the Planning and Permitting Applications.”

24. DESNZ confirmed that Ricardo hold the access keys to the files because the model was developed for them. The keys are not held on behalf of DESNZ. DESNZ did not ask for the access keys and has not seen the content of the files. It does not have the appropriate software through which to view files of this type (viewing software for Dispersion Models). The modelling information was not required by DESNZ other than to evidence the successful granting of the permit by the Environment Agency.
25. The Commissioner accepts that the modelling was a necessary analysis for the Environment Agency as an input to the Air Quality Assessment Report. DESNZ holding the Model Input Files was an almost incidental circumstance. In these circumstances, the information contained there, albeit emissions data, cannot be accessed by the complainant.
26. The Commissioner considered his guidance⁶ and the remaining withheld information, following the disclosure of 22 April 2024, to determine whether any other parts comprised information on emissions. He is satisfied that all emissions information held has been provided.

⁵ This was provided to the complainant.

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

27. Regulation 12(5)(e) of the EIR provides 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.
28. The Commissioner notes the complainant's comments with regard to this exception in requesting an internal review:

"Ricardo provided the information in the knowledge that it could become subject to a requirement to disclose it under the EIR. As an applicant for a government subsidy, Ricardo was furthermore under no obligation to provide information subject to the Request. In addition, DESNZ decisions on the provisions of grants have obviously been subject to public scrutiny in the past. The expectation that there would be no external disclosure of its information is thus not legitimate.

Ricardo has put extensive commercial and industrial information on the Plant into the public domain since it applied to DESNZ for this grant. As above, this includes details of Ricardo's partners; their responsibilities; the Plant's components; its processes; its operating procedures; its inputs; its outputs; its operating capacity; its expected energy performance; and its operating hours.

... The nature and extent of the commercial and industrial information now in the public domain does not support DESNZ's claim that the release of its information would damage Ricardo's commercial interests. This also applies to information generated by DESNZ itself."

29. As set out in the Commissioner's guidance⁶, the exception can be broken down into a four-stage test. All four elements are required in order for the exception to be engaged:
1. The information is commercial or industrial in nature.
 2. The confidentiality is provided by law.

⁶ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/regulation-12-5-e-commercial-or-industrial-information/#:~:text=Practical%20points-,What%20does%20the%20EIR%20say%3F,protect%20a%20legitimate%20economic%20interest>

3. The confidentiality is protecting a legitimate economic interest.
4. The confidentiality would be adversely affected by disclosure.

Is the information commercial or industrial in nature?

30. For information to be commercial in nature, it needs to relate to a commercial activity, either of the public authority or a third party. The essence of commerce is trade. A commercial activity generally involves the sale or purchase of goods or services, usually for profit.
31. DESNZ explained that the project undertaken by Ricardo includes commercial activity involving suppliers and sub-contractors contracted to supply goods and services for the construction of the plant. DESNZ considers that the commercial activities of procurement of goods and services comprises commercial information. Other information in the scope of the request comprises specific detail of Ricardo's application explaining detailed design data and descriptions of the innovation proposed and their route to commercialisation. The information includes commercially confidential details of calculated cost reductions and specific costs of a commercial system compared with the pilot demonstration. DESNZ explained that the assessment and moderation documents are also withheld because they contain references to the innovation technology being developed commercially by Ricardo.
32. DESNZ considers that the information it holds in regard to the assessment and moderation of the bids it received for the Direct Air Capture and Greenhouse Gas Removal Innovation Competition comprises the bidders and DESNZ's commercial information. It explained that during moderation meetings internal and external assessors reference the innovation technology and information on other projects within the GGR programme. It added:

"...the assessment process is a commercially confidential process in allocating innovation funding by government funders."
33. The Commissioner has seen copies of the withheld information and is satisfied that the information withheld under regulation 12(5)(e) is commercial in nature. Notwithstanding this he notes that some of the withheld information is already in the public domain.⁷ The confidential

⁷ <https://www.gov.uk/government/publications/direct-air-capture-and-other-greenhouse-gas-removal-technologies-competition/projects-selected-for-phase-2-of-the-direct-air-capture-and-greenhouse-gas-removal-programme>

annex will detail information contained in the withheld information falling into this category.

Is the information subject to confidentiality provided by law?

34. The Commissioner considers this to include confidentiality imposed on any person by the common law duty of confidence, contractual obligation, or statute. The exception can cover information obtained from a third party, or information jointly created or agreed with a third party, or information created by the public authority itself.
35. With regard to the common law of confidence, there are two issues that need to be considered:
 - Does the information have the necessary quality of confidence? In the Commissioner's view if the information is not trivial nor in the public domain, it has the necessary quality of confidence.
 - Was the information shared in circumstances creating an obligation of confidence?
36. DESNZ submits that the withheld information is subject to confidentiality by law because:

"It is important that companies are able to share commercially sensitive information with Government in the confidence that that information will not then enter the public domain and damage their wider commercial interests and opportunities. Disclosure of the requested information in this case would be contrary to legitimate expectations of confidentiality and would damage the commercial interests of the company."
37. DESNZ points to the standard pre-commercial terms and conditions of Contract for Services which states that the Contractor shall not communicate with regard to the Contract unless agreed in writing with the Authority (DESNZ). Similarly with regard to FOIA the Authority will determine, at its "absolute discretion" whether information is exempt from disclosure. DESNZ considers that this indicates that information is provided in confidence to the Authority.
38. The Commissioner is satisfied that the points set out in paragraph 35 have been met. He considers that the information has the necessary quality of confidence because the information is not in the public domain and is clearly not trivial. The information was shared in circumstances with an expectation of confidentiality.

Is the confidentiality provided to protect a legitimate interest?

39. The First-tier Tribunal confirmed in *Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd*⁸ that, to satisfy this 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. It is not enough that disclosure might cause some harm to an economic interest. The public authority needs to establish that, on the balance of probabilities, ie more probable than not, disclosure would adversely affect an economic interest.
40. DESNZ advised the Commissioner that the legitimate economic interests being protected are those of Ricardo, the parties working with Ricardo, the companies initially bidding for funding and its own interests.
41. The Commissioner's guidance⁹ advises public authorities that if a third party's interests are at stake it should consult with them, unless it has prior knowledge of their views. It is not sufficient to speculate about potential harm to a third party's interests. The Commissioner is aware that DESNZ has consulted extensively with Ricardo in this regard.
42. DESNZ argued:
- "Since all the activity related to the EIR request is working towards the enterprise being commercial and working with potential investors then there is economic interest to protect.
- ... We respect confidentiality of applicants to our funding"
43. DESNZ explained that Ricardo and its named partners are all involved in the design of the innovative technology in use and all would be prejudiced by disclosure of "sensitive design information". It went on to argue that confidentiality in the innovation process, including design information is required to protect the interests of all parties involved, including interested potential customers, to prevent jeopardising their economic interests through the loss of a competitive advantage.
44. DESNZ also explained:
- "The expectation is that in the 3 years following completion of the project, the partners will pursue an updated version of the

8

[https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i479/%5b2011%5dUK_FTT_EA20100106_\(GRC\)_20110104.pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i479/%5b2011%5dUK_FTT_EA20100106_(GRC)_20110104.pdf)

⁹ Ibid

commercialisation plan included in their application form, which details design concept, unique selling proposition, development pathway, risks and mitigations, companies, regions and industrial sectors to target for deployment of the technology. Disclosure of this information into the public domain would remove the competitive advantage of investment into this project, revealing the business ambitions of a private UK company to global competitors.”

45. Furthermore DESNZ advised that disclosure of how it assesses and moderates applications would impact its own legitimate interests by providing information which could be inappropriately used by applicants in presenting their bids potentially resulting in less effective decision making on the part of DESNZ.
46. The Commissioner accepts, as a general principle, that disclosure of information that would harm a party's commercial position in the context of future or existing business is a legitimate commercial interest. Based on the submissions provided by DESNZ he considers that there is a real and genuine risk that disclosure of the information which has been withheld in full, save the material identified in the annex, and the information provided with redactions, would adversely affect the legitimate economic interests of the parties as explained by DESNZ.
47. The Commissioner is therefore satisfied that this limb of the test is met.

Would the confidentiality be adversely affected by disclosure?

48. Although this is a necessary element of the exception, once the first three elements are established, the Commissioner considers it is inevitable that this element will be satisfied. Disclosure of truly confidential information into the public domain would inevitably harm the confidential nature of that information, and would also harm the legitimate economic interests that have already been identified.
49. For the reasons set out above the Commissioner accepts that regulation 12(5)(e) applies to the information excluding that information identified in the annex to this decision.

Public interest test

50. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions.
51. DESNZ recognised the public interest in disclosure of the information. It commented that greater transparency makes government and decision making more open and accountable. The Commissioner notes that the spending of public money to fund projects or competitions such as the

one here adds weight to the public interest in disclosure particularly when the innovation focusses on matters concerning climate change.

52. DESNZ went on to argue that there is, however, a public interest in ensuring that the commercial interests of external companies are not damaged or undermined by disclosure of information not in the public domain and which would adversely impact their economic interests and future business.
53. DESNZ explained that government departments run innovation competitions to allocate Treasury research and development funding. Disclosure of information provided in confidence by companies wishing to access this funding would undermine trust and the companies' willingness to share commercially confidential details which aid the assessment of those applications. This would result in the allocation of taxpayers' money being made on more limited information about the operation of the technology with restricted information on the potential for economic returns for the UK. The resulting economic impact would be experienced by the UK economy and taxpayers. DESNZ considers this situation not to be in the public interest.
54. In the Commissioner's view there is already a large amount of information on Ricardo and the demonstrator plant which is publicly accessible. The complainant acknowledges the significant amount of information in the public domain, as set out in paragraph 28; this significantly weakens the public interest in disclosure. Further information such as the specific content of Ricardo's application and financial tables would provide further transparency. The Commissioner notes that the disclosures made during his investigation have provided additional information. Consequently the Commissioner is not convinced that disclosure of the remaining information withheld under this exception would best serve the public interest. There is an underlying public interest in ensuring that the confidentiality of commercial information is protected. The Commissioner has considered the content of the moderation information (documents, presentation and recording) and accepts that references to commercially confidential information contained therein are sufficient for the public interest to favour maintaining the exception. In the specific circumstances of this case the Commissioner recognises that disclosure risks harming the commercial interests of all parties involved.
55. Whilst the Commissioner has been informed by the presumption in favour of disclosure, he is satisfied that, for the reasons given above, the exception has been applied correctly and the public interest favours maintaining the exception in relation to the information where the exception is engaged.

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

56. 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.

57. The Commissioner's guidance on the application of regulation 12(5)(c)¹⁰ states that in order for the exception to apply the authority must demonstrate that:

- the information is protected by IP rights;
- the person(s) holding the IP rights would suffer harm (infringement alone will not necessarily result in harm);
- the identified harm is a consequence of the infringement or the loss of control over use of the information; and
- the IP rights holder could not prevent the harm or loss by enforcing their IP rights.

58. The Commissioner notes that the information need not be subject to IP rights directly; however its disclosure must be shown to have an adverse effect upon the IP rights.

59. With regard to the first point of paragraph 57 DESNZ explained that the contract between DESNZ and Ricardo (section 27 – intellectual property rights) states:

“Subject to Condition 27(4), all Background Intellectual Property used or supplied under this Contract in connection with the Services shall remain the property of the Party introducing the same and nothing contained in this Contract or any licence agreement pertaining or pursuant to the Contractor’s performance of the Services shall affect the rights of either Party in its Background Intellectual Property.”

60. DESNZ stated that “Ricardo developed the tool and have IP rights.”

61. In respect of the second bullet point DESNZ explained:

“Harm in this respect would be the inability of Ricardo to develop a commercially viable operation. The methodology for verification of CO2 capture is contained in the Reporting Case Study developed by and

¹⁰ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/regulation-12-5-c-intellectual-property-rights/>

unique to Ricardo. The ability to verify capture and scale of capture is what will give Ricardo a competitive advantage in the carbon markets. Investors and buyers are looking for technologies which can quantitatively prove carbon dioxide removal at scale through products such as high quality bio-char. Disclosure of the information would mean that this advantage would be lost.”

62. Regarding the third bullet point DESNZ explained:

“The development of the model which underlies the Reporting Case Study has been developed specifically for the BIOCCUS technology to substantiate the claims that this technology will capture an amount of greenhouse gases over a stated period of time. If this information was placed in the public domain, the considerable expertise used to develop the model would be immediately available to competitors, both for the mathematics and formulae, and for the performance estimates of their designs. This would cause substantial commercial harm and would render Ricardo’s competitive advantage useless.”

63. DESNZ explained that Ricardo could not prevent harm or loss by enforcing their IP rights as follows:

“Ricardo is the IP rights holder under the contract with DESNZ. EIR 12(5)(c) protects these rights and prevents DESNZ from publicising this IP. Ricardo would need to challenge DESNZ regarding release of their IP under the EIR in order to protect their IP, prior to release.

At the point at which this information is released, Ricardo would lose the ability to prevent harm by enforcing their IP rights as the information could be publicised or passed to a third party (especially those with interest in the industry). If another party used this information to then exploit the various models and formulae, Ricardo would not be able to detect where it has been used due to the results of use not being clear in the product. Therefore they would not be able to enforce their IP rights.”

The Commissioner’s view

64. The guidance on this exception¹¹ explains that EIR regulation 5(6) expressly states:

¹¹ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/regulation-12-5-c-intellectual-property-rights/>

"Any enactment or rule of law that would prevent the disclosure of information in accordance with these regulations shall not apply."

65. Following from this DESNZ will not infringe IP rights by disclosing information in response to an EIR request, because it is an activity expressly permitted in law. Regulation 12(5)(c) applies if there is a significant risk of infringement of IP rights by any person who may receive the information. Public authorities are therefore entitled to consider a 'worst case scenario' regarding what any person who wished to infringe the IP rights might do given unrestricted access to the information.
66. For the Commissioner to be satisfied that the exception is engaged he must be persuaded that disclosure would adversely affect the identified IP rights for Ricardo. The Commissioner agrees with DESNZ's definition and consideration of the IP rights in this case. In noting that disclosure under EIR is disclosure to the world, he accepts that other organisations would want to exploit the withheld information for the reasons explained by DESNZ. He considers that those with the appropriate expertise, competitors of Ricardo, could successfully use the information and, from the explanation provided by DESNZ in paragraph 63, could not be protected or detected. Ricardo would no longer be able to rely on their IP rights effectively to control the use of the information.
67. The Commissioner is aware of the innovative nature of the technology involved and the interest in commercially developing the technology. He accepts that Ricardo cannot effectively prevent infringements to their IP rights if the information was disclosed under EIR in response to this request and would suffer harm as a result. The Commissioner therefore concludes that the exception is engaged.

Public interest test

68. DESNZ recognised that there is a general public interest in the disclosure of information making government decision making more transparent, as referenced in paragraph 51 above.
69. The public interest in maintaining the exception is determined by the severity of the harm suffered by the IP rights holder losing control of the information. DESNZ explained its view that there is a public interest in ensuring that the commercial interests of external companies are not damaged or undermined. In this case, damage by disclosure of Ricardo's information relating to a commercial model. DESNZ advised:

"The release of the requested information would damage and adversely affect the commercial position of Ricardo UK Ltd and any partners in their development of a carbon capture demonstration plant."

70. DESNZ further explained the significant size of the potential UK cumulative revenue generated by this project consortium through the UK and overseas markets by 2030 when commercial deployment is expected. It stated:
- “Confidentiality in the innovation process including design information is needed to protect the interests of all parties involved or economic harm would result through the loss of the competitive advantage and substantial potential markets. This is not in the public interest.”
71. Furthermore, in its consultations with Ricardo, they stated that effectively losing their IP would mean losing a competitive advantage.
72. The Commissioner agrees that transparency, accountability and understanding of decision making on environmental issues are important public interest factors in favour of disclosure. He is aware that in some circumstances, infringing an IP right could bring some benefit to society.
73. In this case, information regarding successful carbon capture is clearly beneficial to society as a whole. As previously referenced at paragraph 52 the information relates to a project which uses taxpayers’ money in relation to the private sector and in respect of a new technology. However, the Commissioner is not convinced that disclosure of the specific information relating to IP rights would provide information, in addition to the information already disclosed or in the public domain, warranting the infringement of IP rights.
74. The Commissioner has taken into account the presumption in favour of disclosure in his deliberations. Notwithstanding this he does not consider that removing the protection afforded by IP rights is in the public interest if a commercial company loses control over information it intends to exploit commercially. It is against the public interest to undermine innovation and progress by doing so.
75. In the circumstances of this case the Commissioner considers that with respect to the information withheld under regulation 12(5)(c) the public interest favours maintaining the exception.

Regulation 13(1) – third party personal data

76. DESNZ has applied regulation 13(1) to a limited amount of information comprising the names and contact details of specific individuals included in the information in the scope of the request. 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.

77. In this case the relevant condition is contained in regulation 13(2A)(a)¹²
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 UK General Data Protection Regulation ('UK GDPR').
78. DESNZ has argued that disclosure would breach the first data protection principle which provides that personal data shall be processed fairly and lawfully and must comply with one of the conditions at Article 6(1) UK GDPR.
79. 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.
80. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.
81. Section 3(2) of the DPA defines personal data as:
"any information relating to an identified or identifiable living individual"
82. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
83. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
84. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
85. The Commissioner is satisfied that the withheld information comprises personal data. This is because the information relates to third party named individuals and their contact details and DESNZ officers.
86. However, the fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the EIR. The second element of the test is to determine

¹² As amended by Schedule 19 Paragraph 307(3) DPA 2018

whether disclosure would contravene any of the DP principles. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

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

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

88. 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.

89. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

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

90. 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.”¹³

91. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under the EIR, 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;
- ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;

¹³ 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, regulation 13(6) EIR (as amended by Schedule 19 Paragraph 307(7) DPA and Schedule 3, Part 2, paragraphs 53 to 54 of the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:- “In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK 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”

iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

92. 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

93. In considering any legitimate interests in the disclosure of the requested information under the EIR, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
94. 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.
95. The Commissioner considers that there is a legitimate interest in the transparency and accountability of public authorities as a general principle. He also considers there to be a legitimate interest in this information in the context of the awarding of public money. There is also the legitimate interest of the requester.
96. In this case the complainant has not raised a specific complaint with regard to the withholding of personal information nor have they advised the Commissioner of any personal legitimate interests.

Is disclosure necessary?

97. "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.
98. In the Commissioner's view it is not sustainable to argue that disclosure of the withheld names and contact details is necessary. Disclosure of such information would add little to the public's understanding of the project which is the focus of the requested information.
99. In the circumstances of this case, the Commissioner has identified that whilst there is a legitimate interest in ensuring accountability and transparency on the part of DESNZ, he is not convinced of the necessity in the disclosure of the withheld names and contact details. He considers

that disclosure is not necessary to assist in understanding Ricardo's application or operation of the demonstrator plant.

100. As the Commissioner is satisfied that disclosure is not necessary, there is no lawful basis for disclosure and therefore DESNZ is entitled to rely on regulation 13(1) by way of regulation 13(2A)(a), to withhold the information.

Right of appeal

101. 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

102. 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.

103. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Susan Hughes
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF