



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2020/0009V

Before

Judge Stephen Cragg Q.C.

Tribunal Members

John Randall
Stephen Shaw

Heard via the Cloud Video Platform on 22 and 23 February 2021

Between

Rachel Connor

Appellant

And

**The Information Commissioner
Low Carbon Contracts Company Limited
Sneddon Law Community Wind Company Limited**

Respondents

The Appellant was represented by John Campbell QC

The Commissioner was represented by Laura John

Low Carbon Contracts Company Limited was represented by Robin Hopkins

Sneddon Law Community Wind Company was represented by Rupert Paines

DECISION AND REASONS

DECISION

1. The appeal is dismissed

MODE OF HEARING

2. The proceedings were held via the Cloud Video Platform. All parties joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.
3. The Tribunal considered an agreed open bundle of evidence comprising 581 pages, a further bundle of 2147 pages, a closed bundle and written submissions from all the parties.

BACKGROUND

4. The Commissioner explained in her decision notice dated 4 December 2019 that the aim of the Low Carbon Contracts Company (LCCC) is to promote investment in renewable energy, by entering into contracts (known as Contracts for Difference (CfDs)) with potential generators, which fix the price for the electricity produced from windfarms. Under the terms of a CfD the wind farm has to be operational by an agreed date.

5. In this case the Appellant requested information from LCCC relating to whether a particular generator, Sneddon Law Community Wind Company Limited (Sneddon Law) which is the 3rd Respondent in this case, had applied for an extension to its operational start date on the basis that there had been a *force majeure*. The LCCC refused to disclose any information as to whether such application had been made, and cited a number of exceptions under the EIR as justification for doing so.
6. The Appellant has included the following detail in her appeal document for this appeal:-

CfDs currently have a term of 15 years. CfD payments to Generators commence from the 'Start Date' as defined in Condition 3.21 of T's and Cs. (this is usually the first day of the target commissioning window, but can be any date within the Target commissioning period.

The administrative costs of the LCCC and payments made to generators under CFDs are provided through a Supplier Obligation Levy imposed on all UK electricity suppliers, who pass those additional costs directly on to consumers in their electricity bills. The costs of administering the LCCC and payment to generators under the CfD scheme are therefore borne by the public in direct proportion to the electricity consumed, regardless of household income. This publicly subsidised CfD regime, administered directly under the auspices of a publicly elected representative i.e. the Secretary of State for BEIS, therefore requires to be accountable to the public as comprising a significant proportion of their electricity bill.

7. Against this background, on 23 January 2018 the Appellant requested information of the following description:-

"Question 1.

Under the terms and conditions for this CfD, please provide me with information kept in any form showing or tending to show whether Community Windpower Ltd or Sneddon Law Community Wind Ltd (the "FM Party") have applied for an extension of their target commissioning or long stop (Start of Commissioning) dates citing a 'Force Majeur' as causing delay to construction, as defined in

paragraph 69 of the Terms and Conditions, or as is defined as a Force Majeur (page 20).

Question 2.

Has the LCCC agreed to either a defined extension of time for the start of commissioning, or to an indefinite extension of time to start of commissioning, or to the long stop date for Sneddon Law windfarm?

Question 3.

Under the CfD Terms and Conditions 69.3:

If they did so, when did CWL inform LCCC of a delay resulting from Force Majeur and did LCCC consider this to be prompt notification considering the dates set out in the summary above?

Question 4

Under 69.4, has the FM party provided LCCC of the background detail of why it considers a FM not to be of its own failings, (which relate to the failure of CWL to comply with required planning conditions) been provided?

Under 69.4 c), Has LCCC verified that information or asked the FM party for additional details of why they consider a FM to have occurred?

Question 5.

Has there been compliance with paragraph 69.5 of the terms and conditions?"

8. The LCCC is a private limited company wholly owned by the Secretary of State for Business Energy and Industrial Strategy. As such it is a public authority for purposes of the FOIA by virtue of section 3(1) and section 6 of FOIA, which in turn brings it within the definition of a public authority for the purposes of the EIR under regulation 2(2)(b) EIR.

THE LEGAL FRAMEWORK

9. Regulation 12(1) EIR provides that:-

12. – (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.

10. Regulation 12(2) provides that:-

- (2) A public authority shall apply a presumption in favour of disclosure.

11. Regulation 12(4) entitles a holder to withhold disclosure if:-

- (4) (a) it does not hold that information when an applicant's request is received;
- (b) the request for information is manifestly unreasonable;
- (c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9 (provision of advice and assistance);
- (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or
- (e) the request involves the disclosure of internal communications.

12. Regulation 12(5) entitles a holder to withhold disclosure if:-

- (5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –
 - (a) international relations, defence, national security or public safety;
 - (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
 - (c) intellectual property rights;
 - (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;

(f) the interests of the person who provided the information where that person –

(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;

(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and

(iii) has not consented to its disclosure; or

(g) the protection of the environment to which the information relates.

13. Regulation 12(9) EIR states that 'to the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs (5)(d) to (g).

THE DECISION NOTICE

14. In the decision notice dated 4 December 2019 the Commissioner decided that LCCC was correct to withhold the information that had not been disclosed. The Commissioner provided further background as follows:-

13...The LCCC does not wish to reveal whether there has been any claim that the project has been the subject of a force majeure. It has identified information which explains why the start dates originally set out under the contract were changed and considers this to be the information captured by the request. Having viewed the information the Commissioner is satisfied that it does provide the clarification sought by the request.

14. Nothing in this notice, or references to information being held, should be interpreted as meaning a claim for force majeure was made.

15. In relation to the claimed exception under reg 12(5)(e) EIR, the Commissioner found that the information is of a commercial and industrial nature because:-

21...It relates to the generator's development of the windfarm and its adherence to the terms of the contract it has with the LCCC. That contract provides that the generator will receive a top up from the LCCC if the price at which it can sell the electricity it generates to the market falls below a set price, known as the 'strike price'. If the generator is able to sell its electricity for more than the strike price, the LCCC is paid the difference. This provides certainty as to the returns available to the generator and so provides confidence to those investing in renewable energy and therefore encourages the growth of the industry and ultimately the ability of the government to reduce the emission of greenhouse gases.

16. In relation to the confidentiality requirement in reg 12 (5)(e) EIR, the Commissioner decided that she:-

25... is satisfied that the confidentiality clause can apply not only to the correspondence received from the generator in respect of its contractual obligations, but also the internal communications that are captured by the request.

26. Having viewed the withheld information, given the fact that it relates to the generator's contractual obligations and given the nature of the particular issues it addresses, and that it is not information that has been revealed to other parties, the Commissioner is satisfied that it is of a confidential nature .

17. In relation as to whether the confidentiality is provided to protect a legitimate economic interest, the Commissioner decided she could say in the open decision notice that:-

30...in very broad terms the LCCC argues that disclosing the information would undermine the generator's relationship with its lenders and contractors and, in addition, that there are two ways in which generator's rivals, or others opposed to project, could use the information to the disadvantage of the generator.

31. The Commissioner has fully considered the arguments presented by the LCCC. Some of the information refers directly to the commercial arrangements the generator has with its contractors and lenders. Disclosing this information would undermine the generator's relations with those parties. The rest of the information would also impact on the generator's relations with those parties and its ability to maintain their confidence, if its disclosure could result in others using the information to the economic disadvantage of the generator. The Commissioner finds that one of the arguments presented in respect of how this information could be used by third parties to the generator's disadvantage is rational and sufficient to engage the exception. The Commissioner is not persuaded by the second argument presented by the LCCC as to how the information could be used to the generator's disadvantage.

32. The Commissioner finds that the exception is engaged both on the basis that disclosure would damage the generator's relations with contractors and lenders and on the basis that the information could be used by the generator's rivals. However the Commissioner does not consider the harm that would be caused by the generator's rivals using the information to be as great as that claimed by the LCCC. This in turn reduces the impact disclosing some of the information would have on the generator's relations with contractors and lenders.

18. The Commissioner considered the extent to which disclosing the requested information would damage the economic interests of the LCCC itself, and found that:-

35...The Commissioner considers that the entering into legally binding contracts which obliges the LCCC to pay out money in some circumstances, but which offers the opportunity for it to earn an income in others, is a commercial activity. The fact that the motivation of the LCCC is not to make a profit, but to provide confidence to those investing in renewable energy, does not alter the commercial nature of the relationship between the LCCC and the generators. Anything that would hamper the ability of the LCCC to achieve its aims would be an impact on its economic interests. The more difficult it would be for the LCCC to make CfD contracts attractive to potential generators, the less favourable to the LCCC the strike price is likely to be and the more likely it is to need to pay more top up money to generators and the less likely it is that the strike price would be low enough for the LCCC to earn money from the generators.

19. The Commissioner then posed the question whether disclosing the requested information would interfere with the LCCC's ability to manage CfD contracts and whether disclosure would be a disincentive to generators to enter into such contracts, or undermine the confidence that investors would have in the industry. The Commissioner decided that 'on balance' that LCCC does have a realistic concern that generators would become more circumspect in respect of the information they were willing to provide to the LCCC and that this would impact on the ability of the LCCC to manage the CfD contracts.

20. The Commissioner said that LCCC's 'second argument cannot be discussed within this notice as to do so would reveal the very information that the LCCC is seeking to protect', but that:-

41...All the Commissioner can say is that she accepts that there would be a cost to the LCCC in protecting against the potential harm that it envisages would be caused by disclosing the information and this would have some impact on its economic interest. That impact would however be limited.

21. Summing up the position in relation to reg 12(5)(e) EIR, the Commissioner said that:-

42.The Commissioner has found that there is a contractual obligation of confidence which protects the economic interests of the generator and common law duty of confidence which protects the economic interests of the LCCC itself. ...It follows that both the confidence owed to the generator and that owed to the LCCC would obviously be adversely affected if the requested information was disclosed. ...The exception provided by regulation 12(5)(e) is engaged.

22. Applying the public interest test thereafter, the Commissioner considered the factors for and against disclosure and concluded:-

60. In balancing the public interest arguments for and against the application of regulation 12(5)(e) the Commissioner places some weight on the public interest in disclosing information so that local people affected by the windfarm understood how the project was progressing and also allowing the wider public to take a view on how the project was being managed by the generator and how the CfD contract was being managed by the LCCC. However against this is the public interest in the LCCC being able to meet its objectives of promoting investor confidence in the low carbon electricity industry and in not undermining the economic interests of the particular generator in this case, which in turn could hinder the success of the windfarm and so damage the LCCC's ultimate objective, i.e. the production of low carbon energy.

61. In light of the above the Commissioner finds that the public interest in favour of maintaining the exception outweighs the public interest in favour of disclosure. The LCCC is entitled to rely on regulation 12(5)(e) to withhold the information. In reaching this decision the Commissioner has taken account of the presumption in favour of disclosure established by regulation 12(2).

23. In relation to regulation 12(5)(9) EIR (which dis-applies regulation 12(5)(e) EIR where the information is on emissions), the Commissioner noted that it 'is not sufficient for the information to relate to emissions, the information itself must actually be on emissions for regulation 12(5)(9) to operate' and that 'having viewed the withheld information the Commissioner is satisfied that the information is not on emissions and that therefore regulation 12(5)(e) remains available to the LCCC'.

24. The other issues covered by the Commissioner are featured less prominently in the appeal before us, and so we deal with them more briefly.

25. For the purposes of reg 12(5)(f) EIR the Commissioner accepted that most of the information requested had been provided by Sneddon Law. However, in relation to the question as to whether Sneddon Law was under or could have been put under, any legal obligation to supply the information to LCCC the Commissioner concluded that although she was

unable to discuss the details of the LCCC's arguments in open, 'nothing is revealed by acknowledging that the information relates to the generator's contractual arrangements with the LCCC and the Commissioner finds that under the terms of the contract the generator was obliged to provide the LCCC with the information to which the exception has been applied' (paragraph 68) and therefore reg 12(5)(f) EIR was not engaged.

26. Regulation 12(5)(b) EIR was only applied to the information in one document captured by the request. This was referred to by LCCC as being "external legal advice or correspondence relating to the matter" under consideration. The LCCC also withheld this information under regulations 12(5)(e) & (f). The Commissioner explained that:-

73...In this case the LCCC has claimed the document in question attracts advice privilege. Advice privilege will only apply to communications that have been made between a lawyer and their client for the dominant purpose of seeking or providing legal advice. That advice must be from a qualified legal adviser and given in a legal context, for example about legal rights, liabilities, obligations or remedies. Having viewed the information the Commissioner is satisfied that all these requirements are met and that the information attracts legal advice privilege. Given the importance of maintaining the confidentiality of lawyer client communications to the course of justice, the Commissioner find the exception is very clearly engaged.

27. The Commissioner also found that the public interest favoured withholding this information taking account of 'the very strong public interest in preserving the right of clients to seek and obtain advice from their legal advisers so that they can take fully informed decisions to protect their legal rights'. When aggregated with the public interest in withholding the information under reg 12(5)(e) EIR, the public interest in withholding this information was especially strong.

28. In relation to the exception claimed in relation to reg 12(4)(e) EIR (internal communications) for a number of documents, the Commissioner noted that the exception under reg 12(5)(e) EIR was also claimed. The

Commissioner accepted that most of the fifteen documents listed were correctly identified as internal communications and so the reg 12(4)(e) EIR exception applied. LCCC had made limited submissions on the public interest in withholding these documents and the Commissioner found that:-

85...the Commissioner considers there is only a very limited public interest in maintaining the exception. Given this is the case and the obligation to apply a presumption in favour of disclosure when conducting the public interest test, the Commissioner finds that the public interest in favour of disclosure outweighs the public interest in favour of maintaining the exception provided by regulation 12(4)(e). It should be remembered that this same information has already been considered under regulation 12(5)(e) and the Commissioner found that the LCCC was entitled to rely on that exception to withhold the information.

29. The Commissioner has also produced a closed annex to the decision notice which we will address in a short closed annex of our own.

THE APPEAL GROUNDS

30. The grounds of appeal dated 1 January 2020 were contained in a wide-ranging document of 45 pages which, in addition to appeal grounds, addressed a number of matters which are outside the decision-making powers of both the Commissioner and this Tribunal. In her response to the appeal the Commissioner helpfully summarised the appeal grounds as follows:-

(a) Ground 1: the Commissioner erred in concluding that Regulation 12(5)(e) EIR is engaged, as:

(i) The disputed information is “on emissions” within Regulation 12(9) EIR, and the exception in Regulation 12(5)(e) EIR is therefore not available;

and/or

- (ii) The disputed information is no longer confidential; and/or
 - (iii) disclosure would not adversely affect any legitimate economic interests.
- (b) Ground 2: the Commissioner erred in concluding that Regulation 12(5)(b) EIR is engaged, as the document in question is covered by legal advice privilege rather than litigation privilege; and
- (c) Ground 3: the public interest balance lies in favour of disclosure.

31. Again very helpfully, for this hearing, Mr Campbell QC has provided a skeleton argument which sets out the Appellant's case as of February 2021. The skeleton sets out the case under a number of headings:-

The reg 12(9) EIR exception

32. The skeleton argument contains the following:-

46 Logically, any submission should approach the regulation 12(9) exception first. If it applies all other exceptions are irrelevant, since non-disclosure is not permitted.

47 The IC's Decision Notice at §43 simply holds that based on a view of the withheld information the IC is "satisfied that the information is not on emissions." No reasoning is given.

...

52 The information requested relates to information on emissions. For the avoidance of doubt, the "emission" in question will impact upon groundwater. The Appellant has shown in her evidence how the groundwater will be impacted upon by the Project. The adverse risk to groundwater supplying drinking water by means of Private Water Supplies is categorised as 'major' both in the short and long term by the third party's consultants. In any event it is a matter of direct and pressing public interest and concern, as the Appellant has demonstrated in her submissions.

53 The Appellant submits therefore that reg 12(9) applies, and that the exceptions contained in reg 12(5)(e) and 12(4)(e) are disapplied. The withheld information should therefore be disclosed in response to questions 1-5.

The reg 12(5)(b) EIR exception

33. In relation to the application of the legal professional privilege exception, the Appellant's skeleton argument says:-

54 Being satisfied at paragraph 73 of the decision that legal advice privilege applies to one document, the commissioner has applied this exception. With respect, that is a misapplication of reg 5(b) which only applies to "the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature."

55 The obvious purpose of this exception is to exclude from disclosure material produced or to be produced in contemplation of litigation, internal or external. By a long-standing convention such material is excluded from disclosure requirements. In the present case there is no litigation nor internal inquiry. It is quite wrong to suggest that there might be...

...

57 If the legal advice for which privilege is sought relates to former judicial review proceedings by the third Respondent against Scottish Ministers, or to the s.42 TCPSA application to East Ayrshire Council then demonstrably it relates to emissions (as these proceedings were concerned with water supplies), and reg 12(9) applies, thus nullifying the 12(5)(b) exception.

58 In short, with respect the regulation has been misapplied. If LAP applies, then 12(5)(e) is the only conceivable place that it could do so.

The 12(5)(e) EIR exception

34. The Appellant's skeleton argument in relation to whether the commercial confidentiality exception should apply states that:-

64 The question ought to be whether the confidentiality exemption should be applied in any event to a request for information which

alleges, in detail, that private water supplies will potentially be affected by the Project.

65 Confidentiality is said to be necessary to protect commercial interests and to avoid economic harm, but the application of that exception without consideration of any environmental criteria inevitably tilts the balance in favour of the exception without any possibility of counter-balance “in favour of” the environmental considerations. In the application of the exception, it is submitted that these matters must be considered in the round, otherwise the conclusion will always be that where a colourable case for the application of the confidentiality exception is stated, it will always prevail.

66 In this case, no such case is made, and such evidence as may have been produced is unseen by the Appellant. The IC has noticed (Decision Notice §39), but has failed to take account of, the knowledge that the second Respondent has (Appeal §160) which strongly articulates the principles of openness and disclosure which lies at the heart of the EIRs.

...

68. In the consideration of economic harm, the IC correctly articulates that the harm must be likely rather than theoretical. “Likely” means more than 50%. The assertion of mere prejudice is insufficient. No evidence of the likelihood of economic harm has been produced. This is a case where the third Respondent has already failed to comply with the terms of the CFD, a matter which is acknowledged by the IC. The IC’s reasoning at paragraph 58 is incoherent. The verb used is “could”, rather than “would” as appears in the EIR reg 15(5)(e, which does not equate with any averment or evidence from the third Respondent of the likelihood of actual harm being sustained.

69 It is relevant that the LCCC is funded by the public as the Appellant explains.

The 12(4) (e) EIR exception

35. The Appellant does object to the application of this exception:-

72 This exception can only be used to prevent disclosure when the PIT is also applied against the applicant for information. The reason for withholding these documents is in the end perhaps predicated on the

commercial confidentiality test (12(5)(e)) and perhaps on the PIT. The IC is unclear. The application of 12(5)(e) to the documents produced the conclusion at §85 is that there is only a very limited public interest in maintaining the 12(4)(e) exception, but that production of the documents is prohibited anyway under the commercial confidentiality test.

73 In short, the PIT is brought into play against the documents for which the §12(4)(e) exception is claimed.

74 Without commercial confidentiality there would (§85) only be a “very limited public interest in maintaining the exception.” Yet the PIT is invoked to exclude disclosure by aggregating 12(5)(e) with the 12(4)(e) exception.

Public interest test

36. The Appellant comments on the Commissioner’s approach to the public interest test as follows:-

75 In her Rebuttal...the Appellant argues that the IC has interpreted the narrow commercial, economic and confidentiality interests of the LCCC, the Renewable Energy sector and SLWC in particular, as representing the wider UK and local public interest.

76 In the Decision, the PIT has been applied to all exceptions engaged. The wider public interest related to adverse environmental impacts and local economic impacts have been ignored for all exceptions. The PIT requires consideration of the wider public interest, including environmental questions. The wider public interest related to the economic aspects of energy production has been misinterpreted to be confined to the second and third Respondents’ own commercial interests, and not – even once in the arguments – to embrace the public’s interest in the environmental consequences of the Project. The public interest in transparency and accountability of the LCCC, a publicly owned and funded company performing a public function has been ignored and in any event was never placed in the balance by the IC. The Appellant argues this submission at §27 of her Rebuttal document and at §88-100 of her Reply to the Responses of the second and third Respondents.

THE APPEAL HEARING

37. The Tribunal heard evidence from Dafydd Rhys Thomson who is an associate director at Community Windpower Limited (“CWL”) where he deals with corporate finance, due diligence, construction, development and certain planning matters for the development, consented and operational assets. He has been at CWL for 7 years and was in onshore wind project finance at the Co-operative Bank prior to that. He has been involved with the financing and construction of over 100 turbines comprising 330MW of onshore wind projects. Mr Thomson gave evidence on behalf of Sneddon which is a wholly owned subsidiary of Community Wind Power (Holdings) Limited, and provided both an open and closed witness statement for the Tribunal.

38. Mr Thomson explained, by way of background, as follows about the CfD:-

13. The CfD is a 15 year fixed price bilateral contract between a generating station such as the Wind Farm (the “Generator”) and the LCCC. The CfD procurement framework introduced capacity and budget allocation mechanisms to the procurement of renewable energy assets. Contracts are secured through a competitive ‘Dutch auction’ mechanism whereby the lowest clearing bids for the required capacity are accepted. The cost of private sector capital is reduced by the term and fixed price nature of the contracts, which provide investors with predictable returns over a long-term investment horizon. This in turn allows projects to reduce their price offering, which ensures successful schemes provide best value for the public purse. This increases the amount of investment into new low-carbon technology. It is the stated aim of the Government to encourage such investment in low-carbon infrastructure to facilitate Government policy of net zero carbon emissions by 2050.

14. The CfD operates by guaranteeing a fixed price for each MWh of power produced by a generating station (the “Strike Price”). The Generator sells its power to the wholesale market on commercial terms in the normal fashion. When the wholesale market price Other than CPI indexation which is applied annually to the Strike Price, the Strike Price is fixed over the term of the CfD.

15. CfDs are offered to the market by auction in ‘allocation rounds’ conducted by the Government. Mainland onshore wind energy

was only able to compete in the first CfD allocation round, held in 2014. In that allocation round, SLCWC [Sneddon Law] offered the second lowest Strike Price of any onshore wind operator (£79.99 per MWh of electricity generated) to secure the CfD for the Wind Farm. Other onshore wind farms from that allocation round have higher Strike Prices than SLCWC. Over time, Strike Prices for some other technologies, such as offshore wind, have reduced due to economies of scale as projects and wind turbines themselves get larger, and technology (driven by investment in the sector) has developed.

16. The pro-forma CfD agreement, together with the CfD standard terms and conditions (FiT Contract for Difference Standard Terms and Conditions as at 29 August 2014 (the “Conditions”)) which apply for each round are published on LCCC’s website and therefore publicly available. In addition, there is a public register of all CfDs, which includes key details for each CfD, such as the strike price and key contract dates. Detailed information on CfDs is therefore already available to the public.

17. The CfD included certain contractual milestones. These include a ‘target commissioning window’ and a ‘longstop date’ (i.e. a date by which the wind farm should be operational and generating a minimum amount of electricity). The original ‘target commissioning window’ in the CfD was specified as 1 January 2017 to 31 December 2017, and the longstop date was 31 December 2018. These dates have not been met.

18. The CfD includes a number of confidentiality provisions, including for the protection of ‘Generator Confidential Information’. This concept is defined in the CfD so as to include: “all Information which is confidential or proprietary in nature and which relates (directly or indirectly) to the Generator, the Facility or the Project which the CfD Counterparty (or its Representatives) receives or has received from the Generator (or its Representatives) or any third party who receives or has received such Information from the Generator (or its Representatives) in connection with the Contract for Difference (including any Information which the CfD Counterparty prepares which contains or makes explicit reference to such Information or from which such Information is readily ascertainable);”

19. Many clauses (referred to as ‘conditions’) of the CfD require the Generator to provide Information to the LCCC. Much of the Information is commercially sensitive in nature, and accordingly falls within the definition of Generator Confidential Information. As with most long-term contracts, it is an expected part of the CfD framework that the parties to the CfD will share confidential

information with each other as part of the relationship. The confidentiality provisions are necessary to protect the confidentiality of that information, and in order to allow a free flow of information between the parties to the CfD.

20. By condition 72 of the CfD, the CfD counterparty (ie. LCCC) is obliged to keep confidential all Generator Confidential Information, subject to specified limits and exceptions. One of these exceptions is condition 72.4(I), which permits LCCC to disclose Generator Confidential Information where that is “required” by FOIA or the EIR. The process for dealing with FOIA/EIR requests is set out in condition 74 of the CfD.

39. In relation to the confidentiality exception, Mr Thomson said as follows in his open statement:-

31. I confirm in this ‘open’ statement that the Requested Information which has been provided by SLCWC [Sneddon Law] is Generator Confidential Information within the meaning of condition 72 of the CfD, and that the information is not (and has not been) placed in the public domain.

32. I also confirm that SLCWC considers that disclosing this information would undermine SLCWC’s relationship with its lenders and contractors, and that there are two other ways in which those opposed to the Wind Farm could have used the Requested Information to the disadvantage of SLCWC. Accordingly, SLCWC would have suffered a detriment if the Requested Information had been disclosed in response to the request.

33. Based on my role at CWL, and my understanding of the market for renewable energy more generally, I consider that SLCWC (and other generators) would become more circumspect in the provision of information to the LCCC if Generator Confidential Information was disclosed in response to this request. This would not assist the LCCC to manage CfDs effectively, nor would it promote the LCCC’s guiding principle of maintaining investor confidence in the CfD scheme. As I have already noted, under the terms of the CfD, Generators are obliged to provide the LCCC with considerable amounts of Generator Confidential Information in satisfaction of other contractual obligations. Much of this wider Generator Confidential Information is commercially sensitive. Disclosure of confidential commercial information belonging to one generator (for example, details of financial expenditure or contractual negotiations with subcontractors or other counterparties) under the FOIA or EIR could be used by third parties to promote their own

commercial interests, or prejudice the commercial interests of the generator in question. At a 'macro' level, these consequences would prejudice the development of green energy projects and would not be in keeping with the LCCC's stated aim of bringing forward the investment needed to sustainably deliver the UK's goals for renewable and other low carbon electricity.

40. Mr Thomson answered questions from the Tribunal and Mr Campbell in which he reiterated and supported the contents of his open witness statement. The Tribunal also held a closed session in this case to consider the closed witness statement of Mr Thomson. The Tribunal was able to provide the following gist of that closed session to the Appellant:-

1. In the closed session, the Commissioner's counsel cross-examined Mr Thomson on his 'closed' witness statement, in relation to:

(1)The 'closed' evidence given by him on the reasons why the exceptions in reg. 12(5)(e) and (f) Environmental Information Regulations 2004 ("EIR") were engaged; and

(2)The public interest balance;

by reference to the content of the disputed information.

2. The Commissioner's counsel questioned Mr Thomson as to precisely how harm to Sneddon Law's commercial interests would arise from the disclosure of the withheld information. Mr Thomson explained Sneddon Law's concerns about the implications of disclosure in relation to the positions of competitors, those opposed to the Sneddon windfarm, lenders and contractors, and the ways in which competitors and lenders would have been able to use the withheld information in ways that would prejudice Sneddon Law's delivery of this project. Mr Thomson also explained the wider implications of disclosure for the renewable energy market in general.

3. The Commissioner's counsel also questioned Mr Thomson about the extent to which he considered information supplied to LCCC to have been supplied voluntarily. He indicated, on the basis of examples of the disputed information, that he considered that some information was provided under the CfD, but that other information was not.

4. The Tribunal also asked Mr Thomson questions about the 'closed' material. Specifically, the Tribunal questioned Mr Thomson about the possibility of partial answers to Dr Connor's EIR request being provided without thereby causing the prejudicial consequences envisaged by LCCC and Sneddon Law. Mr Thomson explained that, in his view, partial answers could not be provided without effectively revealing aspects of the withheld information. On this point, Mr Hopkins added that LCCC did not hold information within the scope of the request that could be disclosed without thereby revealing information that attracted LCCC and Sneddon Law's concerns. The documents LCCC holds could not realistically be redacted so as to remove information that attracted those concerns.
5. Having taken instructions, Mr Hopkins gave LCCC's answers to the questions Mr Campbell QC had provided shortly before the hearing. The answer to question 4 had already been provided in open, namely that Sneddon's parent company, CWP, had made the payment referred to in that question. Otherwise, the answers to Mr Campbell's questions were given in 'closed', but cannot be provided in 'open' without revealing aspects of the withheld information.

41. The Tribunal heard submissions from Mr Campbell QC in support of his skeleton argument and submissions from the Respondents, essentially supporting the Commissioner's conclusions in the decision notice.

DISCUSSION

Regulation 12(9) EIR

42. The Appellant argued that the withheld information is or includes 'information on emissions' and therefore LCCC cannot rely on the exceptions in reg 12(5)(e) and (f) EIR at all as these exceptions are excluded in such cases. It is therefore important to determine whether the information is covered by Regulation 12(9) EIR.

43. The relevant case law confirms that the actual content of the information in dispute must relate to emissions: see the judgment of the Upper Tribunal in *GW v IC, Sandwell MBC and LGO* [2014] UKUT 0130 (AAC) at paragraph 62:

“I find it impossible to construe the words “information on emissions” in reg. 12(9) as covering anything beyond information relating to the nature, extent etc of the emissions themselves.”

44. The Tribunal has had the advantage of considering the withheld material and can confirm that, in its view, the information does not relate to the ‘nature, extent etc’ of any emissions, however that term is defined.

Regulation 12(5)(e) EIR

45. Reg 12(5)(e) EIR emerged as the main battleground in the appeal, in particular the harm that disclosure of the withheld information would have been likely to cause to Sneddon Law’s interests and LCCC’s. Thus, Sneddon Law and LCCC made the main arguments in relation to reg 12(5)(e) EIR but these were largely supported by the Commissioner.

46. It seemed to be common ground that the withheld information is commercial in nature and this was not challenged by the Appellant. The Appellant’s main point appeared to be that in relation to confidentiality this had been lost because of the publication of other documents relating to this wind farm project.

47. However, it is pointed out on behalf of the Respondents that none of the published documentation reveals whether, in fact, *force majeure* relief has been applied for by Sneddon Law, whether it was granted, or any grounds which Sneddon Law had to extend the relevant timeframes in

discussion with LCCC. It was argued that information revealing any of these issues remains subject to duties of confidence at law.

48. In our view, having seen all the material, including the withheld material that is a correct description of the current position, and the publication of other material has not affected the confidential nature of the withheld material.

49. The Appellant has also challenged the Commissioner's findings that the disclosure of the withheld information would, on the balance of probabilities, adversely affect the commercial interests of Sneddon Law and, to some extent, LCCC.

50. Having heard evidence in open session and in closed session from Mr Thomson, we are satisfied that the Commissioner was correct to reach this conclusion. We understand that the wind farm business is highly competitive and that the disclosure of the information sought could be used to the disadvantage of Sneddon Law by competitors in the industry, especially those who may have a continuing interest in prejudicing this particular project. We accept the reasoning set out in the Commissioner's closed annex (which of course the Appellant has not seen) and, as set out in the gist above, we have had the opportunity of pursuing relevant points with Mr Thomson in a closed session. We accept his evidence as set out in both the open and closed versions of his witness statement.

51. It also seems to us that there is force in LCCC's argument that disclosure would harm the commercial or economic interests of LCCC. In a competitive industry we can see that other generators might well be circumspect in sharing information, knowing that LCCC had disclosed a generator's confidential commercial information in the past. However, we are also aware that an organisation like LCCC can never promise that disclosure of information to which the EIR apply will never be disclosed,

and it is also the case that just because information is disclosed in one case (for instance because the public interest balance requires this), does not mean that the same result will apply next time there is a request for information. Therefore, we place less weight on this aspect of the case, as did the Commissioner.

52. We also accept that disclosure might also harm LCCC's commercial or economic interests by causing a material increase in its costs arising from this particular disclosure.

53. On that basis we find that the exception under reg 12(5)(e) EIR applies in this case as argued by all the Respondents. Although our reasons in this open judgment largely suffice in explaining the basis for our decision we have also included a short closed annex to deal with the closed evidence.

54. On that basis we need to go on to consider whether the public interest balance favours disclosure of or withholding the information. We accept the strong public interest in transparency and accountability of bodies such as the LCCC, especially, as the Appellant states, the CfD scheme is essentially paid for by consumers. We also accept that wind farm projects are controversial and that many are concerned about the environmental impacts that are caused. But we also remind ourselves that there has already been a full planning process which allowed the public to air these concerns, and which granted permission for the project to proceed. We also remind ourselves that the issue about which the Appellant seems most concerned in this case, namely the issue of emissions, is not something which is the subject matter of the withheld information which, as we have said, we have seen and considered.

55. LCCC and Sneddon Law both disagree that the public interest favours disclosure. They focus on the public interest in parties adhering to their duties of confidence. It is argued that there is a public interest in avoiding

harm to the commercial or economic interests of private companies operating in a competitive marketplace. We accept that there is a public interest in avoiding disruption to fair competition and a level playing field in that marketplace.

56. This is the system which is in place to govern and regulate the wind farm industry, and there is an unfairness if Sneddon Law's competitors were to gain a commercial advantage from this disclosure, where Sneddon Law would have no corresponding access to comparable information about its competitors. Of course, this public interest will not be paramount in all cases but it is something we must place in the balance.

57. We also accept that there is a public interest in protecting LCCC's ability to manage CfD contracts effectively and efficiently, which is assisted by voluntary information-sharing on the part of generators, and protecting the public purse from additional expenditure that might be caused by disclosure.

58. We also do bear in mind that there is a strong public interest in allowing low carbon energy generation projects to flourish, that this is vital for environmental reasons and for minimising energy costs for consumers as much as possible. We accept that that there is a risk that disclosure in this case could harm those objectives, as LCCC says 'by damaging investor confidence and reducing the willingness of generators and their funders to participate in such projects'.

59. LCCC also asks us to consider (and we do) that 'the public interest is further weakened by the fact that the CfDs include a carefully thought out disclosure regime, imposed by regulation, that sets out what information LCCC is required to publish on its website. These disclosures include revised timescales for this project once any extensions and related issues have been resolved'.

60. We must always be careful not to overestimate the public interest claims of those who are against disclosure especially when considering environmental information. Often the dire consequences which are said to follow disclosure are not, in fact, realistically claimed and business will carry on more or less as normal. This is especially the case when the Tribunal makes it clear that each request must be considered anew and no general rules are being set down.
61. However, in this case it is our view that the public interest does favour non-disclosure for all the reasons set out by the Respondents. We bear in mind the points made above that the information does not contain information which is covered by regulation 12(9) EIR, or relates to emissions at all, and so this cannot be one of the reasons in favour of disclosure. We place significant weight on the need to ensure that the system which has been put in place to develop and encourage renewable energy is sustainable and fair for all those involved in what has become a competitive industry.
62. Having formed that view, we must also consider the presumption in favour of disclosure. Mr Campbell urged us to consider this as our starting point, but that is not the way the presumption has been deployed in recent case law.
63. Thus in the UT case of *Vesco v (1) Information Commissioner and (2) Government Legal Department* [2019] UKUT 247 (AAC) the Tribunal described the application of the presumption as the 'third stage' of the process following the decision as to whether an exception applied and whether the public interest favoured withholding the information as follows at paragraph 19:-

19. The third stage. If application of the first two stages has not

resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure under Regulation 12(2) of the EIRs. It was “common ground” in the case of *Export Credits Guarantee Department v Friends of the Earth* [2008] Env LR 40 at paragraph 24 that the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations.

64. In our view the public interest factors are not equally balanced for the reasons set out above. Even when we take the presumption in favour of presumption our decision in this case is the same.

Reg 12(5)(b) EIR

65. The Commissioner concluded that Regulation 12(5)(b) EIR is engaged in respect of one document within the scope of the request. The Appellant’s arguments in respect of this exception were that the exception does not apply to legal advice which is provided outside the context of litigation at all; and that the exception does not apply to all legal advice.

66. In our view, it is well established that safeguarding legal advice privilege “...is a fundamental condition on which the administration of justice as a whole rests.” per Lord Taylor of Gosforth CJ in *Reg v Derby Magistrates Court, Ex p. B* [1996] AC 487 at 507D. Even if no litigation is in prospect, confidence in the efficacy of the justice system would be weakened by the disclosure of such advice: see the recent first tier tribunal case of *CPS v IC* EA/2019/0275 (21 October 2020) for a review of the case law on this issue.

67. In every case it must be asked whether disclosure of the information requested would be likely adversely to affect the course of justice, and there may be cases where disclosing the particular legal advice sought would not do so. However, having seen the advice in question this is not such a case. In our view the Commissioner correctly concluded that disclosing this document would adversely affect the course of justice. In

particular, in our view the advice is not stale, and it was still being actively relied upon at the date of the response to the request.

68. This information is already covered by our decision in relation to reg 12(5)(e) EIR. We agree with the Commissioner's reasons that the public interest factors for non-disclosure of this document are especially strong, and that conclusion is not changed by applying the presumption in favour of disclosure.

Reg 12(4)(e) EIR

69. The Commissioner found that, although reg 12(4)(e) EIR applied to some internal communications, the public interest would have been in favour of disclosure if reg 12(4)(e) EIR had been relied upon. We do not disturb that finding, but note, as did the Commissioner, that in any event the documents are exempted from disclosure pursuant to reg 12(5)(e) EIR.

70. Finally, we note that Mr Campbell's skeleton argument did not raise any issues about the application of reg 12(5)(f) EIR. In our view there is no need for the Tribunal to consider this issue given the findings on reg 12(5)(e) EIR.

CONCLUSION

71. On that basis, and for the additional reasons set out in the closed annex, this appeal is dismissed.

Stephen Cragg QC

Judge of the First Tier Tribunal

Date of Decision: 12 April 2021.

Date Promulgated: 28 April 2021

