

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

**Date:** 4 December 2019

**Public Authority:** Low Carbon Contracts Company  
**Address:** Fleetbank House  
2 - 6 Salisbury Square  
London  
EC4Y 8JX

**Decision (including any steps ordered)**

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1. 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. The complainant requested information relating to whether a particular generator had applied for an extension to, what the Commissioner will refer to as, its start date on the basis that there had been a force majeure. The LCCC refused to disclose any information as to whether such a claim had been made under the regulation 12(4)(e) – internal communications, 12(5)(b) – adverse affect to the course of justice, 12(5)(e) – confidentiality of commercial information, 12(5)(f) – voluntary supply of information.
2. The Commissioner’s decision is that all the information can be withheld under regulation 12(5)(e) and that some of it can be withheld under 12(5)(b). The exception provided by regulation 12(4)(e) is engaged, but can only be relied on to withhold the information when the public interest in favour of maintaining that exception is aggregated with the public interest in favour of maintain regulation 12(5)(e). The exception provided by regulation 12(5)(f) is not engaged.
3. The Commissioner does not require the public authority to take the following any further action in this matter.

## Request and response

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4. On 23 January 2018 the complainant 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?”

5. The LCCC originally dealt with the request under the Freedom of Information Act 2000 (FOIA). The LCCC went on to refuse the request under various exemptions under the FOIA, namely section 41 –

information provided in confidence, section 42 – legal professional privilege, section 43 – prejudice to commercial interests. Following a complaint to the Commissioner, a decision notice was issued on 12 February 2019 (FS50751721) which found the request should have been dealt with under the EIR. The notice required the LCCC to reconsider the request under the provisions of the EIR and issue a fresh response.

6. On 19 March 2019 the LCCC provided that fresh response. It refused to provide the requested information. The LCCC cited regulation 12(4)(e) – internal communications and Regulations 12(5)(e) – confidentiality of commercial information as its basis for doing so.
7. The complainant requested an internal review on 21 March 2019. The LCCC sent her the outcome of the internal review in a letter dated 3 June 2019. The LCCC revised its position. In addition to the two exceptions originally claimed, the LCCC now claimed that some of the information was also exempt under the exceptions provided by regulation 12(5)(f) – voluntary supply of information by a third party, and regulation 12(5)(b) – adverse affect to the course of justice.
8. The contract to which the request relates establishes various milestones which the project is required to meet as it progresses to the point where it is fully functional and generating power which is then supplied to the electricity grid. The Commissioner recognises that the contract defines various dates, such as the 'commissioning date' and the 'long stop date', which each have a specific meaning. Although the request refers to such dates, for simplicity, the Commissioner will just use the 'start date' as a generic term.

## **Scope of the case**

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9. The complainant contacted the Commissioner on 3 June 2019 to complain about the way her request for information had been handled.
10. She advised the Commissioner that the generator's planning application for the proposed windfarm had been contentious and the subject of appeals and enforcement notices in respect of the impact it would have on a number of private water supplies. She also knew, from the details on the CfD Register published on the LCCC's website, that the start date initially set for the windfarm to start producing electricity had lapsed. Failure to start producing electricity by that date would be a breach of contract. However the contract contains a force majeure clause which, in broad terms provides that the start date can be revised in the event of a force majeure, i.e. an event which was beyond the control of the generator (the terms of the contract are known from a template contract published on the LCCC website). The complainant therefore considered it possible that an extension to the start date for the windfarm had been

agreed on the basis that there had been a force majeure event. The Commissioner understands her position to be that if the possible claim of a force majeure related to the planning dispute in respect of the windfarm's impact on private water supplies, the LCCC would have been wrong to accept the claim, as it was not, in her opinion, a matter that was beyond the control of the generator. She argued that it was wrong for the generator to be allowed to benefit from a public subsidy under a contract in such circumstances.

11. The Commissioner considers that the matter to be decided is whether any of the exceptions cited are engaged in respect of the information that the LCCC has identified as being within the scope of the request.

### **Reasons for decision**

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12. 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 that Act, which in turn brings it within the definition of a public authority for the purposes of the EIR under regulation 2(2)(b).
13. Before looking at the application of individual exceptions it is important to comment on the nature of the request and the information identified by the LCCC as being captured by it. The request seeks information as to whether the generator has applied for an extension to its contracted start date on the basis that there has been a force majeure and, if it has, details relating to that claim. 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. The Commissioner obviously cannot discuss what those reasons were.
14. Nothing in this notice, or references to information being held, should be interpreted as meaning a claim for force majeure was made.
15. The grounds for applying the exceptions cited relate directly to the reasons why the generator did not meet its contracted start date. Unfortunately this also means that the Commissioner is unable to discuss her analysis of whether the exceptions apply in any real detail. The Commissioner recognises that this will be very frustrating for the complainant. It also means the complainant will only have limited information on which to base a decision whether she accepts the Commissioner's decision or whether to appeal it. However it is necessary to adopt this approach as any other would undermine the protection

which the exceptions are intended to provide. The Commissioner has set out more detailed arguments as to why the exceptions apply in a confidential annex which will only be made available to the public authority.

16. The Commissioner will start by looking at the exception provided by regulation 12(5)(e) – confidentiality of commercial information. The exception has been applied to all the information captured by the request.

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

17. Regulation 12(5)(e) 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. Regulation 12(5)(e) is subject to the public interest test.
18. The Commissioner considers that in order for this exception to apply there are a number of conditions that have to be met. She has considered how each of the following conditions apply to the facts of his case:
  - Is the information commercial or industrial in nature?
  - Is the information subject to confidentiality provided by law?
  - Is the confidentiality provided to protect a legitimate economic interest?
  - Would the confidentiality be adversely affected by disclosure?
19. The Commissioner's published guidance on section 12(5)(e) advises that for information to be commercial in nature, it will need to relate to a commercial activity; either of the public authority or a third party. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services, usually for profit. Not all financial information is necessarily commercial information.
20. The LCCC has applied the exception on the basis that both its own economic interests and those of the generator would be harmed by disclosing the information that's been requested.
21. The Commissioner has reviewed the withheld information. 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.

22. The Commissioner is satisfied that the development of the windfarm and the arrangements the generator has entered into with the LCCC to guarantee the price for the electricity it produces is a commercial activity. The Commissioner is satisfied the information is of a commercial and industrial nature.
23. The next question is whether the information is subject to confidentiality provided by law.
24. The LCCC has advised the Commissioner that under condition 72 of the standard terms and conditions of the CfD contract between itself and the generator, the LCCC is required to keep all 'Generator Confidential Information' confidential and not to disclose it without prior written consent except in specific circumstances. Generator Confidential Information is defined in condition 1 of the standard terms and conditions. In summary, it includes all information that is of a confidential nature relating to the generator and which is received by the LCCC. It also includes information which relates to, or arises from negotiations, discussions and correspondence in connection with the contract for difference.
25. In light of the above the Commissioner 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
27. For completeness, one of the circumstances in which the LCCC can disclose Generator Confidential Information is where the disclosure is required under the FOIA or the EIR. This is provided for condition 72.4(I). However, this cannot be interpreted as meaning that the LCCC can ignore the confidentiality clause when responding to an information request, such an interpretation would render the clause meaningless. Condition 72.4(I) simply allows the LCCC to disclose information which cannot be withheld under an exemption/exception without the LCCC

breaching the contract. Therefore the Commissioner is satisfied that the information captured by the request is subject to a duty of confidence provided by law. The test set out in the second bullet point of paragraph 18 is met.

28. The most important test when applying the exception in this case is that set out in the third bullet point, i.e. that the confidentiality is provided to protect a legitimate economic interest.
29. The LCCC has argued that the duty of confidence is required to protect both its own interests and those of the generator. The Commissioner will start by looking at the arguments in respect of the economic interests of the generator. When considering arguments about the harm that would be caused to a third party, in this case the generator, the Commissioner would not accept arguments presented by a public authority which were merely speculative and which the public authority cannot demonstrate represent the concerns of that third party. In this case the LCCC consulted with the generator and has provided the Commissioner with the response it received from the generator's representatives. The Commissioner is therefore satisfied that the arguments presented do represent the concerns of the generator.
30. To avoid revealing the nature of the withheld information, the Commissioner is limited as to the reasoning she can present in this notice. However 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 rationale 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 generators 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.

33. The Commissioner will now consider the extent to which disclosing the requested information would damage the economic interests of the LCCC itself. But before doing so, it is necessary to examine whether the LCCC's interests are protected by a duty of confidence. The LCCC has focussed on the obligation established by condition 72 of the standard terms and conditions for the LCCC to maintain the confidentiality of the Generator Confidential Information. This obligation does not protect LCCC's own economic interests. However the Commissioner notes though that condition 72 of standard terms and conditions of the CfD also places a duty on the generator to respect the confidentiality of the information which the LCCC provides to it. It is clear the LCCC views its own information in the hands of the generator as confidential and has taken steps to protect its own interests. Furthermore, having viewed the information, she is satisfied that it has the necessary quality of confidence, being more than trivial and not otherwise accessible. The Commissioner is therefore satisfied that the LCCC would be able to argue that as well as the contractual obligations of confidentiality created by condition 72, there is a common law duty of confidence protecting the interests of the LCCC from any unauthorised disclosure of the information.
34. The Commissioner has also considered whether the interests which the LCCC is seeking to protect can be characterised as an 'economic interest'. The Commissioner's guidance on regulation 12(5)(e) states that, amongst other things, legitimate economic interests could relate to protecting a commercial bargaining position in the context of existing or future negotiations, avoiding commercially significant reputational damage, or avoiding disclosures which would otherwise result in a loss of revenue or income. It goes on to accept that economic interests are wider than commercial interests, and can also include financial interests. For example, arguments that disclosure would adversely affect the finances or tax revenue of a public authority may be relevant to this element of the exception.
35. The Commissioner considers that LCCC does have a commercial and economic interest in its negotiation of CfD contracts. Each contract sets the price that the generator will receive for their electricity. It provides that where electricity can be sold at a price that's higher than the strike price, the LCCC will be paid a sum equivalent to the difference. The strike price is set through a competitive auction in which potential generators bid for contracts, with the lowest bid setting the strike price for that round of contracts. The lower the strike price, the less money the LCCC is obliged to pay generators as a top up if the generator is



unable to achieve the strike price on the open market. Similarly, the lower the strike price, the greater chance there is of it being exceeded by the market price, in which case the LCCC would earn an income from the generator. 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.

36. The question is 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.
37. The first argument the LCCC has made in respect of the harm to its own interests is that disclosing the requested information would be detrimental to the sharing of information between itself and generators.
38. Having accepted that there is at least some potential that disclosing the information would damage the economic interests of the generator, the Commissioner recognises that releasing sensitive information could mean that generators were less willing to provide the LCCC with information they considered commercially confidential in the future. However the LCCC has not developed this point to any degree. In the absence of further arguments the Commissioner considers that since the CfD contracts themselves oblige generators to provide certain information to the LCCC, this impact would be less than argued by the LCCC. Furthermore the generators should be well motivated to both enter into CfD contracts and to engage constructively with the LCCC as the contracts provide a secure income for the generator and one which often subsidises the generators' costs.
39. Nevertheless the Commissioner recognises that generators are commercial entities which seek to earn a profit. The Commissioner also accepts that the renewable energy industry is a competitive environment and that generators therefore consider much of the information they provide to the LCCC is commercially sensitive, as is clearly recognised by the confidentiality clause provided by condition 72

of the standard contract and the submissions provided by the generator's representatives in this case. That said, it is also clear from the standard contract that generators are aware of the LCCC's obligations under the FOIA and the EIR, and should recognise that where they seek to benefit from public money, there should be an expectation of greater transparency.

40. On balance though the Commissioner finds 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.
41. The 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. 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.
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. The test established by the third bullet point of paragraph 18 is met. 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. Therefore the fourth and final test, as set out in paragraph 18 is also met. The exception provided by regulation 12(5)(e) is engaged.
43. For completeness, the Commissioner notes that regulation 12(5)(9) dis-applies regulation 12(5)(e) where the information is on emissions. 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 (more information can be found in the Commissioner's published guidance 'Regulation 12(9): Information on emissions'). 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.
44. Public interest test
45. Regulation 12(5)(e) is subject to the public interest test as set out in regulation 12(1). This provides that even if an exception is engaged, a public authority can only withhold the information, if in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

46. Under regulation 12(2), when considering the public interest test, a public authority has to apply a presumption in favour of disclosure.
47. The LCCC has recognised a number of public interest arguments in favour of disclosing the information. These include a general public interest in the openness and transparency of public bodies, the public interest in transparency in relation to public contracting, the public interest in scrutiny of activity with the cost implications for the public and the public interest in those affected by the construction of the windfarm knowing the dates and times of construction. It has not expanded on any of these points.
48. The complainant is very critical of the windfarm project and believes its construction is detrimental to the interests of a number of locals. She has argued that the controversy surrounding the project means there are questions as to the generator's management of the project and that this in turn raises questions as to whether the project should benefit from public subsidies through the CfD contract. It follows that this would increase the public interest in disclosing the information.
49. The Commissioner agrees with the LCCC that there is a general public interest in transparency. This is particularly true where a public authority has entered into a contract which is likely to result in a significant amount of public money subsidising the activities of a private commercial company (the Commissioner also recognises the public interest in the policy objective to grow the renewable energy industry which is behind the CfD contracts; this will be considered when looking at the public interest in favour of maintaining the exception).
50. The fact that the generator has not met its contracted start dates does raise legitimate public interest arguments in favour of releasing information that would explain why this occurred and what the new start date will be. This would allow the public to reach a more informed view on whether the windfarm is being managed competently which in turn may shape the public's view on whether it should attract a subsidy through the CfD contract. It would also disclose information that would allow scrutiny of how the LCCC has performed in its management of the contract.
51. There is a clear public interest in the public being informed as to the start date for the windfarm. This is recognised by the fact that the LCCC is required to include information about the CfD contracts on the CfD Register published on its website. The details it is required to publish include the relevant start dates. There is a particular public interest in those local to the site and who are affected by the construction or operation of the windfarm, knowing what is happening.

52. When considering the public interest arguments in favour of maintaining any particular exception it is important to note that only those arguments that relate to the interest which the exception in question is designed to protect can be taken into account. Therefore under regulation 12(5)(e) the Commissioner will only look at the public interest in preventing the harm which she has accepted would be caused to both the generator's and the LCCC's economic interests if the information was disclosed.
53. If another exception has also been engaged in respect of the same information the Commissioner will go on to aggregate the public interest in preventing the harm to these economic interests with the public interest in preventing the other harm (or harms). This will be done after each exception has been considered separately.
54. The LCCC has argued that there is a public interest in ensuring no specific generator is materially disadvantaged by the disclosure of confidential contractual information that is not released in respect of other CfD projects, i.e. that there is a level playing field. The Commissioner accepts that the development of the renewable energy industry relies on private generators and that it is a competitive environment. It would work against the public interest if participants in that industry found they were disadvantaged as a consequence of information they had shared with a public authority being made public. At the time of the request the issues to which the information relates were live and this increases its sensitivity.
55. The second public interest argument in favour of maintaining the exception presented by the LCCC is that there is a value in ensuring the open flow of information from generators and that this would be affected if generators did not have confidence that the LCCC could maintain the confidentiality of such information in accordance with the terms of the CfD contract.
56. As will be explained in more detail when analysing the application of regulation 12(5)(f), the Commissioner considers that the generators are obliged under the terms of the CfD contract to provide the LCCC with certain information in order that the LCCC can properly manage the contract and check the terms of the contract are being complied with. However the Commissioner recognises that some of the information that generators are required to provide would correctly be deemed 'Generator Confidential Information' because of its commercial sensitivity. If generators were not confident that the LCCC could protect their information, it is entirely plausible that they would become more reticent about what information they provided to the LCCC. This would undermine the ability of the LCCC to manage those contracts in an efficient and timely manner.

57. The LCCC's third argument in favour of maintaining the exception is that as disclosing the requested information would damage investor confidence in the CfD scheme this would ultimately increase the cost of generating low carbon electricity. As noted in paragraph 32, the Commissioner has accepted that disclosing the information would harm the economic interests of the generator. This interference with the generator's ability to manage the contract smoothly and effectively could damage the confidence of potential investors in future projects, that renewable energy was a sound investment. It follows that they would have to be enticed into the market by offering higher returns which would drive up costs. Since those costs are subsidised by public money and that there is a clear public interest in deriving more of our energy from low carbon generators, such an outcome would be counter to the public interest.
58. The two preceding public interest arguments relate to the wider impacts that disclosure would have on the LCCC's operation of the CfD scheme. Its fourth argument returns to the value in protecting the particular project to which the information relates. When considering whether the exception is engaged the Commissioner accepted the LCCC's argument that the generator's rivals could make use of the information to the generator's detriment. The LCCC argues, in broad terms, that anything which hinders the success of the project would be against the public interest, because the public interest is best served by the development and efficient delivery of low carbon electricity. The Commissioner considers this argument carries some weight.
59. The Commissioner is less convinced by the LCCC's final two arguments. The first of which is that this request was the first it had received for information relating to whether there had been a force majeure claim in respect of any of the projects it was involved in. The Commissioner can see no grounds for accepting that because this is the first request of its kind, there is less public interest in disclosure. The final argument raised by the LCCC is that at some point in the future the LCCC will publish, what the Commissioner has referred to as, the 'start date' on its CfD register. The Commissioner accepts that ultimately the public interest in knowing the start date will be satisfied. However the requested information captures a far broader range of information. This includes information on why the start date has changed and information that the complainant believes would allow those affected by the project to satisfy themselves that decisions regarding the start date were made properly. The Commissioner also has regard for the fact that at the time of the request the start date was not known and that this uncertainty did have an impact on those living locally and who were affected by the construction of the windfarm. The potential for the start date to be published in the future would not satisfy the public interest in local people knowing what was happening at the time of the request.

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).

### **Regulation 12(5)(f) – voluntary supply of information**

62. The LCCC has also applied regulation 12(5)(f) to all the information captured by the request.
63. Regulation 12(5)(f) of the EIR says that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect 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.
64. The engagement of the exception can be broken down into a four-stage test, as recognised by the Tribunal:
- (i) Would disclosure adversely affect the interests of the person who provided the information to the public authority?
  - (ii) Was the person under, or could they have been put under, any legal obligation to supply the information to the public authority?

(iii) Did the person supply the information in circumstances where the recipient public authority, or any other public authority, was entitled to disclose it apart from under the EIR?

(iv) Has the person supplying the information consented to its disclosure?

65. Where the first four stages of the test are satisfied a public authority will owe the person that supplied the information a duty of confidence.
66. As already discussed under the application of regulation 12(5)(e) the Commissioner is satisfied that disclosing the information would have an adverse effect on the interests of the generator. The Commissioner recognises that the generator did not directly provide all the information captured by the request. Some of the requested information comprises of copies of correspondence from the LCCC to the generator. Other information is the internal discussion of the issues raised by the generator and a limited amount includes advice commissioned by the LCCC from a third party. Therefore even where the information is not contained in documents that were directly supplied the generator, the majority of it either discusses the issues raised by the generator, and therefore contains information provided by the generator, or could not be disclosed without revealing the information provided by the generator. The Commissioner is therefore satisfied that the majority of the information, if not all of it, can be regarded as information supplied by the generator.
67. Normally the Commissioner would take a more rigorous approach to determining what information had been supplied to the public authority. However in this case the Commissioner has not found it necessary to adopt such an approach as she finds that the application of the exceptions does not meet stage (ii) of the test set out in paragraph 64 above.
68. Stage (ii) of the test requires that the person supplying the information could not be put under any legal obligation to provide it. Although the Commissioner is unable to discuss the details of the LCCC's arguments, 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. A fuller explanation of the reasons why the Commissioner has come to this decision is set out in the confidential annex which will be provided exclusively to the LCCC.
69. The Commissioner finds that regulation 12(5)(f) is not engaged.

### **Regulation 12(5)(b) - adverse affect to the course of justice**

70. Regulation 12(5)(b) has only been applied to the information in one document captured by the request. When informing the complainant as to the outcome of its internal review the LCCC referred to the information 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).
71. So far as is relevant, regulation 12(5)(b) provides that information is exempt to the extent that its disclosure would adversely affect the course of justice.
72. As explained in the Commissioner's published guidance on regulation 12(5)(b), and as accepted by the Tribunal, regulation 12(5)(b) can be applied to protect information which attracts legal professional privilege (LPP). LPP exists to ensure complete fairness in legal proceedings. A client's ability to speak freely and frankly with his or her legal adviser in order to obtain appropriate legal advice is a fundamental requirement of the English legal system. The concept of LPP protects the confidentiality of communications between a lawyer and their client. This helps to ensure complete fairness in legal proceedings.
73. There are two types of LPP, one protects advice provided for the purposes of litigation and is known as 'litigation privilege'. The other protects legal advice provided where there is no litigation, either underway or in prospect, and is known as 'advice privilege'. Its scope is rather narrower than litigation privilege. 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.

#### Public interest

74. The public interest factors in favour of disclosure are the same as those set out under regulation 12(5)(e) – commercial confidentiality. The Commissioner notes however that given the nature and contents of the information protected by LPP, it is particularly informative as to the robustness and rigour with which the LCCC manages its CfD contracts.



There is therefore a greater public interest in this piece of information being disclosed compared with some of the others captured by the request.

75. However this has to be balanced against 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. In this case those legal rights did not relate to a purely private interest, but to the management of CfD contracts that had been entered into in order to promote the generation of low carbon electricity in pursuit of a public policy objective aimed at benefitting society as a whole. The Commissioner also takes the view that the public interest in protecting the privileged advice is increased by the fact that at the time of the request, the issues to which it related were live and therefore the LCCC was still actively relying on the legal advice it had received.
76. 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)(b) 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).

### **Regulation 12(4)(e) – internal communications**

77. Regulation 12(5)(e) provides that a public authority may refuse a request to the extent that it involves the disclosure of internal communications.
78. Regulation 12(4)(e) has been applied to fifteen documents comprising of emails, or email chains, together with accompanying attachments. The Commissioner has gone through the information. On the whole they consist of internal emails discussing the generator's contract and the circulation of draft responses to correspondence from the generator. The Commissioner is satisfied that this is internal correspondence, this includes the drafts of letters, the final versions of which, were later sent out. The Commissioner is satisfied that such information does engage the exception provided by regulation 12(4)(e).
79. However some of the email chains start with exchanges of correspondence with the generator. Although these are later forwarded to colleagues within the LCCC, the correspondence with the generator cannot be withheld under regulation 12(4)(e). Similarly, there is one occasion of draft advice from an external adviser being circulated, that draft advice does not constitute an internal communication, even if the later email forwarding it is. The Commissioner finds that this information does not attract the exception provided by regulation 12(4)(e).

80. The LCCC has also applied regulation 12(5)(e) – commercial confidentiality to all the fifteen documents and attachments. Therefore even though the Commissioner has found that some of them are not internal communications, she does not require them to be disclosed as they are already protected by the commercial confidentiality exception.

Public interest test

81. The public interest factors in favour of disclosing the information are the same as those already discussed under regulation 12(5)(e) – commercial confidentiality.
82. The public interest factors against disclosure relate to the need to protect the internal deliberation and decision making process. In other words, the exception protects the safe space which a public authority requires if it is to fully consider an issue and also prevents the so called chilling effect, i.e. a reduction in the candour with which issues are discussed in the future through fear that those discussions will also be disclosed.
83. When making its public interest arguments in respect of regulation 12(4)(e) the LCCC has simply referred the Commissioner to the arguments it considered when looking at regulation 12(5)(e). Although, as noted above, the Commissioner accepts that the public interest arguments in favour of disclosure will remain constant, the public interest arguments in favour of maintaining regulation 12(5)(e) are not transferable to the maintenance of regulation 12(4)(e). The arguments presented in favour of maintaining regulation 12(5)(e) relate to the value in not harming the economic interests of the generator and the economic interests the LCCC has in promoting low carbon electricity through the CfD scheme. They do not relate directly to the protection of the internal decision making process.
84. However, having viewed the information the Commissioner notes that although some of it is quite anodyne, there is other information which provides very candid assessments of the issues under consideration and the best approaches to take. The Commissioner considers that certainly some of these internal communications could warrant the protection of regulation 12(4)(e).
85. That said, it is for the public authority to make arguments in favour of maintaining the exception, it is not for the Commissioner to speculate what the LCCC's concerns are, or how severe any impact on the internal deliberations of the LCCC would be if the information was disclosed. Therefore 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.

#### Aggregation of the public interest

86. Under the EIR where the same piece of information engages more than one exception the public interest in maintaining all the relevant exceptions can be aggregated to give a combined weight which can then be balanced against the public interest in favour of disclosure. In this case the Commissioner has found the advice from the LCCC's legal advisers engages both regulations 12(5)(e) and 12(5)(b). The Commissioner also found the public interest in maintaining both of those exception separately was sufficient to outweigh the public interest arguments in favour of disclosure. It follows that the when the public interest factors in favour of maintaining each of the exceptions are combined their collective weight very clearly outweighs the public interest in disclosure.
87. The Commissioner has found that the internal communications captured by the request engage both regulation 12(5)(e) and regulation 12(4)(e). The public interest arguments in favour of maintaining regulation 12(5)(e) were sufficient, on their own, to outweigh the public interest argument in favour of disclosure and this information can therefore be withheld. However the LCCC did not raise any fresh public interest arguments in favour of maintaining regulation 12(4)(e) that were relevant.
88. The Commissioner finds that all the requested information can be withheld. All the information attracts the exception provided by regulation 12(5)(e) and the public interest in maintaining that exception alone is sufficient to outweigh the public interest in disclosure. Some of that information also engages the exception provided by regulation 12(5)(b) and again the public interest in maintaining that exception alone is sufficient to outweigh the public interest. In respect of that legal advice, the combined public interest in maintaining both exception provides particularly weighty grounds for finding that the public interest favours withholding the information. Although the exception provided by regulation 12(4)(e) is engaged there appears very little public interest in its maintenance and can only be relied on once this is aggregated with the public interest in maintaining regulation 12(5)(e).

## **Right of appeal**

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89. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504  
Fax: 0870 739 5836  
Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

90. 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.

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

## **Signed**

**Rob Mehan**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**