

To: McCutcheon, Joanne
Subject: Renewable Heat Incentive - Request for Information

SOL 34916/2012/DETI

Dear Joanne,

I have read GEMA comments, I propose only to focus on those areas where disagreement remains.

In relation to the matter of sub-delegation and discretion, part of GEMA's reply refer:

Otherwise it is difficult to see how GEMA could possibly comply with its administrative law obligation to exercise its discretion independently in relation to the functions conferred on it.

Finally it seems relevant to point out that, in the case of the GB Scheme, there is no doubt that GEMA has an unfettered right, and indeed obligation, to carry out its functions independently of DECC

To clarify, the current circumstance do not involve any attempt by DETI to issue a direction or otherwise control GEMA's decision making, this being the case matters relating to sub-delegation and fettering of discretion are immaterial. In referring to the provisions of the primary legislation the point I was making was to the effect that it expressly used language indicating that GEMA acted on behalf of the Department (it, GEMA, has not replaced or extinguished DETI's overall responsibility and interest in the scheme) and this is the context in which any request for information should be seen. A disclosure to DETI cannot be equated with a disclosure to the public at large or to any other public authority.

DETI have made a request to GEMA for information, specifically:

- (a) performance indicators,
- (b) the details of applicants to the scheme.

There should be no issue with performance indicators, these are not personal data . The remaining matter concerns the supply of applicant s details.

If I could turn to the matter of data protection, again only focusing on those areas where disagreement exist:

As for the identity of the data controller, it would help to clarify with GEMA whether they are registered with the Information Commissioner's Office for the purposes of the scheme? I acknowledge this isn't an altogether easy area particularly where one body acts on behalf of another (bearing in mind it is possible for there to be two data controller). There might be the potential to argue, in light of the statutory language, in so far as GEMA acts under the arrangement it is indivisible from DETI – but this would need to be explored further. Even if we accept that GEMA is the sole data controller I still remain of the clear view that there is no impediment within the Data Protection Act 1998 which prevents GEMA sharing applicant's details with DETI. Naturally, DETI will have to articulate to GEMA why it needs this information, but I imagine it is more than simply "departmental curiosity".

In support of their position GEMA have indicated that such information is not disclosed by it to DECC under the GB scheme, the answer to this is that the subject matter of the scheme is now a transferred matter (the competence for which falls to Department), provided DETI has its own reasons and these are articulated I do not consider that what happens in relation to the GB scheme should inevitably determine what happens in relation to the NI scheme. How DECC manage their scheme is a matter for them alone to determine.

There is some disagreement as to whether the disclosure of applicant's details would satisfy the requirement of fairness contained within the first data protection principle. For my own part I really cannot see any significant problem here:

(a) Relevant to the assessment of fairness would be paragraph 1.24 of the NI Renewable Heat Incentive Guidance (Nov 2012), which clearly envisages GEMA sharing personal data with DETI for the purposes of monitoring the scheme.

Applicants could not be said to possess any expectation that their details were not liable (at some stage) to be disclosed to DETI;

(b) No one has been misled or deceived as to DETI's involvement with the scheme when the information was collected;

(c) Also critical to an assessment of fairness is the potential harm that might be caused to any of the applicant, I cannot identify any conceivable harm to the interests of applicant's in disclosing their information to DETI. This is not a case where the information is going to be used in a manner which is adverse to the individuals concerned, it is a case of information being disclosed between two public authorities (each with a specific role to play in relation to the scheme) for official purposes. Perhaps GEMA might wish to explain what adverse consequences/harm they envisage this particular disclosure to DETI would cause.

In light of the above I remain of the view that there is a sufficient basis to conclude that the requirement of "fairness" would not be contravened.

Schedule 2 condition:

In relation to conditions 6 of Schedule 2 to the Data Protection Act, bear in mind many of the issues identified under the heading of fairness are equally applicable here.

(a) correct me if I am mistaken, but I understand applications to the scheme are entirely voluntary, those applicant's will have been aware from the outset that the scheme is a DETI scheme and (having voluntarily decided to apply) are content to supply the necessary information in connection with their application. In these circumstances, I have to confess that I do not see what possible "prejudice" would be caused to them by having their details disclosed to DETI. Prejudice is not simply being determined on the basis that they supplied the information in the first place, but that they supplied it in the context and circumstances in which they fully appreciated DETI's involvement.

The prejudice assessment would, by contrast, be different if the proposal was now to share information to a public authority (other than DETI) that never had (from the outset) and have no involvement with this particular scheme. If GEMA are of the view that the prejudice/harm of this potential disclosure is on such a scale that disclosure should be prohibited, perhaps they might clarify what this prejudice/harm would be.

(b) As regards the issue of "legitimate purposes" to be pursued by DETI, I would accept that mere curiosity would be insufficient to amount to a "legitimate interest", however the delegation of certain functions to GEMA did not, and could not, extinguish the necessity for DETI to remain involved. Any other public authority granted, but I simply fail to understand how anyone could suggest that DETI, the specific public authority with statutory responsibility for this very scheme, doesn't have a legitimate interest in receiving the details of applicant's to the scheme. Naturally, DETI are going to have to articulate to GEMA why it requires the information, but I certainly would have thought there would be little trouble in DETI explaining the "legitimate purposes" for such disclosure.

Schedule 2 condition 6 its goes on to state:

unwarranted in any particular case by reason of the prejudice to the rights and freedoms or legitimate interests of the data subject

This would require an assessment of the law of confidentiality and Article 8 ECHR.

Article 8 ECHR:

I accept that Article 8 ECHR can, in the right circumstances, be engaged in relation to the supply of a name and address, we need only look at the decision in R(Robertson) v Wakefield Metropolitan Council [2002] 2 WLR 889 in which the supply of a name and address in connection with the electoral roll was held to be a breach of Art 8. This case also confirmed that in assessing whether Article 8 ECHR was engaged you look, not only to the information to be disclosed but, also to the use/purpose to which the information is proposed to be put. In

Wakefield the information was to be disclosed for the purposes of commercial direct marketing, I do not think it is any answer to the Article 8 ECHR issue to indicate that disclosures are case specific, the circumstances surrounding this disclosure are well know and I cannot see (in any way) how the proposed disclosure can be equated with the disclose in either Wakefield or the more sensitive Article 8 cases. Here, bearing in mind GEMA act on "behalf" of DETI, the information is being shared with the very public authority which has been vested with statutory responsibility for the very scheme in relation to which the information was gathered - I just cannot see how this disclosure can be said to be of the nature that it brings with it a risk of contravening Article 8. Indeed, I doubt that Article 8 would be engaged here at all.

Confidentiality:

As for the law of confidentiality, any duty of confidentiality has to be placed in its proper context:

- (a) in light of the primary legislation and the express language of which envisages GEMA acting on behalf of DETI;
- (b) the potential argument, based on (a), surrounding the indivisibility of GEMA and DETI in so far as the disclosure of scheme information is concerned;
- (c) the provisions of the guidance which clearly envisages GEMA sharing information with DETI.

No doubt a duty of confidentiality would be imposed upon GEMA, would it however apply in respect of disclosures made to DETI. In any event, it has always been recognised that a duty of confidence gives way to a sufficient public interest for disclosing the information, provided disclosure was for the legitimate purposes (connected with the scheme) pursued by DETI, I would be of the view that confidentiality (if such a duty existed at all) would not be a bar to the disclosure of applicants details to DETI.

However, if disclosure was to any other public authority or even to DETI for a purpose other than one connected with the Renewable Heat Incentive scheme my opinion would not be the same.

My opinion remains the same, I am of the view that there is a more than respectable argument that the disclosure of applicant's details to DETI does not contravene either the Data Protection Act, the law of confidentiality or Article 8 of the European Convention on Human Rights. I have to confess that I cannot understand the sensitivity surrounding this potential disclosure to DETI.

I am happy to discuss.

Kind regards

Pat Millen

Departmental Solicitors Of