

**From:** [Alan Bissett](#)  
**To:** [Stewart, Susan](#)  
**Cc:** [McCutcheon, Joanne](#); [Hutchinson, Peter](#); [Karla Dooley](#)  
**Subject:** RE: ACX/RHI 004 - Renewable Heat Incentive- Administrative Arrangements  
**Date:** 23 November 2012 18:12:49  
**Attachments:** [image001.jpg](#)

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Susan

As requested, we have now had an opportunity to consider the query raised in your email dated 19th November 2012. Given the issues raised, I have sought input from one of my colleagues in our Intellectual Property Unit and our views are as set out below:-

### **Introduction**

We understand that the introduction of a NI RHI requires an administrative system capable of managing enquiries and applications, ensuring participants meet on-going obligations throughout the life of the scheme (and we have assumed that this includes the provision of meter data to calculate payments), processing payments, preventing fraud and providing management information. We note that GEMA has carried out this function for DECC over the last 2 years.

The Department proposes to enter into an Administrative Arrangements Agreement (the "AAA") with GEMA for the delivery of the administration of the NI RHI; this is pursuant to Section 114(1) of the Energy Act 2011.

### **General Principles**

- As a general principle, there is no property right in individual items of information. However, compilations of data (in this case a database), may be protected by intellectual property rights. The main intellectual property rights subsisting in a database tend to be copyright and database right. Copyright protection tends to cover the structure of the database whilst database right tends to protect the data stored in the database.

### **What is a database?**

- A database is defined in [section 3A\(1\)](#) of the [Copyright, Designs and Patents Act 1988](#) as:-

*"a collection of independent works, data or other materials which:*

*(a) are arranged in a systematic or methodical way, and*

*(b) are individually accessible by electronic or other means."*

### **Copyright**

- Compilations of data which fall within the definition of a database as set out above will only attract copyright protection if they are original. For databases which fall into the definition above, the database will be original if the selection or arrangement of the contents of the database constitutes the author's own intellectual creation. In this case, GEMA will be responsible for the arrangement of the data in the database and they may therefore be able to argue that this arrangement is their own intellectual creation and the copyright in the database (which is an automatic right) vests in them as the author (i.e. the

creator) of the database.

### **Database Right**

- Database right was introduced by the Database Directive which was implemented in NI and the rest of the UK by the Copyright and Rights in Databases Regulations 1997. Under this legislation, database right subsists in a database if there has been “*a substantial investment in obtaining, verifying or presenting the contents of the database*”. The owner of the database right is referred to in the legislation as the “*maker*” and this is the person who takes the initiative in obtaining, verifying or presenting the contents of a database and assumes the risk of investing in that “*obtaining, verification or presentation*”. In this case, given that the Department has commissioned GEMA to produce the database, it would appear likely that the Department is the owner of the database right as it has taken the initiative in commissioning GEMA to collect the data and it is the Department who will assume the risk of investing in “*obtaining, verifying or presenting the contents of the database*” by GEMA.

### **Ownership of the Data**

- In light of the above, there is the possibility that ownership of the intellectual property in relation to the NI RHI database could be split between the Department and GEMA in terms of ownership of the copyright in the database and ownership of the database right. In any event, we would always recommend that ownership of intellectual property in a database is dealt with in a written agreement between the relevant parties.

We would suggest that the Department’s initial stance to GEMA should be that, given it has commissioned the database and is therefore the party making the investment in “*obtaining, verifying or presenting the contents of the database*”, all database right belongs to the Department. Any copyright which may have vested in GEMA as the author of the database should be assigned (transferred) from GEMA to the Department. We would advise that any assignment is an all-encompassing intellectual property rights assignment (as opposed to just a copyright assignment) in order to capture any database right or other intellectual property rights in the database which may have vested in GEMA through its creation of the database. An assignment of intellectual property needs to be in writing signed by the parties.

The Department should also consider whether GEMA has developed any bespoke underlying software to operate the database that the Department may need access to when the contract with GEMA comes to an end in order for it or a third party to operate the database going forward. If any such software exists, the Department should seek to have all intellectual property rights in this software assigned to it as well.

It should be expressly stated in the assignment that all intellectual property rights in the database and underlying software ultimately vest in the Department; this will ensure that the Department is able to transfer the database to any new administrator of the NI RHI on termination of the agreement with GEMA.

In the event that GEMA is reluctant to enter into an assignment of its intellectual property rights in the database to the Department (and if this is the case, the Department should question why GEMA would need to retain any rights in the database), one option would be for the Department to seek an exclusive, irrevocable licence from GEMA which would allow the Department to use any intellectual property rights in the database (and any underlying software) that are vested in GEMA. Any such licence should include the right for the Department to sub-licence its rights of use to any new administrator of the NI RHI

on termination of the agreement with GEMA.

### **Data Protection**

For the purposes of this advice, we have assumed that the database will not contain personal data. Under the Data Protection Act 1998 (“DPA”), personal data means:-

*“data which relate to a living individual who can be identified:*

- (a) from those data; or*
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, a data controller,*

*and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.”*

If the database is likely to contain personal data, consideration will need to be given to the implications of the DPA on the arrangements with GEMA. We can provide you with further advice on this area if required.

Please let me know if you would like to discuss any of the above.

Regards

Alan

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**From:** Stewart, Susan [mailto:Susan.Stewart@detini.gov.uk]  
**Sent:** 19 November 2012 17:21  
**To:** Alan Bissett  
**Cc:** McCutcheon, Joanne; Hutchinson, Peter; David Trethowan  
**Subject:** ACX/RHI 004 - Renewable Heat Incentive- Administrative Arrangements  
**Importance:** High

Alan

You have previously undertaken work for the Department relation to the Administrative Arrangements Agreement between Ofgem and DETI. I have attached a copy of the work request for your convenience. I understand that you have spent just over £ Sensitive commercial information on this work request, therefore we would like you to carry out additional work under this request.

The negotiation of the Admin Arrangements document between DETI and Ofgem is still ongoing. In particular the question has been raised as to 'who owns the data?'

The Primary powers for the NI RHI are contained in the Energy Act 2011

<http://www.legislation.gov.uk/ukpga/2011/16/part/3/crossheading/northern-ireland-renewable-heat-incentives/enacted>

The secondary powers are in the NI Regulations

<http://www.legislation.gov.uk/nisr/2012/396/contents/made>

Ofgem is not mentioned in the Regulations – rather it refers in all cases to DETI. We are engaging Ofgem to act as Administrators of the scheme on our behalf – this is via the Admin Agreement which we understand has no legal basis.

Grateful for your view on who owns the data? This is particularly relevant for us in terms of the position should the agreement be terminated and also in terms of who has the right to pass any data to a third party.

This matter is urgent therefore we would appreciate if you could provide us with your early views by this **Friday 23rd November**.

If you require any further clarification on this matter, you can contact Joanne McCutcheon on 028 9052 9425

Many thanks

Susan

**Susan Stewart**

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***The new website for the European Sustainable Competitiveness Programme for NI is now available - visit [www.eucompni.gov.uk](http://www.eucompni.gov.uk)***



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