From: Millen, Patrick
To: McCutcheon, Joanne
Subject: RE: Renewable Heat Incentive - Administrative Arrangements
Date: 07 February 2013 14:26:09

Joanne,

Should anything further arise feel free to comeback to me. As I said there really is no difficult with DETI receiving the information from GEMA and I certainly do not think explicit consent is required from every applicant.

Kind regards

Pat Millen

Departmental Solicitors Office

Ext: 51210

From: McCutcheon, Joanne
Sent: 07 February 2013 14:24
To: Millen, Patrick
Subject: RE: Renewable Heat Incentive - Administrative Arrangements

Patrick
Many thanks for this very helpful response. On the basis of this, we will continue our discussions with Ofgem.
Regards
Joanne

Joanne McCutcheon
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From: Millen, Patrick
Sent: 06 February 2013 15:18
To: McCutcheon, Joanne
Subject: Renewable Heat Incentive - Administrative Arrangements

SOL 34916/2012/DETI

Joanne,

I refer to the above and to your e-mail dated 30th January.

I have to confess that I do not understand how GEMA consider there are data protection difficulties in providing the names of applicants who have applied to (what is, after all) a DETI scheme.

Looking at the e-mail from Mr. Avis (from GEMA), it is right to say that the legislative intention (as reflected in the express language of the Renewable Heat Incentive Regulations (NI) 2012 (the 2012 Regulations)) is to refer to DETI. That is not surprising given the 2012 Regulations are Regulations made by DETI and the power to make such Regulations is exclusively reserved to DETI. GEMA then go on to state:

"Nevertheless, the Ofgem position is that most of the functions which the Regulations allocate to DETI now fall to be carried out by Ofgem, This is because the signed agreements, which were entered into under the same legislation, provide for that to be the case. The practical effect of the signed agreements in our view is that, in relation to the functions transferred to Ofgem under the arrangements and for as long as the arrangements are in place, the Regulations have to be read and given effect to as if they referred to the Authority rather than to DETI."

It's important not to consider the 2012 Regulations in isolation, but to look at those Regulations in the context of the powers contained in the Energy Act 2011 which provide DETI with the enabling powers to make the 2012 Regulations. Section 113 wholly vests DETI (not GEMA) with the powers to make a scheme, section s114 then goes on to provide:

"(1) GEMA and a Northern Ireland authority may enter into arrangements for GEMA to act on behalf of the Northern Ireland authority for, or in connection with, the carrying out of any functions that may be conferred on the Northern Ireland authority under, or for the purposes of, any scheme that may be established, under section 113.

(2) In this section—

"GEMA" means the Gas and Electricity Markets Authority;

"Northern Ireland authority" means—

(a) the Department of Enterprise, Trade and Investment…" (My emphasis)

The language of section 114 makes it clear that within any arrangement (for powers conferred on DETI under a scheme established by section 113 to be carried out by GEMA) GEMA acts *"on behalf of"* DETI not to the exclusion/replacement of it. It is true that, in practical terms, GEMA may carry out those functions which have been transferred on a day-to-day basis, but in so doing it acts on behalf of DETI (whether or not the view is taken that one now interprets the references to DETI in the 2012 Regulations as references to GEMA - those 2012 Regulations will always have to be read subject to the primary powers under which they have been made i.e. subject to section 114). DETI ultimately remains responsibility for the Scheme, it and the DETI Minister remain solely accountable to the NI Assembly for the Scheme - there is no question, in my mind, that GEMA have somehow extinguished the overall responsibility of DETI here or now that functions have been transferred they have somehow developed a complete freehand in how to they are to be discharged.

Data Protection Act 1998

In terms of data protection I fail to see how there is any problem with DETI being provided with the names of applicants. There are two routes to this conclusion:

1. DETI is and remains, despite any processing of personal data by GEMA, the "data controller" for the purposes of the Data Protection Act 1998 (DPA). As a result there is no disclosure for the purposes of the DPA between GEMA and DETI; or

2. In any event, even if GEMA was to be considered the "data controller" any disclosure between it and DETI would satisfy the requirements of the DPA.

If I can take each:

1. The DPA defines the term "data controller" as:

"data controller" means, subject to section (4), a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be processed; (My emphasis)

Who is the "data controller" (as opposed to a "data processor") will be determined by the exact nature of the relationship between DETI and GEMA. GEMA have absolutely no control or discretion over the *"purpose*" for which the data they received is to be processed. It also occurs to me that it is DETI which is ultimately answerable here, the statutory responsibilities for the making of a scheme have been placed squarely upon it (s113 Energy Act 2011), the scheme has been made by it in exercise of the powers available under s113 of the Energy Act 2011, responsibility for achieving the statutory objectives and it is ultimately accountable to the NI Assembly for how the scheme operates. Deciding where the line is crossed between "data controller" and a "data processor" is often never easy, but it seems to me that a more than respectful argument could be made that DETI remains the “data controller”.

2. The DPA does not absolutely prohibit the disclosure of personal data, it simply require any disclosure, if it is to happen, to adhere to the data protection principles. In terms of disclosures the focus tends to be on the first data protection principle, this principle requires any "processing" (which includes "disclosure") to be:

(a) lawful,

(b) fair,

(c) satisfy a Schedule 2 condition; and

(d) in the case of "sensitive personal data" a Schedule 3 condition.

We can ignore (d), I doubt whether any of the data relates to individuals physical/mental health, sexual life, political opinion, religious beliefs, membership of trade unions, the commission of a criminal offence or the existence of criminal proceedings.

A consideration of "fairness" looks at the circumstances of the case part II of Schedule 1 to the DPA also makes it clear that reference is to made to the method by which information is obtained, whether persons have been deceived to provide the information or have been mislead as to the purposes for which the information is to be processed. In circumstances in which applicants are making the conscious decision to apply to a DETI scheme (I haven’t seen any scheme literature, but I assume it is made clear that the scheme is a DETI scheme regardless of applications being made to GEMA), I

cannot see any unfairness to those persons if their details are subsequently passed to DETI. In fact, it's hard to understand how the scheme could operate without such information being passed to DETI.

In relation to a Schedule 2 condition, the matter of obtaining consent appears at paragraph 1, however obtaining consent in every case is going to be time-consuming and burdensome, DETI does not need to seeks consent in every case. An alternative condition is that contained in paragraph 6, this provides:

"The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of the prejudice to the rights and freedoms or legitimate interests of the data subject"

This balances the legitimate purposes pursued by DETI against any harm that would be caused to the applicants i.e. whose personal data is sought to be disclosed. Again, in circumstances in which it is the applicant (of their own motion) making the application to the scheme I do not believe there would be any prejudice caused to those applicants in having their details disclosed to DETI.

In my view there is no issue with the requirement of "lawfulness", a disclosure by GEMA to DETI would not be unlawful. It would neither constitute a breach of private life guaranteed by Article 8 of the European Convention on Human Rights or the common law duty of confidence.

In these circumstances a disclosure between GEMA and DETI would be fully capable of satisfying the requirements of the DPA.

Should any matter require clarification, or should anything further be required, do not hesitate to make contact.

I am happy to discuss.

Kind regards

Pat Millen

Departmental Solicitors Office

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