

**To:** Mary Smith[Mary.Smith@ofgem.gov.uk]  
**Cc:** Keith Avis[Keith.Avis@ofgem.gov.uk]; Morag Drummond[Morag.Drummond@ofgem.gov.uk]; Michelle Murdoch[Michelle.Murdoch@ofgem.gov.uk]  
**From:** Marcus Porter  
**Sent:** 2013-01-17T14:32:57Z  
**Importance:** Normal  
**Subject:** RE: NIRHI: Administrative Arrangements  
**Received:** 2013-01-17T14:32:59Z

Mary

I have already provided some advice to Keith on this subject – i.e. in relation to the request DETI made to be advised as to who had applied for an application form, as opposed to details of those who have actually applied.

Part of that advice was to the effect that the privacy policy, which has been mentioned in discussion with DETI, is not relevant at this stage – i.e. because it is before the point at which an applicant registers on our system and makes an application – which is when he first becomes aware of the policy.

The *relevance* of the privacy policy is fully explained in my advice, so I shan't go into that again here.

I would also reiterate that, as a piece of information, it's pretty useless: It doesn't follow from the mere fact that someone has requested a form that they will subsequently apply or that, if they do, they will do so at any particular point in time. Indeed that has thus far been borne out by events. We haven't exactly been deluged with applications – indeed there has been only one so far.

I reiterate however my advice that, were DECC to make a similar request in relation to the GB Regs, my advice would be the same.

Can I ask **Morag**, who was copied in on the advice or **Michelle** (contained in at least a couple of emails) to forward this to you? I am a bit tied up at present.

I must say that I think DETI's comments are a little out of line. I confess that I had rather assumed that the privacy policy issue had already been dealt with but, having said that, it is not entirely surprising if any loose ends remain, given the, to say the least, the challenging timetable set by DETI last year.

I'm also rather surprised at DETI's tone given that, as already mentioned, there has been but one application to date.

Furthermore I am frankly astonished at the remarks below concerning our role and that of DETI: Until 28 December, which is when I gather the arrangements were signed, I would have agreed, but the position since then is the reverse of what it was before that date and DETI should be aware of this. I am sure we discussed this repeatedly with them at the teleconferences and I would assume that their Belfast lawyers did likewise.

The reason DETI and not the Authority is are referred to in their Regs is that that is exactly what their legislation calls for. DETI could not lawfully have referred to Ofgem in the legislation so it is right that they didn't. This is the case with or without arrangements.

Nevertheless, most of the functions which, as Fiona says, the Regs allocate to DETI now fall in law to be carried out by Ofgem. This is because the signed arrangements, which were entered into pursuant to section 114 of the Energy Act 2011, provide for that to be the case. The effect of the arrangements in law is in effect that, in relation to the functions concerned, the Regulations have to be read and given effect to *as if* they referred to the Authority rather than to DETI.

Moreover, in relation to those functions we have in essence stepped into the shoes of DETI and taken over their role completely – no less than would have been the case had we been appointed directly in the legislation and there had been no mention there of DETI at all.

Also, the published guidance makes clear that it is for Ofgem to administer the scheme.

Before the arrangements were signed the position was the opposite. The Authority had no legal standing at all in relation to the scheme – which is why I was so concerned that, almost two months after the scheme went live, and having published guidance which makes clear that the Authority would administer the scheme, there was still no legal basis for us to do that.

This is why it would have been wrong in law to categorise the relationship between ourselves and DETI as one whereby we are providing them with “services”. We are doing no such thing, we are taking their place in law and as a result, in administrative law terms, we are required to act independently of them.

Of the functions conferred on DETI in the Regs, the effect of the arrangements is that only 4 functions (designated in the arrangements as “retained functions”) currently reside with DETI.

That said, DETI continue to hold the reins so far as the formulation of general policy is concerned and they are of course custodians of the Regulations as well.

In these various respects DETI are in the same position, vis-a-vis us, as DECC are. The only difference is that, in the case of the GB Regs, that arises from the fact that we are designated in the Regs as their administrators, whereas, in the case of the NI Regs, it arises from the arrangements.

It is of course a different matter if the arrangements are ever terminated. Should that happen there will be no further role for us to play in relation to existing scheme participants or, of course, any that may apply subsequently to DECC.

As regards the question of what information we can supply once people have actually applied, as I have told Keith, I am in the course of preparing supplementary advice in relation to that which will build on similar advice given last year to the Ops team here in relation to the GB scheme, including highlighting any differences between the two. The supply of information relating to particular applicants is part and parcel of this.

This is quite a complex area and my advice will be fairly lengthy. I am about 75% of the way through it but will now be interrupted due to the need for me to give advice before close of play today in relation to draft Regulations just received from DECC, to amend the existing

GB Regulations - on metering . We have been given 2 days to comment on this draft, which is the first we have seen and the regulations have to be laid before Parliament in the next few days. I must therefore give that priority for today and, depending on certain developments that may occur later today, tomorrow as well.

In short, it may be Monday before I can finalise my further advice to Keith, though it is possible it may be tomorrow.

Long term, it's in DETI's interests not to be unduly upset about this short further delay, given that they will presumably be replicating DETI's Regs in due course – so they will no doubt hope, as we do, that they will be carefully thought through.

In the meantime, could I also make the general point that whilst, as the Arrangements make clear, there are legal constraints on what information we can supply to DETI, similar constraints apply in relation to DECC but there is nevertheless still a considerable amount of information that we can and do lawfully supply to DECC and the relationship appears to work quite well in this respect. I am not envisaging that we will be able to supply any less information to DETI. I rather thought we had told DETI all this already but it may be worth re-iterating.

Also worth bearing in mind that, in general, information is supplied to DECC not on a case by case basis but at set intervals when information is to hand regarding a *number* of installations/producers of biomethane.

One more point on legal constraints: it may sound obvious but these are neither conceived nor enacted by Ofgem. They are on the statute book however and we have to take account of them and point out their existence and effects and the fact that non-compliance may result in severe criticism of us and potentially severe financial penalties.

Key amongst this legislation is the Data Protection Act, which applies to NI and is a nightmarish piece of legislation. I shall have more to say about that in my advice. In the meantime suffice to say that, whilst we can certainly supply quite a lot of information relating to various aspects of applications received, there are constraints arising from the Act applicable to the disclosure of information which may identify particular individuals – again these limit what we supply to DECC as well and this has caused no particular difficulty that I am aware of.

Marcus

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**From:** Mary Smith

**Sent:** 17 January 2013 12:51

**To:** Marcus Porter

**Cc:** Keith Avis

**Subject:** FW: NIRHI: Administrative Arrangements

**Importance:** High

Hi Marcus,

We've received the following email from DETI regarding the provision of details of those who've applied to the scheme and I would appreciate your thoughts on their points. Apologies if you've already covered these areas with Keith, he's interviewing much of this afternoon and we need to go back to DETI as soon as we can. For my understanding, I'd also be grateful if you could briefly explain the following:

- Given the wording of the Regs and that they refer to applications going to DETI, why are we unable to share details of applications received with DETI/ why do we need applicants to sign a privacy policy to do so?
- As the Regs only refer to applications for accreditation going to DETI, is this why we would be unable to share details of any simply requesting application forms with them?

Also, you mentioned you'd be able to provide some further advice in your email yesterday about the privacy issue – would you be able to send this through?

Thanks

Mary

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**From:** Hepper, Fiona [<mailto:Fiona.Hepper@detini.gov.uk>]

**Sent:** 17 January 2013 11:56

**To:** Keith Avis

**Cc:** Robert Hull; Matthew Harnack; Mary Smith; Luis Castro; McCutcheon, Joanne; Hutchinson, Peter

**Subject:** RE: NIRHI: Administrative Arrangements

Keith

I understand from Joanne that Ofgem is not going to provide us with the names of applicants until a privacy policy ( currently being drafted) is signed by applicants. I thought we had found a pragmatic way to progress the 'Who owns the data?' issue before Christmas and I am disappointed that the very first time we seek some information (and it is only a name and address) there appears to be an obstacle.

The regulations governing the NI scheme clearly state that 'all applications for accreditation must be made in writing to the Department' where the Department is defined as 'the Department of Enterprise, Trade and Investment' and accreditation is defined as ' accreditation of an eligible installation by the Department following an application'

Received from OFGEM on 18.10.2017

Annotated by RHI Inquiry

There is no mention of Ofgem in the Regs – it is clear that the application is to be to DETI and that it is DETI that accredits; so, legally the power and responsibility resides with DETI .

We are of the view that Ofgem is carrying out this work on our behalf in which case I cannot understand how there could be any issue in providing us any information provided by an applicant. If you do not consider that you are doing this work on our behalf I would be grateful for your view on how you think your position sits with the Regulations as drafted – in layman's terms how is DETI's legal responsibilities under the Regs, transferred to Ofgem?

Furthermore, it seems completely bizarre that if we were to terminate the Agreement you would provide us with the information (as previously agreed) but you will not share it while the arrangement is in place (without a signed privacy policy).

This current issue does not bode well moving forward as I am sure we will be seeking further information in the future. If we cannot reach a workable solution then I think the best way forward is for DETI to amend our processes to ensure that applicants approach DETI in the first instance – applications could then be passed on to Ofgem.

Grateful for a quick response

Regards

Fiona

### **Fiona Hepper**

Head of Energy Division

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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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**From:** Keith Avis [<mailto:Keith.Avis@ofgem.gov.uk>]

**Sent:** 16 January 2013 12:12

**To:** Hepper, Fiona

**Cc:** Robert Hull; Matthew Harnack; Mary Smith; Luis Castro; McCutcheon, Joanne; Hutchinson, Peter

**Subject:** RE: NIRHI: Administrative Arrangements

Fiona

For clarity I thought I should pick up on the fact that in signing off the Administrative Arrangements I am assuming that you were also content with the baseline scope document that accompanied them in my email of 21 December. Suffice to say, the document is as discussed and agreed between DETI and Ofgem, but for completeness, if you could confirm that you are content by way of a reply that would be much appreciated.

Kind regards

Keith

**Keith Avis**

Senior Manager

New Scheme Development

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**From:** Hepper, Fiona [mailto:Fiona.Hepper@detini.gov.uk]

**Sent:** 31 December 2012 10:59

**To:** Keith Avis

**Cc:** Robert Hull; Matthew Harnack; Mary Smith; Luis Castro; McCutcheon, Joanne; Hutchinson, Peter; Hepper, Fiona

**Subject:** RE: NIRHI: Administrative Arrangements

**Importance:** High

Keith

I have signed the e-copy of the Admin Arrangements, scanned and returned as requested (see attached). The hard copy has not yet arrived in the post - if required I can sign this and return separately.

Many thanks and happy new year to all

Regards

Fiona

## Fiona Hepper

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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)*



[www.ni2012.com](http://www.ni2012.com)

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**From:** Keith Avis [mailto:Keith.Avis@ofgem.gov.uk]

**Sent:** 21 December 2012 15:31

**To:** Hepper, Fiona

**Cc:** Robert Hull; Matthew Harnack; Mary Smith; Luis Castro; McCutcheon, Joanne; Hutchinson, Peter

**Subject:** NIRHI: Administrative Arrangements

Fiona cc: As above

Following discussions with you and your team this week, please find attached pdf versions of the Administrative Arrangements and supporting cover letter signed by Bob Hull. Also attached is the file containing the baseline scope document. All three documents have been sent to you through the post, and I would be grateful if you could sign the Administrative Arrangements.

Many thanks

Keith

**Keith Avis**

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[www.ofgem.gov.uk](http://www.ofgem.gov.uk) on 18.10.2017

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