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Memo

Advice on provision of information to DETI in the context of the NI Renewable Heat Incentive Scheme

Legal advice on provision of information to DETI under NI RHI and the impact of the Data Protection Act in relation thereto	From	Marcus Porter
	To	Jacqueline Balian
	cc	Morag Drummond Keith Avis Michelle Murdoch
	Date	17 Jan 2013

INTRODUCTION

I have been asked to advise in relation to provision by the Authority to DETI of information pursuant to the NI Renewable Heat Incentive Scheme Regulations 2012 ('the NI Scheme') and associated "Arrangements" under section 114 of the Energy Act 2011 and this follows.

For the purposes of comparison and perspective it is useful to recall the nature of the parallel requirements arising in relation to the GB Regulations, as regards which Legal provided advice last March. Hence there are numerous references below to the GB Regulations.

Moreover I am mindful of the fact that the administration of the NI Scheme, like the GB Scheme, will be in the hands of the Ops team here and they will thus need to be aware of the practical differences that it appears will arise in relation to the supply of information to DETI – arising from differences between the two schemes as regards the nature of the Authority' obligations and the sources of those obligations.

I am also taking the opportunity to say something about the basis for the "Arrangements" referred to below, as there seems recently to have been some misunderstanding as to this and, whilst this has been on DETI's part, I would not like to think that colleagues here might similarly be unclear as to the position. especially as it has a bearing on the issues concerning the supply of information.

PROVISIONS RELATING TO THE SUPPLY OF INFORMATION TO DECC UNDER THE GB SCHEME AND LEGAL CONSTRAINTS THEREON

The requirements as regards the provision of information imposed on GEMA under the GB Regulations are set out in regulations 53 and 54 of those Regulations. Those should be read in conjunction with section 100 of the Energy Act 2008, under which the Regulations were made.

Regulation 53(1) requires the Authority to provide *specified* information to DECC relating to installations accredited during the period covered by the "report" referred to in the provision and, as regards those who are registered during that period as producers of bio-methane for injection, specified information relating to that production.

Regulation 53(1) also provides that DECC may *request* that this monthly information include certain other information which we hold and which arises from our administration of the GB scheme. The specific nature of this is not set out in terms, though the parameters within which it should fall are clear enough.

The need for a request means that, unlike the specified information referred to above, we do not provide this *routinely*, but only in response to such a request – which has to be made beforehand and be in writing. There is no legal authority to supply the information in the absence of such a request.

That said, it is possible in principle to avoid the need for repeated requests of the same kind by DECC making an initial request and specifying that they also wish the information concerned to be supplied at specified intervals in the future.

Regulation 53 in addition includes an obligation on GEMA to publish quarterly and annual reports containing, in *aggregate* form, the information which the Authority is required to provide on a routine monthly basis as explained above, plus one to publish on our website specified "current information" – i.e. not more than 5 days old – which is again in aggregate form.

Finally, under regulation 54 DECC, may request that we supply other information relating to our administration under the GB Scheme: Again, this is dependent on prior written request being made by them and it covers any information which is not required to be contained in the monthly, quarterly and annual reports described above.

Perhaps a little confusingly, regulation 54 is the legal mechanism whereby we supply DECC with *supplementary* monthly information (i.e. supplementary to the monthly report that we are *required* to provide under regulation 53) which contains a considerable information of a statistical nature which is of assistance to DECC in discharging its responsibility to ensure that the RHI is working as it should and providing value for money.

All in all, the emphasis is thus very much on the provision of information relating to installations and to production of biomethane details rather than on information revealing the identity of individuals.

So far as I am aware, following an initial period of uncertainty not dissimilar to that which we seem currently to be passing through in relation to the NI Scheme, the procedures for the supply of information to DECCC appear to be working quite well.

PROVISONS RELATING TO THE SUPPLY OF INFORMATION IN THE NI SCHEME

The position in relation to the NI Scheme is somewhat different:

The NI Scheme is made under section 113 of the Energy Act 2011. For all practical purposes this makes the same provision as that made by section 100 of the Energy Act 2008, under which the GB Scheme is made.

The equivalent of regulation 53 in that Scheme is regulation 51, but there is **no** obligation *in that* on the Authority to supply *any information at all* to DETI (monthly or otherwise).

Similarly, there is no obligation on the Authority corresponding to that in the GB Scheme to publish quarterly or annual reports or "current information" on our website. Nor is there any provision corresponding to regulation 54 in the GB Regulations.

Indeed, whilst there are multiple references to "the Authority" in the GB Regulations there are none at all in the NI Scheme.

Instead there is simply an obligation *on DETI* in regulation 51, which is retained by them under the "Arrangements" referred to below, to publish on their website (at

unspecified intervals) the same information as that which, under regulation 53(6) of the GB Regulations, *the Authority* is obliged to publish as "current information".

LEGAL BASIS FOR THE AUTHORITY TO ADMINISTER THE NI SCHEME

The above situation arises from the fact that, unlike in the case of the GB Regulations, the Authority's obligations in relation to the NI Scheme arise *not* directly from the Regulations (as just mentioned all functions therein are allocated therein to DETI) but from the fact that, pursuant to section 114 of the Energy Act 2011, we and DETI are permitted to enter into "Arrangements" whereby obligations that the NI Scheme imposes on DETI may be transferred to the Authority.

This has indeed been done and the overall effect of the Arrangements is that most, though not all, of the functions conferred on DETI by the Regulations are effectively transferred to us for as long as the arrangements subsist.

It's important to understand how that arose:

The inclusion of section 114 was presumably regarded as necessary for a *practical* reason, i.e. that DETI were not and (I understand) still are not adequately resourced to administer the NI Scheme themselves.

However in my view the section was also included in light of the *legal* consideration that, but for that, there would have been no legal scope for the Authority to administer - DETI being named in the NI scheme Regulations and not the Authority.

As it is, section 114 authorised DETI to do something which is normally outlawed by virtue of the legal rule prohibiting "sub-delegation" of powers unless express authorisation to sub-delegate is provided in primary legislation, namely the transfer of legal responsibility for administration to the Authority. The section provides that authorisation and is therefore crucial.

That section 114 is all about sub-delegation is clear from the fact such authorisation wouldn't be necessary if what was intended was that DETI should administer but use agents to carry out associated functions such as audit and IT related activities. This is already permitted under the common law and can be contrasted with the situation where it is desired to provide the scope for *wholesale transfer* of responsibility for carrying out certain functions to a third party. In the latter case statutory authorisation is required and, as already stated, section 114 provides that.

The Arrangements were signed on 28 December last year and the effect is that, since that date and unless and until the Arrangements are terminated, DETI is no longer responsible for most of the functions for which it would have continued to be responsible in the absence of the Arrangements.

Until 28 December the position was the opposite – i.e. the Authority had no power at all to administer the NI Scheme.

It's important to appreciate that the relationship between the Authority and DETI is not a contractual one. It cannot be since the authorisation for the Arrangements is *statute.* The term "Arrangements" was thus no doubt chosen by the Parliamentary Counsel who drafted the 2011 Act to emphasise this point and the Arrangements themselves have followed suit by calling themselves "Arrangements" and expressly stating that they are not intended to create contractual relations.

Similarly, the Arrangements do not in essence constitute an agreement whereby the Authority supplies "services" to DETI. This cannot be since, as indicated above, the Authority has in effect *taken over* most of DETI's functions since 28 December.

Nevertheless, DETI of course has the ultimate responsibility for policy formulation and for giving effect to that policy in the NI Scheme.

In addition to the functions in regulation 51 of the NI Scheme which, as mentioned above, are being retained by DETI, they also retain under the Arrangements the obligation to publish annually tariffs updated in accordance with RPI, recovery of overpayments as a civil debt where that is thought appropriate and statutory review of decisions made by the Authority where an applicant requests that.

NATURE OF THE AUTHORITY'S OBLIGATION TO SUPPLY INFORMATION TO DETI AND APPLICABLE LEGAL CONSTRAINTS

Instead of provisions in the NI Scheme Regulations obliging the Authority to supply information, what we have instead, in the Arrangements, are provisions whereby –

(a) we are required to supply DETI with whatever information they need to deal with any civil debt and statutory review cases (see above); and

(b) we must provide such other information as DETI may reasonably request and which GEMA may hold in relation to the "conferred functions" (i.e. those not retained by DETI as mentioned above).

Both requirements are subject to an overriding requirement that the Authority *will at all times act in accordance with the law*. This is as per the GB Regulations, the only difference being that the Arrangements specifically advert to the legal constraints in this way.

My assumption is that the automatic obligation to supply information for the purposes of repayments and reviews is unlikely to occur frequently and that, consequently, the requirement will not in practice normally require our consideration.

As to any other information, in my view the position is effectively as it would be under the GB Regulations if regulation 53 were omitted and only regulation 54 included. In other words, information should be provided only in response to a prior written request for it.

This means that the initiative in relation to the supply of information must come from DETI – though doubtless following discussion with us, just as is the case under regulation 54 of the GB Scheme.

Thus we are not obliged to *volunteer* any information to DETI under the Arrangements but rather only to provide it as and when they *reasonably request* it under the provisions referred to above. Moreover, I would strongly advise against choosing to volunteer such information as it is doubtful that we have the necessary legal powers to do so.

However, as with the GB Scheme, repeated requests may be avoided if the initial request is made in terms that make clear that what it is also desired that the information being supplied is supplied again at specified intervals in the future.

The need for a request is effectively one of the legal constraints mentioned above. Others are as outlined below and, again, they are largely common to the two Schemes.

As already indicated, certain information should not be collected or disclosed under the NI Scheme (or indeed the GB Regulations):

In particular, we should *collect* information only because we consider it necessary for the purposes of our administration of the NI Scheme, e.g. to process applications for accreditation, not because we anticipate that the information may be of interest to DETI. There is a risk of contravening data protection principles (see below) otherwise and going beyond our legal powers.

Also, the Arrangements do not require the Authority to *obtain* information at the behest of DETI, but only to provide such of that information *that it already has,* which it is *reasonable* for DETI to request and (significantly and see below) which can be supplied by us without contravening the law.

The guiding principle is ensuring that at all times the gathering and disclosure of information as part of our administrative functions can be clearly justified as being in accordance with the NI Scheme and Arrangements. In this regard, in order to ensure lawful compliance with our obligations, we must ensure that the information we are proposing to disclose to DETI:

(i) is covered by the wording of the relevant provision in the arrangements – as described above. .; **and**

(ii) has previously been requested by DETI pursuant to those provisions in writing.

As to *disclosure* of information to DETI, just as, under the GB Regulations, the provisions on information contained in the Regulations are not the only ones relevant to the provision of information to DECC, so too under the NI Scheme the provisions in the Arrangements are not the only relevant provisions (a fact that is emphasised though by the specific requirements in the Arrangements that we comply with the law) and disclosure has to be compatible with relevant statutory requirements (see below).

One statutory constraint applicable in relation to the GB Regulations is to be found in section 105 of the Utilities Act 2000. Our advice last year in relation to the GB Regulations considered this but it appears that a similar analysis is not required here as the 2000 Act does not apply to NI.

That said, we do need to establish whether there is any parallel NI legislation having a similar effect. I doubt it but the question should be asked of DETI (who will no doubt consult their Belfast lawyers) pursuant to para 4.1(h) of the now signed arrangements. I also doubt that any such provision would in practice preclude disclosure (especially in the case of aggregated information) but we need to be sure as it does potentially impact as regards the issue of what information we may pass to DETI and what we may not. I imagine DETI can obtain this information quite quickly.

I turn now to the all important data protection legislation:

Section 1 of the Data Protection Act defines "personal data" as "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, the 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".

Particular care should be taken in relation to information which may not on the face of it appear to be personal data but, if taken together with other information available could identify an individual as an owner or producer. Nevertheless, the higher courts have confirmed that, in keeping with the spirit and policy of the EU Directive 95/46/EC which formed the basis for the DPA, if, by anonymising information, a living individual could no longer be identified from the data, then it should no longer be treated as personal data[1].

As already indicated, the information referred to in regulation 53(1)(a)(i) of the GB Regulations relates to the *accredited RHI installation and to bio-methane producers* rather than to the identity of owners and producers. Therefore, details of individual participants as

[1] *Common Services Agency v Scottish Information Commissioner* (2008) 27 UKHL 47

listed in Schedule 1 would normally fall outside the scope of the information DECC can require under that provision. On this basis postcodes and property numbers should not be disclosed routinely in the monthly reports provided under that provision and I understand that that is not normally done. If such a request were made by DECC under regulation 53(a)(i) we would need to consider carefully its purpose and whether such disclosure was appropriate in light of statutory requirements in the DPA 1998.

The position is a little different *on the face* of the NI Arrangements, since the information provision requirement is not specifically expressed to be limited to the installation itself, so at first sight it might be thought it could embrace the provision of information relating to the owner. However, the DPA constraints are in reality no less applicable to the NI Scheme and thus a similar approach to that described above in relation to GB should be taken.

With the same constraints in mind, caution should likewise be exercised when providing information to DETI under ad-hoc "data requests" relating to individuals and the principles outlined here should be observed in respect of such requests. However I envisage that, as with GB, information supplied will normally relate to a number of installations/producers.

Also, DPA requires us to ensure that the information is processed fairly and lawfully in accordance with the Act and obtained for one or more lawful purposes.

A particular way in which compliance with those principles and more generally with data subjects' rights can be achieved is through publishing a robust privacy notice. The Privacy Notices Code of Practice[2], issued by the ICO in December 2010 provides guidance on how to achieve effective and compliant privacy notices. This document states: "In some cases individuals are required by law to provide their personal details. Where this is the case, seeking consent is meaningless. Instead, organisations should be open with people and explain clearly why their information is being collected and what it will be used for".

I have already given extensive advice on the subject of privacy notices and their content so need say no more here, save to reiterate that, following advice that Legal gave last year, certain improvements were made to the then wording of the GB Scheme privacy policy and that the revised document should now be used as the basis for the corresponding NI privacy policy, subject to the minor modifications the need for which I have advised. I have further advised and now reiterate that finalising the wording of the NI policy is an essential first step which needs to be taken before we begin to disclose information to DETI.

This advice has had much to say as regards some complex issues, notably that of what information we can/must supply to DETI. I understand the concern of DETI that they may not get all the information they ask for but hopefully it is clear from the above that there is no question of them getting nothing at all. Far from it indeed since I anticipate that, provided they request it in the manner advised above, we should be able, subject to largely the same legal constraints as are applicable in relation to GB, to supply much the same information as we currently supply to DECC in our two monthly reports.

This may well include information of the kind I was asked about yesterday, provided it is provided in aggregate form and in a document separate to ay information supplied at intervals and relating to particular plants/biomethane production. However in my view my advice should be sought in the early stages on a case by case basis when we start to supply particular information for the first time.

I envisage that the information supplied, as with GB in the required (and not required) monthly reports, will generally be supplied in relation to multiple plants rather than on an individual basis.

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[2] Issued under Section 51 of the DPA

The frequency with which information is supplied will be for discussion with DETI. However it occurs to me that the the fact that they do not need to publish information on their website (under regulation 51 of their Regulations) at any specified time may leave scope for us to supply information to DETI at intervals other than monthly intervals.

I am aware that all these issues took a little while to discuss with DECC before both we and they were content and I imagine the same may occur in relation to NI. I recommend, therefore, that we start on the task now and that in my view, especially given their experience in relation to the GB Scheme, it seems appropriate that it be undertaken by the Ops team.

MARCUS PORTER