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By email: [foi@ofgem.gov.uk](mailto:foi@ofgem.gov.uk)

Dear Freedom of Information Officer

**Subject: EIR-88-2020 representation under Regulation 11 of the Environmental Information Regulations 2004**

ClientEarth refers to Ofgem's response (dated 11 June 2020) to our request for information (dated 16 April). We understand and appreciate the significant work that would have been required to provide this response, especially during the Covid-19 pandemic.

We write regarding certain parts of Ofgem's response in which it appears that Ofgem has failed to comply with the duty to make available environmental information under regulation 5 of the Environmental Information Regulations 2004 (**EIR**). We therefore make representations under regulation 11 of the EIR as set out below.

Detailed information explaining emissions intensity

In response to question 1(a) in ClientEarth's request, Ofgem stated that it carried out a formal assessment of carbon impacts of the reforms under consideration. However Ofgem did not provide that assessment to ClientEarth. We request Ofgem to provide this assessment including any consideration of lifecycle emissions intensity of new-build closed-cycle gas turbines.

Specificity of data

In response to question 1(b) in ClientEarth's request, Ofgem stated that its 'assumptions are estimated from FES 2018 data'. Ofgem did not, however, provide such data to ClientEarth. We request that Ofgem identify or provide this data so that we can better understand the bases for Ofgem's assumptions.



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## Specificity in addressing requests and relying on exceptions

In its response, Ofgem listed a series of exceptions on which it relied, but did not indicate what requested information those exceptions apply to (apart from the reference to regulation 12(5)(b) in Annex 2).

The Information Commissioner's Office (**ICO**) guidance on refusing a request under the EIR notes that '[i]f the public authority is dealing with a multi-part request, or is refusing several requests at the same time, then the refusal notice will need to address each individual request or part of a request separately.'<sup>1</sup>

ClientEarth does not consider Ofgem to have sufficiently addressed each of the requests in accordance with the ICO guidance. It has not specified to which of our requests the exceptions relied on relate.

We therefore seek clarification from Ofgem on these matters. In particular, we ask Ofgem to indicate which of ClientEarth's requests for information are covered by the exceptions in regulations 12(4)(e), 12(5)(b) and 12(5)(f) (but not regulation 12(3)).

## Clarification with respect to reliance on exception in regulation 12(5)(f)

Ofgem stated in its response that, for a number of disclosures, it relied on the exception in regulation 12(5)(f). In support of this decision, Ofgem noted that 'we are satisfied on the basis of representations made to us by the party in question that disclosure would adversely affect their interests.' However Ofgem did not provide further information about the adverse impacts.

In relation on the exception in regulation 12(5)(f), the relevant ICO guidelines state that:<sup>2</sup>

'In considering whether there would be an adverse effect in the context of this exception, a public authority needs to identify harm to the third party's interests which is real, actual and of substance (i.e. more than trivial), and to explain why disclosure would, on the balance of probabilities, directly cause the harm.'

The ICO guidance also provides that where a person has stated that disclosure would harm their interests but does not articulate the nature of that harm, the authority should enter into discussions with the person in order to establish whether there is any substance to the concerns.<sup>3</sup>

ClientEarth therefore requests Ofgem to identify the real, actual and substantial harm caused to the relevant third party's interests, and explain why disclosure would, on the balance of probabilities, directly cause the relevant harm.

## Application of the public interest test with respect to application of regulation 12(5)(f)

In relation to the public interest test for the exception in regulation 12(5)(f), Ofgem emphasised in its response the public interest in the 'prevention of adverse effects on the interests of the

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<sup>1</sup> ICO, 'Refusing a request under the EIR' at paragraph 22, available at [https://ico.org.uk/media/for-organisations/documents/1628/refusing\\_a\\_request\\_under\\_the\\_eir.pdf](https://ico.org.uk/media/for-organisations/documents/1628/refusing_a_request_under_the_eir.pdf).

<sup>2</sup> ICO, 'Interests of the person who provided the information to the public authority (regulation 12(5)(f))' at paragraph 23, available at [https://ico.org.uk/media/for-organisations/documents/1638/eir\\_voluntary\\_supply\\_of\\_information\\_regulation.pdf](https://ico.org.uk/media/for-organisations/documents/1638/eir_voluntary_supply_of_information_regulation.pdf).

<sup>3</sup> Ibid at paragraph 27.

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third party provider of information’, ‘the principle of confidentiality’ and ‘the public interest in maintaining the voluntary supply of information to public authorities’.

The relevant ICO guidance on this matter states:<sup>4</sup>

‘Whilst there will always be some public interest in preserving trust in a public authority’s ability to keep third party information “confidential”, it is the extent and nature of the harm to the individual that will influence the degree to which the principle of confidentiality is damaged and, therefore, the amount of weight attributed to this public interest argument.’

The ICO notes that ‘if the harm caused by disclosure is only minimal, there is likely to be little public interest in maintaining the exception, especially given the presumption in favour of disclosure.’<sup>5</sup>

ClientEarth therefore requests that Ofgem provide information regarding the ‘extent and nature of the harm to the individual’ who provided the information.

We also highlight that the ICO guidance states there is a ‘strong public interest in disclosing information supplied by scientific and other experts which may contribute to scientific developments’.<sup>6</sup> We submit that this might be relevant to Ofgem’s consideration if the relevant information contains scientific evidence.

Relatedly, we request that Ofgem confirm that the relevant information covered by the exception is not information about emissions (given that regulation 12(9) would not then allow reliance on the exception).

We look forward to Ofgem’s responses to these points.

Kind regards

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<sup>4</sup> Ibid at paragraph 55.

<sup>5</sup> Ibid at paragraph 56.

<sup>6</sup> Ibid at paragraph 65.