

Environmental Information Regulations – Response - 27677

Under the Freedom of Information Act 2000 (FOIA) and the Environmental Information Regulations 2004 (EIR), I am writing to request information regarding your authority's decision in August 2024 to withdraw from / abandon potential Judicial Review proceedings against the Secretary of State for Energy Security and Net Zero regarding the Sunnica Energy Farm Development Consent Order (DCO).

Specifically, I request the following recorded information held by the Council between 12 July 2024 (the date the Sunnica DCO was granted) and 31 August 2024:

1. Cabinet / Executive Briefings & Decisions:

o Copies of all internal reports, briefing notes, risk assessments, or cabinet memos provided to Cabinet members, Council Leaders, or Chief Executives regarding the Pre-Action Protocol letter and the subsequent decision to withdraw from Judicial Review proceedings.

o The formal minutes, decision notices, or records of executive decisions where the decision to discontinue legal action was ratified.

Redacted briefing note to the Leader of the Council (file: '202407 JR briefing.pdf') on the possibility of a legal challenge to the Secretary of State's decision to grant development consent for the Sunnica Energy Farm disclosed.

Any Cabinet decisions would be published and made available on the Council's committee paper database available on the Council's website:

[Home Page - Committee Minutes](#)

2 Inter-Council & Inter-Authority Correspondence:

o Copies of all email correspondence, meeting minutes, and notes between senior officers or Cabinet members of your Council and representatives of:

- Suffolk County Council*
- East Cambridgeshire District Council*
- West Suffolk Council*
- Cambridgeshire County Council*
- The Government Legal Department (GLD) / Department for Energy Security and Net Zero (DESNZ)*

regarding the decision to issue, pause, or abandon the Pre-Action Protocol letter or Judicial Review claim.

No Inter-Council Correspondence has been retained. One Inter-Authority Correspondence has been withheld under r.12(5)(b) please see below for exception details.

3 Financial Expenditure & Cost Breakdown:

The total amount of public money expended by your authority on external legal advice, barrister fees, solicitor fees, or consultant costs relating to the joint Pre-Action Protocol

letter and potential Judicial Review against the Sunnica DCO decision.
£420 (plus recoverable VAT)

4 *Legal Advice Exception Clarification:*

- To the extent that legal advice itself may be claimed as exempt under Legal Professional Privilege (Regulation 12(5)(b) of EIR), please note that I am not asking for privileged legal strategy, but rather the recorded non-privileged administrative, financial, and policy reasoning communicated between decision-makers to justify abandoning the legal action.

- If any information is withheld under a legal privilege or public interest test exemption, please provide a clear statement explaining how the public interest in withholding the information outweighs the strong public interest in transparency regarding public expenditure and environmental governance.

This has been taken into consideration within the responses above.

Redacted Information

Regulation 12(5)(b)

Some of the information requested has been withheld under r.12(5)(b) the course of justice exception of the Environmental Information Regulations 2004 (EIR). This exception applies where disclosure would adversely affect the course of justice. The Information Commissioner's Office (ICO) recognises that information subject to legal professional privilege will generally engage this exception because disclosure would undermine the well-established principle that parties should be able to obtain confidential legal advice.

The withheld information comprises of confidential communications between Suffolk County Council (SCC) and its legal advisers and records which directly reveal or reflect legal advice obtained in relation to SCC's consideration of potential Judicial Review proceedings concerning the Sunnica Development Consent Order. The information attracts legal professional privilege because it was created for the purpose of obtaining and/or providing legal advice and was intended to remain confidential.

SCC considers that disclosure would adversely affect the course of justice by undermining the principle of legal professional privilege. The ICO's guidance recognises that there is a strong public interest in protecting the ability of public authorities to seek and receive full and frank legal advice in confidence. Disclosure of privileged legal advice would erode that confidentiality and prejudice SCC's ability to obtain candid legal advice when considering its legal position and litigation risks.

SCC recognises the public interest in openness, transparency and accountability regarding decisions affecting environmental matters and the expenditure of public funds. There is also a public interest in understanding the factors that informed SCC's decision-making in relation to the proposed Judicial Review.

However, there is a particularly strong public interest in maintaining legal professional privilege, which safeguards the confidentiality of communications between a client and their legal advisers. The ICO recognises that this is a fundamental principle of the legal

system and that public authorities must be able to obtain comprehensive and candid legal advice without concern that such advice will routinely be disclosed into the public domain.

Having considered the circumstances of this case and applied the presumption in favour of disclosure under Regulation 12(2), SCC has concluded that the public interest in maintaining the exception outweighs the public interest in disclosure. Accordingly, the information has been withheld under Regulation 12(5)(b) of the Environmental Information Regulations 2004.

Regulation 13

All information released in response to a Freedom of Information Act 2000 (FOIA) or Environmental Information Regulation 2004 (EIR) request is deemed to be in the public domain. As such we must consider whether or not the requested information qualifies as personal information and should therefore not be released into the public domain.

The council has determined that this is personal information and is therefore exempt from disclosure under **section 40** of the FOIA and **regulation 13** of the EIR.

The Council considered the following, including the possible consequences of disclosure for the data subjects concerned and their reasonable expectations as to the use of their data:

- expectations of the individuals concerned about personal information being put into the public domain;
- reasonable expectations - the data subjects concerned would have a legitimate expectation of privacy concerning their personal information and would not have anticipated this being put into the public domain;
- whether or not the requested information could be anonymised; and
- balancing the individual's rights and the legitimate interests - In past cases the Information Commissioner has weighed the individual's rights to privacy against the public interest in disclosure. There is no presumption in favour of releasing personal data.

This is an absolute exemption, which means that if the condition is satisfied there is no additional public interest test to consider.

In assessing fairness, the Council considered the likely consequences of disclosure of the requested information. Personal information should not be used in ways that have unjustified adverse effects on the individuals concerned. The council also considered whether such disclosure would be within the reasonable expectations of the individuals, given that any response to a request under the FOIA or EIR is deemed to be in the public domain. The council believes that in this instance it is not fair to disclose personal data and is therefore withholding the requested information under section 40 of the FOIA and regulation 13 of the EIR.

County Council

Report Title:	Briefing note on the possibility of a legal challenge to the Secretary of State's decision to grant development consent for the Sunnica Energy Farm
Lead Councillor(s):	Matthew Hicks
Director:	██████████ Executive Director of Growth, Highways and Infrastructure
Assistant Director or Head of Service:	██████████, Head of Programmes and PMO
Author:	██████████, Senior Planning Officer

[illegible]

¹ The Sunnica Energy Farm Order 2024 (“the Sunnica DCO”).

² Together, “the councils”.

Action recommended

Reason for recommendation

7. 2nd August 2024 is the date by which SCC must send a pre-action protocol letter, so a decision must be made before then. A decision can only be made following the receipt of expert legal advice.

Alternative options

8. The choice is whether or not to launch a legal challenge.

Who will be affected by this decision?

9. Local residents in the areas directly impacted by Sunnica may be affected in a number of ways. If the challenge is successful and the decision is quashed, the impacts of the project could be avoided. The pursuit of a JR may though prolong uncertainty about the status of the project.
10. Council taxpayers may be indirectly affected by a decision to commit resources to a legal challenge.

How does this relate to the County Council objectives?

11. This briefing is linked to the County Council's objectives indicated below:

Promoting and supporting the health and wellbeing of all people in Suffolk	☒
Strengthening our local economy	☐
Protecting and enhancing our environment (including carbon reduction)	☒
Providing value for money for the Suffolk taxpayer	☒

How will this impact on the Council's objectives?

12. If the challenge is successful and results in the decision being quashed, the landscape/environmental impacts of the project could be avoided.
13. However, pursuing a JR may in itself impact the community's wellbeing, due to this prolonging the uncertainty about the status of the project.
14. Council taxpayers may be indirectly affected by a decision to commit resources to a legal challenge.

Main body of report

Legal considerations

15.

Planning arguments

16. JR proceedings do not engage with the merits of the case, so there will not be an opportunity to revisit planning arguments made during the course of the examination.

Financial and resource considerations

17.

18. The costs could be split if the JR was jointly brought and funded through all or some of the other three affected local authorities (CCC, ECDC, and WSC). If a joint approach is taken, it may be necessary to add a junior barrister to any joint legal team, the cost for which would need to be confirmed.

19. If unsuccessful, the claimants are likely to be ordered to pay the Secretary of State's legal costs. For organisations bringing environmental claims these costs are capped at £10,000, but it is not clear whether this cap would apply to local authorities in this case. It is worth clarifying with counsel whether any costs order could potentially be uncapped.

20. It is difficult to accurately gauge the Secretary of State's legal costs as most planning cases are brought by environmental organisations and are therefore capped. If costs are uncapped it must be anticipated that a claim for costs would be in a range similar to SCC's own costs.

21. In addition to legal fees, bringing a claim will require officer time to assist counsel and provide instructions. Based on previous experience this would be divided into at least two stages: preparing the pre-action protocol letter and supporting the legal proceedings.

22.

23.

Practical considerations

24. Bringing a JR against the Secretary of State for Energy Security and Net Zero may close down avenues of communication with DESNZ, and potentially also the NSIP team in MHCLG, which SCC has been using effectively to influence government policy on energy infrastructure. In a best-case scenario SCC officers may only be able to communicate with the department on solar policy issues via legal channels and formal consultation routes. It would be open to the government to further restrict communication on all NSIP issues, and even potentially on Sizewell C related matters.

Conclusion

25. The decision to launch a legal challenge should be carefully considered, based on legal advice as to the ground/s for a challenge, the likelihood of its success, financial and resource implications, and the wider implications.

Sources of further information

No other documents have been relied on to a material extent in preparing this report.