

Public

Ref: FOI/24/0002

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30 October 2024

Dear requester

### **Request for Information**

Thank you for your request for information which we received on 3 October 2024.

### **Request**

1. You asked us to confirm whether the following are currently meeting their construction milestones and are on track to open as indicated:
  - a. Drax 3 x OCGTs due to open October 2024
  - b. Immingham OCGT due to open for 2025/6
  - c. Eggborough CCGT due to open for 2026/7
  
2. You also asked to know what, if any, steps NESO is taking in relation to the missing Drax capacity for this winter, e.g. whether there is there a need to procure additional reserve.

We understand that you previously requested information about the construction milestones for the units listed above from the Electricity Market Reform (EMR) Delivery Body which refused your request about the construction milestones on the grounds of confidentiality, but did provide you with a link to publicly available information in the Capacity Market Registers. You are now asking

for your request to be reconsidered, specifically under the provisions of the Freedom of Information Act 2000 (FOIA) and have added the second question above.

The National Grid Electricity System Operator was part of the National Grid PLC group of companies until 30 September 2024 and was not subject to the requirements of the FOIA. On 1 October 2024 we became the National Energy System Operator (NESO) under government ownership and now fall within the provisions of the FOIA.

Your emails framed your request as a capacity market issue rather than a planning, building, or environmental related issue, so we have considered your request and our response under the FOIA rather than under the Environmental Information Regulations (EIR).

We believe that there is a distinction to be drawn between information provided to National Grid ESO and the EMR Delivery Body prior to 1 October 2024 when ESO was not a public authority subject to the FOIA, and information shared with NESO after 1 October and have reflected this in our responses below.

### **Our response to Question 1**

We confirm that we hold some information which would confirm whether or not the construction milestones are progressing as expected.

We are refusing this part of your request under the exemption at Section 44 of the FOIA (Prohibition on Disclosure). Although the FOIA creates a duty for public authorities to provide information on request, there are prohibitions on disclosure created by other legislation, retained EU obligations and contempt of court. The effect of section 44 is that, if one of these other prohibitions applies, the information is exempt from disclosure under FOIA. The Information Commissioner's guidance on Section 44 also explains that some statutory prohibitions refer to the functions of a public authority. Relevant functions would be those given to the organisation specifically rather than general obligations on all public authorities.

Please note that the Information Tribunal found that the FOIA disclosure requirement is a general duty on all public authorities and does not override prohibitions on disclosure provided for by other primary or secondary legislation or by virtue of a public authorities' specific public functions.

In the case of NESO, we have specific functions as set out in the Energy Act 2023, the Utilities Act 2000, the Electricity Capacity Regulations 2014 and the associated Capacity Market Rules.

NESO falls within the scope of the Utilities Act 2000 and Section 105 of that Act makes it a criminal offence to disclose information:

- a) obtained under the Utilities Act 2000 and any other key energy legislation such as the Gas Act 1986 and the Electricity Act 1989, subject to specific exceptions; and'
- b) where the information relates to the affairs of any individual or any particular business.

You may find it helpful to know that this kind of confidentiality obligation is not limited to the energy sector. There are equivalent provisions in legislation governing other sectors (e.g. the Water Act 1989, the Telecommunications Act 1984, the Airports Act 1986, and the Broadcasting Act 1990).

In our opinion, the information in question which is held by our Connections Team is subject to the restrictions at Section 105 of the Utilities Act.

In addition, National Grid ESO was the designated Delivery Body for the purposes of the Electricity Capacity Regulations 2014 and this role has transferred to NESO as of 1 October 2024. Paragraph 65 of the Electricity Capacity Regulations 2014 states:

*Protection of information*

*65.—(1) A person who, by virtue of these Regulations or capacity market rules, has obtained information which relates to the affairs of any individual or to any particular business (“protected information”) must not except as provided in paragraphs (2) to (4)—*

*(a) use that information for any purpose other than—*

*(i) participating in the capacity market;*

*(ii) exercising capacity market functions; or*

*(iii) providing services to a person exercising capacity market functions; or*

*(b) disclose that information.*

In our opinion, the Electricity Capacity Regulations and the associated Capacity Market Rules apply to the requested information held by the EMR Delivery Body team. We judge that disclosure under the FOIA is not covered by any of the exceptions in sub-paragraphs 65 (2)–(4). NESO has no explicit consent from the other parties to share information which is not already in the public domain or required to be made public.

Furthermore, the information in question was provided to the EMR Delivery Body under the Capacity Market Rules prior to the National Grid ESO’s transition to NESO on 1 October and prior to our obligations under the FOIA. Disclosures under the FOIA would not have fallen within the expectations of parties providing information to ESO.

We are, therefore, refusing your request under the exemption at Section 44(1)(a) of the Freedom of Information Act 2000 and specifically linking this exemption to our obligations and the prohibitions under section 105 of the Utilities Act and paragraph 65 of the Electricity Capacity Regulations.

Section 44 is an absolute exemption, which means that, if information is covered by any of its subsections, it is exempt from disclosure and is not subject to the public interest test.

## **Our Response to Question 2**

The [Winter Outlook Report](#) sets out our view of the security of supply for the electricity systems for the winter ahead. There is a similar report for Gas. We base our modelling assumptions on a range of data sources including the [Future Energy Scenarios](#), published information through REMIT, updates on completing capacity market milestones or changes to connections dates. The modelling takes a holistic approach considering a range of different factors and potential risks, including capacity that is unavailable. It is not NESO's role to replace unavailable capacity in the market. This is a risk that we anticipate and plan for when providing our recommendations to Government on how much capacity to secure through the Capacity Market. Market participants have obligations to provide information to the EMR Delivery Body under the Capacity Market Rules. Our Winter Outlook Report shows that we expect margins to be adequate this winter, allowing for variations in factors impacting on the supply and demand of energy.

This concludes our response to your request.

## **Next steps**

You can ask us to review our response. If you want us to carry out a review, please let us know within 40 working days and quote the reference number at the top of this letter.

If you are still dissatisfied after our internal review, you can complain to the Information Commissioner's Office (ICO). You should make complaints to the ICO within six weeks of receiving the outcome of an internal review. The easiest way to lodge a complaint is through their website: [www.ico.org.uk/foicomplaints](http://www.ico.org.uk/foicomplaints). Alternatively they can be contacted at: Wycliffe House, Water Lane, Wilmslow, SK9 5AF.

Thank you for your interest in the work of the National Energy System Operator (NESO).

Regards,

The Information Rights Team

National Energy System Operator (NESO)