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1 May 2012

Our ref: 12/0562

Dear ,

RE: FITs Legal Advice and Costs

Thank you for your Freedom of Information request received on 30 March 2012 from and as set out below.

Your requests, received 30 March states:

The following questions relate to [the attempt] by the DECC to reduce the feed in tariff generation rate from 43p to 21p per unit (approximately) for retro fit micro installations of Solar pv of less than 4kW capacity eligible after the 11th December 2012.

1. Please provide the step by step costs to the public purse, to date, of defending against the legal challenge to the above attempt brought about by Friends of the Earth, Solar Century and Home Sun?
2. Please provide the estimated further cost to the public purse of pursuing a further appeal in the Supreme Court?
3. Does the DECC have any plans for further action to defend their position beyond that of appealing to the Supreme Court?
4. Will the DECC be liable for the costs of the Friends of the Earth consortium if the current high court ruling is ultimately upheld?
5. How much are these costs (4) likely to be?
6. Has the DECC sought legal advice at each stage of their defence?
7. What was that step by step legal advice?
8. How much did the DECC anticipate saving as a result of the above attempt to reduce the rate.
9. How much will they save if the action is ultimately proved unlawful?

We considered your request under the Freedom of Information Act 2000 (FoIA) rather than under Environmental Information Regulations 2004 (EIR) as the information requested relates to the legal challenge on the FITs policy rather than about the underlying policy. We have now completed searching for the information requested and have set out the response to each of your question in turn below.

Q1 & 2:

The Department incurred total legal cost in respect of its own legal fees of approximately £83,870 in defending the proposal for new lower tariffs to apply to solar PV installations with an eligibility date of 12 December 2011 when changes are made in April 2012.

Q3:

As you may now be aware on 23 March the Supreme Court handed down its decision not to grant permission to DECC to appeal the High Court decision on the reference date of 12 December 2011 for new tariffs to apply when changes are made in April 2012. Although Ministers are disappointed by the decision, the Court's ruling draws the line under the case. Since then we have been focusing our efforts on ensuring the future stability and cost effectiveness of the scheme.

Q4:

The Department is liable to pay the following costs in respect of the proceedings in the High Court and Court of Appeal, to be assessed by the court if not agreed: (i) the costs of each of the claimants up to and including the time that claim forms were filed in the High Court in each case; and (ii) thereafter the costs of Homesun Holdings Ltd only. The Supreme Court has not yet made any order in relation to the claimants' costs of objecting to the Department's application for permission to appeal.

Q5:

This information is not held, as the claimants have not yet served a schedule of the costs they are claiming from DECC, and those costs have not yet been assessed by the court.

Q6:

As is its usual practice when defending a judicial review, the Department instructed external counsel and obtained their advice.

Q7:

The legal advice obtained by the Department is exempt from disclosure under section 42(1) of the Freedom of Information Act 2000 as it is information in respect of which a claim to legal professional privilege could be maintained in legal proceedings, and under section 35(1)(a) of that Act in that it relates to the formulation or development of Government policy. Both of those are qualified exemptions, and we have therefore considered the public interest test.

There is a general public interest in the disclosure of information; greater transparency makes the government more accountable to the electorate; increases trust and also enables the public contribution to policy making to become more effective.

However, it is in the public interest that the decisions taken by government, including in particular decisions as to the conduct of litigation, are taken in a fully informed legal context. Government departments therefore need high-quality, comprehensive legal advice for the

effective conduct of their business. That advice needs to be given in context, and with a full appreciation of the relevant facts.

The legal adviser needs to be able to present the full picture to his or her departmental clients, which includes arguments in support of his or her final conclusions with relevant counterarguments. It is in the nature of legal advice that it often sets out the possible arguments both for and against a particular view, weighing up their relative merits. This means that legal advice obtained by a government department will often set out the perceived weaknesses of the department's position. Without such comprehensive advice the quality of the government's decision-making would be much reduced since it would not be fully informed and this would be contrary to the public interest.

Disclosure of legal advice has a significant potential to prejudice the government's ability to defend its legal interests, by diminishing the reliance it can place on the advice having been fully considered and presented without fear or favour. This scenario is not in the public interest, as it may result in poorer decision-making because the decisions themselves may not be taken on a fully informed basis. There is also a risk that if legal advice were liable to be disclosed clients and lawyers might avoid making a permanent record of the advice that is sought or given or make only a partial record. This too would be contrary to the public interest.

In all the circumstances, we have concluded that the public interest in maintaining the exemptions outweighs the public interest in disclosing the information.

Q8:

If DECC had won the appeal, we would have stood to save consumers about £40m per year or £700m over the next 25 years for those installations with an eligibility date between 12 December and 2 March 2012.

If we had not appealed against the Court of Appeal's judgment we estimate that the costs would have been even higher - around £1.5 billion over 25 years

Q9:

This information is not held by the Department

If you are dissatisfied with the handling of your request, you have the right to ask for an internal review. Internal review requests should be submitted within two months of the date of receipt of the response to your original letter and should be addressed to the DECC Information Rights Unit (foi@decc.gsi.gov.uk)

Please remember to quote the reference number above in any future communications.

If you are not content with the outcome of the internal review, you have the right to apply directly to the Information Commissioner for a decision. The Information Commissioner can be contacted at: Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF.

Yours sincerely,

Feed-in Tariffs Policy Development
Office of Renewable Energy Deployment
Department of Energy and Climate Change – www.decc.gov.uk