

Environmental Information Regulations 2004 (EIR)

Decision Notice

Date: 21 August 2017

Public Authority: Department for the Economy
Address: Netherleigh
Massey Avenue
Belfast
BT4 2JP

Decision (including any steps ordered)

1. The complainant has requested information relating to a petroleum licence permitting exploratory drilling, granted by the Department for the Economy. The Department disclosed some information and withheld other information in reliance on the exceptions at regulation 12(4)(e), regulation 12(5)(b) and regulation 12(5)(e).
2. The Commissioner's decision is that the Department was entitled to withhold information on the basis of the exceptions at regulation 12(4)(e) and regulation 12(5)(b).
3. The Commissioner does not require the public authority to disclose any information withheld under any exception. However she does require the public authority to disclose the following information on the basis that it falls within the scope of the request, and no exception has been claimed:
 - the paragraph redacted from the letter dated 23 November 2015 from InfraStrata to DETI.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the FOIA and may be dealt with as a contempt of court.

Request and response

5. On 31 December 2015 the complainant submitted the following request to the Department:

"Please forward to the address above, all documents and correspondence which the Department holds which is in any way and all ways related to requests from Infrastrata to ask for extensions to licence PL1/10 and which include but are not limited to extensions to work programmes, extensions to licence itself, and applications for further licences. Please provide a cover list describing the documents requested."

6. Licence PL1/10 relates to a petroleum licence awarded to InfraStrata plc and eCORP Oil & Gas UK Ltd on 4 March 2011.¹
7. The complainant did not receive a response from the Department within the statutory time for response, and he complained to the Commissioner. Following the Commissioner's intervention, the Department issued a response on 18 March 2016, although the correspondence itself was dated 27 January 2016. On 26 March 2016 the complainant complained about the Department's interpretation of his request, since he considered that the Department had adopted an unduly narrow interpretation.
8. On 20 May 2016 the Department accepted that it could have clarified the complainant's request before responding, although it considered its interpretation to be reasonable. In any event the Department agreed to reconsider the request in light of the complainant's interpretation.
9. The Department consequently issued a revised response on 26 July 2016. At this stage the Department disclosed some information, but withheld other information in reliance on the exceptions at regulations 12(4)(e), 12(5)(b), 12(5)(e) and 13 of the EIR.
10. The complainant requested an internal review on 22 August 2016. Following a further complaint to the Commissioner, the Department issued its response on 20 October 2016. At this stage the Department disclosed some of the previously withheld information, but maintained its reliance on the exceptions at regulations 12(4)(e), 12(5)(b) and 12(5)(e) in respect of the remainder.

¹ <https://www.economy-ni.gov.uk/articles/petroleum-licensing>

Scope of the case

11. On 11 November 2016 the complainant contacted the Commissioner to complain about the Department's decision. The complainant was of the view that all of the requested information ought to have been disclosed.
12. During the course of her investigation the Commissioner asked the Department to consider whether some of the information could now be disclosed to the complainant. On 8 May 2017 the Department issued a revised response to the complainant disclosing further information.
13. On 15 June 2017 the complainant asked the Commissioner to make a decision in this case. The complainant asked the Commissioner to consider whether the remaining withheld information ought to have been disclosed. The complainant also asked the Commissioner to consider whether the Department had been obstructive in its interpretation of the request.

Reasons for decision

Interpretation of the request

14. The complainant has expressed concern that the Department interpreted his request too narrowly, thus excluding relevant information from its initial response. The Department addressed this concern in its correspondence dated 20 May 2016. The Department noted that the original request referred to *"extensions to work programmes, extensions to the licence itself and applications for further licences"*.
15. The Department said that the complainant had subsequently clarified that he was seeking information relating to the granting of a new term to InfraStrata. The Department considered this to be "similar" to the wording of the original request, but maintained that it was reasonable not to have included within its scope information relating to the continuation of the licence into a new term.
16. The Commissioner considers the wording of the complainant's request to be broad, but clear in its scope. The Commissioner does not agree that it was reasonable for the Department to exclude information relating to the continuation of the licence into a new term. Rather, the Commissioner is of the opinion that an objective interpretation of the request ought to have included this information. The decision to exclude it appears arbitrary, although the Commissioner has not seen any evidence to suggest that the Department deliberately adopted an unduly narrow interpretation of the request.

17. The Department has redacted one paragraph of a letter dated 23 November 2015 from InfraStrata to the then Department of Enterprise, Trade and Investment (DETI), on the basis that it falls outside the scope of the request. This letter sets out InfraStrata's request to continue into the second term of the licence. In the Commissioner's opinion the inclusion of the reference to the Islandmagee Gas Storage project in this letter indicates that InfraStrata considered it relevant to the context of the license request. Therefore the Commissioner finds that it is in scope, and since the information is already in the public domain² the Commissioner finds that the information ought not to have been withheld.

Regulation 12(5)(e): confidentiality of commercial or industrial information

18. The information withheld under regulation 12(5)(e) comprises a small amount of information redacted from the letter of 23 November 2015 from InfraStrata to DETI.
19. Regulation 12(5)(e) of the EIR provides an exemption to the extent that disclosure of the information in question would adversely affect
"the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest".
20. The wording of the exception sets out a number of tests or conditions that must be met before the exception can be engaged, and the Commissioner has considered each in turn below.

Is the withheld information commercial or industrial in nature?

21. The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity either of the public authority concerned or of a third party. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit.

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http://www.infrastrata.co.uk/images/stories/Presentations/interims_presentation_220316.pdf

22. Having inspected the information in question the Commissioner notes that it relates to the commercial activities of InfraStrata. The Commissioner is therefore satisfied that it is commercial information.

Is the withheld information subject to confidentiality provided by law?

23. The Commissioner considers that "provided by law" will include confidentiality imposed on any person under the common law of confidence, contractual obligation, or statute. The Commissioner is not aware of any statutory duty of confidence in this case so she has gone on to consider the common law of confidence, which has two key tests:

- Does the information have the necessary quality of confidence?
- Was the information imparted in circumstances creating an obligation of confidence?

24. For the common law duty of confidence to apply the information must have the necessary quality of confidence, meaning the information should not be trivial in nature and should not already be in the public domain. The Commissioner acknowledges that much of the requested information has now been disclosed to the complainant. However this does not necessarily affect the confidentiality of the remaining withheld information.

25. The Commissioner is aware that some relevant financial information was in the public domain at the time of the complainant's request. However the Commissioner considers that the withheld information is more detailed, therefore its confidentiality is not affected. The Commissioner further considers that none of the withheld information is trivial, and she accepts that it is capable of having the necessary quality of confidence.

26. The Department has confirmed to the Commissioner that the information was provided by InfraStrata in circumstances importing an obligation of confidence at the time the information was provided. On this basis the Commissioner accepts that the information which has not already been disclosed into the public domain will be subject to the common law duty of confidence.

Is this confidentiality provided to protect a legitimate economic interest?

27. The First-tier Tribunal confirmed in *Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd*³ that, to satisfy this

³ Appeal no EA/2010/0106, 4 January 2011

element of the test, disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. It is not enough that disclosure might cause some harm to an economic interest. A public authority needs to establish (on the balance of probabilities – ie more probable than not) that disclosure would cause some harm.

28. The Department's position is that disclosure of the information withheld under regulation 12(5)(e) would harm InfraStrata's economic interests. This argument is based on the Department's consultation with InfraStrata.
29. Having considered the information provided by the Department, and having examined the withheld information, the Commissioner accepts that the withheld information was commercially sensitive at the time of the request. The Commissioner is satisfied that the common law of confidence will apply to this information, and that disclosure would adversely affect InfraStrata's legitimate economic interest, ie its commercial activities. Consequently the Commissioner finds that the exception is engaged in respect of the information withheld under regulation 12(5)(e).

Public interest in favour of disclosure

30. The Department said that it wished to be as open and transparent as possible, and recognised the widespread interest in Petroleum Licence PL1/10. The Department was of the view that releasing as much information as possible could increase understanding of the issues involved. This could also increase confidence in the decisions made by the Department.
31. The complainant drew the Commissioner's attention to the significant public concern around the issue of fracking and oil and gas development. He suggested that it may have been the first time a publicly owned water company had allowed such development near a public reservoir, in a water catchment area. The complainant considered this to be a strong public interest argument in the disclosure of information that would better inform the public about what was happening.

Public interest in favour of maintaining the exception

32. The Department reiterated the arguments it had made in order to demonstrate that the exception was engaged.
33. The Department stressed that it had consulted with InfraStrata, both at the time of the internal review and again in 2017. InfraStrata expressed concern that disclosure of the information in question would damage its

ability to attract and maintain commercial partners. The Department argued that the withheld information could be used by other companies to their commercial advantage, and to the detriment of InfraStrata's commercial interests.

34. The Department was also concerned that disclosure of the withheld information would erode trust in the Department's ability to treat sensitive information confidentially in the future. This may lead to reluctance among companies to provide such information, which would itself make it more difficult for the Department to make sound decisions regarding petroleum licensing. This would not be in the public interest, since the Department had a responsibility to ensure the effective administration of licensing in accordance with the petroleum legislation.

Balance of the public interest

35. The Commissioner considers that there is a strong public interest in the public being adequately informed about the Department's decision making in this case. The Commissioner is mindful of the extensive public debate around fracking issues, especially with regard to concerns about public health and safety. However she must consider what is in the best interest of the public, as opposed to what the public may be interested in. The Commissioner has therefore attached weight to this argument in favour of disclosure, but it is not an overriding factor in this case.
36. The Commissioner is also mindful that the access rights under the EIR are designed to support public access to environmental information, public participation in decision making and access to justice. There is a strong public interest in disclosing information that would inform the public about decisions concerning activities that may have an impact (whether positive or negative) on the environment.
37. The Commissioner is aware that the Department has withheld a very small portion of information under regulation 12(5)(e). The Commissioner is of the view that the information disclosed is significant in meeting the legitimate public interest in favour of informing the public. Obviously the Commissioner is assisted by the fact that she has been able to inspect the information in question and see it in context. This enables her to conclude that disclosure of the withheld information would not significantly add to the public's understanding of the licensing issue.
38. In light of the above the Commissioner is not convinced that disclosure of the withheld information is necessary in order to inform the public as to the Department's decision making process. The Commissioner accepts that disclosure of the information would prejudice InfraStrata's

commercial interests, and may well discourage companies from offering information over and above what it is required to provide.

39. The Commissioner is of the opinion that the public interest arguments in this case are relatively balanced, but considers that the public interest in protecting the Department's ability to ensure effective licensing administration – as well as InfraStrata's commercial interests – is sufficiently strong as to outweigh the public interest in disclosure of the redacted information.
40. In light of the above the Commissioner concludes that the Department was entitled to rely on regulation 12(5)(e) with regard to the information redacted from the letter of 23 November 2015.

Regulation 12(4)(e): internal communications

41. Regulation 12(4)(e) provides an exception from disclosure to the extent that the information in question constitutes internal communications. The exception is class-based, which means that if the information in question falls within the scope of the exception then it will be exempt. There is no need to consider prejudice or harm in order to engage the exception.
42. The Department sought to rely on regulation 12(4)(e) in respect of the following information:
 - i) Information redacted from a Ministerial submission dated 13 January 2016;
 - ii) A request for legal advice made to DSO (the Departmental Solicitor's Office, a government department);
 - iii) Legal advice provided by DSO.
43. The complainant has suggested that a Ministerial submission ought not to be considered an internal communication, on the basis that it is a "finalised factual document". The Commissioner respectfully disagrees, although she is mindful that she has had the benefit of inspecting the information in question. The submission is a communication from a departmental official to the Minister, and while it does contain factual information, its purpose was to communicate information to the Minister and seek approval for a decision. Consequently the Commissioner is satisfied that submission does comprise an internal communication within the meaning of regulation 12(4)(e).
44. The Commissioner is also satisfied that the request for legal advice, and the legal advice itself, fall within the scope of regulation 12(4)(e). Regulation 12(8) of the EIR clarifies that for the purposes of regulation

12(4)(e) internal communications will include communications between government departments. Since DSO is a government department, communications between the Department and DSO are internal communications under regulation 12(4)(e).

Public interest in favour of disclosing the withheld information

45. The Department sought to rely on the same arguments in favour of disclosure as it had in respect of regulation 12(5)(e). The Department said that it wished to be as open and transparent as possible, and recognised the widespread interest in Petroleum Licence PL1/10. The Department was also of the view that releasing as much information as possible could increase understanding of the issues involved. This could also increase confidence in the decisions made by the Department.
46. The complainant's arguments in respect of regulation 12(5)(e) are also relevant to regulation 12(4)(e). The complainant considered that there was an overwhelming public interest in the public being fully informed about the Department's decision making with regard to licence PL1/10.

Public interest in favour of maintaining the exception

47. The Department advised that some of the requested information attracted legal professional privilege as it comprised communications relating to legal advice. The Department was of the view that there was a strong public interest in maintaining the exception in order to protect privilege and thus protect the Department's ability to seek and consider legal advice.
48. The Department pointed out that the request for legal advice, and the advice itself, included sensitive details of the legal issues involved in the Department's consideration of the licensing issue. The Department said that disclosure of this information into the public domain would damage its ability to obtain and receive appropriate legal advice. This would not only harm the Department's ability to carry out one of its core functions, ie to provide an effective service in relation to petroleum licensing.
49. With regard to the Ministerial submission, the Department argued that it needed to be able to provide the Minister with detailed information in order for him to make an informed decision. The Department recognised the importance of being able to preserve a private thinking space to discuss issues with both its Ministers and legal advisers.
50. The information redacted from the Ministerial submission related to sensitive commercial and legal issues. Interference with this "safe space" would have a detrimental effect on the Department's ability to brief its Minister freely and frankly, and to request and receive legal advice required. It would also make it more difficult for the Minister to

consider the issues raised and reach a decision away from premature public scrutiny.

Balance of the public interest

51. The Commissioner has published guidance on considering the public interest with regard to regulation 12(4)(e).⁴ She considers that public interest arguments in maintaining the exception should be focused on the protection of internal deliberation and decision making processes.
52. The Commissioner notes that, during the course of her investigation, the Department disclosed a large amount of information that it had previously withheld. As indicated above the Commissioner has inspected the remaining withheld information and notes that a small portion of this information overlaps with the information withheld under regulation 12(5)(e). The Commissioner is not required to consider this information again under regulation 12(4)(e). The Commissioner notes that the remaining withheld information focuses on sensitive commercial and legal issues.
53. The Commissioner agrees with the complainant that there is a legitimate and significant public interest in the public being properly informed as to the Department's decision making on issues that affect the environment. The substantial public concern around exploratory drilling and the possibility of fracking has been well documented, although the Commissioner is not in a position to comment on the extent to which such concern is justified.
54. The timing of the request is relevant when deciding the weight to attach to the public interest arguments. The Commissioner is generally of the view that the sensitivity of information will often be higher around the time that a decision is made. The passage of time is likely in many cases to decrease such sensitivity and allow fuller disclosure.
55. The chronology of this complaint is made more complex by the inordinate delays on the part of the Department, as well as the matter of interpretation of the request as set out above. The Commissioner notes that, whilst the original request was made on 31 December 2015 it was not until July 2017 that the Department issued a response addressing all of the information that fell within the scope of the

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http://ico.org.uk/for_organisations/guidance_index/~/_media/documents/library/Environmental_info_reg/Detailed_specialist_guides/eir_internal_communications.ashx

request. In addition some information was not held in December 2015, but was held by the time the complainant confirmed the scope of his request on 26 March 2016. It was not until late October 2016 that the Department communicated the outcome of its final internal review.

56. In any event the Commissioner is of the view that the substantive issue, ie InfraStrata's request to the Department regarding licence PL1/10, was relatively fresh throughout the period in which the Department considered the request. The Commissioner does not consider that the passage of time served to diminish the weight that should be attached to the public interest in maintaining the exception.
 57. The Commissioner accepts the Department's argument that it required safe space to consider InfraStrata's request and reach decisions on how to proceed. The Department has disclosed some information which will inform the public as to how the Department made its decision. However the Commissioner is of the view that further disclosure would harm the Department's position more than it would assist the public's understanding. The Commissioner considers there to be a strong public interest in protecting the safe space required by the Department in order to make reasoned decisions, which would be made much more difficult by the disclosure of the withheld information in this case.
 58. The Commissioner also considers that the Department's arguments in relation to legal professional privilege must also be afforded significant weight. Protecting the principle of legal professional privilege is not inherent in the exception at regulation 12(4)(e), but it is relevant in the context of considering how disclosing privileged information could harm the internal deliberation and decision making process. In this case the Commissioner accepts that disclosure of the withheld information would impair the Department's ability to obtain legal advice, which in turn would harm the decision making process. In addition the Commissioner has seen no overriding reason why the significant public interest in protecting the confidentiality of legal advice should be set aside in this case.
 59. For the reasons set out above the Commissioner is of the view that the public interest in maintaining the exception at regulation 12(4)(e) outweighs the public interest in disclosure of the withheld information. The Commissioner therefore finds that the Department was entitled to refuse the request on this basis, and is not required to consider the Department's reliance on regulation 12(5)(b) to the same information.
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Right of appeal

60. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals
PO Box 9300
LEICESTER
LE1 8DJ

Tel: 0300 1234504
Fax: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

61. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
62. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Sarah O’Cathain
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