

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 11 June 2021

**Public Authority:** Department for Business, Energy and Industrial Strategy ("BEIS")

**Address:** 1 Victoria Street  
London  
SW1H 0ET

### Decision (including any steps ordered)

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1. The complainant has requested information on invitations received by ministers or members of the BEIS management team to attend events sponsored by Shell and BP and any BEIS meetings held with Shell and BP.
2. The Commissioner's decision is that BEIS is entitled to withhold the redacted information in reliance of section 43(2) commercial interests, and the public interest, although finely balanced, favours maintaining the exemption.
3. The Commissioner does not require the public authority to take any steps.

### Request and response

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4. On 2 December 2019 the complainant wrote to BEIS and requested information in the following terms:

"Under the Freedom of Information Act 2000, I request that you disclose the following information:

- Have any ministers or members of the BEIS management team received invitations to attend events hosted by or sponsored/supported by any of the following companies in the last 6 months:

BP

Shell?

If yes, please provide copies of invitations and any associated correspondence.

- Have any members of the department held meetings with staff from BP or Shell during the last 6 months? If yes, please provide copies of any agendas, notes or correspondence arising from those meetings."

5. BEIS responded on 19 February 2020. It provided redacted information comprising some internal emails and notes from various meetings with Shell and BP. It relied on sections 43(2) commercial interests and 40(2) personal information to withhold the redacted information.
6. Following an internal review BEIS wrote to the complainant on 6 May 2020, at which time it determined that some previously redacted information could be disclosed. This further, limited information was provided. It stated that the remaining redacted information continued to be withheld in reliance of sections 43(2) and 40(2).

## Scope of the case

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7. The complainant contacted the Commissioner on 5 June 2020 to complain about the way his request for information had been handled. He explained:

"The extent of the redactions, in my view, goes against the principle of transparency and accountability and the scope of the exemptions applied. Greater disclosure of the documents would, at the very least, give a clearer understanding of the particular agendas external stakeholders are bringing to bear on the government, particularly around issues of significant public interest such as climate change."

8. The redacted information provided did not include any correspondence as described in the request. The Commissioner questioned the lack of any such correspondence. BEIS confirmed that no correspondence is held.
9. The complainant did not question the application of section 40(2) in requesting an internal review, which the Commissioner confirmed in the scope of her investigation letter to the complainant on 11 November 2020. Therefore the Commissioner considers the scope of her investigation to be the application of section 43(2) to the remaining redacted information.

## Reasons for decision

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### Is the information 'environmental information'?

10. Regulation 2(1) of the EIR defines environmental information as any information in any material form on:

'(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)'

11. The Commissioner considers that the phrase 'any information...on' should be interpreted broadly. Therefore information that would inform the public about the matter under consideration and would facilitate effective participation by the public in environmental decision making, is likely to be environmental information.

12. Having reviewed the requested information in this case, the Commissioner has concluded that it does not constitute environmental information. Whilst the Commissioner cannot reveal the content of the withheld information she can confirm that it does not include references to specific detailed measures, such as policies or plans affecting the environment. The information is primarily contextual without providing tangible environmental information. In the Commissioner's opinion the information could be accurately described as notes on discussions which focus on commercial issues and activities rather than matters of energy policy.

## Section 43- Commercial interests

13. Section 43(2) of FOIA states:

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).<sup>1</sup>”

14. In order for a prejudice based exemption, such as section 43, to be engaged the Commissioner believes that three criteria must be met:

- Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, i.e. disclosure ‘would be likely’ to result in prejudice or disclosure or ‘would’ result in prejudice. In relation to the lower threshold, the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner’s view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.

15. BEIS explained to the Commissioner its view that the information withheld in reliance of section 43(2) would likely harm the commercial interests of the companies involved. It explained that disclosure of the redacted information would prejudice the commercial position of the companies concerned, BP and Shell, for various business reasons. BEIS provided the Commissioner with detailed explanation which cannot be replicated here but may be summarised as including market sensitive information, internal business planning, information on international

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<sup>1</sup> The full text of section 43 is available here:  
<http://www.legislation.gov.uk/ukpga/2000/36/section/43>

business interests, security and energy infrastructure. BEIS confirmed to the Commissioner that it had consulted with Shell and BP in respect of the disclosure of the redacted information. It confirmed that Shell and BP were of the view that disclosure would be likely to prejudice their commercial interests, as disclosure of this information could cause significant commercial harm by revealing their strategies to competitors.

16. With regard to the first criterion of the three limb test set out in paragraph 12, the Commissioner accepts that the harm alleged to occur, as described above, relates to the commercial interests which the exemption contained at section 43(2) is designed to protect.
17. The Commissioner is satisfied that the second criterion of the test is met because disclosure of the withheld information has the potential to undermine the companies' strategies resulting in prejudice to their commercial interests. The Commissioner has reached this conclusion given the insight the information would provide to their competitors and stakeholders.
18. BEIS advised the Commissioner that the level of the likelihood of prejudice being relied on is that disclosure 'would be likely to' result in prejudice. The level of prejudice must be supported by the public authority's submissions. In this case, having considered the information and supporting submissions, the Commissioner is satisfied that the lower threshold has been met.
19. The Commissioner therefore considers that section 43(2) is engaged in regard to this information.

### **The public interest test**

20. Section 43 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

### **Public interest in favour of disclosing the information**

21. BEIS advised the Commissioner that it recognises the public interest in the disclosure of information which may lead to greater transparency and accountability in Government and help further public debate on the Government's engagement with industry.
22. The complainant explained in detail his views, as follows:

"Crucially, I believe that the wrong conclusion has been reached in the undertaking of the public interest test and that, in this case, a greater degree of transparency and more extensive disclosure of material is required.

Specific arguments that should be taken into consideration and, I believe, outweigh those put forward by BEIS include:

- Many of the areas of information indicated by the sub-headings in the documents relate to areas of activity that are rapidly changing and, since the time of those original meetings, will have evolved. The public interest is best served by allowing for greater understanding of engagement between BEIS and these companies in the past, and their ability to influence or inform government policy.
- Public interest in climate change and the response of governments and businesses to the climate emergency (as declared by parliament) is at a record high. The public interest is best served through greater transparency as this allows the public to understand whether the government/the companies are acting in alignment with their publicly stated positions and in accordance with existing climate legislation. The recent ruling by the Court of Appeal that the National Planning Statement on airports had not taken full account of the Paris Climate Accord is perhaps relevant here.
- Both government and the companies in question have adopted net zero targets and publicly claim to be undertaking policies and actions that are consistent with the goals of the Paris Climate Accord. Significant parts of the documents clearly pertain to the companies' net zero goals and responses to climate change, as well as the actions they plan to undertake in relation to those goals. Greater transparency would allow the public to better understand whether the government's interaction with these companies is in support of those objectives or run counter to it.
- Several sections of the documents also reference the COP26 negotiations taking place in Glasgow later this year. There is a strong public interest in disclosing details of any efforts by these companies to have a greater or privileged involvement in, or influence over, COP26 above that of other stakeholder groups. It is essential that in order for the UNFCCC<sup>2</sup> process more broadly, and COP26 specifically, to deliver effective outcomes, that there is a level playing field. Redactions in documents (4) and (7) are specifically relevant here.
- Carbon capture, utilisation and storage (CCUS) is a technology unproven at scale but has been cited as a key plank of plans by BP and Shell to achieve net zero in the future. The government, as part of its own net zero plans, has also been an advocate of CCUS. As

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<sup>2</sup> United Nations Framework Convention on Climate Change

highlighted above, it is clearly within the public interest to understand to what extent companies and governments are taking actions that are consistent with their net zero targets. Within the various documents, passages relating to CCUS are regularly and often extensively redacted. Greater disclosure would allow the public to better understand the potential role CCUS could feasibly play in reducing or limiting future greenhouse gas emissions or whether it is of limited impact. Greater transparency here would allow the public to better understand whether government activity in this area is strategic or effective in contributing to its net zero target and obligations under the Paris Climate Accord.”

### **Public interest in favour of maintaining the exemption**

23. BEIS explained its view that there is a strong public interest in ensuring that the commercial and economic interests of businesses are not damaged or undermined by disclosure of information which is not in the public domain and which would adversely impact on future business.
24. BEIS added that it is also important that it is able to respect and maintain commercial confidences, as failure to do so would undermine and prejudice meaningful and productive engagement with companies. It is vital to policymaking for there to be a voluntary flow of information from third parties to public authorities. Disclosure of information which would adversely affect the interests of these third parties would discourage the flow of information in the future.
25. The complainant challenged BEIS’ arguments in regard to its own commercial interests and reputational damage:

“The companies in question are large, multi-national corporations with business activities in numerous countries. The government’s relationships with these companies are long-running and, in order to operate within a UK regulatory framework, will continue to engage with the UK government on projects (North Sea, CCUS, COP26 etc.) which are geographically specific to the UK context.

Greater transparency would be very unlikely to deter these companies from their ongoing business activity in the UK or seeking contracts from the UK government and would, in reality, promote greater understanding among the public of that regulatory environment and the interaction between government and the fossil fuel industry. In practice, it may ultimately promote greater competition between companies as there is greater understanding of what competitors are offering to the department and the UK taxpayer.”

### **The Commissioner’s view**

26. The Commissioner notes the complainant's detailed points made when requesting an internal review, replicated above in paragraphs 22 and 25. She is disappointed that BEIS did not engage with the complainant and specifically address his points. The Section 45 Code of Practice<sup>3</sup> sets out best practice in handling internal reviews including paying particular attention to concerns raised by the complainant.
27. The Commissioner agrees with the complainant that transparency of government departments' meetings with private sector companies enables a greater understanding of such relationships. However, she does not consider that the public interest is *a/ways* best served by the disclosure of such information, depending on the specific circumstances of the case
28. She agrees that there is a weighty public interest in transparency to allow the public to understand both the government and the companies' actions with regard to climate change responsibilities and whether they are in alignment with their publicly stated positions and in accordance with existing climate legislation. However, the Commissioner having had the benefit of viewing the withheld information, with and without redactions, is not convinced that disclosure of the redacted information would ultimately provide this knowledge. The meetings held cover broad topics containing commercial information. The Commissioner, in accepting that prejudice would be likely to result from disclosure, acknowledges the importance of the information to the companies and must determine whether there is a sufficient weight in favour of disclosure to tip the balance despite the recognised detriment to the companies.
29. Regarding the COP26 in Glasgow in November this year, referenced by the complainant in paragraph 22, the Commissioner notes that information on sponsorship is published soon after agreements have been signed, on the dedicated website below<sup>4</sup>. More sponsors will be added to this site as new agreements are signed. The Commissioner acknowledges that at the time of the request this information was not available, however, as the sponsorship sectors are agreed, further sponsors will now continue to appear.

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<sup>3</sup> <https://ico.org.uk/for-organisations/foi-guidance/section-45-code-of-practice-request-handling/>

<sup>4</sup> <https://ukcop26.org/uk-presidency/partnerships-and-support/>



30. The Commissioner understands the complainant's comments with regard to carbon capture, utilisation and storage and in this regard, to what extent companies and governments are taking actions that are consistent with their net zero targets. Notwithstanding this the Commissioner accepts the importance of not disclosing information which would cause damage to, or undermine, the commercial interests of the companies concerned by adversely impacting on future business. The Commissioner considers that it is reasonable for the organisations to be allowed the opportunity to explain their actions in complying with their publicly stated positions to government without public disclosure of commercially sensitive information.
31. The Commissioner notes BEIS' concerns regarding its ability to respect and maintain commercial confidences, and its belief that failure to do so would undermine and prejudice meaningful and productive engagement with companies. She also notes the complainant's comments set out in paragraph 25 above.
32. The Commissioner is not convinced that the long-standing relationships of BEIS with large organisations such as Shell and BP would be prejudiced to such an extent that there would cease to be any meaningful engagement. However, she considers that disclosure of information which would nevertheless adversely affect the interests of these third parties may also discourage or hinder the flow of some information in the future.
33. The Commissioner considers this to be a finely balanced decision. She accepts the unquestionable significance of matters pertaining to climate change whilst also accepting the importance of the redacted information to the commercial interests of the companies involved. The Commissioner has considered whether disclosure of the information would reveal inappropriate relationships with government or evidence of misleading the public. She does not consider that redacted material provides evidence of any concerns in this regard. Her view is that disproportionate prejudice to the companies operating in a complex, international market is not in the public interest. The companies fulfilling their publicly stated objectives regarding climate change and their net zero ambitions is clearly in the public interest. She is not convinced that the redacted information in this case would allow the public to better understand government activity or to judge how it is contributing to its net zero target and obligations under the Paris Climate Accord.
34. On balance, and in the particular circumstances of this case, the Commissioner is persuaded that the public interest lies in maintaining the exemption.



## Right of appeal

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35. 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 123 4504  
Fax: 0870 739 5836  
Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

36. 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.

37. 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 .....**

**Susan Hughes**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**