

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 20 September 2022

Public Authority: Department for International Trade
Address: Old Admiralty Building
Admiralty Place
London
SW1A 2DY

Decision (including any steps ordered)

1. The complainant submitted a request to the Department for International Trade (DIT) seeking correspondence between DIT officials and officials at the British Embassy in Lima which mention 'Tullow Oil' or 'Natural Protected Areas'. DIT provided the complainant with some information falling within the scope of his request but redacted parts of it on the basis of sections 40(2) (personal data), 27(1)(a) (international relations), 35(1)(a) (formulation or development of government policy) and 43(2) (commercial interests) of FOIA. It subsequently sought to withhold the redacted information on the basis of regulations 12(4)(e) (internal communications), 12(5)(a) (international relations), 12(5)(e) (confidentiality of commercial or industrial information) and 13(1) (personal data).
2. The Commissioner's decision is that the redacted information is exempt from disclosure on basis of the EIR regulations cited by DIT and that in respect of the qualified exceptions the public interest favours maintaining the exceptions.
3. No steps are required.

Request and response

4. The complainant submitted the following request to DIT on 18 November 2020:

'Please consider this a clarification to my request. Please understand "DIT officials" to refer to whichever team within DIT is most likely to deal with this issue

Please treat this as a request under the Environmental Information Regulations. Please provide:

Correspondence between DIT officials and staff at the British Embassy in Lima mentioning "Tullow Oil" or "Natural Protected Areas" between 1 February 2020 and 5 May 2020.

In accordance with Regulation 9 please can you provide any advice and assistance that may help my request to be more effective? In any case if my request is too general please provide advice and assistance as to how it can be refined.

I look forward to your response within 20 working days, as stipulated by Regulation 5.

If you have any queries please don't hesitate to contact me via email or phone, my details are outlined below'

5. DIT provided him with a response to his request on 12 January 2021. It disclosed documents falling within the scope of his request but explained that some information had been redacted on the basis of the following sections of FOIA: 40(2) (personal data), 27(1)(a) (international relations), 35(1)(a) (formulation or development of government policy) and 43(2) (commercial interests).
6. The complainant contacted DIT on the same day and asked it to conduct an internal review. He argued that the request should have been processed under the EIR rather than under FOIA. He also identified what he assumed would be the EIR exceptions which DIT would seek to rely on and set out why he considered that these would not apply.
7. DIT informed the complainant of the outcome of the internal review on 31 March 2021. DIT accepted that the request should have been processed under the EIR but concluded that the redacted information was exempt from disclosure under that legislation on the basis of the following regulations: 12(5)(e) (confidentiality of commercial or

industrial information), 12(4)(e) (internal communications) and 12(5)(a) (international relations).¹

Scope of the case

8. The complainant contacted the Commissioner on 31 March 2021 in order to complain about DIT's decision to redact information from the documents disclosed to him. He explained that he particularly wished to challenge the redactions to the read-out of a call with Tullow Oil, contained in an email dated 12 February 2020 detailed on pages 6 and 7 of the documents disclosed to him. Details of the complainant's submissions to the Commissioner to support his complaint are set out below.

Reasons for decision

Regulation 12(4)(e) – internal communications

9. Regulation 12(4)(e) states that information is exempt from disclosure if it involves 'the disclosure of internal communications'. It is a class-based exception, meaning there is no need to consider the sensitivity of the information in order to engage the exception. Rather, as long as the requested information constitutes an internal communication then it will be exempt from disclosure.
10. Regulation 12(8) states that internal communications includes communications between government departments.
11. DIT explained that it had applied this exception to internal exchanges between UK Government officials considering options and activities of current and future operations in supporting companies, including Tullow Oil, in Lima and trade between UK and Peru.
12. In his submissions to the Commissioner the complainant argued that the fact DIT cited exceptions within the EIR to withhold the very same information it had originally withheld under FOIA demonstrated that it

¹ During the course of the Commissioner's investigation DIT confirmed that the information previously withheld on the basis of section 40(2) of FOIA was considered to be exempt from disclosure on the basis of regulation 13(1) of the EIR.

had decided what information it did not want the public to see and was applying the exceptions in an arbitrary fashion.

13. By way an example in the context of regulation 12(4)(e), the complainant cited part of an email with redactions sent on 12 February 2020 at 14:05. He noted that originally this had been withheld on the basis of section 35(1)(a) of FOIA but in the internal review DIT instead sought to rely on regulation 12(4)(e). The complainant argued that the redacted information in question was a read out of an external call and not an internal communication and therefore did not fall within the scope of the exception.
14. The Commissioner has reviewed the parts of the emails in the scope of the request to which DIT has applied regulation 12(4)(e). Having done so the Commissioner is satisfied that all of these emails constitute internal communications because they consist of emails only sent between officials within government departments. The Commissioner appreciates the complainant's point that the emails may contain details of discussions government officials have had with external third parties. However, the communications to which regulation 12(4)(e) has been applied are emails between government departments, and such communications are therefore considered to be internal ones for the purposes of the EIR, even if they refer to external discussions. The Commissioner is therefore satisfied that the parts of emails to which DIT has applied regulation 12(4)(e) are covered by that exemption.

The public interest test

15. Regulation 12(1)(b) requires that, where the exception under regulation 12(4)(e) is engaged, a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information.
16. As stated in the Upper Tribunal decision *Vesco v Information Commissioner* (SGIA/44/2019), 'If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure...' and 'the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations' (paragraph 19).

Public interest arguments in favour of disclosing the information

17. In his submissions to the Commissioner the complainant argued that there was a particular public interest in the disclosure of the email of 12 February 2020 referred to above. He suggested that it appears to refer to the UK government's view on whether the Peruvian Ministry of

Environment ought to continue to enforce its protection of certain natural areas, a topic of clear public interest, particularly given the UK's hosting of COP26.

18. More broadly, the complainant argued in assessing the public interest in this case DIT had not taken into account the public interest in the protection of natural areas around the world, given the multi-faceted global environmental crisis, nor the public interest in the public understanding how the UK is approaching its role as COP26 president.
19. In the context of this case, and the UK government departments' relationship with Tullow Oil, the complainant questioned whether the UK was using its diplomatic power around the world to protect the environment or whether it was encouraging governments to allow oil companies exemptions from environmental protections. In light of such concerns the complainant argued that there was a clear public interest in disclosure of the redacted information.
20. DIT acknowledged that there is a general interest in openness and transparency in all aspects of government and that openness increases public trust and confidence in government. It also acknowledged that release of information around internal deliberation and decision making can potentially lead to greater engagement in political debates and policy discussions as the public would become better informed on all aspects of the work of government.

Public interest arguments in favour of maintaining the exception

21. DIT argued that in order to develop robust and effective policies, it is essential that officials are able to deliberate, advise and recommend freely and frankly without concern of release of information which would seriously undermine the Government's ability to formulate policy without concern about the possible reactions from external sources.
22. DIT argued that this was especially pertinent to the development of policy to support Tullow Oil in Lima and trade between UK and Peru. In support of this point it emphasised the importance of internal email correspondences where free and frank exchanges could be had. In terms of this request these focused on the thinking around the development of ideas and formulation of policy to support the Peruvian government in promoting investments in hydrocarbons that respect the environment and the pre-existing rights on natural protected areas.
23. With regard for the need for a safe space for policy making, DIT argued that this is of significant importance as premature disclosure of discussions of policy options, whilst most appropriate options are being explored and the policy is in the process of formulation, is likely to have

an adverse effect on the free and frank exchange of views. This in effect has the negative consequence of officials not being fully armed with all possible options and relevant information to consider the best possible solution.

24. In the circumstances of this case, DIT argued that release of internal communications discussing openly ways to promote and encourage British investments (including that of Tullow Oil) and exports to Peru would be likely to jeopardise investment opportunities and trade. In its view, it is highly unlikely to be in the public interest unless there are overwhelming reasons to do so, for example where disclosure would expose wrong doings in government. DIT argued that officials are entitled to have the time and space to consider all feasible policy options by exploring in a safe space all possible safe and even radical options.
25. Finally, DIT stressed that at the time of the request, there was active consideration within government regarding further policy in this area. More specifically, various internal discussions between DIT officials and within UK government were ongoing about the best approach to take on natural protected areas, and supporting energy sector reform in Peru. Considerations were being given to improve the business environment while supporting Peru's transition to renewable energy. This included considerations being given with respect to policy development which would make Peru an attractive and competitive destination for investors for energy sources whilst placing emphasis on improving existing regulations, respecting and protecting the environment and communities.

Balance of the public interest arguments

26. With regard to attributing weight to the public interest arguments in favour of maintaining the exception, the Commissioner accepts that a public authority needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. The safe space arguments may carry significant weight in some cases. In particular, the Commissioner considers that the need for a safe space will be strongest when the issue is still live.
27. In the circumstances of this case, the Commissioner is satisfied that at the time of the request the policy making in relation to this particular area remained live and ongoing. The Commissioner is also satisfied that the information which has been redacted on the basis of regulation 12(4)(e) relates directly to the policy making in this area. Furthermore, the Commissioner agrees with DIT's characterisation of the redacted information as containing free and frank exchanges. In light of the above, in the Commissioner's view, significant weight should be attributed to the safe space arguments in this particular case.

28. With regard to the public interest in favour of disclosing the information, the Commissioner recognises that there is a public interest in the disclosure of information which would reveal how the work of UK government departments abroad can affect environmental issues. In the circumstances of this case the Commissioner acknowledges, as highlighted by the complainant, the potential tension between the UK using diplomacy to support a UK oil company and the UK's role in the COP26. Disclosure of the information which has been withheld on the basis of regulation 12(4)(e) would provide the public with some insight into policy discussions in respect of promoting and encouraging British investments in Peru, including Tullow Oil, and in light of his preceding comments the Commissioner accepts that there is a considerable public interest in the disclosure of this information.
29. Nevertheless, and even taking into account the presumption in favour of disclosure, the Commissioner has concluded that the public interest favours maintaining the exception. The Commissioner has reached this conclusion given the weight that, in the circumstances of this case, he believes should be attributed to the safe space arguments given the live and ongoing nature of policy making. In reaching this conclusion the Commissioner notes DIT's point above regarding one reason for disclosure of such information being to expose wrongdoing in government. Having considered the content of the withheld the information the Commissioner does not consider this factor to be relevant in this case.

Regulation 12(5)(a) – international relations

30. Regulation 12(5)(a) provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect international relations, defence, national security or public safety.
31. In this case DIT applied the exception on the basis that disclosure of the information withheld on the basis of regulation 12(5)(a) would adversely affect the UK's international relations. More specifically in the internal review, it argued that:
 32. Firstly, disclosure of the information would estrange some international partners, in particular UK's relationship with Peru, and potential partners because of the content of the information.
 33. Secondly, disclosure would estrange some international partners, and potential partners because they would be unwilling to provide the UK with confidential information in the future and as a result the government would be deprived of means of pursuing UK national interests via diplomatic means.

34. Thirdly, disclosure of the information would give insight into aspects of UK's negotiation strategy to both international partners and rival companies and as a result the UK would be at a disadvantage in the future on negotiations on this market and other areas.
35. DIT provided additional submissions to the Commissioner to support this position. It explained that Peru is an important partner for the UK in bilateral trade; it is one of the fastest growing economies in Latin America, with key exports from the UK and in particular in the infrastructure sectors as well as in other fields. DIT explained that Peru and the UK have signed over the last 5 years a number of bilateral Government-to-Government Agreements to support Peru develop key projects and infrastructure such as the Lima 2019 Pan American Games and a number of projects with the Peruvian Reconstruction Authority. DIT noted that the UK is the largest foreign investor in the mining sector in Peru and has worked closely with Peruvian authorities around the COP26 agenda and multiple initiatives in preserving biodiversity, protecting forests and wildlife.
36. DIT explained that the UK enjoys a diverse bilateral relationship with Peru. In particular, the UK works closely with Peru in its continued commitment to combat organised crime and other threats to stability and corruption. DIT argued that the UK's commitment to maintain and build on its strong relationship with the Peruvian government, and to encourage the growing interest of British businesses investing in Peru, is of relevance to its argument to withhold the information. DIT argued that releasing the information withheld from disclosure would be seen by the Peruvian government as a breach of trust, and would undermine the UK's ability to play this role, as well as damaging the broader UK/bilateral relationship.
37. DIT noted that the information withheld on the basis of this exception included information discussing work in this area to identify the best approach to take in supporting the Peruvian government. DIT argued that disclosure of such information offering insights into discussions and thinking process will have a negative impact for the UK government with its international partners.
38. With regard to whether disclosure of such information would adversely affect the UK's international relations, the Commissioner has taken into account the comments of the Information Tribunal when it considered the application of section 27 of FOIA, the equivalent exemption in that legislation. The Tribunal accepted that prejudice to international relations can be said to be real and of substance if such harm 'makes relations more difficult or calls for a particular damage limitation

response to contain or limit damage which would not have otherwise have been necessary'.²

39. Having reviewed the information withheld on the basis of this exception, the Commissioner is satisfied that its disclosure would prejudice the UK's international relations. As DIT's submissions implies, how this harm occurs depends on the content of a particular redaction. However, having carefully considered the content of this information, the Commissioner has no hesitation in accepting the relevance of DIT's reasoning set out above at paragraphs 32 to 34, and he is satisfied that harm would occur either directly to the UK's relations with Peru and/or harm would be caused to the UK's standing and influence with other states if the withheld information was disclosed.
40. The information withheld by DIT on the basis of regulation 12(5)(a) is therefore exempt disclosure on the basis of this exception.

The public interest test

41. Regulation 12(1)(b) requires that, where the exception under regulation 12(4)(e) is engaged, a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. Again, the Commissioner must considered the presumption in favour of disclosure in light of the Vesco decision referred to above.

Public interest arguments in favour of disclosing the information

42. The complainant's arguments in favour of disclosing the information are set out above.
43. For its part, in the context of this exception DIT explained that it wanted the public to have confidence that it properly manages the impact of its activities on the environment. It suggested that releasing the information would reassure the public that DIT is cooperating with foreign states in a responsible and economic way to minimise the negative impact on the environment. It would also show that DIT manages its relationship with other international governments in the most environmentally sound way. This involves supporting its commitment to sustainable developments, ensuring the environmental

² Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence (EA/2006/0040), paragraph 81.

impact is minimised and that sustainability is an integral part of the support it offers and or provides to government of other states.

Public interest arguments in favour of maintaining the exception

44. However, DIT argued that given the adverse impact on the UK's international relations (as outlined above) the public interest clearly favoured maintaining the exception.

Balance of the public interest arguments

45. For the reasons set out above, the Commissioner accepts that there is a clear public interest in disclosure of information falling within the scope of this request. In the context of this exception, the Commissioner agrees with DIT that there is a public interest in the disclosure of information which would increase the public's confidence in how the UK government manages its activities abroad taking into account the environment. In terms of the specific information that has been withheld on the basis of regulation 12(5)(a), disclosure of this would provide a particular insight the UK's discussions with the Peruvian government in relation to matters covered by the complainant's request.
46. However, the Commissioner accepts that there is an inherent public interest in the UK maintaining effective relationships with other states. In the particular circumstances of this case he considers that there is a clear public interest in not adversely affecting the UK's relationship with Peru give that it is an important partner in the region. More specifically, the UK's established relations with Peru allows it to effectively promote and protect UK interests in the country. In the Commissioner's view such an outcome which would adversely affect this would be firmly against the public interest. Furthermore, in the Commissioner's view in this case the public interest in favour of maintaining the exception attracts further weight given that disclosure of the information risks harming not simply the UK's relations with Peru, but also the UK's relations more broadly with other international partners. For these reasons, and despite the acknowledged public interest in disclosure of the information and presumption in favour of disclosure, the Commissioner has concluded that the public interest favours maintaining the exception.

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

47. This regulation states that a public authority may refuse to disclose information to the extent that its disclosure would affect the confidentiality of commercial or industrial information where such

confidentiality is provided by law to protect a legitimate economic interest.

48. In order for the exception to be engaged, four criteria must be met:

- (i) The information is commercial or industrial in nature.
- (ii) Confidentiality is provided by law.
- (iii) The confidentiality is protecting a legitimate economic interest.
- (iv) The confidentiality would be adversely affected by disclosure.

49. In support of its position that the above criteria were met, DIT explained that in terms of (i) the withheld information related to the activities of Tullow Oil in respect of delivering specific projects in the oil and gas industry and was therefore clearly of commercial nature.

50. In relation to (ii), DIT noted that in order to be covered by the common law duty of confidence information must not be trivial in nature or already in the public domain. DIT explained that the information withheld on the basis of this exception was not publicly available. Furthermore, it explained that the exchange of information between DIT officials and Tullow Oil are provided in confidence (including the information withheld on the basis of this exception) in the assurance that it will not be disclosed to the public and therefore possess the necessary quality of confidence. DIT was therefore satisfied that the information attracts a common law duty of confidence.

51. With regard to (iii), DIT explained that the legitimate economic interest the confidentiality is protecting includes:

- Not prejudicing the position of the department or the third parties in respect of ongoing negotiations.
- Protecting the third parties commercial interest by not prejudicing their bargaining position in securing deals and contracts and their future investment in this market.

52. In respect of (iv), DIT explained that the withheld information was part of ongoing negotiations to secure specific support to the company, and that disclosure of which would be detrimental to Tullow Oil concerned as it would give insight to its competitors of the method of its working and reveal its financial position in a way that is detrimental to its commercial interest. The information would be likely to be used as a reference point, against which competing companies/customers might establish patterns allowing for an unfair level of insight. In addition, although the information primarily concerns the activities of Tullow Oil it also refers to the activities of other companies.

53. Furthermore, DIT argued that organisations and companies in this market would be discouraged from dealing with the public sector, fearing disclosure of information that might weaken their position in the marketplace. Many of these relationships have been developed over an extended period of time providing the companies confidence and assurance to provide commercially sensitive information voluntarily. Therefore, in addition to disclosure of the information harming the commercial interest of third parties, disclosure could also lead to economic implications for the UK as it would not be able to negotiate and secure best value for money for the public purse.
54. The Commissioner is satisfied that the information in question is clearly commercial in nature and therefore (i) is met. He is also satisfied that the information in question was provided to UK government with the implied understanding that it would not be disclosed, and moreover that the information is not already in the public domain. On this basis the Commissioner accepts that it is correct to conclude that the information is covered by the common law duty of confidence and therefore (ii) is met. In terms of the third criterion, the Commissioner is also satisfied that this confidence is protecting a legitimate economic interest, namely the commercial interests of the third parties in question.
55. With regard to the (iv), having considered the information in question the Commissioner is satisfied that its disclosure would, as DIT has argued, provide the competitors of the third parties in question with a direct insight into their activities and financial positions. In turn the Commissioner accepts that such information could be used by competitors to their advantage, thus harming the commercial interests of the third parties in question.
56. The information withheld by DIT on the basis of regulation 12(5)(e) is therefore exempt from disclosure on the basis of that exception.

The public interest test

57. Regulation 12(1)(b) requires that, where the exception under regulation 12(5)(e) is engaged, a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. Again, the Commissioner must consider the presumption in favour of disclosure in light of the Vesco decision referred to above.

Public interest in favour of disclosing the information

58. The complainant's arguments in favour of disclosing the information are set out above.

59. For its part, DIT acknowledged the following factor in disclosure, namely transparency and accountability of DIT in a fair, open and democratic society.

Public interest in favour of withholding the information

60. DIT argued that there is a strong public interest in the UK having good working relations with investors and foreign governments and partners so that the UK can effectively pursue its interests abroad. Disclosure of this information would prejudice relations with a key investor, namely Tullow Oil, at a time when relations between UK government and investors is of importance, particularly, in maintaining those good relationships in the period after the UK's exit from the EU. DIT argued that these relationships are sensitive, and release of the information withheld from disclosure would give rise to harmful effects that would not be in the public interest.
61. Furthermore, DIT argued that disclosure of the information would have the likely consequences of discouraging companies from dealing with the public sector, fearing disclosure of information that might weaken the third party's position. It would additionally have negative consequences for the UK in its ability to continue to promote long term trade and investment in Peru and other overseas region.

Balance of the public interest

62. For the reasons set out above, the Commissioner considers that there is a public interest in the disclosure of the information which would provide greater insight into the relationship between UK government departments and Tullow Oil. Disclosure of the information which has been withheld on the basis of regulation 12(5)(e) would provide some insight into this.
63. With regard to the public interest arguments in favour of maintaining the exception, the Commissioner does not consider that it is in the public interest that third parties (such as Tullow Oil) have their commercial interests harmed simply because they have been supported in their interests abroad by the UK government. The Commissioner believes that such an argument will always attract significant weight. Moreover, the Commissioner considers that there will always be some inherent public interest in maintaining the principle of confidentiality and the relationship of trust. Furthermore, the Commissioner accepts that there is legitimate public interest in ensuring that the UK government can continue to receive and discuss commercially sensitive information from commercial third parties so that it can best represent and promote their interests abroad.

64. In conclusion, the Commissioner accepts that the public interest in disclosure of the redacted information cannot be dismissed lightly. However, he believes that even taking into account the presumption in favour of disclosure, this is outweighed by the combined effect of the negative impact on Tullow Oil's commercial interests and the risk to the flow of confidential information to DIT, and UK government more broadly, in the future.

Regulation 13(1) – personal data

65. Regulation 13(1) of the EIR provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in regulations 13(2A), 13(2B) or 13(3A) is satisfied.
66. In this case the relevant condition is contained in regulation 13(2A)(a)³. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('GDPR').
67. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then regulation 13 of the EIR cannot apply.

Is the information personal data?

68. Section 3(2) of the DPA defines personal data as:

“any information relating to an identified or identifiable living individual”.

69. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
70. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

³ As amended by Schedule 19 Paragraph 307(3) DPA 2018.

71. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
72. The information which DIT had withheld on the basis of regulation 13(1) consisted of the names of junior officials in government departments and Tullow Oil.
73. Having reviewed the information in question, the Commissioner is satisfied that all of the information withheld on the basis of regulation 13(1) both relates to, and identifies, the individuals concerned. The information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
74. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the EIR. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
75. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

76. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

77. In the case of an EIR request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
78. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.
79. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

'processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal

data, in particular where the data subject is a child⁴.

80. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the EIR, it is necessary to consider the following three-part test:-

- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

81. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

82. In considering any legitimate interest(s) in the disclosure of the requested information under the EIR, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.

83. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be

⁴ Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, regulation 13(6) EIR (as amended by Schedule 19 Paragraph 307(7) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

84. For the reasons discussed above regarding the balance of the public interest in relation to the other exceptions cited by DIT, the Commissioner considers that there is a legitimate interest in the disclosure of information falling within the scope of the request.

Is disclosure necessary?

85. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the EIR must therefore be the least intrusive means of achieving the legitimate aim in question.
86. In the Commissioner's view it is not sustainable to argue that disclosure of the names of the officials either in the government departments or at Tullow Oil is necessary; disclosure of such information would not materially add to the public's understanding of this subject matter, particularly taking into account the information which DIT has already disclosed in response to this request.
87. Therefore, as the Commissioner has decided that disclosure of the names of the officials is not necessary to meet the legitimate interest in disclosure, he has not gone on to conduct the balancing test in respect of this information. As disclosure is not necessary, there is no lawful basis for processing this information and it is unlawful. It therefore does not meet the requirements of principle (a). The Commissioner has therefore decided that DIT is entitled to withhold the names of the officials under regulation 13(1), by way of regulation 13(2A)(a).

Right of appeal

88. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

89. 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.
90. 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

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