

## **Environmental Information Regulations 2004 (EIR)**

### **Decision Notice**

**Date:** 21 December 2017

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

#### **Decision (including any steps ordered)**

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1. The complainant requested documents and correspondence relating to a petroleum licence granted by the Department for the Economy. The Department disclosed some information and withheld other information in reliance on the exceptions at regulation 12(5)(d) and regulation 12(5)(e).
2. The Commissioner's decision is that the Department was entitled to rely on the exception at regulation 12(5)(d) and regulation 12(5)(e) with regard to most of the withheld information. However the Commissioner finds that some of the withheld information ought to have been disclosed.
3. The Commissioner requires the public authority to take the following steps:
  - Disclose the information specified in the confidential schedule.
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**

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5. The request that is the subject of this decision notice relates to an application for an extension to a petroleum exploration licence held by Tamboran Resources UK Ltd (TRUK). The Department had previously granted a six month extension in March 2014, but refused a further request for extension. The licence expired on 30 September 2014, at

which point TRUK confirmed that it had lodged an application for judicial review.<sup>1</sup>

6. On 18 November 2016 the complainant submitted the following request to the Department:

*"Please forward to the address above,*

*all documents, correspondence known to you between the then department DETI, and Tamboran, in relation to licence PL2/10 between 10 August 2014 and 10 October 2014 inclusive. Please provide a list of documents found in search of same with details of what those documents are, their dates and whether they are withheld, disclosed or partially disclosed."*

7. The Department issued a response on 9 December 2016. It disclosed some information but withheld the remainder in reliance on the exception at regulation 12(5)(e) of the EIR.
8. The complainant requested an internal review on 1 January 2017, and the Department provided him with the outcome of that review on 27 February 2017. The Department maintained reliance on the exception at regulation 12(5)(e) with regard to the withheld information.

### **Scope of the case**

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9. On 10 March 2017 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.
10. During the course of her investigation the Commissioner asked the Department to reconsider whether any of the information could be disclosed to the complainant. The Department subsequently issued a revised response to the complainant on 23 June 2017 disclosing some of the previously withheld information. The Department advised the complainant that it had redacted names, telephone numbers and email addresses under regulation 13 of the EIR.
11. The Commissioner made further recommendations to the Department, and the Department disclosed some further information to the complainant on 5 December 2017. The Department confirmed to the Commissioner that it sought to rely on the exceptions at regulation

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<sup>1</sup> <http://fermanaghherald.com/2014/09/latest-no-extension-to-fracking-licence/>

12(5)(d) and regulation 12(5)(e) in respect of all of the remaining withheld information.

12. The complainant has asked the Commissioner to consider whether the Department was entitled to rely on regulation 12(5)(e) in respect of the remaining withheld information. Since the Department did not advise the complainant that it also sought to rely on regulation 12(5)(d) the Commissioner has also addressed the procedural handling of the request. The complainant did not raise any concern about the redaction of personal information under regulation 13 so the Commissioner's decision has only considered the application of regulations 12(5)(d) and 12(5)(e).

## Reasons for decision

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### Regulation 12(5)(d): confidentiality of proceedings

13. Regulation 12(5)(d) states that a public authority may refuse to disclose information if to do so would adversely affect the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law.
14. The Commissioner must first decide whether the proceedings in question are relevant to this exception. The term 'proceedings' is not defined in the EIR. However, the Commissioner's published guidance on this exception sets out her interpretation as follows:
- "...the word implies some formality, i.e. it does not cover an authority's every action, decision or meeting. It will include, but is not limited to:*
- formal meetings to consider matters that are within the authority's jurisdiction;*
  - situations where an authority is exercising its statutory decision making powers; and*
  - legal proceedings."*<sup>2</sup>
15. In this case the Commissioner considers that the Department's consideration of petroleum licences can be interpreted as proceedings within the meaning of regulation 12(5)(d). The Petroleum (Production) Act (Northern Ireland) 1964 sets out that any person wishing to explore

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<sup>2</sup> [https://ico.org.uk/media/for-organisations/documents/1626/eir\\_confidentiality\\_of\\_proceedings.pdf](https://ico.org.uk/media/for-organisations/documents/1626/eir_confidentiality_of_proceedings.pdf)

for, drill for or extract oil or gas in Northern Ireland must hold a Petroleum Licence granted by the Department. The Department's website explains that:

*"The application and licensing process is underpinned by regulations which, among other things, set out the arrangements for making and determining applications, permissible terms and conditions for granting a Petroleum Licence and the model clauses which may be incorporated in a Petroleum Licence."*<sup>3</sup>

16. Having considered the statutory basis of the licensing process as set out above, the Commissioner is satisfied that it demonstrates the necessary level of formality to constitute proceedings, therefore the first test is met.
17. The next condition to be satisfied is that the proceedings must be protected by confidentiality provided by law. The confidentiality may be provided in statute or derived from common law. The Department referred the Commissioner to Model Clause 24 of Schedule 2 to the Petroleum Production Regulations (Northern Ireland) 1987:

*"24. All records, returns, plans, maps, samples, accounts and information (in this clause referred to as 'the specified data') which the Licensee is or may be from time to time required to furnish under the provisions of this Licence shall be supplied at the expense of the Licensee and shall not (except with the consent in writing of the Licensee which shall not be unreasonably withheld) be disclosed to any person not in the service or employment of the Crown."*

18. The Department stated that the withheld information referred to information provided by TRUK, and on this basis came within the scope of the confidentiality of proceedings provided by law. The Department argued that even if this were not the case then there is a common law duty of confidentiality.
19. The Commissioner notes that Model Clause 24 applies only to certain records which the licensee (in this case TRUK) is required to provide to the Department. It does not apply to information generated by the Department. In any event the Commissioner is mindful that the exception at regulation 12(5)(d) protects the confidentiality of proceedings, rather than the confidentiality of the information. The Commissioner interprets Model Clause 24 as protecting the

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<sup>3</sup> <https://www.economy-ni.gov.uk/articles/petroleum-licensing>

confidentiality of certain information, rather than the wider issue of the Department's petroleum licensing proceedings.

20. For a common law duty of confidentiality to apply the public authority will need to demonstrate that the information has the necessary quality of confidence and that it was shared in circumstances importing an obligation of confidence. Information will have the necessary quality of confidence if it is not in the public domain and so long as it is not trivial.
21. Having inspected the withheld information the Commissioner is satisfied that it comprises correspondence between the Department and TRUK. The Commissioner is further satisfied that the information has not been placed in the public domain. TRUK has not consented to its disclosure and in the Commissioner's opinion this demonstrates that TRUK considers the information important and not trivial. The Commissioner accepts that both parties understood the information to have been shared in confidence and would not expect it to be disclosed. Accordingly the Commissioner is satisfied that a common law duty of confidentiality applies.
22. The Department did not explicitly state how it believed that confidentiality would be adversely affected by disclosure. However, since disclosure under the EIR in effect means disclosure to the world at large, it is clear that the confidentiality of proceedings would be adversely affected if the information were to be disclosed because that confidentiality would necessarily be lost. Accordingly the Commissioner is satisfied that the exception at regulation 12(5)(d) is engaged, and has gone on to consider the public interest.

#### Public interest in favour of disclosure

23. The Department said that it was keen to be as open and transparent as possible and acknowledged the presumption in favour of disclosure at regulation 12(2) of the EIR.
24. The Department recognised the extent of public interest in petroleum licensing, especially relating to health, environmental and safety standards. The Department further recognised that the issue remained live as indicated by the judicial review proceedings.
25. The Department acknowledged that disclosure of the withheld information would provide insight into its handling of this licence and would increase public confidence in Departmental decisions. The Department also said that disclosure would inform the public as to why it did not consider a further extension to the licence to be appropriate in 2014.

26. The complainant also put forward public interest arguments in favour of disclosure. He drew the Commissioner's attention to the Aarhus Convention,<sup>4</sup> and in particular the first strand, access to information. The complainant argued that without access to information the public could not enjoy meaningful public participation or access to justice as set out in strands two and three.
27. The complainant said that there was no statutory duty to consult with the public in the area of petroleum licensing, and argued that the Department's proactive dissemination of relevant information was limited. The complainant said that this meant the public was forced to submit information requests under the EIR.

#### Public interest in favour of maintaining the exception

28. The Department advised that it considered the arguments in favour of disclosure and in favour of maintaining the exception at regulation 12(5)(d) to be the same as those identified under regulation 12(5)(e). The Commissioner accepts that the arguments in favour of disclosure may be transferable, but considers that the arguments in favour of maintaining any exception must relate to the interest inherent in that exception. Therefore, with regard to regulation 12(5)(d) the Commissioner has only considered the Department's arguments insofar as they are relevant to the confidentiality of the Department's licensing proceedings.
29. The Department said that the loss of confidentiality would cause reputational damage to TRUK, which would in turn be likely to damage its ability to secure future investment. The Department also argued that disclosure would more probably than not result in TRUK bringing a legal case against the Department for breach of confidence which could result in significant financial loss to the Department through award of damages and costs as well as reputational damage to the Department.
30. The Department further argued that the loss of confidentiality caused by disclosure would discourage other companies from providing commercially sensitive information in similar circumstances. The Department said it must be able to have a frank exchange with such companies to improve performance and ensure effective delivery in the future without risk to their interests.

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<sup>4</sup> The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, adopted on 25 June 1998. The full text can be accessed at: <http://ec.europa.eu/environment/aarhus/>

31. In addition, the Department argued that loss of confidence in its ability to protect commercially sensitive information would discourage TRUK and other companies from applying for future licences. This would be likely to damage the Department's ability to promote the exploration for natural resources elsewhere and thereby its ability to fulfil one of its key roles.
32. Finally, the Department pointed out that the withheld information did not relate to any environmental failing on the part of the Company or any issues in relation to health or safety standards that would warrant the information being made public. The Department was of the view that the public interest in disclosure was limited for this reason.

### Balance of the public interest

33. The Commissioner's guidance sets out her view that there is always a general public interest in protecting confidential information. Breaching an obligation of confidence undermines the relationship of trust between confider and confidant, regardless of whether the obligation is based on statute or common law. The guidance says:

*"For this reason, the grounds on which confidences can be breached are normally limited... while in common law there may be a public interest defence to a breach of confidence."<sup>5</sup>*

34. The Commissioner recently issued a decision notice considering a request for similar information.<sup>6</sup> The Commissioner is mindful of the extensive public debate around fracking issues, and considers that there is a strong public interest in the disclosure of information that would assist the public's understanding of how the Department makes decisions.
35. The Commissioner also recognises the legitimate 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. As the complainant has pointed out, access rights under the EIR are designed to support public access to environmental information, public participation in decision making and access to justice.

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<sup>5</sup> [https://ico.org.uk/media/for-organisations/documents/1626/eir\\_confidentiality\\_of\\_proceedings.pdf](https://ico.org.uk/media/for-organisations/documents/1626/eir_confidentiality_of_proceedings.pdf)

<sup>6</sup> ICO case reference [FER0654939](#), issued 21 August 2017

36. The Commissioner has taken account of the fact that the Department has disclosed most of the requested information, and the remaining withheld information is that which is considered most sensitive. The Commissioner is of the view that the Department has – albeit following her intervention – sought to meet the legitimate public interest in disclosure of as much information as possible.
37. The Commissioner is mindful that she has had the benefit of inspecting the withheld information and on this basis she is satisfied that the nature of most of the information is such that there is a strong public interest in maintaining the exception. The Commissioner finds that there is a significant public interest in protecting the confidentiality of the Department's licensing proceedings, and with regard to most of the withheld information this is sufficient to outweigh the public interest in favour of disclosure.
38. However the Commissioner finds that the public interest in maintaining the exception does not outweigh the public interest in disclosure in respect of two small pieces of information (extracts from correspondence). Since the Department also sought to rely on regulation 12(5)(e) in respect of this information, the Commissioner has gone on to consider this exception.

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

39. As indicated above the Department sought to rely on the exception at regulation 12(5)(e) in respect of all of the withheld information. Since the Commissioner has found that the Department was entitled to rely on regulation 12(5)(d) in respect of most of the withheld information, she is not required to consider the exemption at regulation 12(5)(e) in respect of this information. The Commissioner is only required to make a decision in respect of the information that cannot be withheld in reliance on regulation 12(5)(d).
40. 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"*.
41. 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?*

42. 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 Commissioner is satisfied that the information in question is commercial information since it relates to the commercial activities of TRUK.

*Is the withheld information subject to confidentiality provided by law?*

43. The Commissioner considers that "provided by law" will include confidentiality imposed on any person under the common law of confidence, contractual obligation, or statute. In the Commissioner's consideration of regulation 12(5)(d) she indicated that she was not satisfied that there was a statutory duty of confidence, but that there was a common law duty of confidence. Paragraph 19 above sets out the Commissioner's reasoning in this regard, and she is satisfied that it applies equally with regard to regulation 12(5)(e).

*Is this confidentiality provided to protect a legitimate economic interest?*

44. The First-tier Tribunal confirmed in *Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd*<sup>7</sup> that, to satisfy this 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.
45. The Department's position is that disclosure of the information withheld under regulation 12(5)(e) would harm TRUK's economic interests. The Department has put forward similar arguments to those considered under regulation 12(5)(d). These relate to TRUK's reputation and ability to attract investment.
46. As set out above, the Commissioner is only considering regulation 12(5)(e) in respect of information that could not be withheld under regulation 12(5)(d). This comprises two extracts from correspondence. Having examined this information the Commissioner does not accept that disclosure would adversely affect TRUK's legitimate economic interest, ie its commercial activities. The Commissioner cannot describe the information in detail since to do so would defeat the purpose of the

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<sup>7</sup> Appeal no EA/2010/0106, 4 January 2011

Department's reliance on the exception. However the Commissioner can say that in her view disclosure of the information would not be more likely than not to harm TRUK's commercial activities. Consequently the Commissioner finds that the exception is not engaged in respect of these two extracts.

47. Since the Commissioner finds that the exception is not engaged she is not required to consider the public interest. The Commissioner has identified the information to be disclosed in a confidential schedule to this decision notice, which is provided to the public authority but not the complainant.

### **Procedural requirements**

#### Regulation 14: refusal notice

48. Regulation 14 of the EIR provides that a public authority refusing a request must issue a refusal notice. According to regulation 14(3) this must include details of any exception claimed. Since the Department has not informed the complainant that it sought to rely on regulation 12(5)(d), the Commissioner finds that it failed to comply with regulation 14(3).

## Right of appeal

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49. 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](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

50. 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.
51. 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**  
**Senior Case Officer**  
**Information Commissioner’s Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**