

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

Date:

Public Authority: Department for the Economy (Northern Ireland)

Address: Netherleigh

Massey Avenue

Belfast

BT4 2JP

Decision (including any steps ordered)

1. The complainant has requested information relating to application for petroleum licences. The Department for the Economy (Northern Ireland) ("the Department") refused to disclose the information, citing regulations 12(5)(d), 12(5)(e) and 13 of the EIR as a basis for non-disclosure.
2. The Commissioner's decision is that the Department has correctly applied regulations 12(5)(d) and 13 to the requested information. She has therefore not considered its application of regulation 12(5)(e).
3. The Commissioner requires no steps to be taken.

Background to the request

4. In March 2017 the complainant requested documents and correspondence relating to a petroleum licence granted by the Department. The request related 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.

5. The Department disclosed some information in response to the complainant's request and withheld other information in reliance on the exceptions at regulation 12(5)(d) and regulation 12(5)(e).
6. The Commissioner's decision was that the Department was entitled to rely on the exceptions at regulation 12(5)(d) and regulation 12(5)(e) with regard to most of the withheld information. However the Commissioner found that some of the withheld information ought to have been disclosed and ordered disclosure of that information accordingly.

Request and response

7. On 28 May 2019, the complainant wrote to the Department and requested information in the following terms:

"Please forward to me an unredacted version of this document (Redacted Annex B to Response to ICO letter of 23 October 2017 - information to be released withheld.PDF)

This is a redacted version of correspondence between the Department and Tamboran Resources UK and its then parent company Tamboran Resources Pty from 2014.

In light of the new application by TRUK for a Petroleum Licence over approx 630 sqKM of Fermanagh, I believe this redaction needs to be removed as the Public Interest Test has now been elevated.

The Department is under a duty to consider previous operations under licences held under 4(1)(d) of the regulations. Therefore I believe the public interest test now outweighs any company confidentiality or otherwise in this case."

8. On 24 June 2019 the Department responded to the complainant stating that it was withholding the requested information ("the withheld information") under regulations 12(5)(d), 12(5)(e) and 13 of the EIR.
9. On 10 July 2019 the complainant requested an internal review of the Department's handling of his request, the result of which was provided to him on 3 September 2019. The reviewer upheld the original application of the above exceptions to the requested information.

Scope of the case

10. The complainant contacted the Commissioner on 25 September 2019 to complain about the way his request for information had been handled.
11. The Commissioner has considered the Department's handling of the complainant's request, in particular its application of the above regulations of the EIR to the requested information.

Reasons for decision

Regulation 13 –personal data of third parties

12. Regulation 13(1) allows a public authority to withhold personal data where the applicant is not the data subject and where one of the conditions listed in Regulation 13(2A), 13(2B) or 13(3A) is satisfied.
13. In this case the relevant condition is contained in Regulation 13(2A)(a). 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 General Data Protection Regulation ("the GDPR").
14. In order to engage regulation 13, the information sought by the applicant must satisfy the definition of personal data provided by sections 3(2) and (3) of the Data Protection Act 2018 ("the DPA") and means any information relating to an identified or identifiable living individual.
15. 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.
16. Information will relate to a person if it is about them, linked to them, has biographical significance to them, is used to inform decisions affecting them or has them as its main focus.
17. The Department considers the redacted personal data to fall into 3 categories:
 - (a) The personal data of junior Departmental staff
 - (b) The personal data of former Departmental staff.

- (c) The personal data of TRUK personnel.
18. The Commissioner has examined the information which the Department has redacted. She agrees with the Department that the redacted information is the personal data of the third parties as outlined above. It is not special category personal data nor is it criminal offence data.
19. 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"*. In this case processing personal data means its disclosure in response to a request for information.
20. In order to be lawful, processing must satisfy one of the lawful grounds provided by Article 6(1) of the GDPR and must also be 'generally lawful'.
21. The Commissioner considers that basis 6(1)(f) is relevant to the Department's position in this case. This states:
- "...processing is necessary for the purposes or 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 and which require protection of personal data, in particular where the data subject is a child"*.
22. The Department has informed the Commissioner that it has considered whether it would be lawful to disclose the withheld personal data. It has advised the Commissioner that the legitimate interests which would be served by disclosure of the information are openness and transparency. The Department wishes to put as much information as possible into the public domain about why PL2/10 was allowed to determine in September 2014 rather than being extended.

Necessity: Is disclosure necessary to satisfy those legitimate interests?

23. In this case, the Commissioner considers that 'necessary' means more than desirable but less than indispensable or absolute necessity. Therefore, the test is one of reasonable necessity: It involves consideration of alternative measures whereby the legitimate aim could be achieved by something other than the disclosure of the identified personal data. Disclosure of personal data under the EIR must therefore be the least intrusive means of achieving the legitimate aim in question.

24. The Department stated that the redacted personal data would provide the names, email addresses, phone numbers and occasionally the home address and job titles of those involved to varying degrees in the decision not to extend PL2/10. However this would not increase the Department's openness and transparency around the reasons for the decision to allow this licence to determine, and does not give any indication of the roles and responsibilities of the individuals concerned. Disclosure is therefore not necessary.
25. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest of openness and transparency, she has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).
26. The Commissioner has therefore decided that the Department was entitled to withhold the information under regulation 13(1), by way of regulation 13(2A)(a).

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

27. 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.
28. 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."*
29. The Department considers the proceedings in this case to be formal in nature because the correspondence was part of a formal procedure through which it considered TRUK's request for an extension to its

deadline of 30 September 2014. This formal procedure fell under the Department's jurisdiction as part of its regulation of the oil and gas industry.

30. The Department had awarded TRUK a Petroleum Licence pursuant to the provisions of the Petroleum (Production) Act (Northern Ireland) 1964 to search and bore for and get petroleum within the lands specified, and the Commissioner's Decision Notice of 2017 confirmed that, having considered the statutory basis of the licensing process, the Commissioner was satisfied that it demonstrated the necessary level of formality to constitute proceedings, and therefore that the first test of Regulation 12(5)(d) was met. The Commissioner is satisfied that this continues to be the case.
31. 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 confirmed that the Model Clauses in Schedule 2 to the Petroleum Production Regulations (Northern Ireland) 1987 [SR 1987 No 196] as amended by the Petroleum Production (Amendment) Regulations (Northern Ireland) 2010 [SR 2010 No 169] ("the Model Clauses") are deemed to be incorporated in any petroleum licence awarded by the Department.

Model Clause 24 in Schedule 2 to the Petroleum Production Regulations (Northern Ireland) 1987 states:

Reports to be treated as confidential

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:

Provided that-

(a) the Department shall be entitled at any time to make use of any of the specified data for the purpose of preparing and publishing such returns and reports as may be required by law;

(b) the Department shall be entitled at any time to furnish any of the specified data to the Geological Survey of Northern Ireland and to any other body of a like nature as may from time to time be carrying on

activities of a substantially similar kind to the geological activities at present carried on by the Geological Survey of Northern Ireland;

(c) the Department, the Geological Survey of Northern Ireland and any other such body shall be entitled at any time to prepare and publish reports and surveys of a general nature using information derived from any of the specified data;

(d) the Department, the Geological Survey of Northern Ireland and any such other body shall be entitled to publish any of the specified data of a geological, scientific or technical kind after the expiration of the period of five years beginning with the date when the Department received the data or after the expiration of such longer period as the Department may determine after considering any representations made to it by the Licensee about the publication of data in pursuance of this sub-paragraph.

32. The information withheld refers to, and on occasion quotes from, the records or information furnished by TRUK and so comes within the scope of the confidentiality of proceedings provided by law. Even if this were not the case, the Department considers that the common law of confidence is engaged.
33. The Department is content that the information has the necessary quality of confidence because it is of the utmost importance to both the Company and to the Department, it is not in the public domain, has not been passed to third parties who might waive the obligation of confidence and was shared in the expectation that it would not be disclosed, as detailed above. The Department is therefore content that these proceedings were conducted on the implicit understanding that they were confidential.
34. As previously, the Department believes that the disclosure of this information would adversely affect this confidentiality and that Regulation 12(5)(d) is therefore engaged.
35. The Decision Notice of 2017 confirmed that, having inspected the information withheld under regulation 12(5)(d), the Commissioner was satisfied that it comprises correspondence between the Department and TRUK, that the information had not been placed in the public domain, that TRUK had not consented to its disclosure and that in the Commissioner's opinion this demonstrated that TRUK considers the information important and not trivial.
36. The Department confirms that all of the above continues to be the case and, upon further inspection of the withheld information, the Commissioner is also satisfied that this continues to be the case. The

Commissioner also accepts that both parties understood the information to have been shared in confidence and would not expect it to be disclosed and is accordingly satisfied that a common law duty of confidentiality applies. She is content that there has been no change to the Department's position or to the circumstances of the case, and that the confidentiality of these proceedings continues to be provided by law in line with the Commissioner's previous decision.

Link between disclosure of the withheld information and adverse effect on the confidentiality of proceedings

37. The confidentiality of these proceedings would necessarily be lost if the information in question was released to the complainant, because under the EIR disclosure in effect means disclosure to the world at large. Disclosure would therefore remove the confidentiality of the proceedings. The Department therefore continues to consider that the confidentiality of these proceedings would be adversely affected if the information were to be disclosed. The Commissioner accepts this reasoning and is accordingly 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

38. The Department said that it wishes to be as open and transparent as possible and acknowledged the presumption in favour of disclosure at regulation 12(2) of the EIR.
39. The Department recognises the extent of public interest in petroleum licensing, particularly in relation to health, environmental and safety standards.
40. 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.
41. The Department recognises that the public needs as much information as possible in order to engage in meaningful debate. It also recognises public interest in the determination of TRUK's previous license PL2/10 in 2014 in light of the company's current application and the Department's recent public consultation.

42. The complainant put forward the argument that the public interest in favour of disclosure has now been elevated due to the new application by TRUK for a Petroleum Licence over approx 630 sqKM of Fermanagh.
43. The complainant also stated that the Department is under a duty to consider previous operations under licences held under 4(1)(d) of the regulations. Therefore he believes that the public interest in favour of disclosure now outweighs any company confidentiality or otherwise in this case.
44. The complainant also drew the Commissioner's attention to the Aarhus Convention¹ 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. He also stated that the public interest in maintaining the exception had decreased as the judicial review proceedings were no longer live.

Public interest in favour of maintaining the exception

45. The Department stated that information requested was shared between it and TRUK as part of formal petroleum licensing proceedings and both parties understood the information to have been shared in confidence with no expectation of disclosure. The release of this information would adversely affect the confidentiality of these proceedings and discourage participation in future proceedings by TRUK and other companies.
46. The Department also stressed the importance of it being able to have frank exchanges with TRUK and other companies to improve performance and encourage the effective delivery of licence requirements. It considered that disclosure of the withheld information would discourage TRUK and other companies from sharing sensitive commercial information as part of Departmental confidential proceedings in the future.
47. The Department is keen to stress that the information being withheld is as highly sensitive now and at the time of the complainant's request as it was in 2017, and its release could potentially cause reputational damage to the Company which could in turn potentially impact the

¹ 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/>

financial support associated with TRUK's September 2016 application for a Petroleum Licence.

48. The Department considers that TRUK could legitimately commence legal action against the Department should it disclose the information, which would cause financial loss to the Department in these difficult times.
49. The Department also considers that the loss of confidentiality of proceedings would more probably than not discourage TRUK and other companies from applying for future licenses. This would damage the Department's ability to fulfil one of its key functions of promoting the exploration for natural resources. The information withheld does not relate to an environmental failing or any issues in relation to health or safety standards which would warrant the information being made public and running the risk of the Department's ability to fulfil a key function being damaged.

Balance of the public interest arguments

50. The Commissioner is of the 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 Commissioner's 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."*²

51. 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.
52. The Commissioner has taken into account the fact that the Department

² https://ico.org.uk/media/fororganisations/documents/1626/eir_confidentiality_of_proceedings.pdf

disclosed most of the requested information in response to the complainant's 2017 request. The information which it continued to withhold in response to that request was that which it considered to be most sensitive. The Commissioner is of the view that the Department at that time— albeit following her intervention – sought to meet the legitimate public interest in disclosure of as much information as possible.

53. The Commissioner has inspected the remaining withheld information and on this basis she is satisfied 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, which outweighs the public interest in favour of disclosure.
54. As the Commissioner considers that the exception as set out in regulation 12(5)(d) of the EIR applies to all of the withheld information save that which was redacted under regulation 13 of the EIR and covered earlier in this notice, she has not gone on to consider the Department's application of regulation 12(5)(e) to the withheld information.

Right of appeal

55. 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@justice.gov.uk

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

56. 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.
57. 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

Deirdre Collins
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