

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

**Decision notice**

**Date:** 30 September 2022

**Public Authority:** Foreign, Commonwealth and Development Office

**Address:** King Charles Street  
London  
SW1A 2AH

**Decision (including any steps ordered)**

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1. The complainant submitted a request to the Foreign, Commonwealth and Development Office (FCDO) for copies of correspondence between the FCDO in the US and BP staff in relation to COP26 and associated initiatives. The FCDO refused to provide any of the requested information, citing the commercial interest's exemption under section 43(2) of FOIA as its basis for doing so.
2. The Commissioner determined that the request fell to be considered under the EIR. Having considered the application of regulation 12(5)(e) – adverse effect on the confidentiality of commercial interests – which has similarities to section 43(2) FOIA, he is satisfied that the information was withheld correctly. However, the FCDO breached regulation 5(2) since it responded outside the statutory period of 20 working days.
3. The Commissioner does not require any steps to be taken as a result of this decision notice.

## Request and response

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4. On 19 March 2021, the complainant wrote to the FCDO and requested information in the following terms:

"Please disclose copies of any correspondence between your team/office in the US and any staff from BP that relates to the COP26 climate summit or its associated events, campaigns, or initiatives.

Please also disclose details of any meetings or conference calls between your US team and any staff from BP that also relate to the above. This should include copies of any relevant agendas or meeting notes.

I would like copies of any materials from 2020. However, if this is too long a period, searches can be limited to the second half of the year."

5. The FCDO responded on 27 May 2021. It refused to provide the requested information, citing section 40 and section 43(2) of FOIA as its basis for doing so.
6. Following an internal review, the FCDO wrote to the complainant on 9 August 2021. It upheld its decision to withhold the information under section 43(2) of FOIA.

## Scope of the case

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7. The complainant contacted the Commissioner on 1 October 2021 to complain about the way their request for information had been handled.
8. The Commissioner notes that the withheld information relates to the FCDO's correspondence with BP regarding COP26 and other associated initiatives. It covers matters concerning climate change and the interaction with the private sector.
9. He has therefore determined that the information is on measures and activities which are likely to affect the elements and factors of the environment, as defined in regulation 2(1) of the EIR. The withheld information is, therefore, "environmental" within the definition at regulation 2(1)(c).
10. Noting the FCDO's position that it considered disclosure of the relevant information would be prejudicial to BP and its own commercial interests, and an offer of the disclosure of a suitably redacted digest of relevant

email correspondence, he has proactively considered, in this notice, whether the information was correctly withheld under regulation 12(5)(e) of the EIR – adverse effect on commercial confidentiality.

## Reasons for decision

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### **Regulation 12(5)(e) EIR: adverse effect on the confidentiality of commercial or industrial information**

11. Regulation 12(5)(e) of the EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information, where such confidentiality is provided by law to protect a legitimate economic interest.
12. The Commissioner has published guidance<sup>1</sup> on the application of this exception. As the guidance explains, the exception can be broken down into a four-stage test.
13. All four elements are required in order for the exception to be engaged. The Commissioner has considered how each of the following conditions apply to the facts of this case:
  - The information is commercial or industrial in nature;
  - It is subject to confidentiality provided by law;
  - The confidentiality is protecting a legitimate economic interest; and
  - The confidentiality would be adversely affected by disclosure.

### **Is the information commercial or industrial in nature?**

14. The Commissioner has considered the withheld information, and notes that it comprises data within email correspondence between the FCDO and BP as well as a transcript of a conversation which took place earlier that year.
15. Specifically, the FCDO withheld the information pertaining to:

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<sup>1</sup> <https://ico.org.uk/for-organisations/commercial-or-industrial-information-regulation-12-5-e/>

- 1) Details of the introduction of an FCDO employee to BP employees in the US working with cities on net zero;
- 2) A conversation transcript of an early meeting with BP employees in the US concerning BP's net zero announcement.

The Commissioner is satisfied that, since the information relates to the FCDO's introduction to the inner workings of BP and their commercial activities and how they may potentially assist with their net zero ambitions, the information is commercial in nature.

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

16. The phrase "confidentiality provided by law" in this circumstance, as explained in the Commissioner's guidance, includes confidentiality imposed on any person by the common law of confidence, contractual obligation, or statute. In contrast to section 41 of FOIA, there is no need for the public authority to have obtained the information from another. It covers information obtained from a third party, information jointly created or agreed with a third party, and also covers information that the public authority has created.
17. For a common law duty of confidentiality to exist, it is required (a) that the information has the necessary quality of confidence, and (b) that it was imparted in circumstances which gave rise to an obligation of confidence.
18. Regarding (a), whether the information has the necessary quality of confidence, this requires that the information is not trivial, and has not otherwise been made public. In this case, the Commissioner is satisfied that this is so since the information relates to the FCDO's core activities – the engagement with organisations regarding their commercial activities.
19. Regarding (b), whether it was imparted in circumstances giving rise to an obligation of confidence, the Commissioner has considered the information set out in paragraph 18, above. With regard to 1), and 2) these were provided only to the FCDO by BP, in extending its professional services and assistance in understanding its future aims and objectives.
20. In each case, the Commissioner is satisfied that the intention was that the information would remain confidential, for consideration only within the FCDO.

21. The Commissioner considers that the common law duty of confidentiality exists with regard to the information and is satisfied that the information is subject to confidentiality provided by law.

**Is the confidentiality protecting a legitimate economic interest?**

22. As the Tribunal confirmed in the case of Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd (EA/2010/0106, 4 January 2011) ("Elmbridge"), to satisfy this element of the test, disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person(s) the confidentiality is designed to protect.
23. This requires the consideration of two elements: whether a legitimate economic interest has been identified, and (because it needs to be shown that the confidentiality is provided to protect this interest, as explained below) whether the interest would be harmed by disclosure.
24. Regarding the first element, the Commissioner is satisfied that the FCDO has a legitimate economic interest in managing its relationships with commercial business effectively, in order to meet its obligations to central government and the general public. It also has an interest in maintaining a strong position going forward, in order to help negotiate any future projects and objectives set centrally.
25. The FCDO has also explained why it considers that disclosure would harm its interests: the second element.
26. It explained that it believed "The release of the information would damage our relationship with BP - they confirmed that some of the information they have provided to us is commercially sensitive and therefore their expectation was that the information would never be made public because they were speaking candidly about their business plans and net zero."
27. It further commented that: "It is obviously part of Government business to speak to industry about policy (in this case net-zero) to inform our thinking and broader industry approaches. In order for these conversations to be productive they need to discuss issues that are not known/yet disclosed to the wider public. Industry need to trust that they can speak candidly without fear that these private conversations will be put out into the public domain."
28. It was also concerned that disclosure may negatively impact on its relationship with other private sector organisations, by causing concern that they could not have open and honest conversations around the very

emotive issues surrounding climate change and the road to net zero, leading, in turn, to damage to the FCDO's reputation, which could adversely affect its position in future commercially sensitive activities.

29. As explained in his guidance, the Commissioner's approach is that the wording of this part of the exception – it may be engaged "where the confidentiality is provided by law to protect a legitimate economic interest" – should be interpreted strictly: that the confidentiality must be objectively required at the time of the request.
30. In this case, the Commissioner is satisfied that the FCDO correctly asserted that the confidentiality was required to protect a legitimate economic interest.

### **Would the confidentiality be adversely affected by disclosure?**

31. The final requirement for the exception to be engaged is for it to be shown that an adverse effect to the confidentiality, provided to protect the legitimate economic interest, would occur from the disclosure of the information.
32. Although this is a necessary element of the exception, the Commissioner's approach is that, once the first three elements are established, it is inevitable that this element will be satisfied. Disclosure of confidential information into the public domain would inevitably harm the confidential nature of that information and would also harm the legitimate economic interests that have been identified.
33. As explained in the Commissioner's guidance, referenced previously, this was confirmed in *Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association* (EA/2010/0012, 24 May 2010), in which the Tribunal stated that, given its findings that the information was subject to confidentiality provided by law and that the confidentiality was provided to protect a legitimate economic interest: "it must follow that disclosure... would adversely affect confidentiality provided by law to protect a legitimate economic interest" (para 11).
34. In all the circumstances of this case, the Commissioner is satisfied that the exception is engaged.

### **The balance of the public interests**

35. Regulation 12(5)(e) is subject to the public interest test. This means that, when the exception is engaged, public authorities also have to consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. Even where the exception is engaged, the

information should still be disclosed if the public interest in disclosing the information is not outweighed by the public interest in maintaining the exception.

36. In addition, under regulation 12(2) of the EIR, public authorities are required to apply a presumption in favour of disclosure.

### **Factors in favour of disclosure**

37. There will always be some public interest in disclosure to promote transparency and accountability of public authorities, greater public awareness and understanding of, particularly, environmental matters, a free exchange of views, and more effective public participation in decision-making, all of which ultimately contribute to a better environment.
38. With regard to transparency, in this case, the complainant considers that the FCDO has not demonstrated that disclosing the information requested would prejudice its commercial interests. They commented: "The response provided by the FCDO does not establish how BP's or its own commercial interests would, or would be likely to, be prejudiced by the disclosure of information. The connection between disclosure and the prejudice itself occurring is speculative."
39. The complainant also considered that "A fundamental factor relevant to my request is that BP's stated plans are not aligned with the targets set out in the Paris Climate Agreement."
40. The FCDO recognises that there is a general public interest in openness and transparency, and in particular around the issue of Climate Change regarding its activities and negotiations with the private sector.

### **Factors in favour of the exemption being maintained**

41. The FCDO argues, however, that disclosure of the information would be detrimental to its ability to achieve its aims and objectives, as well as the best outcome in future negotiations and that the public interest is therefore best served by withholding the information." To release all of the information requested would damage FCDO's commercial interests because companies would be reluctant to share commercially sensitive information with us in the future, which could impact our ability to develop policy."
42. And that: "BP have been explicit on what they considered to be commercially sensitive information, and therefore the significant risk that breaking that confidence to release the information would undermine future sharing. This is particularly acute at the moment given

many and complex discussions on energy, and the need to retain the trust of BP in particular, and wider energy industry more generally, in order to serve the public interest in tackling energy price rises.”

43. They also argued:” On balance, the limited additional value of releasing information, versus the potential harm to a key contact (and contact base) at a critical time for HMG relationships with energy companies, meant honouring the requested redaction for commercial interest best served the public interest.”

### **The Commissioner's decision**

44. The Commissioner recognises that there is a general public interest in the disclosure of information in order to provide transparency to the public about the activities of public authorities. And that Climate Change, and the issues surrounding it, are very much in the forefront of public debate.
45. However, the Commissioner has already acknowledged that the envisaged prejudice would be likely to occur. This would not be in the public interest.
46. As covered above, in this case the Commissioner’s view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced.
47. This means that the Commissioner’s decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(5)(e) was applied correctly.

### **Regulation 5 EIR – duty to make environmental information available**

48. Regulation 5(1) states that, subject to certain provisions, a public authority that holds environmental information shall make it available on request.
49. Regulation 5(2) states that information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.
50. In this case, the FCDO responded to the request outside this timeframe and has therefore breached regulation 5(2) of the EIR.

## Right of appeal

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51. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

52. 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.
53. 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 .....**

**Phillip Angell**  
**Group Manager**  
**Information Commissioner's Office**  
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