

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

Decision notice

Date: 29 June 2023

Public Authority: Department for Energy Security & Net Zero¹
Address: 1 Victoria Street
London
SW1H 0ET

Decision (including any steps ordered)

1. The complainant submitted a request to Department for Business, Energy & Industrial Strategy (BEIS) seeking information about the potential environmental impact of Shell's Brent decommissioning project in the North Sea. BEIS located five documents falling within the scope of the request but sought to withhold these on the basis of regulation 12(4)(d) (material in the course of completion, unfinished documents and incomplete data).
2. The Commissioner's decision is that the information falls within the scope of regulation 12(4)(d) and that in all the circumstances of the case the public interest favours maintaining the exception.

¹ The complainant's request was submitted to the Department for Business, Energy & Industrial Strategy (BEIS). However, as a result of machinery of government changes in February 2023 this department no longer exists and responsibility for the policy area to which this request relates was transferred to the Department for Energy Security and Net Zero (DESNZ). The decision notice is therefore served on DESNZ.

3. The Commissioner does not require further steps.

Request and response

4. The complainant submitted the following request to BEIS on 27 September 2022:

'In light of the attached foi response from the NSTA [North Sea Transition Authority] I would like to submit the following request:

I would like to request a copy of all documents and reports that have been created since 1 January 2021 regarding the potential environmental impact of Shell's Brent decommissioning project in the North Sea'.

5. BEIS responded on 25 October 2022 and explained that it had considered the request under the EIR given the subject matter. It confirmed that it held information falling within the scope of the request but considered it to be exempt from disclosure on the basis of regulation 12(4)(d) (material in the course of completion, unfinished documents, and incomplete data) of the EIR.
6. The complainant contacted BEIS on 25 October 2022 and asked it to conduct an internal review.
7. BEIS informed him of the outcome of the review on 22 November 2022. It upheld the application of regulation 12(4)(d).

Scope of the case

8. The complainant contacted the Commissioner on 20 December 2022 in order to complain about BEIS' decision to refuse his request on the basis of regulation 12(4)(d).
9. During the course of his investigation of this complaint, DESNZ informed the Commissioner that five core documents had originally been located as falling within the scope of the request. However, it explained that in addition to this core documentation, searches of the Offshore Petroleum

Regulator for Environment & Decommissioning's (OPRED²) filing system to identify any records which contained any or all of the words used by the requester had confirmed the existence of a very large amount of information that potentially fell within the scope of the request. DESNZ explained that although it had not conducted a full review of all of this information (owing to its volume), it was expected that all of this further body of information relates to the ongoing consideration of the environmental impacts of the decommissioning projects. DESNZ explained that it remained of the view that the five core documents were exempt from disclosure on the basis of regulation 12(4)(d) and that it was entitled to withhold the further documents on the basis of regulations 12(4)(d), 12(4)(b) (manifestly unreasonable) and 12(4)(e) (internal communications) of the EIR.

10. DESNZ informed the complainant on 4 May 2023 of the two additional exceptions it was now applying to his request.
11. The complainant responded on the same day and explained that he disagreed with the application of additional exceptions at this stage. He also suggested that that his request had not sought all communications, and thus would not encompass the range of information that DESNZ had suggested. Furthermore, the complainant explained that if clarification was required to understand what his request was seeking then this should have been sought previously.
12. In light of these developments, and given the complainant's concerns that his request had been interpreted too broadly, the Commissioner proposed that a pragmatic and practical way forward at this stage would be for the request to effectively be refined to only seek the five core documents that were originally considered to fall within the scope of the request. As DESNZ only considered regulation 12(4)(d) to apply to these documents, then the Commissioner's investigation would only consider the application of that exception to these documents.
13. Both parties confirmed that they were content to proceed on that basis. The scope of this decision notice is therefore simply to consider the application of regulation 12(4)(d) to the five documents originally considered to fall within the scope of the request.

² OPRED is responsible for regulating environmental and decommissioning activity for offshore oil and gas operations, including carbon capture and storage operations, on the UK continental shelf. It is part of DESNZ and was previously part of BEIS.

Reasons for decision

Regulation 12(4)(d) – Material in the course of completion, unfinished documents and incomplete data

14. Regulation 12(4)(d) of the EIR provides that a public authority may refuse to disclose information to the extent that the request relates to material which is still in the course of completion, to unfinished documents, or to incomplete data.
15. The exception is class-based, which means that it is engaged if the information in question falls within its scope. It is not necessary to show that disclosure would have any particular adverse effect in order to engage the exception.

DESNZ's position

16. DESNZ explained that the following five core documents which were originally identified as falling within the scope of the request are:
 - Draft Brent Field Decommissioning Programme;
 - Draft Brent Field Environmental Appraisal (also titled Environmental Statement);
 - Draft Brent Field GBS Decommissioning Technical Document;
 - Draft Brent Field GBS Contents Decommissioning Technical Document; and
 - Draft Brent Field Drill Cuttings Decommissioning Technical Document.
17. DESNZ explained that whilst earlier versions of these documents were published as part of the public consultation process in 2017, the most recent versions are working drafts which have been amended and updated to reflect the various consultation processes that have taken place, and OPRED's ongoing, and currently incomplete, review and assessment of the proposals.
18. By way of background, DESNZ explained that decommissioning of oil and gas infrastructure on the UK Continental Shelf is regulated by the Petroleum Act 1998. OPRED has responsibility for ensuring that the requirements of the Petroleum Act and the UK's international obligations are complied with.
19. OPRED is responsible for assessing/reviewing and, if appropriate, approving decommissioning proposals from owners of offshore oil and gas infrastructure. DESNZ explained that determining appropriate decommissioning solutions is a lengthy, complicated and detailed process. Proposals are submitted to OPRED in the form of a decommissioning programme and supporting documentation, studies

and reports. This can be supplemented by a variety of additional material and the review/assessment process also includes various statutory, public and international consultation stages depending on the nature and complexity of the proposals. DESNZ explained that the review process can be very protracted depending on the scale, complexity and sensitivity of the proposals. If satisfied, OPRED will recommend approval of the proposals on behalf of the Secretary of State.

20. DESNZ explained that the review process has no specific timescale because it is dependent on the nature, scale and complexity of the proposals and the outputs from domestic and international consultation. OPRED has been reviewing and assessing the Brent decommissioning proposals for a number of years and this process is still currently ongoing.
21. DESNZ explained that the five core documents identified above are very lengthy technical/specialist documents. They explain and detail the complex decommissioning proposals for the installations and substances contained within them, and their potential environmental impacts, now and in the future. DESNZ noted that the environmental impacts of the proposals are one of the fundamental key considerations in its assessment process.
22. DESNZ explained that all of the material is considered draft/interim documentation and includes new, revised and/or updated information not in the public domain. This draft material is subject to OPRED review and assessment which includes further discussion, query, comment and potential further change. DESNZ noted that changes made in one document can also have implications or ramifications for the information in other closely associated documents. As such, OPRED considered the information requested to be draft/interim form and a work progress, subject to change, updating, revision, additions, checks and assessment as part of the standard review/assessment process. DESNZ argued that this suite of information also needs to be reviewed and assessed all together as part of the wider overall decision making process which OPRED undertakes prior to determining its decision on the proposals.
23. DESNZ explained that if, in the future, OPRED determines that the proposals can be approved then the draft documents will be finalised and, on approval, made available to the public via the OPRED Decommissioning webpage.

The complainant's position

24. The complainant disagreed with the application of 12(4)(d). He argued that simply because there had been no final decision on the Brent

decommissioning project this does not mean that all of the documents are draft documents or are unfinished.

The Commissioner's position

25. The Commissioner accepts that the five documents in question are in draft form as they are still being reviewed, amended and revised as part of OPRED's assessment and consultation process. In reaching this view the Commissioner notes that the withheld documents contain various track changes which in his view evidences the draft nature of the documents (and the ongoing work being made to them). As the Commissioner's guidance notes 'Draft documents will engage the exception because they are, by definition, unfinished.'³ The Commissioner is therefore satisfied that the documents fall within the scope of regulation 12(4)(d) on the basis that they are unfinished documents. Furthermore, the Commissioner accepts that documents are material which is still in the course of completion and therefore also fall within the scope of the exception on this basis.

Public interest test

26. Regulation 12(1)(b) requires that, where the exception under regulation 12(4)(d) 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.
27. 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 in disclosure of the information

28. DESNZ acknowledged that there was a public interest in openness and accountability, in oil and gas activities in their potential environmental impacts generally, and in Brent decommissioning specifically, to promote understanding and to give greater transparency to decision making by public bodies.

³ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/regulation-124d-eir/#whatisan>

Public interest in maintaining the exception

29. However, DESNZ argued that in the circumstances of this case it did not believe that the public interest would be best served by disclosure. Rather, DESNZ argued that in its view the public interest favoured withholding the information whilst consideration of the proposals, and the central aspect of their potential environmental impacts, is incomplete and ongoing.
30. In reaching this position, DESNZ emphasised that it is particularly important for the integrity of its decision making processes that officials are able to engage in free, frank and robust discussions and exchanges with the owners, absent from external interference or distractions. DESNZ argued that the ability of officials to engage effectively in such a way and to reach their conclusions on a fully informed and properly considered basis would be hindered if the information in question were to be released at this stage.
31. DESNZ noted that the Commissioner's guidance recognised that the need for a safe space was strongest when the issue is still 'live' as it was here, ie as withheld information forms an intrinsic part of the decommissioning proposals which are still being considered. Premature release could mean incorrect, out of date and unverified data and information being in the public domain, creating or leading to misinterpretation, misunderstanding and/or confusion. DESNZ argued that this would not be helpful to maintaining confidence in its decision making. Rather, it argued that early disclosure of such draft/unfinished/interim material, ahead of a decision on the appropriateness of the decommissioning proposals would impede and significantly undermine confidence in, and the integrity of, OPRED's decision making process.
32. In addition, DESNZ argued that releasing the information is very likely to seriously hinder, distract and divert OPRED resources and specialists at a critical stage of their review and decision making process. Given the current interest in the energy sector, oil companies and the Brent project specifically, it is likely to require disproportionate effort to correct or rebut misunderstandings, misinterpretations, and misleading impressions caused by draft or out date or selected information of a highly specialised and technical nature, being viewed in isolation in the public domain without the benefit of context.
33. In reaching this decision DESNZ emphasised that if a decision is taken to approve the Brent decommissioning project proposals, the final versions of the documents would be published.

Balance of the public interest

34. The Commissioner agrees that there is a public interest in disclosure of information that would increase public understanding of the Brent decommissioning process and OPRED's assessment of the materials provided by Shell, Brent's operator. As DESNZ explained to the Commissioner this decommissioning process is the most long running, complex and sensitive to date given Brent's long history and the proposal to leave some installations in the marine environment. The Commissioner recognises that the proposals have drawn considerable interest from NGOs, the media and the public. In the Commissioner's view disclosure of the information would provide a direct insight into recent developments in these proposals beyond the information already published by OPRED. Given the significance of the project, and the potential environmental impacts, the Commissioner accepts that the public interest in disclosure of this information should not be underestimated.
35. With regard to the public interest in maintaining the exception, the Commissioner accepts that there is clear need for OPRED to have a safe space to consider these proposals and continue to consult on them away from external interference. Disclosure of the information, which is detailed, lengthy and technical, would, the Commissioner accepts be likely to result in questions and queries to OPRED that would have to be addressed, particularly given the significance and external interest in this project. The Commissioner accepts that addressing this external interest would directly interfere with OPRED's safe space to consider the proposals and undermine the efficiency of its decision making process. Such arguments, given the ongoing nature of the decommissioning assessment process, therefore deserve significant weight.
36. In terms of DESNZ's concerns that disclosure of the information may result in the disclosure of misleading information, the Commissioner is generally sceptical of such arguments. As his guidance on this exception notes:

'In most cases we [ie the Commissioner] do not consider that this argument carries any significant weight because it should generally be possible for you [ie the public authority] to put the disclosure into context. You should usually be able to provide an explanation if, for example, incomplete data contained errors or provisional estimates, or a draft differed significantly from a final version.

The argument would only carry some weight if the information would create a misleading or inaccurate impression and there were particular circumstances that would mean it would be difficult or require a disproportionate effort to correct this impression or provide an

explanation. Examples of this could include where the explanation could only be provided by an employee who is no longer employed by you, or you do not hold the final or corrected information. Another example may be where you have received the information from an external source and are not sure of the accuracy or the legitimacy of that information.⁴

37. However, in the circumstances of this case given the volume of withheld information contained in the five documents, and the very technical and specialised nature of the information, the Commissioner accepts that there is some legitimacy to DESNZ's argument that information could be misinterpreted. Moreover, the Commissioner accepts that to correct this, given the nature of the material, would require a disproportionate effort to do so. The Commissioner also accepts that such efforts would distract from and risk undermining OPRED's processes. As a result in the particular circumstances of this case, the Commissioner does accept that some weight should be given in balancing the public interest to the risk that information will be misunderstood or misinterpreted given the impact of for addressing such consequences of disclosure.
38. In conclusion, whilst the Commissioner accepts that are strong public interest arguments in disclosure, in his view these are outweighed, even taking into account the presumption in favour of disclosure, by the greater public interest in allowing OPRED's assessment of the decommissioning proposals to continue as effectively as possible.

⁴ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/regulation-124d-eir/#whataboutmisleading>

Right of appeal

39. 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

40. 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.
41. 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

Jonathan Slee
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