

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

### **Decision notice**

**Date:** 02 September 2013

**Public Authority:** Department of Energy and Climate Change  
**Address:** 3 Whitehall Place  
London  
SW1A 2AW

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

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1. The complainant has requested copies of field development plans and details of extended well test periods for a specific licence (PEDL 133) and any field development plans submitted to DECC for coal bed methane, shale gas or underground coal gasification developments. DECC disclosed the information within the field development plans it considered to be information on emissions but withheld the remaining information on the basis of regulation 12(5)(e).
2. The Commissioner's decision is that DECC has correctly applied this exception to withhold the information in the field development plans and the public interest favours maintaining the exception.
3. The Commissioner requires no steps to be taken.

#### **Request and response**

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4. On 26 October 2012, the complainant wrote to DECC and requested information in the following terms:

*"I'm writing to you to request copies of the field development plans for license PEDL 133, for AIRTH COAL BED METHANE DEVT (Field approved under licence number: .327)*

*I would also like to request copies for all field development plans that have been submitted to DECC for any Coal Bed Methane, Shale Gas or Underground Coal Gasification developments."*

5. DECC acknowledged this request on 29 October 2012 and subsequently the complainant wrote again to DECC to add some further questions to his request. The complainant asked:

*"Could I receive details of any Extended Well Test periods for the above PEDL license (PEDL 133). For any Extended Well Test Periods could I receive copies of the monthly gas and water production figures the licensee holder supplied to DECC."*

6. On 21 November DECC responded to explain it was extending the time limit for responding to the request in order to consider the public interest test in relation to sections 22, 41 and 43 of the Freedom of Information Act 2000 (FOIA). DECC also explained it would include an answer to the supplementary question asked on 29 October 2012 in its response.
7. DECC responded to the request on 21 December 2012 and explained the request had been considered under both the FOIA and the EIR. DECC referred the complainant to some relevant field development plans (FDPs) available online<sup>1</sup> and considered these plans exempt on the basis of section 21. For the more recent FDPs DECC explained these would also be published on this website and were therefore exempt on the basis of section 22 of the FOIA. For the remaining FDPs DECC considered sections 41 (information provided in confidence) and 43 (commercial interests) provided a basis for withholding the information.
8. DECC also stated that for any information within the FDPs which was environmental it considered regulations 12(5)(d) and 12(5)(e) would apply. Finally, DECC confirmed no information was held in relation to the additional question asked regarding Extended Well testing.
9. The complainant requested an internal review on 11 January and stated he did not consider information was reasonably accessible via the link provided in the refusal notice as there were subscription costs. The complainant was also concerned no public interest test had been carried out in relation to the section 22 exemption. The complainant also raised concerns that it was likely some of the information in the FDP's would be information on emissions and therefore required to be disclosed as regulation 12(5)(e) would not apply.
10. Following an internal review DECC wrote to the complainant on 8 February 2013. It stated that it accepted section 21 would not apply and

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<sup>1</sup> [www.onshoreuk.com](http://www.onshoreuk.com)

provided the 2 FDPs that had previously been withheld under this exemption in their entirety . DECC explained there were five FDPs it had withheld on the basis of section 22 and it now also agreed that section 22 was not applicable. However, DECC maintained that these five FDP's were still exempt from disclosure on the basis of section 41 and 43(2) of the FOIA.

11. With regard to the issue of any information on emissions within the FDPs, DECC identified that information on fracking and flaring operations within the FDPs would be information on emissions and it provided the complainant with the information from the five remaining FDPs it identified as information on emissions.

### **Scope of the case**

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12. The complainant contacted the Commissioner on 26 February 2013 to complain about the way his request for information had been handled.
13. The Commissioner considered that it was likely all of the information in the FDPs was environmental and should have been considered under the EIR. He therefore contacted DECC who accepted the information was all environmental. In addition to this DECC cited a further exemption – regulation 13(1) – as a basis for withholding any personal data contained within the FDPs.
14. On this basis, the Commissioner considers the scope of his investigation to be to determine if DECC has correctly withheld the five remaining FDPs on the basis of regulation 12(5)(d) and (e) and 13(1) of the EIR.

### **Background**

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15. DECC is responsible for allocating and administering licences for exploration, development and production of hydrocarbons. UK onshore licences are Petroleum Exploration and Development Licences (PEDL).
16. The documentation required for new oil and gas field authorisations is the FDP. This should provide a summary description of the development and the principles and objectives that will govern its management. FDPs will generally include details of all activities and processes required to develop a field including environmental impact, geology, engineering, well design, economics and risk assessment.

## Reasons for decision

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### Regulation 12(9) – information on emissions

17. Before considering the application of the exceptions the Commissioner considered whether there was any further information in the five FDPs which is information on emissions.
18. Regulation 12(9) provides that public authorities cannot rely on the exceptions at regulations 12(5)(d) – (g) if the information relates to information on emissions.
19. DECC has identified information on emissions within the FDPs and has considered this to be the information on fracking and flaring which is clearly information on emissions into the environment.
20. The Commissioner queried whether any further information in the FDPs would be information on emissions given that some of the withheld information relates to gases and drilling. DECC pointed out the recent guidance from the Commissioner on emissions<sup>2</sup> which had narrowed the interpretation of regulation 12(9) and therefore the situation in which that provision would apply. DECC had considered this guidance when determining the information on emissions in the FDPs that had been disclosed and had concluded that the remaining information in the FDPs was on a measure likely to affect the environment, so was environmental information to be considered under the EIR, but was not information on emissions.
21. The Commissioner has looked at the information in the FDPs to determine if any further information could be information on emissions. Whilst there are references to gases throughout the FDPs the Commissioner has been mindful that his guidance generally considers emissions as being:
  - The by-product of an activity or process;
  - Which is added (or potentially added) to and affecting the elements of the environment;

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[http://www.ico.org.uk/for\\_organisations/guidance\\_index/~media/documents/library/Environmental\\_info\\_reg/Detailed\\_specialist\\_guides/information-on-emissions-eir-guidance.ashx](http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Detailed_specialist_guides/information-on-emissions-eir-guidance.ashx)

- Over which any control is relinquished.
22. In this case references to gas extraction in the remaining withheld information are mostly in reference to part of a controlled process and based on the above criteria would not qualify as information on emissions.
23. In recent decisions<sup>3</sup> the Commissioner has considered similar issues and the narrower interpretation of the scope of regulation 12(9) and concluded that only the information directly on the emissions into the environment is within the scope of regulation 12(9), not the more indirectly linked information.
24. The Commissioner accepts that the remaining information in the FDPs is not information on emissions and the exceptions cited by DECC are applicable to the information in question. The Commissioner has therefore gone on to consider whether the exceptions have been correctly applied.

### **Regulation 12(5)(e) – confidentiality of commercial information**

25. The withheld information identified by DECC is:
- Airth FDP – Composite 14 November 2006 (disclosed with minor redactions under regulation 12(5)(d) and (e));
  - Airth FDP Addendum – DART 27 June 2012 (withheld under regulation 12(5)(d) and (e));
  - Doe Green – Nexen 16 December 2008 (withheld under regulation 12(5)(d) and (e));
  - Potteries – Nexen 12 March 2009 (withheld under regulation 12(5)(d) and (e)); and
  - Llangeinor – UK Methane 30 May 2011 (withheld under regulation 12(5)(d) and (e)).
26. Regulation 12(5)(e) of the EIR states that a public authority can refuse to disclose information if to do so would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.

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<sup>3</sup> e.g. ICO decision notice FER0436344

27. When assessing whether this exception is engaged the Commissioner will consider the following points:

- Is the information commercial or industrial in nature?
- Is the information subject to confidentiality provided by law?
- Is the confidentiality required to protect a legitimate economic interest?
- Would the confidentiality be adversely affected by disclosure?

*Is the information commercial or industrial in nature?*

28. The Commissioner considers that for information to be commercial or industrial in nature it will need to relate to a commercial activity. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for a profit.

29. DECC considers the information to be commercial or industrial in nature as the FDP's relate to a commercial activity. The FDPs contain information such as the estimates of field reserves and potential, development costs and contractor remuneration and production forecasts. DECC consider that this information ultimately affects the value of the company which holds the licence.

30. The Commissioner accepts that the nature of the FDPs is commercial as they are intended to set out a company's plan as to how it will develop a field which is a clear business activity with a commercial gain and the information is commercial in nature.

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

31. With regard to this element of the exception the Commissioner will consider if the information is subject to confidentiality provided by law, which may include confidentiality imposed under a common law duty of confidence, contractual obligation or statute.

32. DECC explained to the Commissioner that there are model clauses prescribed by legislation which apply to PEDL licences and place the Minister under an obligation to treat FDPs as confidential for a period of six years.

33. The Commissioner has identified the relevant model clause as being Schedule 8 of The Petroleum (Current Model Clauses) Order 1999<sup>4</sup>. Paragraph 28 of this Order relates to the confidentiality of reports and states that any information which a licensee is required to provide under the provisions of the licence "*shall not ... be disclosed at any time to any person not in the service or employment of the Crown.*" However this section does then go on to state at paragraph 28(iv) that the Minister "*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 Minister received the data or after the expiration of such longer period as the Minister may determine after considering representations made to him by the Licensee.*"
34. Taking this into account the Commissioner is satisfied there is a confidentiality provided by law, particularly in respect of any FDPs within the five year period set out in the model clause. The Commissioner acknowledges that the model clause is drafted in such a way that even if the FDP falls outside the five year period there is still an obligation of confidence provided by law inherent in the model clause. As such he is satisfied the information in the FDPs was imparted in circumstances importing an obligation of confidence.

*Is the confidentiality required to protect a legitimate economic interest?*

35. The Commissioner considers that to satisfy this element of the exception disclosure would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. In the Commissioner's view it is not enough that some harm might be caused by disclosure. The Commissioner considers that it is necessary to establish on the balance of probabilities that some harm *would* be caused by the disclosure.
36. DECC argues that the confidentiality is designed to protect the legitimate economic interests of the commercial companies who submitted the FDPs to DECC and the disclosure of the information would significantly adversely affect the economic interests of these companies and their contractors.
37. DECC explained that as the FDPs contain information on the estimates of field reserves and potential, development costs, contractor remuneration and production forecasts if these sensitive commercial issues were shared with competitors it would harm each company's business; this

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<sup>4</sup> <http://www.legislation.gov.uk/ukxi/1999/160/schedule/8/made>

would affect both the value of the company which holds the licence and that of its contractors. To justify this proposed prejudice further, DECC explained that the companies to which the unpublished FDP's relate are currently seeking funding for their project and making the information available to competitors could put these companies at a commercial disadvantage and affect their ability to obtain funding.

38. In respect of any prejudice caused to a third party, the Commissioner will not accept speculation from a public authority regarding harm to the interests of third parties without evidence that the arguments genuinely reflect the concerns of the third parties involved. In this case, the public authority did consult with the companies who submitted the FDPs and provided evidence of their concerns which demonstrates that the prejudice argued reflects the genuine concerns of the companies.
39. Of the comments submitted by the companies the Commissioner has taken particular note of the argument that the commercial sensitivity of the information would usually decrease in time but as the work had not commenced on the FDP the sensitivity was particularly high. Similarly the companies reiterated the importance of the non-disclosure agreement to the commercial content of the FDPs and the adverse impact on discussions on onshore operations that would result in disclosure of a live FDP. One company stressed the commercial benefits the information may have to competitors, particularly where the FDPs contain information on geological assessments and the most promising areas. As the FDPs require significant negotiations with numerous stakeholders over the first five-year term the disclosure of a live FDP could compromise a company's negotiating position.
40. After considering the arguments put forward by DECC and the comments made in consultation with the companies the Commissioner accepts that the withheld information consists of information which is of commercial value and which, if disclosed, may impact a company's commercial interests, particularly its ability to negotiate with stakeholders and to operate in a competitive environment. This would harm the legitimate interests and as such the Commissioner accepts that disclosure of the withheld information would be likely to prejudice the commercial interests of these companies.

*Would confidentiality be adversely affected by disclosure?*

41. As the first three elements of the test have been established, the Commissioner is satisfied that disclosure into the public domain would adversely affect the confidential nature of that information by making it publicly available and would consequently harm the legitimate economic interests of the companies. He therefore concludes that the exception at regulation 12(5)(e) is engaged in respect of the withheld information

and has gone on to consider whether in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosure of the requested information.

### Public interest test

#### *Public interest arguments in favour of disclosing the information*

42. DECC has recognised there is a public interest in transparency of the licence process and disclosure of the information from the remaining FDPs would assist in increasing transparency of this process.
43. The complainant argues that in relation to the FDPs covering a development in Airth there is a planning application in place and if successful, this will be the first production facility of unconventional gas in the UK. As such the complainant states this proposed development has attracted considerable public interest.
44. The complainant considers that it is therefore in the public interest for members of the public and elected representatives to have a full set of information regarding the development of the field and not just that in the planning application in order to be able to effectively contribute to any discussions during the planning process.

#### *Public interest arguments in favour of withholding the information*

45. DECC strongly argues that the disclosure of the withheld information would undermine confidence as commercial information would become available to competitors. This would significantly undermine the position of the operators and licence holders for the field in question. DECC considers that this could adversely affect company valuations on the stock market.
46. DECC argues that, as a consequence, operators will become wary of providing full and detailed costing information about their projects if they know that the information is liable to be made publicly available once it has been submitted to DECC. DECC states that this information is essential in order for it to be able to ensure that maximum economic recovery from a field is being achieved.
47. DECC states that its discussions with companies often focus on whether incremental investments and the benefit achieved in incremental recovery are commercially viable. DECC therefore needs to ensure that the full economic potential of a field is being realised the assessment of which requires the sharing of cost and production data. DECC argues that disclosure of the information in the FDPs could impact on the production of this data and DECC's ability to ensure economic recovery, which would not be in the public interest.

*Balance of the public interest arguments*

48. The Commissioner has considered all these arguments. He considers that arguments in favour of maintaining an exception must always be inherent in the exception that has been claimed. The interests inherent in regulation 12(5)(e) are the public interest in avoiding commercial detriment and the public interest in protecting the principle of confidentiality.
49. There is a particular public interest in the subject of the request in this case because the issue of the exploration and production of hydrocarbons has generated a lot of media and citizen interest. The Airth development in particular has generated both local and national interest. Usually the Commissioner would attach weight to the argument that disclosure of the withheld information will help to engage the public and ensure transparency. He does so in this case, but he also recognises there are counter arguments.
50. DECC has already disclosed the majority of the Airth FDP from 2006 as the non-disclosure period has since passed. The only information remaining in this document which has been withheld under regulation 12(5)(e) is that where specific figures are quoted such as estimated production rates and costs. The release of the majority of this FDP has gone some considerable way to assisting public understanding of the proposal.
51. DECC has already disclosed the information about fracking and flaring which was contained in the FDPs. This is likely to be the information of most interest to the public and the media. Therefore the Commissioner considers the strength of any argument in favour of disclosure of the remaining information in the FDPs to be reduced.
52. The express non-disclosure agreement in the Model Clause Order is important and the Commissioner apportions significant weight to this. There is a legislative requirement for DECC to keep confidential the FDPs and the Commissioner is of the view that there is therefore a strong public interest in maintaining the confidentiality provided by law.
53. The Commissioner also accepts that disclosing this information could have a detrimental effect on the interests identified in the exception. He considers the argument that disclosing the information in the FDPs whilst the process is still 'live' and the companies involved are still finalising funding arrangements could impact on these companies' commercial interests. The Commissioner accepts that the disclosure of this information may provide competitors with information which could undermine the companies' positions. He does not consider that it would

be in the public interest to disclose information which could damage a company's commercial interests and its negotiating position with DECC.

54. That being said, the Commissioner does not consider the argument that disclosure could potentially lead to companies not including as much on costs and production data leading to DECC being unable to ensure economic potential is realised to carry much weight. DECC has not provided any further detail to support this and the Commissioner considers that even if the information in the FDPs was to be disclosed it would still be in a company's best commercial interests to include full details in future FDPs in order to obtain PEDL licences. As DECC has provided no evidence to suggest there is a real possibility of this the Commissioner does not give this argument significant weight.
55. The Commissioner does accept that there is always a public interest in ensuring that public authorities are transparent and able to demonstrate they are acting appropriately and in the best interests of the public. It is important that public authorities are accountable for the decisions they make and the money they spend and generate.
56. The Commissioner is of the view that, whilst there are strong public interest arguments on both sides, the public interest in disclosure is, in all the circumstances of the case, outweighed by the public interest in maintaining the exception. In reaching this decision he has placed considerable weight on the fact that the FDPs are all still live and within the period set out in secondary legislation during which confidentiality is assured. He notes that DECC has demonstrated by disclosing the majority of the Airth FDP from 2006 that it is willing to provide most of the information from the FDPs once the non-disclosure period has passed. However, the Commissioner is satisfied that, in response to this request at this time, DECC correctly withheld the information under regulation 12(5)(e) of the EIR.
57. The Commissioner has therefore not gone on to consider the application of regulation 12(5)(d).

## Right of appeal

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58. 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: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

59. 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.
60. 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 .....**

**Graham Smith**  
**Deputy Commissioner**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
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