

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

**Decision notice**

**Date:** 16 November 2018

**Public Authority:** The Oil and Gas Authority  
**Address:** 21 Bloomsbury Street  
London  
WC1B 3HF

**Decision (including any steps ordered)**

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1. The complainant has requested information relating to the decision not to extend a petroleum exploration licence granted to Xcite Energy Resources for Bentley Field and to subsequently grant a 4 year licence extension for the same field to Whalsay Energy Limited a company owned by the holders of the bonds in Xcite Energy Resources. The public authority disclosed some of the requested information and withheld the remainder relying on the exemptions at sections 36(2)(b)(ii), 36(2)(c), 40(2), 41(1), 43(2) FOIA and, the exceptions at regulations 12(5)(c), 12(5)(e), 12(5)(f) and 13 EIR.
2. The Commissioner's decision is that:
  - The withheld information is environmental information within the meaning of regulations 2(1)(a), 2(1)(b), 2(1)(c) and 2(1)(e) EIR,
  - The public authority was entitled to withhold the withheld information on the basis of the exception at regulation 12(5)(e) EIR and,
  - The public authority breached regulation 11(4) EIR.
3. No steps are required.

## Request

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4. Until 2017, Xcite Energy Resources (Xcite) was the sole licensee of licence P1078, a petroleum exploration licence. Xcite had held the licence since 2003, and had been granted five extensions to the licence term, totalling 5 years and 9 months.
5. On 5 December 2016 the Court in the British Virgin Islands appointed FTI as liquidator of Xcite Energy Ltd (XEL), the parent company of Xcite. Subsequently, FTI agreed to sell XEL's shares in Xcite to Whalsay Energy Holdings (WHEL) a company owned by the holders of the bonds in Xcite. WHEL then changed the name of the company holding licence P1078 from Xcite to Whalsay Energy Limited (Whalsay). On 16 May 2018, Whalsay sent a letter to the public authority applying to extend the licence. Subsequently the public authority agreed to extend the licence term until 30 June 2021.
6. On 22 July 2017 the complainant wrote to the public authority in relation to the handling of XEL's applications to extend licence P1078 primarily expressing his dissatisfaction. On 16 August 2017 the public authority informed the complainant that it had concluded that his letter of 22 July included a request for the following information:

"A copy of the correspondence provided to the OGA by Whalsay in relation to Whalsay's extension request."

7. The public authority explained that it had identified the request above from the following statement in that letter:

"You have said in your latest communication:

The OGA considered representations made by Whalsay in which they set out how they intend to use the extension to maximise the value of economically recoverable petroleum from the Licence acreage. The OGA also considered evidence of Whalsay's ability to deliver on those intentions, including in particular, their financial standing and an integrated work programme.

This is ludicrous. What "representations"?"

8. The public authority subsequently issued its response to the request on 14 September 2017. It confirmed that it held the information requested which it considered exempt on the basis of the exemption at section 43(2) FOIA and the exception at regulation 12(5)(e) EIR.

9. The complainant requested an internal review of this decision on 22 September 2017.
10. The public authority wrote to the complainant with details of the outcome of the internal review on 1 March 2018. It explained that it held the following information: "three powerpoint presentations delivered to the OGA by Whalsay Energy Holdings Limited, a submitted Working Capital Facility (which details exact costs, liabilities, and commitments) and Whalsay's application letter."
11. The public authority disclosed redacted copies of the presentations and the application letter. The Working Capital Facility was withheld in full. The redacted information and the Working Capital Facility were considered exempt on the basis of sections 36(2)(b)(ii), 36(2)(c), 41(1), 43(2) FOIA and, regulations 12(5)(e), 12(5)(f).

### **Scope of the case**

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12. The complainant originally contacted the Commissioner on 28 April 2018 to complain about the public authority's handling of his request primarily the decision to withhold the remaining information held by the public authority within the scope of his request.
13. The public authority reconsidered its response following the complaint to the Commissioner and on 30 August 2018 it disclosed additional information to the complainant from Whalsay's application letter dated 16 May 2017 and Whalsay's presentation to the public authority dated June 2017. It also sought to additionally rely on the exemption at section 40(2) FOIA and the exceptions at regulations 12(5)(c) and 13 EIR.
14. The scope of the Commissioner's investigation therefore was to determine whether the public authority was entitled to rely on sections 36(2)(b)(ii), 36(2)(c), 40(2), 41(1), 43(2) FOIA and, regulations 12(5)(c), 12(5)(e), 12(5)(f) and 13 EIR.

### **Reasons for decision**

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#### **The withheld information**

15. For clarity, the withheld information comprises of the following information:

- Information redacted from letter dated 16 May 2017 (Whalsay's application letter)
  - Information redacted from Whalsay's PowerPoint presentations to the public authority dated 15 March 2017 and June 2017 respectively.
  - XER 2016 Activities Review
  - Working Capital Facility (WCF)
16. Following the complaint to the Commissioner the public authority submitted that upon further consideration, it did not consider that the WCF falls within the scope of the request. It argued that the word "What representations?" in the complainant's letter of 22 July 2017 was in substance a request for correspondence provided to the public authority by Whalsay in relation to its request for an extension of the licence term. Having considered the matter further, it did not consider that a copy of the WCF which is a loan agreement and the information contained in that agreement do in fact constitute "representations" within the meaning of the complainant's request as correctly interpreted. The WCF contains no statements made by Xcite/Whalsay of the type that could be described as representations. Rather, it simply consists of the terms of the agreement which are not statements directed at the public authority.
17. The Commissioner explained to the public authority that she did not share this view. In the Commissioner's view the WCF falls within the scope of the request by virtue of the fact that it was provided to the public authority by Whalsay pursuant to the application to extend licence P1078. The WCF has been requested because of its character and not necessarily its content alone. It has been requested because it was part of Whalsay's representations in support of its application to extend licence P1078 which the public authority subsequently granted. It is clear from the complainant's statement that he would like to see the information the public authority considered pursuant to Whalsay's application to extend licence P1078.
18. Since the public authority had withheld the WCF in any event, the scope of the Commissioner's investigation inevitably extended to whether it was entitled to withhold the WCF.

### **Applicable access legislation**

19. The public authority considers that the EIR applies to some of the withheld information within the scope of the request. It considers that not all of the information "could reasonably be classified as

environmental information” and the FOIA therefore applies to the rest of the information it has deemed non-environmental on the basis that it does not constitute environmental information within the meaning of regulation 2(1) EIR.<sup>1</sup> The public authority has set out in an Annex to its submissions to the Commissioner the information it has concluded is environmental and that which it has concluded is non-environmental.

20. It submitted that the environmental information falls within the meaning of environmental information in regulation 2(1)(a) EIR.
21. It explained that it had taken into account the fact that the term “environmental information” must be interpreted broadly, the Commissioner’s guidance and, recent caselaw in which the Upper Tribunal and Court of Appeal have made clear that if there is only a minimal connection to an environmental factor the information is not environmental information.<sup>2</sup>
22. Having carefully considered the withheld information against the backdrop of the request itself the Commissioner has concluded that the information in its entirety is environmental information within the meaning of regulation 2(1) EIR.
23. The request was submitted pursuant to an application by Whalsay to extend licence P1078, a petroleum exploration licence. The withheld bundle contains information directly linked to the elements and factors in regulations 2(1)(a) and 2(1)(b) FOIA. The Commissioner considers that the information in the withheld bundle not directly linked to the elements and factors such as information relating to Whalsay’s business strategy and funding is information concerning or relating to plans and activities relating to petroleum exploration which are likely to affect the elements and factors. It is also information concerning or relating to cost-benefit and other economic analyses and assumptions within the framework of those plans and activities likely to affect the elements and factors. The Commissioner considers that this approach is supported by the Court of Appeal’s judgment in the Henny decision, in particular the reasoning at paragraphs 37 – 40 of that judgement.

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<sup>1</sup> The full text of regulation 2(1) is available here:  
<http://www.legislation.gov.uk/ukxi/2004/3391/regulation/2/made>

<sup>2</sup> BEIS v ICO and Henny [2017] EWCA Civ 844 (the Henny decision) and DVT, DVSA, Porsche Cars and Cieslink [2011] UKUT 127 (AAC).

24. The Commissioner does not share the view that the information the public authority considers to be non-environmental is minimally connected to the elements and factors. The Commissioner considers that in the context of a request for an application to extend a petroleum exploration licence, the information relating to Whalsay's business strategy and funding which was provided to the public authority pursuant to that application would inform the public about matters affecting the environment.
25. The Commissioner therefore finds that the withheld information is environmental information within the meaning of regulations 2(1)(a), 2(1)(b), 2(1)(c) and 2(1)(e) EIR.

### **Application of Regulation 12(5)(e)**

26. Having concluded that the withheld information is environmental the Commissioner has gone on to consider whether the public authority was entitled to rely on the exceptions at regulations 12(5)(c), 12(5)(e), 12(5)(f) and 13 EIR. She has initially considered the application of the exception at regulation 12(5)(e) which the public authority has applied to the withheld information in full in the alternative to the FOIA exemptions.
27. Regulation 12(5)(e) states:
- "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."<sup>3</sup>

#### *Public authority's submissions*

28. The public authority's submissions are summarised below.
29. It acknowledged that in order to successfully engage the exception, it will need to establish that:
- The withheld information is commercial or industrial in nature,
  - The withheld information is confidential under the common law of confidence , contract or a statutory bar,

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<sup>3</sup> <http://www.legislation.gov.uk/ukxi/2004/3391/regulation/12/made>

- The confidentiality is protecting a legitimate economic interest, and
  - The confidentiality would be adversely affected by disclosure.
30. The public authority considers that the withheld information "is all commercial or industrial in nature [because] it relates to levels of oil reserves, possible equipment and drilling and recovery methods etc."
31. It considers that the withheld information is subject to the common law duty of confidence. It submitted that the information is not trivial and that as evidenced in its correspondence with the public authority, Whalsay has a genuine interest in the contents remaining confidential since to disclose it would cause detriment to Whalsay. All of the information is clearly marked commercially sensitive and confidential by Whalsay. In addition, a licence condition of Xcite's licence provides that any information which the licensee is or may be from time to time required to furnish under the provisions of the licence shall not without consent (not to be unreasonably withheld) be disclosed to any person not in the service or employment of the Crown.
32. The public authority therefore argued that disclosure of the withheld information would be more likely than not to harm Whalsay's economic interests. This is because should competitors and suppliers of Whalsay be able to see the information, they would be able to undercut or increase costs of equipment, supplies and services to Whalsay, copy technology and procedures and estimate production levels, yields and profits. Disclosure could have disadvantaged Whalsay at the time of the request and currently by giving third parties greater insights into their business than is usual in such commercial relationships and place contractors/infrastructure owners in an advantageous bargaining position to be able to extract more value from that commercial relationship than would otherwise have been the case.
33. Furthermore, the timelines set out Whalsay's plans at the time of application for the licence extension and how those plans were progressing. As at the time of the request that was commercially sensitive information which would have disclosed Whalsay's strategy and could have put the plan/timelines in jeopardy and weakened Whalsay's bargaining position.
34. Additionally, if the plans did not go as planned (for legitimate reasons) there could be damage to investor confidence not just in Whalsay (which would have been particularly sensitive at the time given the circumstances in which it acquired the licence) but also in the UK continental shelf more generally.



35. In relation to who Whalsay was intending to work with, this still had not been completed as at the date of the request. The world which Whalsay works and operates in is very small and extremely competitive and disclosure could, by a process of elimination, identify those who Whalsay were seeking to work with and would have been likely to again damage its bargaining position.
36. Summing up, it drew attention to the Information Tribunal's comments in *Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association*<sup>4</sup> that disclosure of truly confidential information into the public domain would inevitably harm the confidential nature of that information and would also harm the identified legitimate interests.
37. With respect to the balance of the public interest, the public authority acknowledged that there is a general public interest in transparency and accountability.
38. It however argued that there is a strong public interest in ensuring that companies can have confidence that their commercially confidential information will not be disclosed.
39. There is also a strong public interest in the public authority being able to fulfil its principal objective of maximising economic recovery of petroleum. This might not be possible if licensees and other parties are reluctant to provide information voluntarily and engage in free and frank discussions with the public authority for fear that commercially confidential information might be disclosed.

#### *Complainant's submissions*

40. The complainant's submissions in support of disclosure are reproduced below.
41. "The OGA and DECC made a decision to give Xcite Energy a final 6 month extension on its licence which was reported to shareholders (and the world) in February 2016. This was precisely the time that Xcite was urgently attempting to secure finance to repay a secured loan set to expire in June 2016. The whole industry was struggling to secure finance at that time.

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<sup>4</sup> EA/2010/0012



42. Certainly, in partial consequence of the DECC/OGA licence being available for only that short time, Xcite failed to obtain financial or other backing from third parties and the secured lender called up the loan last year and liquidated the Company.
43. The secured (and still anonymous) lenders then ousted the Directors of Xcite, appointed replacement Directors of their choosing, changed the name of Xcite Energy to Whalsay, extinguished the shares of shareholders such as myself and, during this process persuaded the OGA to grant a new minimum 4 year oil licence for the Bentley Field to Whalsay.
44. Whalsay Energy has made no progress towards developing the Bentley oil field and has been sitting on its licence. It states on its website that they are in the lucky position of having a minimum licence period of 4 years which is 'a realistic time horizon for us to attract suitable partners and a field operator, enabling delivery of Bentley field development plan.' However, .....my Company was not allowed a similar 'realistic time horizon' regardless of the fact that we expended huge sums of money in proving up a massive, development-ready oil field."
45. The public authority disagreed with the view that Xcite "was not allowed a similar realistic time horizon" or that Whalsay was granted a hugely favourable, minimum 4 year licence extension. It explained that Xcite had held licence P1078 since 2003 and had undertaken various work programmes in that time to understand the potential of the licensed area and how it might be developed.
46. However, despite having been granted five extensions to the relevant term in the licence totalling five years and nine months, Xcite had been unable to bring forward an approvable Field Development Plan which was required in order for the licence to pass into the production period.
47. Furthermore, as Xcite had yet to develop the licensed area and had been unable to meet its obligations to secured bondholders and other creditors, the Courts in the British Virgin Islands appointed FTI as liquidator of XEL on 5 December 2016. However, it is not the case that the public authority decided not to extend the licence and the licence lapsed. The licence itself is still valid and held by the same licensee albeit that licensee has a different name and is controlled by different shareholders.

## **Commissioner's considerations**

### *Is the exception engaged?*

48. The Commissioner has considered whether the exception is engaged with reference to the four criteria which must be met, namely; the information is commercial or industrial in nature, the information is subject to a duty of confidence under either the common law of confidence, contract, or a statutory bar, the confidentiality is protecting a legitimate economic interest and, that economic interest and thereby its confidentiality would be adversely affected by disclosure of the information.
49. The Commissioner is satisfied that the withheld information is commercial or industrial in nature for the reasons set out by the public authority.
50. The Commissioner considers that the withheld information is subject to the common law duty of confidence for the reasons set out by the public authority. For the avoidance of doubt, she has seen correspondence between the public authority and Whalsay in relation to the commercial sensitivity of the withheld information.
51. The Commissioner considers that to satisfy the third criterion, 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.
52. The Commissioner accepts that disclosure of the withheld information would adversely affect Whalsay's legitimate economic interests for the reasons set out by the public authority.
53. The Commissioner further accepts that the disclosure of truly confidential information into the public domain would invariably harm the confidential nature of that information. In other words, if the first three criteria are met then the exception will be engaged. Consequently, she has concluded that the public authority was entitled to engage the exception at regulation 12(5)(e).

### *Public interest test*

54. In common with all EIR exceptions, the exception at regulation 12(5)(e) is subject to the public interest test set out in regulation 12(1)(b) EIR. Therefore, the Commissioner has considered whether in all the

circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the withheld information.

55. In addition to the general public interest in transparency and accountability, the Commissioner is mindful of the requirement in regulation 12(2) EIR that a public authority should apply a presumption in favour of disclosure.
56. The withheld information would clearly inform the public about matters relating to petroleum exploration in particular considerations pertinent to obtaining a petroleum exploration licence.
57. The Commissioner however considers that there is a stronger public interest in not disclosing information which would adversely affect Whalsay's commercial interests in a small but very competitive field.
58. Although she shares the view that there is also a public interest in free and frank discussions between the public authority, licensees and other parties, the Commissioner does not consider that this interest is inherent in the exception at regulation 12(5)(e) which is designed primarily to protect the confidentiality of commercial or industrial information.
59. Nevertheless, the Commissioner is satisfied that the public interest in protecting Whalsay's commercial interests is sufficiently strong in this case to outweigh the public interest in disclosing the withheld information.
60. The complainant, a shareholder in Xcite Energy, is clearly unhappy with the public authority's decision not to extend XEL's petroleum exploration licence for Bentley Field and to subsequently grant a 4 year licence extension for the same field to Whalsay a company owned by the holders of the bonds in Xcite. However, his suggestion that there were irregularities in the decision not to extend XEL's licence and grant Whalsay a new licence extension is unsubstantiated in the Commissioner's view. She is also mindful of the public authority's persuasive rebuttal of the complainant's allegations. Consequently, the Commissioner does not consider that the public interest in disclosure in light of those allegations tips the balance against the strong public interest in not disclosing the withheld information.
61. The Commissioner therefore finds that in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure.

62. The Commissioner did not consider the applicability of the remaining exceptions in view of her finding that the public authority was entitled to rely on regulation 12(5)(e).

**Procedural matter**

63. By virtue of regulation 11(4) EIR, a public authority may take up to 40 working days to conduct an internal review. The complainant's internal review request of the public authority's original decision was submitted on 22 September 2017. The public authority issued the outcome of the review on 1 March 2018.
64. The Commissioner therefore finds the public authority in breach of regulation 11(4) EIR.

## Right of appeal

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65. 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)

66. 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.
67. 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 .....**

**Gerrard Tracey**  
**Principal Adviser**  
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