

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

Decision notice

Date: 22 May 2013

Public Authority: Foreign and Commonwealth Office
Address: King Charles Street
London
SW1A 2AH

Decision (including any steps ordered)

1. The complainant requested information in relation to the salvage operation and compensation claims made following the sinking of a vessel in Nightingale Island, Tristan da Cunha which is part of the British Overseas Territory of Saint Helena, Ascension, and Tristan da Cunha.
2. The Commissioner's decision is that, other than the chain of emails from 31 March 2011 (15:23) to 4 April 2011 (16:15), the public authority was entitled to withhold all the information that it did not disclose to the complainant at time of the request and during the course of his investigation on the basis of the exceptions at regulations 12(4)(e) (internal communications), 12(5)(a) (international relations), 12(5)(b) (the course of justice), 12(5)(e) (confidentiality of commercial information) and 13 (personal data).
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the chain of emails from 31 March 2011 (15:23) to 4 April 2011 (16:15) subject to the application of the exception at regulation 13 to the names therein.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as contempt of court.

Request and response

5. On 21 July 2011, the complainant wrote to public authority and requested information in the following terms:

'I would like to submit a request under the terms of both the FOIA and EIR seeking all information held relevant to the recent sinking of the ship Oliva off Nightingale Island, Tristan da Cunha, March 2011 and the subsequent follow up operation, including liaising with island staff on and offshore, rescue authorities and any others involved, negotiations regarding compensation claims and environmental impacts. [Part 1]

In addition I would also like to request any information held on [named person], any companies linked to him, any trading or business relations and/or any previous dealings, if any, with HMG or UK defence, trade, cultural or other interests.' [Part 2]

6. The public authority wrote to the complainant on 18 August 2011 to advise that it was considering the balance of the public interest in relation to the exemptions at sections 27 (international relations) and 43 (commercial interests) FOIA. It explained that it would need another 20 working days to consider this and aimed to provide a full response by 15 September 2011. The public authority further informed the complainant that it did not hold any information within the scope of Part 2 of his request and advised him to seek the relevant information from the Department for Business, Innovation & Skills or the Department for Transport.
7. The public authority provided the outcome of its deliberations on the balance of the public interest on 10 November 2011. It provided some information within the scope of the request but refused to provide the remainder. It explained that some information had been redacted from the disclosed material. It cited the following exemptions as its basis for doing so:
- section 27(1)(a) and 27(2) FOIA – International Relations
 - section 42 FOIA – Legal Professional Privilege
 - section 43(2) FOIA – Commercial Interests.
8. On 26 November 2011 the complainant requested an internal review on the following grounds:
- No reason was given for the redaction of names from the information disclosed.

- The public authority was wrong to consider the request under FOIA rather than the EIR.
 - The seriousness of the public interest in disclosure should override any public interest in protecting international relations and commercial interests.
 - The argument in relation to commercial interest seems insufficient. It is unclear what harm would likely be caused by disclosure.
9. The complainant did not challenge the public authority's response in relation to Part 2 of his request above.
10. Following an internal review the public authority wrote to the complainant in a letter dated '1 November 2012'. It disclosed some of the information which had previously been withheld on the basis of section 43(2) but upheld the exemption in respect of the remainder. It also upheld the exemptions at sections 27(1)(a) and 27(2). The public authority additionally explained that the names redacted from the information disclosed to the complainant on 10 November had been withheld on the basis of section 40(2) (personal data) FOIA. No mention was made of the exemption at section 42 (legal professional privilege).
11. In response to the complainant's view that the EIR rather than FOIA, was the correct information access regime, the public authority explained:
- 'The FCO chose to treat your request under the Freedom of Information Act 2000 rather than the Environmental Information Regulations 2004 as this was judged to give the better and more comprehensive coverage.'*

Scope of the case

12. The complainant initially contacted the Commissioner on 3 March 2012 to complain about the way his request for information had been handled. However, due to insufficient documentation, the complaint was not accepted until 19 April 2012. The complainant maintained that the withheld information should be disclosed on the same the grounds advanced in his email of 26 November 2011 to the public authority.
13. In its submissions to the Commissioner, the public authority confirmed that it was still relying on section 42 in addition to the remaining exemptions at sections 27(1)(a), 27(2) and 40(2) and 43(2).

14. The public authority also claimed that regulations 12(5)(a), 12(5)(b), 12(5)(e) and 13 applied in the alternative if the Commissioner found that the EIR was the correct access regime.
15. During the course of the investigation, the public authority disclosed additional information to the complainant. Some of the information was disclosed because the public authority considered the exemptions/exceptions no longer applied due to the passage of time. The public authority accepted that the rest of the disclosed information did not engage the exemptions/exceptions relied on. The disclosed information does not form part of the withheld information referred to in this notice.
16. The public authority also dropped its reliance on the exception at regulation 12(5)(a) in respect of a chain of internal emails and sought to rely instead on the exception at regulation 12(4)(e) to withhold the relevant emails.
17. For reasons explained further below, the Commissioner finds that the EIR is the correct information access regime for the information withheld in respect of Part 1 of the request.
18. The Commissioner does not have any discretion whether or not to accept the late introduction of an exception by a public authority - i.e. an exception not relied on at the time of the request but subsequently claimed during the course of the Commissioner's investigation. Therefore he accepted the late introduction of regulation 12(4)(e).
19. The substantive scope of the investigation therefore was to determine:
 - whether the public authority was entitled to withhold information within the scope of Part 1 of the request on the basis of the exceptions at regulations 12(4)(e) – internal communications, 12(5)(a) – international relations, 12(5)(b) – the course of justice, 12(5)(e) – confidentiality of commercial or industrial information and 13 – personal data.

Reasons for decision

Applicable Information Access Regime

20. Regulation 2(1) of the EIR defines 'environmental information' as any information in any material form on:

'(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)'

21. The Commissioner considers that the phrase 'any information...on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, from which the EIR are derived. In the Commissioner's opinion a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor etc in question. In other words, information that would inform the public about the matter under consideration and would therefore facilitate effective participation by the public in environmental decision making is likely to be environmental information.
22. According to the public authority, on 16 March 2011, a cargo vessel the MV Oliva ran aground on Nightingale Island within the Tristan da Cunha archipelago. The vessel began to break up on the rocks shortly afterwards and started to release its heavy fuel oil and cargo of soya beans. The public authority explained that Nightingale is an important breeding site for Northern Rockhopper Penguins and other sea birds and the nearby Inaccessible Island has been granted World Heritage Status

in recognition of its important wildlife biodiversity. In addition, the fishing grounds surrounding Nightingale and Inaccessible account for around 20% of the Tristan annual lobster catch quota. The grounding of the ship therefore represented not just a threat to the internationally important wildlife and eco-habitats but also to the livelihood of the community itself.

23. It was against this backdrop that the complainant made his request in July 2011. The information within the scope of Part 1 of the request broadly relates to internal (i.e. between officials) and external deliberations in connection to the grounding of the MV Oliva, the salvage and environmental clean-up operation and compensation claims made against the vessel's insurers.
24. The Commissioner considers the information within the scope of Part 1 of the request includes information concerning or related to, the state of the elements, discharges and other releases into the environment likely to affect the elements, activities likely to affect the elements and designed to protect the elements, and the state of human health and safety, including the contamination of the food chain as they are affected by the state of the elements. He believes all of the information in scope would, in the broadest sense, facilitate effective participation by the public in environmental decision making regarding the grounding of the MV Oliva on 16 March 2011.
25. The Commissioner therefore finds that the information within the scope of Part 1 of the request is environmental information within the meaning of regulations 2(1) (a), (b), (c) and (f) of the EIR.
26. As mentioned, the public authority relied on the exceptions at regulations 12(4)(e), 12(5)(a), 12(5)(b), 12(5)(e) and 13 to withhold the information in scope.

Regulation 12(4)(e)

27. By virtue of the exception at regulation 12(4)(e), a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications.
28. The information withheld on the basis of regulation 12(4)(e) is a chain of emails between the public authority's officials discussing the UK government's response to the grounding of the MV Oliva. The relevant exchanges start on 17 March 2011 and end on 22 March 2011.
29. The Commissioner considers an internal communication is a communication within one public authority. For the avoidance of doubt, all central government departments are deemed to be one public

authority for these purposes. He therefore finds that the relevant chain of emails constitute internal communications within the meaning of regulation 12(4)(e).

30. The Commissioner consequently finds that the public authority was entitled to withhold the chain of emails (17 March 2011 to 22 March 2011) on the basis of regulation 12(4)(e).

Public Interest Test

31. All the exceptions at regulation 12 of the EIR are qualified. This means that even if they have been correctly engaged, a public authority must also consider whether in all the circumstances of the case, the public interest in maintaining the exceptions outweigh the public interest in disclosure.
32. The public authority submitted that there was very little if any public interest from disclosing the relevant chain of emails. It argued that disclosure would not provide '*more real information*' about the grounding of the vessel or the actions that followed it.
33. Against disclosure, the public authority argued that it would inhibit '*self contained space needed to ensure effective formulation and development of government policy and government decision making....*'
34. The Commissioner agrees with the complainant that there is a significant public interest in disclosing all the information within the scope of his request. As mentioned, the grounding of the MV Oliva presented a significant environmental and economic threat to the islands and its inhabitants. Given the nature of the threats faced by the community, the Commissioner believes there is a significant public interest in knowing the nature of the discussions between officials in relation to the UK government's immediate response to the incident. This would increase accountability on the part of the government in relation to its response in the immediate aftermath of the grounding of the MV Oliva. It would also increase transparency in relation to the subsequent actions taken by the government.
35. That significant public interest however has to be balanced against the very strong public interest in ensuring that officials had the necessary private thinking space to consider all possible options in terms of the UK government's response. Although the request was made approximately four months (July 2011) after the last email in the chain (March 2011), the issue was still live because discussions were ongoing between the UK government, the Tristan da Cunha government and representatives of the MV Oliva. It was therefore more likely than not that internal deliberation between officials was also ongoing. Disclosure would have

exposed officials to premature public scrutiny of their deliberations and eroded the private thinking space necessary to ensure effective consideration of all possible options.

36. The perception of a lack of private thinking space in the circumstances would have also had a chilling effect on the ongoing discussions between officials in relation to the incident. Premature media and public scrutiny would have made officials understandably less forthright with their views for fear of being ridiculed. This would have consequently affected the robustness of the deliberations and possibly the effectiveness of the UK government's response to the incident. There was therefore a very strong public interest in preventing a chilling effect on the ongoing discussions between officials in response to the incident in light of its environmental and economic impact.
37. On balance therefore, the Commissioner finds that in all the circumstances of the case the public interest in maintaining the exception at regulation 12(4)(e) outweighed the public interest in disclosing the relevant withheld information.
38. The Commissioner would however like to record that he was not particularly persuaded by the public authority's skeletal and generic public interest arguments against disclosure. They could have been more robust with specific references to why it considered the public interest was best served by withholding the relevant chain of emails. Notwithstanding, the Commissioner is satisfied for the reasons mentioned above that the chain of emails were correctly withheld on the basis of regulation 12(4)(e).

Regulation 12(5)(a)

39. Information is exempt on the basis of regulation 12(5)(a) if disclosure would adversely affect international relations, defence, national security or public safety.
40. To engage regulation 12(5)(a), disclosing the withheld information would have an adverse effect on at least one of the interests the exception seeks to protect. The Commissioner considers this means that it has been more probable than not that the alleged harm would occur if the information were released.
41. At the time of the request, the public authority informed the complainant that the information was exempt on the basis of section 27(1) (the equivalent FOIA exemption to regulation 12(5)(a)) because disclosure would prejudice relations between the UK and Tristan da Cunha only.

42. However, during the course of the Commissioner's investigation, the public authority initially submitted that disclosing the information withheld on the basis of regulation 12(5)(a) would adversely affect relations between the UK and South Africa only. Late on in the investigation, it claimed that a small amount of information was also specifically exempt on the basis that it would adversely affect relations between the UK and Tristan da Cunha.
43. The Commissioner has not included full details of the public authority's explanation in relation to the prejudicial effect of disclosure on relations with South Africa and Tristan da Cunha in this notice in order not to reveal the withheld information and consequently defeat the purpose of applying the exception in the first place. For the avoidance of doubt, he considered the submissions and the withheld information in full. However, the brevity of his reasoning below in relation to the application of the exception and the public interest test is a consequence of ensuring that he does not reveal withheld information in this notice.
44. In the Commissioner's view, an adverse effect on international relations does not need to be measurable in terms of a tangible or material loss, nor does it have to be immediate. He agrees with the Information Tribunal (Tribunal) in Campaign Against Arms Trade v Information Commissioner and the Ministry of Defence (EA/2007/0040) (CAAT case) that section 27(1)(a) FOIA is engaged if disclosure;
- '.....makes relations more difficult or calls for particular diplomatic response to contain or limit damage which would not otherwise have been necessary. We do not consider that prejudice necessarily requires demonstration of actual harm to the relevant interests in terms of quantifiable loss or damage.'*¹
45. He also agrees with Tribunal in the CAAT case that the risk of an adverse reaction by the State in question (in this case, South Africa) would suffice and it is not necessary to predict the precise form of the reaction either as a matter of probability or certainty.² Although the request in that case was not for environmental information, the Commissioner believes the findings about what may be deemed a prejudice to international relations are relevant to regulation 12(5)(a).

¹ Paragraph 81

² Paragraph 81

46. The Commissioner finds that in all of the circumstances, it was more probable than not that disclosing the withheld information would have resulted in an adverse reaction from the South African government. In the Commissioner's view, although it is possible that the South African government might not have reacted openly, in the circumstances at the time, the UK government could have considered it necessary to take remedial steps in order to protect the relationship between South Africa and the UK and the equally very important relationship between South Africa and Tristan da Cunha. He finds that regulation 12(5)(a) was correctly engaged.
47. A specific chain of emails from 23 March 2011 (at 07:40) to 23 March 2011 (09:26) was also withheld by the public authority on the basis of regulation 12(5)(e). The Commissioner is satisfied that these emails engaged regulation 12(5)(a) for the same reasons above.
48. As mentioned, the public authority additionally withheld a small amount of information from an email of 4 April 2011 (09:21) from the Administrator of Tristan da Cunha on the basis that disclosure would adversely affect relations between the United Kingdom and Tristan da Cunha. Given that Tristan da Cunha is not a State under international law but an Overseas British Territory, the Commissioner first considered whether relations between the government of Tristan da Cunha and the UK government falls within the meaning of 'international relations' in regulation 12(5)(a).
49. Although Tristan da Cunha³ is defined as an Overseas British Territory the Commissioner is satisfied that the UK does enjoy 'international relations' with it in light of the fact that section 27(5) FOIA confirms that in that legislation at least references to States other than the UK include references to any territory outside the UK. The Commissioner considers it appropriate to adopt the same interpretation when considering the application of regulation 12(5)(a).
50. According to the public authority, the withheld comments in the email relating to a named conservation/environmental charity were made by the Administrator of Tristan da Cunha in confidence to a senior official. It claimed that disclosure has the potential to affect the UK government's and the Territory's relations with the named charity and argued that disclosure would therefore dent the Territory's confidence in dealing frankly and openly with the UK government on future issues. It stressed that it was not arguing that relations between the UK

³ Hereinafter referred to interchangeably as the Territory

government and the charity is covered by regulation 12(5)(a). Rather, the consequential effect of prejudicing relations with the named charity would be an adverse effect on relations between the Tristan da Cunha and the UK.

51. The Commissioner has considered the relevant comments in full and given their frank nature, he accepts that the Territory would reasonably expect that the comments would not be made publicly available. Although it was not explicitly stated that the relevant comments or indeed all/any of the other comments in the email were provided in confidence, the Commissioner accepts that discussions at that level and in the context of the ongoing negotiations in relation to the grounding of the MV Oliva can reasonably be said to be confidential.
52. As mentioned, the Commissioner accepts that the UK does enjoy 'international relations' with Tristan da Cunha. However, the threshold for establishing prejudice to international relations under the EIR is a high one. It has to be more probable than not that disclosure would affect relations between the UK and Tristan da Cunha, specifically because the Territory would be less confident in dealing frankly and openly with the UK government in relation to similar issues in the future.
53. Tristan da Cunha is part of the British Overseas Territory of Saint Helena, Ascension and Tristan da Cunha. Executive authority is vested in the Queen who is represented by the Governor of Saint Helena. The Governor acts as the de facto head of state. An Administrator represents the Governor in Tristan da Cunha. There is therefore a self-governing structure in place which in practice is largely independent of the UK. Given the frank nature of the comments and in the context in which they were made - i.e. in the middle of negotiations to secure an effective clean-up operation of the spillage from the MV Oliva and a settlement to compensate for the financial/economic cost to the people of Tristan da Cunha, it is more probable than not that the Territory would be less willing to share similar frank remarks with officials in future if its comments were disclosed. This would make relations difficult and affect the extent of the influence the UK is able to exert in the Territory in relation to matters which could ultimately impact on the UK taxpayer. For instance it could make similar negotiations in future more difficult than they perhaps would if representatives of the Territory do not feel that they can be free and frank with officials.
54. Therefore, in all the circumstances, the Commissioner finds that it is more probable than not that disclosing the relevant comments would make relations between the UK and Tristan da Cunha difficult. He finds that the public authority was entitled to withhold information from the relevant email of 4 April 2011 (09:21) on the basis of regulation 12(5)(a).

55. However, the Commissioner notes that a chain of emails from 31 March 2011 (15:23) to 4 April 2011 (16:15) does not contain exchanges between UK officials and South African authorities or between UK officials and Tristan da Cunha authorities. Therefore, for reasons explained in the confidential annex (to be disclosed to the public authority only), he finds that these specific emails did not engage regulation 12(5)(a).

Public Interest Test

56. The public authority did not provide the Commissioner with any public interest submissions specifically in support of the application of regulation 12(5)(a). In the circumstances of this case, the Commissioner will rely on the public interest arguments in the refusal notice of 10 November 2011 and internal review. Although those arguments were made in relation to relations with Tristan da Cunha, he is satisfied that they equally apply to the UK's relations with South Africa.⁴ Nevertheless, the Commissioner would like to place on record his concern that the public authority did not appear to consider it important to provide him with public interest arguments specifically in support of protecting the UK's relations with South Africa in the circumstances.
57. The public authority acknowledged that disclosure would increase public knowledge of relations between the UK and South Africa and between the UK and Tristan da Cunha.
58. In favour of maintaining the exception, the public authority argued that the effective conduct of international relations depends upon maintaining trust and confidence between governments. If the UK did not maintain this trust and confidence, its ability to protect and promote UK interests through international relations will be hampered and that will not be in the public interest.
59. A consequence of harming the UK's relations with the South Africa and the Territory is that it would reduce the government's ability to promote and protect UK's interests abroad and that will not be in the public interest.
60. As mentioned, in light of the environmental and economic effect of the spillage on Tristan da Cunha, the Commissioner accepts there is a

⁴ The chain of emails from 31 March 2011 (15:23) to 4 April 2011 (16:15) was not part of the public interest assessment as the Commissioner found that these emails did not engage regulation 12(5)(a).

significant public interest in ensuring that officials and representatives of the Territory are accountable. Closely aligned is that the handling of the matter is transparent so that the public are able to decide for themselves whether officials and the Territory's authorities acted properly or otherwise. The Commissioner believes that disclosing the withheld information would have enhanced both public interests.

61. He also believes that in specific circumstances of this case, disclosure would have increased the public's knowledge of the nature of our relationship with South Africa and that is also in the public interest.
62. The Commissioner however accepts that there is a very strong public interest in the effective conduct of international relations and maintaining trust and confidence between governments is a cornerstone of international relations. There is a very strong public interest in the UK being able to protect and promote its interests abroad. It is not in the public interest to weaken its influence in Tristan da Cunha and South Africa by making relations with both governments difficult. The Commissioner acknowledges the significant public interest in disclosure against the backdrop of the grounding of the MV Oliva and consequent spillage. However, the timing of the request is also crucial because negotiations on a settlement between Tristan da Cunha and representatives of the MV Oliva were ongoing and officials were playing a pivotal role in the negotiations. It would not have been in the public interest to undermine the trust and confidence of representatives of Tristan da Cunha in the UK government (and consequently, the UK's influence) during those negotiations.
63. Therefore, the Commissioner finds that in all the circumstances of the case the public interest in maintaining the exception outweighed the public interest in disclosure.

Regulation 12(5)(b)

64. Information is exempt from disclosure on the basis of regulation 12(5)(b) if its disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.
65. The public authority explained that information withheld on the basis of this exception is legal advice on the international liability limitations and laws applicable in relation to the grounding of the MV Oliva and the resulting spillage which led to the suspension of lobster fishing. It submitted that the withheld information is subject to legal professional privilege for that reason. The Commissioner notes that, strictly speaking, some of the information is not legal advice. There are a number of exchanges between officials (including the Territory's

representatives) other than law officers regarding legal obligations and jurisdiction in relation to grounding of the MV Oliva. He further notes that representatives of the MV Oliva were privy to some of the exchanges between officials and the Territory's representatives. The public authority explained that it was an inevitable consequence of negotiations towards a settlement for the MV Oliva's representatives to be privy to or involved in some of the discussions. Nevertheless, it stressed that all parties to the negotiations understood that the discussions were highly sensitive and confidential.

66. The Commissioner considers regulation 12(5)(b) a broad exception that includes (but also extends beyond) legal professional privilege which is specifically recognised as an exemption from disclosure under section 42 FOIA. He considers the exception includes any information which if disclosed, would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature. Therefore, although information subject to legal professional privilege would be caught by the exception, its scope is by no means limited to legally privileged information as is the case under section 42 FOIA.
67. As mentioned, the withheld information includes legal advice sought and received in relation to the potential criminal and civil liabilities for the grounding of the MV Oliva. It also includes exchanges between officials considering the options of the UK government and that of the Tristan authorities in relation to criminal and civil liabilities for the MV Oliva. Discussions which the MV Oliva's representatives were privy to or involved in are also included.
68. The Commissioner considers the information described above falls under the broad scope of information within the contemplation of regulation 12(5)(b) because in the circumstances of this case, he accepts that disclosing this information would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature. As mentioned, the Commissioner considers this to mean that it has to be more probable than not that the alleged harm to any of the interests above would occur if the withheld information was released.
69. The Commissioner believes that disclosing legal advice sought and received on the extent of the possible of liabilities from the sinking of the MV Oliva at the time of the request (i.e. in the middle of ongoing settlement claims negotiations) would have had an adverse effect on any subsequent civil claims and/or criminal prosecution. Revealing legal advice including internal discussions (i.e. between officials, the Territory's authorities and its fishing concessionaires) at the time when there was still a very strong possibility of litigation would have exposed

the strategy of the Territory's authorities prior to potential litigation and consequently weakened the strength of any future civil claims and/or criminal action. The Commissioner also believes that disclosing the exchanges to which representatives of the MV Oliva were privy to or involved in would adversely affect the ability of those considered responsible and therefore liable for the incident to receive a fair trial and/ or defend themselves at an inquiry of a criminal or disciplinary nature. For instance, it could expose them to comments in the media likely to be prejudicial to their ability to receive a fair trial.

70. In view of the above, the Commissioner accepts that the public authority was entitled to apply regulation 12(5)(b) to the relevant information.

Public Interest Test

71. The public authority did not provide the complainant or the Commissioner with any public interest factors it considered would be in favour of disclosing the withheld information
72. In favour of maintaining the exception, the public authority pointed to the fact that at the time of the request a compensation settlement had not been agreed between the Territory's authorities, its fishing concessionaires and representatives of the MV Oliva. In view of the ongoing negotiations, the public authority submitted that there was a very strong public interest in not undermining the legal position of Tristan da Cunha and its fishing concessionaires. It argued that disclosure could lead to a waste of resources in defending unnecessary legal challenges and this would not be in the public interest. It was in the public interest that the negotiations lead to a settlement rather than ending up in litigation which may take longer and cost considerably more.
73. As mentioned, given the nature of incident, the Commissioner accepts the public interests in accountability and transparency would be enhanced by disclosure. Specifically, he considers it is in the public interest that the legal advice sought and received is robust and of acceptable quality. It is also in the public interest that the discussions between officials and representatives of the Territory as well as the MV Oliva are seen to be robust and adequately represent the interests of the people of Tristan da Cunha and by extension the interests of the UK.
74. The Commissioner however accepts there is a very strong public interest in not undermining the legal position of Tristan da Cunha and in also not undermining the negotiations. He accepts that in the circumstances, it would not be in the public interest to weaken the strength of the claims made against the MV Oliva. He further accepts that achieving a negotiated settlement is very much in the public interest as litigation

would be time consuming and expensive and therefore not in the public interest. The Commissioner is also mindful of the inherent strong public interest in not disclosing legal advice in the absence of a countervailing public interest in disclosure, for instance, suspicion of wrong doing by officials and/or the Territory's authorities. He has not found such a countervailing public interest in this case.

75. The Commissioner also believes there is a very strong public interest in not exposing individuals to the risk of criticism which would adversely affect their ability to obtain a fair trial or defend themselves at an inquiry. Given that negotiations were taking place in good faith, it would not be in the public interest to disclose information which was provided on a confidential basis in the hope of reaching a negotiated settlement. It is also highly likely that representatives of the MV Oliva would have been less willing to cooperate if they felt their views/comments would be made available to the public during ongoing negotiations to settle the claims against them.
76. In view of the above, the Commissioner finds that on balance, in all the circumstances of the case the public interest in maintaining the exception outweighed the public interest in disclosure.

Regulation 12(5)(e)

77. As mentioned, the Commissioner did not consider the chain of emails from 23 March 2011 (at 07:40) to 23 March 2011 (09:26) under this exception because he has already found that the public authority was entitled to withhold those emails under regulation 12(5)(a).
78. Information is exempt on the basis of regulation 12(5)(e) if 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. Therefore, in order to engage the exception, the following four requirements must be met:
- The information is commercial or industrial in nature,
 - Confidentiality is provided by law,
 - The confidentiality is protecting a legitimate economic interest,
 - The confidentiality would be adversely affected by disclosure.

Is the information withheld on the basis of regulation 12(5)(e) commercial or industrial in nature?

79. The public authority explained that the withheld information relates to the ongoing and commercially sensitive negotiations on a claim settlement by the MV Oliva's representatives to the Tristan da Cunha authorities and their commercial fishing concessionaire partners. It explained that the Tristan community relies heavily on commercial lobster fishing around the islands for 80% of its annual income. Negotiations on a settlement therefore include claims for lost revenue to both Tristan da Cunha and its fishing concessionaires from the sale of lobsters. Discussions therefore also relate to the commercial interests of the MV Oliva's representatives.
80. The Commissioner finds that the withheld information is commercial in nature because it relates to the commercial interests of the Tristan da Cunha, its fishing concessionaires, and that of the MV Oliva's representatives.

Confidentiality provided by law

81. Where there is no contractual or statutory obligation of confidence, the Commissioner will consider whether confidentiality is imposed under common law. The public authority provided the Commissioner an extract of a text in the latest draft version of the settlement agreement (i.e. after the request was made) in which the MV Oliva's representatives make clear that the terms of the settlement and the negotiations in connection with it are confidential. The public authority also provided an extract from a statement made by the Territory's authorities in which it expressed the view that information relating to negotiations in connection with the settlement is confidential and disclosure would prejudice its commercial interests. It is not clear when this statement was made. In any event, in the absence of a contractual or statutory obligation of confidence, the Commissioner considered whether the common law of confidence applies to the withheld information. The key questions to consider are: Does the information have the necessary quality of confidence and was the information shared or provided in circumstances creating an obligation of confidence?
82. As mentioned, the withheld information relates to ongoing negotiations to settle compensation claims made against the MV Oliva by the Territory's authorities and its fishing concessionaires. The information is not trivial and has not been disseminated to the general public. The Commissioner is satisfied it possesses the necessary quality of confidence. Furthermore, given the sensitivity attached to such negotiations, the Commissioner is satisfied that at the time of the request, there was certainly an implied obligation of confidence on all

the parties involved. As can be seen from the statements made by the Territory's authorities and the MV Oliva's representatives, it is also more likely than not that there was an explicit obligation on the parties to keep the discussions confidential. The Commissioner is therefore satisfied that the requirement for the confidentiality to be provided by law has been met in this case.

The confidentiality is protecting a legitimate economic interest

83. To satisfy this element of the exception, the Commissioner must determine whether disclosure would harm the legitimate economic interests of any or all of the parties involved (i.e. Tristan da Cunha, their fishing concessionaires and representatives of the MV Oliva). As mentioned, at the time of the request, negotiations were ongoing to settle the claims made by the Territory's authorities and their fishing concessionaires for loss of revenue or income as a result of the suspension of lobster fishing, which according to the public authority accounts for over 80% of Tristan da Cunha's annual income. It is clearly in the legitimate economic interests of Tristan da Cunha and its fishing concessionaire that their claims are settled in order to offset the impact of the suspension of lobster fishing on their commercial interests. Disclosing the withheld information would make negotiations more difficult and the possibility of an out of court settlement less likely. The representatives of the MV Oliva would be less inclined to resolve the matter without going to litigation if their discussions with the other parties were made public. They might consider that disclosure would allow competitors gain access to their negotiations techniques and/or other commercially valuable information which could potentially place them in a weaker position in relation to that particular negotiation and similar negotiations in the future.
84. The Commissioner is satisfied that the confidentiality is protecting the legitimate economic interest of Tristan da Cunha, their fishing concessionaires and representatives of the MV Oliva.

The confidentiality would be adversely affected by disclosure

85. The Commissioner considers it is inevitable that this element will be satisfied once the first three elements of the exception are satisfied. Disclosure of confidential information would inevitably harm the confidential nature of that information and would also harm the legitimate economic interests identified above.
86. The Commissioner therefore finds that the public authority was entitled to apply regulation 12(5)(e) to the information it withheld from disclosure on that basis.

Public Interest Test

87. In favour of disclosure, the public authority noted the general public interest in the disclosure of commercial information to ensure effective, open and honest use of public money in accordance with published policy and to provide an environment where business can better respond to government opportunities.
88. In favour of maintaining the exception, the public authority argued that obtaining adequate compensation would prevent Tristan da Cunha from going bankrupt and becoming a burden on the UK taxpayer. It therefore submitted that there is a very strong public interest in protecting the economic interest of Tristan da Cunha by not undermining the confidentiality of commercial negotiations between the Territory, their fishing concessionaires and representatives of the MV Oliva. By the same token, there is also a very strong public interest in protecting the economic interest of the UK by preventing Tristan da Cunha from going bankrupt and becoming a burden on the UK taxpayer.
89. The Commissioner has mentioned he believes that in the circumstances, disclosure would enhance the significant public interests in accountability and transparency. Specifically, given the importance of obtaining an adequate settlement to compensate for loss of revenue in area which accounts for over 80% of the Territory's annual income, there is a significant public interest in ensuring negotiations are seen to be robust and fully reflective of the commercial impact that the suspension of lobster fishing had on the island. There is also a significant public interest in ensuring that any damage to the environment is fully taken into account or reflected in a negotiated settlement.
90. However, as mentioned, the Commissioner considers the timing of the request crucial. Negotiations were ongoing and notwithstanding the significant public interests in disclosure identified above, he believes there was a very strong public interest in not undermining the ongoing negotiations. Disclosing the withheld information would have seriously reduced the chances of an out court settlement and enhanced the possibility of litigation which would be time consuming and expensive. The economy of Tristan da Cunha would have suffered more as a result and the possibility of it becoming a burden on the UK taxpayer would have increased, this would not be in the public interest.
91. The Commissioner also believes there is a significant public interest in protecting the negotiation techniques and/or commercially valuable information of representatives of the MV Oliva. It would not be in the public interest if the information they provided in good faith and on the understanding that it would be held in confidence was disclosed.

92. In view of the above, the Commissioner finds that on balance, in all the circumstances of the case the public interest in maintaining the exception outweighed the public interest in disclosure.

Regulation 13

93. Information is exempt from disclosure on the basis of the exception at regulation 13 if it constitutes third party personal data (i.e. the personal data of anyone other than the individual making the request) and either the first or second condition in regulation 13(2) is satisfied.
94. Personal data is defined in section (1)(a) of the Data Protection Act 1998 (DPA) as:

'.....data which relate to a living individual who can be identified from those data or from those data and other information which is in the possession of, or likely to come into the possession of, the data controller; and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any person in respect of the individual.'

95. The public authority withheld the names of junior officials and the names of private individuals including those acting on behalf of the MV Oliva and the Territory.
96. The Commissioner accepts that the withheld names constitute personal data within the meaning of section 1 of the DPA as they clearly relate to identifiable individuals.

Would the disclosure of the withheld names contravene any of the data protection principles?

97. As mentioned, for regulation 13 to apply, either the first or second condition in regulation 13(2) must be satisfied. The first condition in regulation 13(2) states that disclosure of personal data would contravene any of the data protection principles or section of the DPA.
98. The first data protection principle states:

'Personal data shall be processed fairly and lawfully and, in particular shall not be processed unless-

At least one of the conditions in schedule 2 [DPA] is met.....

99. The public authority submitted that disclosure breached the fairness element of the first data protection principle. It did not however provide

either the complainant or the Commissioner with any detailed explanation as to why it considered it would be unfair to disclose the withheld names.

100. The Commissioner first considered whether disclosing the names of junior officials would have been fair to the individuals concerned. In the considering the fairness element of the first principle of the DPA, the Commissioner takes into account factors such as the reasonable expectations of the data subjects, circumstances in which the personal data was obtained, distinction between private and public life and the impact of disclosure.
101. The Commissioner believes that the junior officials would have had a reasonable expectation that their names will not be disclosed in the context of the request. He accepts that the individuals concerned were carrying out public functions and must therefore have the expectation that their actions in that regard will be subject to a greater scrutiny than would be the case in respect of their private lives. However, he is particularly mindful of the fact that the officials were not in public facing roles and did not exercise any significant level of authority in relation to the documents from which their names were redacted. Therefore, disclosing their names in that context could place them in a similar position with the senior officials whose names were disclosed by the public authority in that they could be seen as having exercised a significant level of authority as those senior officials even though that was clearly not the case.
102. In view of the above, the Commissioner finds that it would have been unfair to disclose the names of the junior officials in question. Disclosure would have contravened the first data protection principle. The public authority was therefore entitled to withhold the names of the junior officials on the basis of the regulation 13.
103. The Commissioner next considered whether the public authority was entitled to withhold the names of private individuals including those acting on behalf of the MV Oliva and the Territory.
104. The Commissioner believes private individuals would have had a reasonable expectation that their names will not be disclosed in the context of the request. He believes they would expect they would reasonably expect the names of the organisations they work for to be made public in that context and not their names. Members of the public would also reasonably expect their names not to be disclosed. These were private individuals some of whom were carrying out their duties on behalf of organisations acting on behalf of the MV Oliva and the Territory. They were not undertaking public functions with the attendant expectation of greater public scrutiny of individual actions or

comments. The Commissioner therefore believes that disclosing the names of private individuals in the context of the request would be an unwarranted intrusion into their private lives and would therefore be unfair.

105. In view of the above, he finds that disclosure would have contravened the first data protection principle and the public authority was therefore entitled to rely on regulation 13 to withhold the names of private individuals including those acting on behalf of the MV Oliva and the Territory.
106. As regulator of the DPA, the Commissioner considers that he has a duty to take positive steps to prevent the disclosure of personal information under the EIR which would be in breach of the DPA. It is for this reason that he decided, in the circumstances of this case, to consider the application of the exception at regulation 13 notwithstanding the lack of detailed submissions from the public authority. However, given the public authority's obligations under the DPA, it clearly also has a duty to provide the Commissioner with detailed submissions in support of the application of the exception. The Commissioner would like to place on record that he does not believe the public authority has fulfilled that duty in this case.

Procedural Breaches

107. Regulation 5(1) requires a public authority to make information available upon request within 20 working days following the request.
108. As mentioned, during the course of the investigation, the public authority disclosed some information it accepted was not caught by the exceptions relied on. The Commissioner therefore finds the public authority in breach of regulation 5(1) for failing to make this information available to the complainant at the time of the request.
109. Regulation 14(2) requires a public authority to issue a refusal notice within 20 working days. The refusal notice should specify the exceptions relied on and the matters the public authority considered in reaching its decision with respect to the public interest test.
110. The public authority issued a substantive refusal notice to the complainant on 10 November 2011 more than 20 working days after the request was made on 21 July 2011. The Commissioner therefore finds the public authority in breach of regulation 14(2).
111. The Commissioner additionally finds the public authority in breach of regulation 14(2) for failing to rely on the exception at regulation 12(4)(e) at the time of the request.

Right of appeal

112. 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

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

113. 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.

114. 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

Steve Wood
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