

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

Decision Notice

Date: 15 May 2023

Public Authority: North Sea Transition Authority
Address: Sanctuary Buildings
20 Great Smith Street
London
SW1P 3BT

Decision (including any steps ordered)

1. The complainant requested from the North Sea Transition Authority ('NSTA') information relating to the environmental impact of Shell's Brent decommissioning project in the North Sea. NSTA stated that it did not hold the requested information.
2. The Commissioner's decision is that the NSTA does hold the requested information in accordance with regulation 3(2)(a) of the EIR. In addition, in failing to respond to the internal review within the statutory timescale, the Commissioner has determined that NSTA breached regulation 11(4) of the EIR.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Issue a fresh response to the complainant, and either disclose the information or, in respect of any information it wishes to withhold, issue a refusal notice within the meaning of regulation 14 of the EIR specifying the exception relied on to withhold the information. The response should not rely on a claim that NSTA does not hold the information within the meaning of regulation 3(2) of the EIR.
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 FOIA and may be dealt with as a contempt of court.

Background

5. NSTA is a business name of the Oil and Gas Authority.¹
6. NSTA's website² states that one of its functions is to "work with industry to minimise the cost and greenhouse gas impact of decommissioning."
7. The Brent Field is an oil and gas field located in the East Shetland Basin of the North Sea. The Brent Field consists of four platforms (Brent Alpha, Brent Bravo, Brent Charlie, and Brent Delta) installed between 1976 and 1978.
8. The operator, Shell, is decommissioning the Brent Field on behalf of Shell and Brent Field partner Esso, as the field is reaching the end of its economic life after having been in operation for 40 years.³
9. The Commissioner understands that 'decommissioning' is the process by which options for the physical removal and disposal of structures at the end of their working life are assessed; a plan of action is formulated by the operator, followed by public consultation, approved by government, and then implemented.
10. Owners of offshore oil and gas infrastructure, including wells, must fulfil their obligations to decommission in accordance with statutory requirements and remediate the marine environment consistent with government policy.⁴
11. In accordance with legislation, in 2017 Shell submitted Decommissioning Programmes in document form, including an Environmental Statement⁵

¹ <https://www.nstauthority.co.uk/about-us/>

² <https://www.nstauthority.co.uk/decommissioning/what-we-do/>

³ <https://www.shell.co.uk/sustainability/decommissioning/brent-field-decommissioning/brent-field-decommissioning-programme.html>;
<https://www.shell.co.uk/sustainability/decommissioning/brent-field-decommissioning/brent-field-faqs.html>

⁴ <https://www.nstauthority.co.uk/media/7538/decommissioning-strategy-may-2021.pdf>

⁵ https://www.shell.co.uk/sustainability/decommissioning/brent-field-decommissioning/brent-field-decommissioning-programme/_jcr_content/par/tabbedcontent/tab/textimage.stream/1486493763877/2e9db9691b9165f8ef25c88eb7ff445f1626827b/environmental-statement-rev-11-final6-feb-2017.pdf

regarding the potential environmental impacts of the decommissioning programme of work proposed by Shell.

12. The Commissioner understands that decommissioning of the Brent field is complete with the exception of Brent Charlie.

Request and response

13. On 29 July 2022, the complainant requested the following information from NSTA:

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

14. NSTA responded to the complainant on 27 September 2022 stating that it did not hold the requested information. It said it:

"only holds the information in question by virtue of holding it on behalf of another public body (in this case the Department for Business, Energy and Industrial Strategy (BEIS)).

In line with ICO guidance we have consulted both the original information owner (Shell) and BEIS for their views and one of the conclusions of these consultations was that BEIS considered that they held the information, that they do not consent to any decision being taken on disclosure of the information by the NSTA.

Therefore any and all decisions on disclosure would be appropriately addressed by BEIS and we would suggest that you approach them regarding disclosure of this information."

15. The complainant requested an internal review that same day.
16. NSTA conducted an internal review and communicated the outcome to the complainant on 21 March 2023. NSTA maintained its position that it did not hold the requested information. It said:

"..the NSTA identified 5 documents in its possession which fell into scope. However, in considering the content of the documents and the circumstances under which the NSTA came to be in possession of them, the NSTA concluded that it did not hold the documents in its own capacity, rather it held the documents on behalf of BEIS. The party who originally provided the information to BEIS was of the opinion that this information should not have been shared with the NSTA in the first place. ...

NSTA held the information requested by virtue of the fact that BEIS asked the NSTA to perform a revision of the Brent decommissioning programme costs. In order for the work to be carried out, BEIS provided the NSTA with information created by Shell....”

Scope of the case

17. The complainant contacted the Commissioner on 23 March 2023 to complain about the handling of their request. They did not accept NSTA’s claim that it did not hold the requested information for the purposes of the EIR and maintained that the request had not been properly responded to by it.
18. The Commissioner is of the opinion that the requested information would be environmental information within the meaning of regulation 2(1)(c) of the EIR. This is because information relating to the potential environmental impact of Shell's Brent decommissioning project is a measure that would be likely to affect elements of the environment such as water and marine areas, as well as factors such as energy and releases into the environment. Reports on the implementation of environmental legislation are also environmental information under regulation 2(1)(d) of the EIR. Neither the complainant nor the public authority has raised the correct access regime as an issue, therefore the Commissioner has considered the complaint under the EIR.
19. Accordingly, the scope of the Commissioner’s investigation was to determine whether or not NSTA held the information requested by the complainant under the EIR. It is accepted that the requested information is physically held by NSTA; the question is whether NSTA holds the information for the purposes of the EIR. If the Commissioner finds that NSTA only holds the information on behalf of BEIS then it is not held by NSTA for the purposes of the EIR and he cannot require NSTA to take any further action. If the Commissioner finds that NSTA does hold the information for the purposes of the EIR, he will require NSTA to disclose the information or issue a refusal notice. The Commissioner has not made any decision as to whether or not the requested information ought to be disclosed.

Reasons for decision

Regulation 3(2): information held by the public authority

20. Regulation 3(2) of the EIR states that:

(2) For the purposes of these Regulations, environmental information is held by a public authority if the information –

(a) is in the authority's possession and has been produced or received by the authority; or

(b) is held by another person on behalf of the public authority.

21. The complainant's view is that, as the information was received by NSTA, it is held for the purposes of the EIR. They argue that the fact that the documents should not have been shared with NSTA is immaterial. NSTA has copies of these documents and so the complainant considers NSTA should release them.
22. NSTA's view is that it does not hold the requested information. NSTA confirmed in the internal review that BEIS (as it was⁶) provided NSTA with 5 documents created by Shell. However, NSTA argues that it did not hold the documents in its own capacity, rather it held the documents on behalf of BEIS as BEIS asked NSTA to perform a revision of the Brent decommissioning programme costs.
23. NSTA states that ICO guidance and the courts have determined that for a public authority to be determined as 'holding' information, simple possession is not enough, there must be an appropriate connection between the information requested and role and functions of the authority.
24. In its internal review, NSTA set out that there are a number of factors to determine whether and to what extent information is held for its own purposes. NSTA weighed these factors and argued that the information was provided to NSTA for a narrow and specified purpose. NSTA argued that it did not, and continues not to, exercise any control over the information and has no power to allow access to it. Also, NSTA argued that the information was not created by, for, or for the purposes of NSTA and NSTA did not have any input into its creation. Further, NSTA does not retain management of the information nor is it providing storage of the document. NSTA therefore maintained that it was reasonable to conclude that it did not hold the information.

⁶ In February 2023 it was announced that BEIS's functions were to be split into three new departments: <https://www.gov.uk/government/publications/making-government-deliver-for-the-british-people/making-government-deliver-for-the-british-people-html>

25. ICO guidance⁷ sets out the circumstances in which public authorities hold information for the purposes of the EIR. Regulation 3(2) sets out two scenarios in which the information is considered to be 'held' for the purposes of the EIR. The first scenario (regulation 3(2)(a)), which is relevant here, is when an authority is in possession of the information and it produced or received it. The second scenario is when a third party holds the information on an authority's behalf.
26. ICO guidance says that unlike FOIA, the definition of information held for the purposes of the EIR does not explicitly exclude information a public authority holds solely on behalf of another body or person. However, this does not mean that this type of information falls within the scope of the EIR, unless the authority is holding it to any extent for its own purposes.
27. The Commissioner is satisfied that the requested information is in the possession of NSTA as it physically held copies of the five documents at the time of the internal review. It therefore appears to the Commissioner that the key consideration in this case is whether NSTA has produced or received the requested information. For this requirement to be met, there must be a connection between the information and the functions and work NSTA does as a public authority.
28. The leading authority on the interpretation of regulation 3(2)(a) is the Upper Tribunal's decision in *Holland vs Information Commissioner and University of Cambridge* [2016] UKUT 260 (AAC)⁸. This case states that when seeking to establish if an authority holds environmental information under regulation 3(2)(a), it needs to consider whether it holds it either physically or digitally - and the extent to which the authority holds it for its purposes.
29. The Commissioner notes that while NSTA's internal review sets out an exhaustive list of factors used to decide the extent to which it holds information for its own purposes, NSTA does not specially address the extent of the appropriate connection between the information requested and the role and functions of NSTA itself. In other words, it did not consider the extent to which NSTA used the information for its own purposes, regardless of whether it was created by a third party. The

⁷ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/information-you-hold-for-the-purposes-of-the-eir-regulation-3-2/>

⁸ <https://administrativeappeals.decisions.tribunals.gov.uk/Aspx/view.aspx?id=4884>

internal review simply states that 'the information was provided to the NSTA for a narrow and specified purpose.' However, the *Holland* case notes that it is important to consider the extent to which the authority holds the information for its own purposes.

30. The Commissioner does consider that there is an appropriate connection between the requested information and the functions and work NSTA does as a public authority. The Commissioner understands that BEIS provided NSTA with five documents created by Shell in order for NSTA to perform one of its own work functions - a revision of decommissioning programme costs.
31. The Commissioner is satisfied that NSTA was carrying out its own functions and was not doing this work on BEIS's behalf or simply storing the information on behalf of BEIS. He is mindful that NSTA used it to perform one of its own functions. NSTA's website says it "work[s] with industry to minimise the cost and greenhouse gas impact of decommissioning." NSTA also has a Decommissioning Strategy⁹ document on its website which clearly states that one of its functions is to "ensure that decommissioning is carried out in a timely and cost-effective manner." The Commissioner notes that NSTA has not at any point argued that it was only operating in an advisory capacity on the instructions of BEIS.
32. The Commissioner is satisfied that the requested information was also clearly received by individuals acting in their professional capacity at NSTA and the information is held on NSTA premises or computer systems. NSTA had access to the information, used it to prepare a cost report, and retained the information at the time of the request. The Commissioner has not seen any evidence of any confidentiality agreement that would prevent NSTA from holding the information.
33. The Commissioner therefore respectfully disagrees with NSTA's view that it does not hold the information for the purposes of the EIR, irrespective of the fact that Shell believes that the information should never have been shared with NSTA by BEIS in the first place.
34. The facts of this complaint clearly contrast with the facts in the *Holland* case above. In that case the disputed information was held by an academic in connection with an external, honorary post which he held and not in connection with his work at the University. Therefore, even if the information was physically located within the University or stored on its IT network, it was not received by the University as a public

⁹ <https://www.nstauthority.co.uk/media/7538/decommissioning-strategy-may-2021.pdf>

authority, and hence it was not held by the University in terms of EIR. Here, the information is held by NSTA staff in connection with NSTA's own functions.

35. The effect of these points is that the Commissioner has concluded NSTA had a meaningful connection with the requested information at the time of the request. NSTA required possession of environmental information for its own business purposes. Taking into account the specific factual circumstances of the case, the Commissioner has decided that the requested information is held by NSTA in accordance with regulation 3(2)(a) of the EIR.

Regulation 11(4): internal review

36. Regulation 11(4) provides that a public authority should respond promptly and no later than 40 working days after the date of receipt of the request for review.
37. The complainant requested an internal review on 29 September 2022 and NSTA provided the outcome 6 months later, on 23 March 2023. The Commissioner considers that by failing to provide the outcome of the internal review within 40 working days, NSTA breached regulation 11(4) of the EIR.
38. The Commissioner considers such delays to be unacceptable and he has recorded this delay for his own purposes of monitoring NSTA's performance in terms of completing internal reviews within the statutory time limit. NSTA should ensure that it meets the requirement to issue responses and internal reviews in a timely manner in future.

Right of appeal

40. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals
PO Box 9300
LEICESTER
LE1 8DJ

Tel: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

41. 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.
42. 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

Sarah O’Cathain
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