

**Freedom of Information Act 2000 (Section 50)
Environmental Information Regulations 2004**

Decision Notice

15 December 2008

Public Authority: Cabinet Office
Address: 70 Whitehall
London
SW1A 2AS

Summary

The complainant requested information relating to contact between the Prime Minister's Office and Shell, and/or its subsidiary Sakhalin Energy, about the Sakhalin 2 project. The Cabinet Office confirmed that it held a number of pieces of information but it considered this information to be exempt from disclosure by virtue of the exemptions contained at sections 27(1)(a), (c) and (d); section 41; and section 43(2) of the Act. Having reviewed the information withheld by the Cabinet Office the Commissioner concluded that some, though not all, of the information falling within the scope of the request was in fact environmental as defined by regulation 2(1)(c) of the EIR. The Commissioner therefore asked the Cabinet Office to confirm which exceptions within the EIR it would seek to rely on to withhold this information. The Cabinet Office cited the exceptions contained at regulations 12(4)(e); 12(5)(a); 12(5)(d); 12(5)(e); 12(5)(f) and 12(5)(g). The Commissioner has concluded that the Cabinet Office was correct to withhold the information that falls within the scope of the Act on the basis of exemptions contained at section 27(1)(a), (c) and (d) and was also correct to withhold the information that falls within the scope of the EIR on the basis of regulation 12(4)(a). However, the Commissioner has also concluded that in dealing with this request the Cabinet Office breached a number of procedural requirements of both the Act and the EIR.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the Act).
2. The Environmental Information Regulations (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR

shall be enforced by the Commissioner. In effect, the enforcement provisions of Part 4 of the Act are imported into the EIR.

3. In this case the Commissioner has had to consider whether the public authority has complied with the requirements of both the Act and the EIR. This Notice sets out his decision.

The Request

4. On 25 September 2006 the complainant submitted the following request to the Cabinet Office:

'I would like to request information relating to contact between the between the Prime Minister's Office and Shell and/or its subsidiary Sakhalin Energy about the Sakhalin 2 project on Russia's Sakhalin Island from 1 January 2005 to the present day. This includes minutes of meetings, letters, notes of telephone calls, briefings and any other recorded information.'

5. The Cabinet Office informed the complainant on 21 November 2006 that it did hold information falling within the description of his request, however, it considered this information to be exempt on the basis of sections 27(1)(a), 27(1)(c) and 27(1)(d); section 41 and section 43(2) of the Act.

6. On 22 November 2006 the complainant submitted the following three questions to the Cabinet Office:

'What evidence is there to support the view that releasing the information would be *likely* to cause prejudice to the UK's relations with Russia and the interests of the United Kingdom abroad? Can you please provide copies of any evidence or assessments of this?'

What evidence is there to prove that the information held was provided in confidence by Shell and/or its subsidiary companies and disclosure of it would amount to an actionable breach of confidence? Can you send me a copy of the document that sets out the confidentiality agreement between the No 10 and Shell and its subsidiaries?'

What evidence is there that disclosure is *likely* to prejudice the commercial interests of Shell and/or its subsidiary companies? Again, is it possible to send me written evidence of this?'

7. The Commissioner understands that the complainant and the Cabinet Office then discussed whether this correspondence represented a request for an internal review of his original request or constituted a new request for information under the Act. On 29 January 2007 the complainant submitted these questions to the Cabinet Office as a separate request under the Act.

8. The Cabinet Office responded on 23 February 2007 and informed the complainant that although it held information falling within the scope of these three questions, it considered them to be exempt from disclosure on the basis of exemptions contained at 36(2)(b)(i) and (ii) of the Act.
9. On 24 February 2007 the complainant requested an internal review of his original request.
10. The Cabinet Office informed the complaint on 23 April 2007 that it had conducted an internal review and concluded that the information originally requested remained exempt on the basis of sections 27, 41 and 43.

The Investigation

Scope of the case

11. On 15 May 2007 the complainant contacted the Commissioner in order to complain about the Cabinet Office's decision to withhold the information he originally requested on 25 September 2006. He did not ask the Commissioner to consider the Cabinet Office's handling of his request of 22 November 2006.

Chronology

12. On 21 February 2008 the Commissioner wrote to the Cabinet Office and asked to be provided with a copy of the information originally requested by the complainant. The Commissioner also asked the Cabinet Office to provide him with a detailed explanation as to why it considered this information to be exempt on the basis of sections 27(1)(a), 27(1)(c) and 27(1)(d); section 41 and section 43(2) of the Act.
13. The Commissioner received the Cabinet Office's response on 8 May 2008. The Cabinet Office provided the Commissioner with 6 documents that fell within the scope of the complainant's request. The Cabinet Office noted that for some documents all of the information contained within it fell within the scope of the request; however, in some cases only parts of documents fell within the scope of the request because some of the documents contained discussions on issues not related to the topic of the complainant's request, namely the Sakhalin 2 project. (The Commissioner has listed these documents in the annex attached to this notice along with details of the exemptions the Cabinet Office considers to apply to each document.)
14. The Commissioner subsequently wrote to the Cabinet Office again on 15 May 2008. In this letter the Commissioner suggested to the Cabinet Office that his initial view was that the information falling within the scope of this request constituted environmental information on the basis that it fell within the description of regulation 2(1)(c) of the EIR. The Commissioner provided the Cabinet Office with an explanation as to why he had reached this preliminary conclusion. Consequently, the Commissioner informed the Cabinet Office that it intended to

- treat this complaint under the EIR rather than under the Act. The Commissioner therefore invited the Cabinet Office to explain which exceptions contained in the EIR it would seek to rely on to withhold the requested information
15. The Commissioner also explained to the Cabinet Office that he understood that its position with regard to document 5 was that only some of that document fell within the scope of the request. The Commissioner suggested that in his opinion all of the document fell within the scope of the complainant's request. The Commissioner therefore asked the Cabinet Office to confirm which exceptions it considered the remainder of document 5 to be exempt under. Similarly, the Commissioner noted that he did not appear to have been provided with a number of annexes to some of the documents which the Cabinet Office had supplied. Consequently, the Commissioner asked the Cabinet Office to provide him with copies of these additional documents along with an explanation as to which exceptions the Cabinet Office would rely on to withhold these documents should it consider them to be exempt, assuming of course that the Commissioner concluded that they fell within the scope of the request.
 16. The Commissioner received a response from the Cabinet Office on 9 June 2008. In this response the Cabinet Office explained why it did not believe that the requested information constituted environmental information and therefore in its opinion the request should be dealt with under the Act rather than the EIR. Nevertheless, the Cabinet Office provided the Commissioner with detailed arguments to support its view that the various documents were exempt from disclosure on the basis of a number of the exceptions contained in the EIR. The Cabinet Office also provided the Commissioner with a number of additional documents as the Commissioner had requested along with an indication as to which exceptions the Cabinet Office applied to each document. The Cabinet Office noted that in its opinion these additional documents (labelled as 2(a), 5(a) and 5(b) in the annex) did not fall within the scope of the complainant's request.
 17. The Commissioner wrote to the Cabinet Office again on 1 July 2008 in order to seek clarification on number of outstanding points in relation to which exemptions under the Act it considered to apply the additional documents 2(a), 5(a) and 5(b).
 18. The Cabinet Office provided the Commissioner with this clarification on 20 August 2008.

Analysis

What information falls within the scope of the request?

19. As detailed above, in response to the Commissioner's initial letter, the Cabinet Office provided the Commissioner with the documents 1, 2, 3, 4, 5, and 6 (i.e. all of the documents listed in the annex except 2(a), 5(a) and 5(b)). In providing these documents the Cabinet Office noted that for some of these documents only some of the information contained in them fell within the scope of the complainant's request.

20. For the majority of these documents the Commissioner agrees with the Cabinet Office. However, with regard to document 5, the Cabinet Office indicated to the Commissioner that it remained of the view that only part of this document fell within the scope of the complainant's request. The Commissioner disagrees with this position for the following reasons:
21. The complainant's original request to the Cabinet Office read:

'I would like to request information relating to contact between the between the Prime Minister's Office and Shell and/or its subsidiary Sakhalin Energy about the Sakhalin 2 project on Russia's Sakhalin Island from 1 January 2005 to the present day. This includes minutes of meetings, letters, notes of telephone calls, briefings and any other recorded information.'
22. Therefore in the Commissioner's opinion the request is not only seeking correspondence between the Prime Minister's Office and Shell but also information 'relating to contact between' these two parties. In the Commissioner's opinion the remainder of the information contained with document 5, which Cabinet Office does not consider to fall within the scope of the request, can correctly be described as information 'relating' to contact between Shell and the Prime Minister's Office on the subject of Sakhalin and thus falls within the scope of the request.
23. Furthermore, the Commissioner established that there were a number of attachments to the six documents that the Cabinet Office initially provided the Commissioner. These attachments are labelled in annex A as documents 2(a), 5(a) and 5(b). The Cabinet Office has explained to the Commissioner that it does not consider these documents to fall within the scope of the complainant's request.
24. In the Commissioner's opinion if an individual requests a document, for example document 2 which is a piece of correspondence, then any attachments or enclosures to that document would be included in the scope of that request. Therefore, the Commissioner believes that documents 2(a), 5(a) and 5(b) fall within the scope of the request.
25. Moreover, having reviewed the content of document 5(a) the Commissioner notes that it relates to discussions between Shell and the Prime Minister's Office about Sakhalin 2 and therefore also falls within the scope of the request by virtue of the logic outlined in paragraph 22.

Is the requested information 'environmental'?

26. 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)'

27. In his letter of 15 May 2008 to the Cabinet Office the Commissioner suggested that the information contained in documents 1-6 was environmental information by virtue of the fact that it falls within the scope of regulation 2(1)(c). For information to fall within the scope of regulation 2(1)(c) the Commissioner believes that the following two criteria have to be met:

- The information itself must be on a measure or activity.
- The measure or activity (not the information itself) must affect, or be likely to affect, the elements and factors in 2(1)(a) and (b), or be designed to protect the elements in (a).

28. With regard to the test for how 'likely to affect' should be interpreted, the Commissioner believes that the likelihood of an effect occurring is not one that needs to be more likely than not, but must be more substantial than remote.

29. The Commissioner suggested to the Cabinet Office that the activity in question was the operation of the Sakhalin Energy Investment Company (SEIC), in which Shell own a share, and more specifically the Sakhalin 2 project. The operation of SEIC obviously involves the drilling for oil and natural gas off the coast of the Russian Island of Sakhalin. The Commissioner acknowledged that in some instances the information contained in some of the documents did not specifically focus on the activities of Sakhalin 2 project or Sakhalin Energy Company, however in the Commissioner was of the *initial* view that such information was directly related to the core activity of the Sakhalin 2 project, and thus the activity of drilling for oil and natural gas.

30. With regard to the second criteria, the Commissioner suggested that there was clear evidence to suggest that the continued preparation for, and operation of, drilling for oil and natural gas by the Sakhalin 2 project will be likely to affect both the elements in 2(1)(a) and the factors in 2(1)(b). In support of this position the Commissioner highlighted the fact that Shell had acknowledged that the activities of the Sakhalin 2 project had affected the environment. For example, the network of onshore pipelines for the Sakhalin 2 project has involved the construction of pipelines which cross, in Shell's words 'about 180 sensitive salmon spawning rivers'. Similarly, Shell acknowledged that the construction of the offshore aspect of the Sakhalin 2 project may have an affect on the western grey whales which spend the summer months off Sakhalin island. Concern over the affect on the whale population led SEIC to re-route the offshore pipeline 20 km away from the whales feeding ground and in doing so the project 'used advanced acoustics and strict speed limits on vessels to minimise disturbance' on the whale population.¹
31. Furthermore the Commissioner highlighted the criticism the Sakhalin 2 project has faced from environmental groups, including World Wide Fund for Nature, Friends of the Earth and Pacific Environment. The concerns of these groups mirror those identified by Sakhalin Energy above, i.e. the effect on salmon rivers and grey whales but also include the potential threat of an oil spill in the Okhotsk and Japanese seas. It has also been argued that as the practice of illegally tapping pipelines to siphon off oil for private use or sale is not uncommon in Russia, which results in oil leaks, this could well happen with pipelines associated with the Sakhalin 2 project.²
32. Moreover, the Commissioner also noted the link between the Sakhalin 2 project and the effects on the environment was one that was clearly accepted by Mr Justice Mitting in the recent High Court High Court case *Export Credit Guarantee Department v Friends of the Earth* [2008] EWHC 638 (Admin) (17 March 2008).³
33. In its response of 9 June 2008 the Cabinet Office provided detailed reasoning as to why it disagreed with the Commissioner's suggestion that the requested information fell within the scope of regulation 2(1)(c). Although the Cabinet Office appeared to acknowledge that the activities of the Sakhalin 2 project would be likely to affect the environment and thus the second of the criteria listed at paragraph 27 is fulfilled, the Cabinet Office explained that it did not agree that the requested information was in fact 'on' the Sakhalin 2 project. Rather the Cabinet Office asserted that the information was 'on' Shell's shareholding in the SEIC and wider interests. In essence it was information on wider, more strategic issues than the particular activity of drilling for oil undertaken by the Sakhalin 2 project.
34. It is clear therefore that in this case determination as to what the requested information is in fact 'on' is central to which access regime this request should have been dealt with under. Crudely put, is the withheld information 'on'

¹ Source: <http://sustainabilityreport.shell.com/2006/workinginchallenginglocations/sakhalin.html>

² Source: <http://www.pacificenvironment.org/article.php?id=2607>

³ [http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2008/638.html&query=EWHC+and+638+and+\(Admin\)&met hod=boolean](http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2008/638.html&query=EWHC+and+638+and+(Admin)&met hod=boolean) – see paragraph 3 of this judgement.

measures or activities that are likely to affect the environment or is the information on measures or activities that are not likely to affect the environment.

35. With regard to a test or a set of criteria by which the Commissioner has defined what 'information on' should include, he has been guided two decisions issued by the Information Tribunal. The first being *The Department for Business, Enterprise and Regulatory Reform v Information Commissioner and Friends of the Earth* (EA/2007/0072). In this case the Tribunal found:

'that the Decision Notice [in which the Commissioner has concluded that none of the requested information was environmental information] fails to recognise that information on 'energy policy' in respect of 'supply, demand and pricing' will often fall within the definition of 'environmental information' under Regulation 2(1) EIR. In relation to the Disputed Information we find that where there is information relating to energy policy then that information is covered by the definition of environmental information under EIR. Also we find that meetings held to consider 'climate change' are also covered by the definition.' (Tribunal at paragraph 27).

36. In reaching this conclusion the Tribunal placed weight on two arguments advanced by FoE, the first being that information on energy policy, including the supply, demand and pricing issues, will often affect or be likely to affect the environment and the second that term 'environmental information' should be interpreted broadly:

'23. Mr Michaels on behalf of FOE contends that policies (sub-para (c)) on 'energy supply, demand and pricing' often will (and are often expressly designed to) affect factors (sub-para (b)) such as energy, waste and emissions which themselves affect, or are likely to affect, elements of the environment (sub-para (a)) including, in particular and directly, the air and atmosphere and indirectly (in respect of climate change) the other elements.

24. He provides by way of simple and practical example, national policy on supply, demand and pricing of different energy sources (e.g., nuclear, renewable, coal, gas) has potentially major climate change implications and is at the heart of the debate on climate change. Similarly, national policy on land use planning or nuclear power has significant effect on the elements of the environment or on factors (e.g. radiation or waste) affecting those elements.

25. Mr Michaels further argues that the term 'environmental information' is required to be construed 'very broadly' so as to give effect to the purpose of the Directive. Recognition of the breadth of meaning to be applied has been recognised by the European Court of Justice, by the High Court and by this Tribunal in *Kirkaldie v Information Commissioner & Thanet District Council* EA/2006/001. The breadth is also recognised in the DEFRA guidance 'What is covered by the regulations'. It does not appear, Mr Michaels argues, that the Commissioner has adopted such an approach.'

37. Moreover in reaching this conclusion the Tribunal appeared to reject BERR's arguments that there must be a sufficiently close connection between the information and a probable impact on the environment before it can be said that the information is 'environmental information'.
38. The second Tribunal decision is *Ofcom v Information Commissioner and T-Mobile* (EA/2006/0078) which involved a request for the location, ownership and technical attributes of mobile phone cellular base stations. Ofcom had argued that the names of Mobile Network Operators were not environmental information as they did not constitute information 'about either the state of the elements of the environment....or the factors.....that may affect those elements.'
39. The Tribunal disagreed, stating at para 31 that:

' The name of a person or organisation responsible for an installation that emits electromagnetic waves falls comfortably within the meaning of the words "any information...on....radiation". In our view it would create unacceptable artificiality to interpret those words as referring to the nature and effect of radiation, but not to its producer. Such an interpretation would also be inconsistent with the purpose of the Directive, as expressed in the first recital, to achieve "... a greater awareness of environmental matters, a free exchange of views [and] more effective participation by the public in environmental decision making...". It is difficult to see how, in particular, the public might participate if information on those creating emissions does not fall within the environmental information regime.'
40. Therefore on the basis of these Tribunal decisions the Commissioner considers that the EIR, and the terms within them should be interpreted broadly. With regard to the particular term 'any information...on' in the Commissioner's opinion a broad reading 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.
41. Nevertheless, the Commissioner does acknowledge that some of the information contained in the withheld documents may well be 'on' a measure or activity which would make the information environmental whereas other parts of the documents may be issues which could not be said to 'on' measures or activities which would make the information environmental.
42. In anticipation of the possibility that in fact both the Cabinet Office and the Commissioner were correct, i.e. some information is environmental and some is not, the Commissioner has also been guided in terms of the practicalities of the how to decide to what depth to analyse the withheld information by the Tribunal's approach in the *BERR* case quoted above. In this case the Tribunal decided that some of the information covered by FoE's request was environmental and thus should be dealt with under the EIR and some was not environmental and therefore should be dealt with under the Act. In dealing with practicalities of such a position, the Tribunal's approach was as follows:

- ‘28. We are faced with documents which may contain both environmental and non-environmental information. Ms Grey on behalf of BERR argues that we should consider whether the Disputed Information is environmental information on a document by document basis. This would be a very convenient way to approach the matter. However the definition under Regulation 2(1) EIR covers “information”, not documents as we understand is the position in other jurisdictions.
29. Under s.39 FOIA information that is covered by the definition of environmental information under EIR is exempt under FOIA and is to be dealt with under the Regulations. It is therefore necessary for us to consider which jurisdiction to apply to the Disputed Information. This is not easy because some documents may contain both environmental and other information. How should we approach such documents? Where a document divides easily into parts where the subject matter of each part is easily identifiable this should enable the document to be considered in parts so as to decide which information is caught by EIR. Where this is not the case do we need to review the document in exacting detail to decide which parts or even paragraphs or sentences are subject to EIR or FOIA? To do so would be an extremely onerous approach on those needing to apply the law. But our information laws are based on requests for information not documents. We believe Parliament may not have appreciated such a consequence and that where possible would have wanted a pragmatic approach to be taken. Therefore we find that where the predominant purpose of the document covers environmental information then it may be possible to find that the whole document is subject to EIR. Where there are a number of purposes and none of them are dominant then it would appear that the public authority has no choice but to review the contents of the document in detail. In deciding which statute applies the public authority cannot, of course, take into account the fact that one piece of legislation may be more favourable to it than another. There is no suggestion that this has happened in this case.’
43. Having considered the various pieces of information along with the Cabinet Office’s submissions and the relevant case law quoted above, the Commissioner has concluded that some of the information falling within the scope of the request is environmental as defined by the EIR and some is not.
44. The Commissioner has outlined below his findings in relation to each document as to which parts of the requested pieces of information constitute environmental information, and which do not. Given that any detailed explanation of these findings would reveal the content of the requested information, the Commissioner has simply summarised his conclusions below. The detailed reasoning behind them, along with a clear indication of which sections the Commissioner believes to fall within which access regime, will be provided to the Cabinet Office in the form of a confidential annex, but for obvious reasons not to the complainant.
45. However, the Commissioner does feel that he can explain the distinction he has drawn by reference to two theoretical examples. For example, if information

relating to communications about the operational activities of Sakhalin 2 or the SEIC, e.g. specific plans for drilling or decisions where to lay pipelines – he believes that such activities would be likely to affect the elements and factors of the environment and thus fall within the scope of regulation 2(1)(c).

46. Where the information relates to what may be described as more 'top-level' issues, for example communications about the level of remuneration paid to executives of the SEIC, then although such information falls within the scope of the request, he does not believe that such information relates to an activity which would be likely to affect the environment.
47. In the Commissioner's opinion all of the information contained in documents 1, 2 and 3 which falls within the scope of the request falls within the scope of the Act rather than the EIR.
48. In the Commissioner's opinion the information contained in all of the remaining documents contains information which is both environmental as defined by regulation 2(1)(c) and must be dealt with under the EIR **and** information which is not environmental and must be dealt with under the Act.

Exceptions and Exemptions

49. Given that the Commissioner has found that some information is environmental information and some is not, the Commissioner must consider both the exceptions contained in the EIR and the exemptions contained in the Act.
50. The Commissioner has considered the environmental information first, albeit that there is inevitably some cross over between the exemptions contained in the Act and the exceptions contained in the EIR.
51. The Cabinet Office has argued that all of the information falling within the scope of this request is exempt from disclosure on the basis of regulation 12(5)(a) (albeit that the Cabinet Office maintains its position that the information does not fall within the scope of the EIR). The Cabinet Office has also argued that the following documents are exempt from disclosure on the basis of section 27(1)(a), (c) and (d):
 - 2a, 3, 4, 5, 5a, 5b and 6
52. The Commissioner notes that the Cabinet Office did not specifically cite section 27 as a basis to withhold documents 1 and 2; this would appear to be slightly odd given the that the Cabinet Office did argue that the corresponding exemption, 12(5)(a), did apply to this information. However, as the Commissioner has concluded that the information contained in documents 1 and 2 falls within the scope of the Act, on the basis that the Cabinet Office argued that such information was exempt on the basis of regulation 12(5)(a), he has considered whether this information is exempt from disclosure by virtue of the exemptions contained section 27(1) of the Act.

Regulation 12(5)(a)

53. Regulation 12(5)(a) of the EIR state that a public authority may refuse to disclose information to the extent that its disclosure would adversely effect international relations, defence, national security or public safety.
54. The Commissioner is conscious that the threshold to engage an exception under regulation 12(5) of the EIR is a high one compared to the threshold needed to engage a prejudiced based exemption under the Act:
- Under regulation 12(5) for information to be exempt it is not enough that disclosure of information will have an effect, that effect must be 'adverse'.
 - Refusal to disclose information is only permitted to the extent of that adverse affect – i.e. if an adverse affect would not result from disclosure from part of particular document, then that information should be disclosed.
 - It is necessary for the public authority to show that disclosure 'would' have an adverse effect, not that it may or simply could have an effect. With regard to the interpretation of the phrase 'would' the Commissioner has been influenced by the Tribunal's comments in the case *Hogan v Oxford City Council & Information Commissioner* in which the Tribunal suggested that although it was not necessary for the public authority to prove that prejudice would occur beyond any doubt whatsoever, prejudice must be at least more probable than not.⁴

The Cabinet Office's position

55. The Cabinet Office has provided the Commissioner with detailed submissions which explain why it considers the requested information to be exempt from disclosure on the basis of regulation 12(5)(a). In the circumstances of this case the Commissioner cannot discuss in detail the Cabinet Office's arguments because to do so would reveal the nature of the withheld information itself.
56. However, the Commissioner believes that he can explain that the Cabinet Office considers regulation 12(5)(a) to be engaged on the following basis:
- Firstly, the Cabinet Office has argued that disclosure of the information would estrange some international partners because of the content of the information.
 - Secondly, the Cabinet Office has argued that disclosure would estrange some international partners, and potential partners, because they would be unwilling to provide the UK with confidential information in the future and

⁴ These guiding principles in relation the engagement of exceptions contained at regulation 12(5) were set out in Tribunal case *Archer v Information Commissioner & Salisbury District Council* (EA/2006/0037)

as a result the Government would be deprived of a means of pursuing UK national interests via diplomatic means.

- Thirdly, disclosure of some of the information would reveal aspects of the UK's negotiation strategy to both international partners and rivals and as a result the UK would be at a disadvantage in the future on negotiations on this and other topics.

The Commissioner's position

57. Regulation 12(5)(a), unlike section 27(1) in the Act does not provide a definition of how 'international relations' could be harmed. However, the Commissioner is satisfied that the three consequences of the disclosure summarised above can be correctly described as effects on the UK's international relations and would thus fall within scope of regulation 12(5)(a). Moreover the Commissioner is satisfied that these effects are clearly ones that are 'adverse'.
58. With regard to the likelihood as to whether disclosure would adversely affect the UK's international relations, the Commissioner does not feel able to explain in great detail why he has concluded that disclosure would be likely to result in the prejudicial effects outlined above. However, after careful examination of the withheld information and the Cabinet Office's submissions, he is satisfied that there is sufficient evidence to support the view that this is a sound conclusion to reach.
59. In order to support this conclusion, the Commissioner does feel able to make the following points:
60. It is clear that in recent history Anglo-Russian relations have been somewhat sensitive – for example in January 2006 the Russian state security service, FSB, accused British diplomats of spying in Moscow – and therefore it is clear that the context into which these documents would be disclosed is one where relations between the two countries are arguably tense.⁵ Therefore with regard to the Cabinet Office's first prejudice argument, it is clear that any effect of disclosure on Anglo-Russian relations has to be seen in this context.
61. The Commissioner notes that the parties involved in exchanges of information are at a sufficiently high level that they would have expected their communications to remain confidential. Moreover, the Commissioner believes that the subject matter of the documents clearly implies that those involved expected that their communications would remain confidential.⁶ Therefore, if such information was disclosed then the effect outlined in the Cabinet Office's second argument that partners would be less willing to provide the UK with information in the future is logical.

⁵ 'UK diplomats in Moscow spying row' <http://news.bbc.co.uk/1/hi/world/europe/4638136.stm>

⁶ The Commissioner notes that this was factor the Tribunal considered to be relevant in the consideration of section 27(2) in the recent decision *Campaign Against Arms Trade v Information Commissioner and Ministry of Defence* (EA/2006/0040). See paragraph 67 of that decision.

62. The issues to which the information pertain, namely Shell's share in SEIC and its involvement in the Sakhalin 2 project, at the time of this request were clearly still 'live'— Gazprom and Shell had been in talks since July 2005 and these were not concluded until December 2006.⁷ Therefore the Commissioner is satisfied that the consequences of any disclosure on the UK's relations with any partners involved in this project would have had an effect on current and ongoing discussions that is to say, the information does not relate to a dated or historical issue.⁸
63. Finally, the Commissioner accepts that the effects of disclosure would not be just to the UK's relations with Shell and the Russian government which are the focus of this information. Rather, the Commissioner is satisfied that disclosure would have an effect on the UK's relations with other energy firms who have assets in Russia and also other international partners involved in the Sakhalin project. Consequently, given the multiple number of relations which disclosure of the information could effect, the Commissioner accepts that the adverse effects of disclosure are more probable than not. (In accepting this argument the Commissioner is not suggesting that regulation 12(5)(a) should be interpreted so broadly that it applies to the UK government's relations with international companies, in addition to the UK's government's relations with international organisations. Rather, it is the impact of disclosure on these companies in the context of the UK's ability to protect the interests of these international companies in the delicate international context of Anglo-Russian relations which the Commissioner believes 12(5)(a) is designed to protect).
64. The Commissioner notes that the Tribunal in the *Archer* case reference above suggested parts of the information falling within the scope of the request should be made if disclosure of such sections would not have the adverse effect particular regulation is designed to protect. In his careful and detailed analysis of the withheld information (demonstrated by the breaking down of documents into environmental and non-environmental information) the Commissioner has considered whether it would be possible to disclose redacted versions of the 9 documents withheld by the Cabinet Office. In the Commissioner's opinion it would not be possible to disclose redacted versions of any of the documents without adversely affecting the UK's international relations.
65. On the basis of the above, the Commissioner is satisfied that the information which he has concluded is environmental information is exempt by virtue of regulation 12(5)(a).

Public interest test

66. However regulation 12(5)(a) is subject to the public interest test set out at 12(1)(b) of the EIR which states that information must still be disclosed unless in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

⁷ 'Gazprom grabs Sakhalin gas', <http://news.bbc.co.uk/1/hi/business/6201401.stm>

⁸ This was a factor the Commissioner took into account in the decision notice FS50077719, see paragraph 17 of that decision.

Arguments in favour of disclosing the information

67. The complainant has argued that Sakhalin 2 is a high-profile and controversial oil and gas extraction project which has considerable environmental impact, influence on UK-Russian relations, impact on global energy supplies and cost to the UK taxpayers are matters of pressing public interest. The complainant specifically highlighted the impact that the project is having on the population living in the area, the local economy and the regions environment which adds to the strong public interest in disclosing information which reveals the nature of the UK Government's involvement in the project.
68. In correspondence with the Commissioner the Cabinet Office acknowledged the general public interest in openness and the benefits of transparency in public life.

Arguments in favour of withholding the information

69. The Cabinet Office has highlighted a number of reasons as to why withholding the information is in the public interest. These can be summarised as follows:
70. There is a strong public interest in the UK having good working relations with foreign governments and partners so that the UK can effectively pursue its interests abroad. Disclosure of this particular information would prejudice relations with a key international partner, namely Russia, at a time when relations between the two Governments are sensitive and such a harmful effect would not be in the public interest. Disclosure has the potential to affect the UK's relations with Russia not just in issues relating to Sakhalin project.
71. The Cabinet Office has argued that the expansion of trade with, and investment in, Russia is in the national interest. In particular the Cabinet Office has noted the importance of British investment in Russian energy sources and the expansion of mutually profitable relationships.
72. The Cabinet Office also argued that it would not be in the public interest if foreign governments and partners understood the UK's negotiating tactics because the UK's economic interests in other countries would be put at risk.
73. Finally, the Cabinet Office noted that it was not in the public interest that the UK's diplomatic relations are undermined by partners, and prospective partners, being less willing or candid in sharing information with the UK in the fear that such information may be subsequently disclosed.

Balance of the public interest arguments

74. The Commissioner acknowledges there is clear public interest in greater awareness of the Government's role in matters which effect the environment – such a position is enshrined in the Directive which assumes that there is an explicit assumption on disclosure – and this factor can be said to have particular weight given the controversial and high profile nature of the Sakhalin 2 project. Moreover, the Commissioner appreciates that there is a public interest in the

Government being accountable for time and, as the complainant suggests, taxpayers' money which has been spent on such projects. On a more general level, disclosure may inform the public about the nature of the UK's relations with a key international partner, a factor of significance given the changing nature of the global energy market and the UK's increasing reliance on Russia for supplies of gas.

75. However, the Commissioner accepts that the harmful effects of disclosure of this information are multiple (see the three different arguments advanced by the Cabinet Office), have a significant chance of occurring (certainly one that is more probable than not), and have the potential not only to affect the UK's relations with Russia on this particular issue, but all Anglo-Russian relations, as well as the UK's relations with other current and potential international partners.
76. In the Commissioner's opinion the fact that the adverse effects of disclosure are both severe and widespread means that these factors have to be given considerable weight in the balance of the public interest test. In contrast the public interest in favour of disclosure focus largely on issues of transparency and accountability with regard to one particular aspect of Anglo-Russian relations, namely Sakhalin 2 project and therefore such factors have to be given less weight. Therefore, in this specific case the Commissioner does not believe that the public interest in accountability and transparency is sufficient to outweigh the factors in maintaining the exemption/
77. Consequently, the Commissioner believes that on balance, the public interest in withholding the information outweighs the public interest in disclosing the information.

Section 27(1)

78. The Cabinet Office has also argued that the information falling within the scope of the request is also exempt on the basis of sections 27(1)(a), 27(1)(c) and 27(1)(d) of the Act.

79. Section 27(1) states:

'27(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) relations between the United Kingdom and any other State,
- (b) relations between the United Kingdom and any international organisation or international court,
- (c) the interests of the United Kingdom abroad, or
- (d) the promotion or protection by the United Kingdom of its interests abroad.'

80. With regard to whether the likelihood of prejudice is one that 'would be likely' to occur, or rather one that 'would' occur, the Cabinet Office has confirmed that it considers the likelihood of prejudice to be one which meets the higher test of 'would'.

81. In support of this position the Cabinet Office has provided the Commissioner with the very same arguments which are detailed above in paragraph 56 in relation to the engagement of regulation 12(5)(a).
82. On the basis of these arguments, and for the reasons detailed above in paragraphs 57 to 65, the Commissioner is satisfied that the disclosure of the information which falls within the Act would prejudice the UK's international relations. The Commissioner is conscious of the fact that the Act, unlike the EIR, actually set out the ways in which international relations could be prejudiced by the disclosure of information and the Cabinet Office has cited the basis provided by sub-sections 27(1)(a), (c) and (d). Having reviewed the information that the Commissioner considers to fall within the scope of the Act, the Commissioner accepts that disclosure of all of this information, i.e. the information contained within all of the documents, would have the effects set out at sections 27(1)(a), (c) and (d).
83. Section 27, like regulation 12(5)(a), is subject to the public interest test. As with the consideration of the prejudice test, the Commissioner does not intend to set out in full his consideration of the balance of the public interest test under the Act. Rather, he is satisfied, on the basis of the reasons set out above at paragraphs 74 to 77, that the public interest in disclosing the information exempt on the basis of section 27(1) is outweighed by the public interest in withholding the information.
84. As the Commissioner has concluded that each piece of information, be it environmental or not, is exempt on the basis of one exemption or exception, he has not gone on to consider whether the remaining exemptions or exceptions cited by the Cabinet Office have been correctly applied.

Procedural matters

85. The Commissioner has concluded that the Cabinet Office committed a number of procedural breaches when handling this request. To a large extent these breaches have occurred because, in the Commissioner's opinion, some of the information falling within the scope of the request should have been dealt with under the EIR rather than under the Act.

Late response to request and refusal notice issues

86. Both the Act and the EIR require that a public authority responds to an information request 20 working days following its receipt. In this case the complainant submitted his request on 25 September 2006 and the Cabinet Office replied on 22 November 2006.
87. With regard to the information falling within the scope of the Act, the Commissioner finds that the Cabinet Office breached section 17(1) by failing to issue its refusal notice within 20 working days.

88. With regard to the information falling within the scope of the EIR, the Commissioner finds that the Cabinet Office breached regulation 5(2) by failing to respond to the request within 20 working days. Furthermore, the Commissioner finds that the Cabinet Office breached regulation 14(1) in failing to provide a refusal notice citing the exceptions contained within the EIR which the Cabinet Office later relied upon (albeit that the Cabinet Office maintains that the information is not environmental). The Cabinet Office also breached regulation 14(2) and 14(3) which require that such a notice is provided within 20 working days following the request and states the exceptions that are being relied upon.

Failure to initially instigate an internal review

89. Under regulation 11(3) of the EIR if a public authority receives representations from the applicant in which the applicant indicates that the public authority's initial decision to refuse to disclose information is incorrect then the public authority should conduct an internal review of its initial refusal.
90. In the Commissioner's opinion the complainant's letter of 22 November 2006 to the Cabinet Office constituted an expression of dissatisfaction with the Cabinet Office's decision to refuse his original request of 25 September 2006. However, the Cabinet Office did not treat this as a request for internal review but as a separate and distinct information request. It was not until the complainant contacted the Cabinet Office on 24 February 2007 in order to explicitly ask for an internal review to be conducted in relation to his original request of 25 September 2006 was this processed.
91. In the Commissioner's opinion, by failing to instigate an internal review upon receipt of the complainant's letter of 22 November 2006, the Cabinet Office breached regulation 11(3).⁹

The Decision

92. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- The Cabinet Office was correct to withhold the information which the Commissioner is satisfied falls within the scope of the Act on the basis of sections 27(1)(a), (c) and (d).
 - The Cabinet Office was correct to withhold the information which the Commissioner is satisfied falls within the scope of the EIR on the basis of regulation 12(5)(a).
93. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

⁹ See paragraph 96 in the 'Other Matters' section of this notice with regard to the implications under the Act of the Cabinet Office failing to instigate an internal review.

- The Cabinet Office breached section 17(1) of the Act by failing to provide a refusal notice within 20 working days.
- For similar reasons the Cabinet Office also breached the following regulations of the EIR 5(2), 14(1), 14(2) and 14(3).
- Finally by failing to conduct an internal review upon submission of the complainant's letter of 22 November 2006, the Cabinet Office breached regulation 11(3).

Steps Required

94. The Commissioner requires no steps to be taken.

Other matters

95. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
96. As noted above, the Cabinet Office did not instigate its internal review procedure following receipt of the complainant's letter of 22 November 2006. The Commissioner wishes to draw the Cabinet Office's attention to the desirable practice for complaints procedures under the Act as set out in the Section 45 Code of Practice¹⁰. In the Commissioner's opinion, the Code should be interpreted to mean that *any* communication from an applicant expressing dissatisfaction with a response to a request should be sufficient to trigger the public authority to instigate its internal review procedure; there is no need for the applicant to specifically state that he wishes an internal review to be conducted. The Commissioner would expect that the Cabinet Office's handling of requests for internal reviews to comply with the guidance outlined in the Code in the future.

¹⁰ Section 45 Code of Practice <http://www.foi.gov.uk/reference/impref/codepafunc.htm>

Right of Appeal

97. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 15th day of December 2008

Signed

**Richard Thomas
Information Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Document Number	Date	Document Summary	FOI exemptions claimed by CO	EIR exceptions claimed by CO	ICO opinion on whether information is FOI or EIR	ICO opinion on disclosure
1	20.01.05	Letter from Prime Minister's Office to FCO	s41 & 43(2)	12(4)(e), 12(5)(a), 12(5)(d), 12(5)(e), 12(5)(f) & 12(5)(g)	All FOI	Exempt on basis of s27(1)(a), (c) & (d)
2	26.06.05	Letter from Shell to Prime Minister's Office	s41 & s43(2)	12(5)(a), 12(5)(d), 12(5)(e), 12(5)(f) & 12(5)(g)	All FOI	Exempt on basis of s27(1)(a), (c) & (d)
2(a)	22.06.05	Letter from Shell to Russian authorities	S27(1)(a),(c) & (d) S41(1) S43(2)	12(5)(a), 12(5)(d), 12(5)(e), 12(5)(f) & 12(5)(g)	Some EIR, some FOI.	Exempt under reg. 12(5)(a) and s27(1)(a), (c) & (d)
3	12.07.05	Letter from Prime Minister's Office to Shell	S27(1)(a),(c) & (d) & s41	12(5)(a), 12(5)(d), 12(5)(e), 12(5)(f) & 12(5)(g)	All FOI	Exempt on basis of s27(1)(a), (c) & (d)
4	08.08.05	Letter from Shell to Prime Minister's Office	S27(1)(a),(c) & (d) & s41	12(5)(a), 12(5)(d), 12(5)(e), 12(5)(f) & 12(5)(g)	Some EIR, some FOI.	Exempt under reg. 12(5)(a) and s27(1)(a), (c) & (d)
5	14.09.06	Internal email between staff in Prime Minister's Office	S27(1)(a),(c) & (d) & s41	12(4)(e), 12(5)(a), 12(5)(d), 12(5)(e), 12(5)(f) & 12(5)(g)	Some EIR, some FOI.	Exempt under reg. 12(5)(a) and s27(1)(a), (c) & (d)
5(a)	Not dated	FCO speaking note	S27(1)(a),(c) & (d) & s41 S43(2)	12(4)(e), 12(5)(a), 12(5)(d), 12(5)(e), 12(5)(f) & 12(5)(g)	Some EIR, some FOI.	Exempt under reg. 12(5)(a) and s27(1)(a), (c) & (d)
5(b)	Not dated	FCO background note	S27(1)(a),(c) & (d) & s41	12(4)(e), 12(5)(a), 12(5)(d),	Some EIR, some FOI.	Exempt under reg. 12(5)(a) and



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			& S43(2)	12(5)(e), 12(5)(f) & 12(5)(g)		s27(1)(a), (c) & (d)1)
6	20.09.06	Email from Prime Minister's Office to FCO	S27(1)(a),(c) & (d) & s41 & S43(2)	12(4)(e), 12(5)(a),12(5)(d), 12(5)(e), 12(5)(f) & 12(5)(g)	Some EIR, some FOI.	Exempt under reg. 12(5)(a) and s27(1)(a), (c) & (d)

Legal Annex

Freedom of Information Act 2000

Section 1(1) provides that -

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

Section 1(2) provides that -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

Section 2(1) provides that –

“Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that either –

(a) the provision confers absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information

section 1(1)(a) does not apply.”

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Section 17(1) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

(a) states that fact,

(b) specifies the exemption in question, and

- (c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 27(1) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) relations between the United Kingdom and any other State,
- (b) relations between the United Kingdom and any international organisation or international court,
- (c) the interests of the United Kingdom abroad, or
- (d) the promotion or protection by the United Kingdom of its interests abroad.”

Section 41(1) provides that –

“Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

Section 43(2) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

Environmental Information Regulations 2004

Regulation 2(1) In these Regulations:

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other 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 elements of the environment referred to in (b) and (c);

Regulation 5(1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

Regulation 5(2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

Regulation 11(1) Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request.

Regulation 11(2) Representations under paragraph (1) shall be made in writing to the public authority no later than 40 working days after the date on which the applicant believes that the public authority has failed to comply with the requirement.

Regulation 11(3) The public authority shall on receipt of the representations and free of charge –

- (a) consider them and any supporting evidence produced by the applicant; and
- (b) decide if it has complied with the requirement.

Regulation 12(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

- (a) it does not hold that information when an applicant's request is received;
- (b) the request for information is manifestly unreasonable;
- (c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;
- (d) the request relates to material which is still in course of completion, to unfinished documents or to incomplete data; or
- (e) the request involves the disclosure of internal communications.

Regulation 12(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

- (a) international relations, defence, national security or public safety;

- (b) 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;
- (c) intellectual property rights;
- (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
- (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
- (f) the interests of the person who provided the information where that person –
 - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from the Regulations to disclose it; and
 - (iii) has not consented to its disclosure; or
- (g) the protection of the environment to which the information relates.

Regulation 14(1) If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.

Regulation 14(2) The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.

Regulation 14(3) The refusal shall specify the reasons not to disclose the information requested, including –

- (a) any exception relied on under regulations 12(4), 12(5) or 13; and
- (b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).