



Oil & Gas
Authority

21 Bloomsbury Street
London WC1B 3HF

Richard Bales

By email to: request-522085-d9fbf7f8@whatdotheyknow.com

Ref No: FOI-2018-0054

15 February 2019

Dear Mr Bales,

INTERNAL REVIEW OF FREEDOM OF INFORMATION REQUEST FOI-2018-0054

A. Background

1. I am writing in response to your request for an internal review of the above case, dated **25 November 2018**.
2. I have reviewed the Oil and Gas Authority's ('**OGA**') response to your original request (the '**Response**'), dated **19 November 2018**. A copy of the Response is attached to this letter and marked **Annex [B]**.
3. In your original request of **26 September 2018** (the '**Original Request**') you asked whether Ineos Upstream Limited ('**Ineos**') had a parental guarantee and, if it did, to be provided with copies of the correspondence and documentation. A copy of the Original Request is set out at **Annex [A]** to this letter.
4. The OGA did not confirm or deny whether it held the requested information under *Section 43(2)* of the Freedom of Information Act 2000 ('**FOIA**') and, where relevant, under *Regulation 12(5)(e)* of the Environmental Information Regulations 2004 ('**EIR**') (*commercial confidentiality*).
5. On **25 November 2018**, you requested an internal review into the way your request was handled. A copy of your internal review request can be found at **Annex [C]**. You disagreed with the OGA's application of the public interest test, believing that the public interest in disclosing the information requested outweighed the public interest in withholding it.

6. I have now considered the OGA's original response to your request and my findings are below.

B. Review

7. Having further considered your request and the potential harm that the information could cause to Ineos if it were to be released, and having undertaken further consultations with Ineos, I have concluded, on balance, that confirming that such a guarantee is held and also revealing the terms of that guarantee would *not*, in itself, be likely to cause a sufficient level of harm to justify continuing to withhold it.
8. Looking at the wider picture in regard to what companies place in the public domain about their guarantee arrangements and information in the wider public domain, the fact that they have one is not always viewed as sensitive. Each case should be carefully judged on its merits and, in this case, on closer examination there are not in my view sufficient reasons to preclude the disclosure of the fact that Ineos has a Covenant of Guarantee in place.
9. Therefore, I can confirm that a Covenant of Guarantee *was* provided by Ineos to the OGA on 17 December 2014, and please find attached a redacted version of it at **Annex [D]**.
10. The redactions made have been made on the following basis:

Exemptions/exceptions

i) Section 40(2) FOIA and Regulation 13(1) EIR (personal data)

11. The disclosed document contains the names and signatures of two individuals. This information is being withheld under Sections 40(2) and 40(3A) FOIA and Regulation 13(1) EIR. Section 40(2) provides that personal data is exempt from disclosure if one of the conditions in 40(3A) is satisfied. One of the conditions in Section 40(3A) is a breach of any of the data protection principles in the Data Protection Act 2018 ('DPA'). The data protection principles include that any processing of personal data must be fair and lawful. The provisions of Section 13 EIR mirror those of Section 40(2) FOIA.
12. The OGA considers that disclosure of the names and signatures of the two individuals would breach the principles of fairness and lawfulness. The individuals whose details have been withheld have and are entitled to an expectation of privacy. In any event, the relevant individuals have not consented to their personal data being disclosed.
13. As such, disclosure would meet neither the fair nor lawful processing principles. In light of this, this is being withheld under Sections 40(2) and 40(3A) FOIA and Regulation 13(1) EIR.

ii) Section 43 (1) and (2) FOIA (commercially confidential); and, Regulation 12(5) (e) EIR

14. Section 43 (2) FOIA provides that information is exempt from disclosure if disclosure would, or would be likely to prejudice the commercial interests of any person (including the public authority holding it). Regulation 12(5)(e) EIR provides that a public authority may refuse to disclose information to the extent that its disclosure would likely adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
15. ICO guidance on commercial confidentiality includes (among other things):
 - Regulation
 - Private finance initiatives/public-private partnerships.
 The withheld information falls into the above categories.
16. We also need to consider whether or not the commercial interests of the company who has made the applications, would be “prejudiced” by the release of the information. Having seen the withheld information, I have concluded that this would be likely.
17. In summary, the information being withheld is the identity of the guarantor and any other information that would identify them (for example unique company numbers and their address). Should this information become known, it would prejudice Ineos’ commercial operations by:
 - Risking such a guarantee being demanded of INEOS on a routine basis. Either forcing INEOS to concede the provision of the same or similar guarantee more widely, with the resultant increase in the guarantors liability.
 - Risking future acquisitions by INEOS of interests in onshore licences because the potential vendors and its/their co-venturers would be likely to demand a guarantee from the same guarantor in the future.
 - Risking the participation by INEOS in future onshore licence bidding rounds because competitors would be likely to assume future provision of guarantees, possibly by the same entity, which would be helpful to them in structuring their competing bids to the detriment of INEOS.

Public Interest

18. The OGA acknowledges that disclosure of the requested information can lead to greater transparency and enhanced scrutiny of public authorities. However, the need and desire for greater transparency must be balanced against the need to protect the commercial interests of the companies and their interests in maintaining confidentiality, and the OGA’s objective of having an effective system of regulation.
19. The disclosure of the requested information would mean that the OGA’s ability to have free and frank discussions with parties would be adversely affected, with

detrimental consequences for the OGA's ability to fulfil its statutory functions and objectives; and it would prejudice the commercial interests of the licence holders. There is also a public interest in ensuring that companies can have confidence that their commercial/confidential information will not be disclosed.

20. The OGA, therefore, considers that the public interest in disclosing the information is outweighed by the public interest in maintaining confidentiality and the exemptions/exceptions.

iii) Section 41(1) (information provided in confidence)

21. I also consider that *Section 41(1)* applies in this situation. The commercial information mentioned in the preceding paragraphs was supplied to the OGA under conditions that imposed an obligation of confidence upon the OGA (and also the third parties, such as the guarantee provider, provided cover to Ineos on the understanding that their identities would be kept confidential).
22. Licensees, such as Ineos, are required to confirm in writing, via a letter from the Board, that they have sufficient funds to meet their obligations and work programmes. Ineos, however, provided further information to the OGA in correspondence with relevant staff, which was the subject of this request.
23. Furthermore, this places a duty of confidence on the OGA, for which the public interest considerations in this case do not outweigh the duty of confidence (as discussed generally above). Should the OGA breach such a confidence, Ineos could take legal action against the OGA.

Other considerations

24. Finally, your request for an internal review makes a number of statements which the OGA has chosen not to address (as there would be no further point in doing so, having now decided to release part of the previously withheld information). However, the fact that the OGA have not addressed these points should *not* be taken to mean that the OGA agrees with them.

C. Summary

25. Therefore, in consideration of the above, I conclude that:
 - a) reliance on a refusal to confirm or deny whether any guarantee was held was incorrect and a redacted version of the Guarantee is to be released; and,
 - b) the OGA is entitled to rely on the exemptions/exceptions under *sections 41(1), 43 FOIA and Regulations 13 and 12(5)(e) EIR*, in regard to the balance of the information (the identity of the guarantor) and that to do so is reasonable.
26. This concludes my review of the handling of your request.

27. If you are unhappy with the outcome of this internal review, you may contact the Information Commissioner for a decision. The Information Commissioner can be contacted at: Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF

Yours sincerely,

[Signed]

Hedvig Ljungerud
Director of Strategy
OGA

Annex A (Original request)

*"Dear Oil and Gas Authority,
Would you please confirm what form of Parental Guarantee has been provided by Ineos Holdings Limited or other parts of the Ineos Group to underpin the liabilities and obligations of Ineos Upstream Limited, in respect of the various PEDL agreements currently in place. Please provide copies of relevant documentation or correspondence."*

Annex B (Original Response)

[Attached]

Annex C (Request for an internal review)

"Dear Oil and Gas Authority,

Please pass this on to the person who conducts Freedom of Information reviews.

I am writing to request an internal review of Oil and Gas Authority's handling of my FOI request 'Parental Guarantee'.

My complaint is as follows:-

You have chosen to neither deny nor confirm whether the OGA holds the information that I have requested, for which you provided the following justification:-

"Section 43(3) FOIA provides that the duty to confirm or deny whether the OGA holds the requested information does not arise if confirming the same would, or would be likely to, prejudice the commercial interests of the OGA or a third party. Regulation 12(5)(e) EIRs provides that a public authority may refuse to disclose information to the extent the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest."

"Even confirming whether or not the OGA holds a copy of a Guarantee in this instance would likely provide Ineos' competitors with information on their financial status and, by doing so, would likely undermine Ineos' commercial position (for example by undermining Ineos' ability to get credit, or making such credit more expensive, forcing Ineos to provide guarantees more widely, thus increasing liability, or not providing them, thus losing business)."

You will of course be aware that neither Section 43(3) FOIA nor Regulation 12(5)(e) EIRs confers an absolute exemption from the duties embodied in both pieces of legislation. Your failure to acknowledge

that fact and provide active assistance to myself in pursuing my information request is in itself an unlawful obstruction, which I will not pursue at this point.

As you will be aware, the exemption will apply in either instance where the following applies:-

"FOIA 2000 Section 17(3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming—

(a) that, 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 authority holds the information, or (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

"EIR Regulation 12(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if— (a) an exception to disclosure applies under paragraphs (4) or (5); and (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

(2) A public authority shall apply a presumption in favour of disclosure."

The application process and subsequent award of PEDL allocations is subject to clearly defined guidelines and appraisal methods, many of which are not disclosed to the public for reasons of confidentiality and commercial interest. A key part of that process is the assessment of the applicant company's financial capability, comprising financial resilience and financial capability to meet future commitments. Your own guidelines include the arrangements to be employed when the applicant company has an insufficient track record to meet those financial criteria, including documentation to be supplied by guarantors, where applicable.

The majority of 2014 PEDL awards were made in favour of INEOS, in the guise of a newly incorporated company, INEOS Upstream Ltd. Latest published accounts of that company indicate their lack of current financial substance, to the extent that auditors have signed off as a going concern only based on a one-year promise of continued funding from the parent Group.

That promise, without written and legal undertaking, would have little significance in terms of guarantee to meet future obligations under the PEDL terms. It is therefore to be expected that a form of Guarantee would have been provided to the OGA or BEIS by the INEOS Group and to confirm that point would represent no significant release of commercial information that is not already expected in the public domain.

However, if the INEOS Group have not provided such a Guarantee or equivalent undertaking, the implication would be that the obligations incorporated in the relevant PEDLs are not protected to the extent envisaged by OGA and BEIS guidelines and that INEOS have been treated more favourably than other PEDL holders or unsuccessful applicants. The public interest in that information would be considerable, relating not only to the financial protection offered against future breaches of PEDL terms, but also to the conduct of the public authorities charged with managing the PEDL award process. Both of those aspects are of high importance to the wider public and would outweigh any commercial interest that INEOS might have in maintaining a secrecy that related to an abuse of the PEDL allocation process.

Your refusal to neither confirm nor deny the existence of the requested information is therefore not justified by reference to either FOIR 43(3) or EIR 12(5)(e) as the public interest in disclosure will far outweigh the commercial interest of the INEOS Group."

Annex D (Provided Information – see attachment)