

Annex C - FOI/EIR: Release Of Commercial Information By Trading Funds, As Suppliers

Introduction

1. Guidance on the release of commercial information, where MOD is the purchaser is available in Annex A. This document intends to provide guidance on the release of commercial information where MOD, through its Trading Funds is operating in a more commercial environment. This guidance addresses both the Freedom of Information Act 2000 and the Environmental Information Regulations 2004.

What Can Be Classed As Commercial Information?

2. Commercial information when acting as a purchaser primarily relates to pre and post contractual information, a large proportion of which is provided by third parties. However, a wider spectrum of information can be considered commercial information in a Trading Fund. A list of commercial information could include:

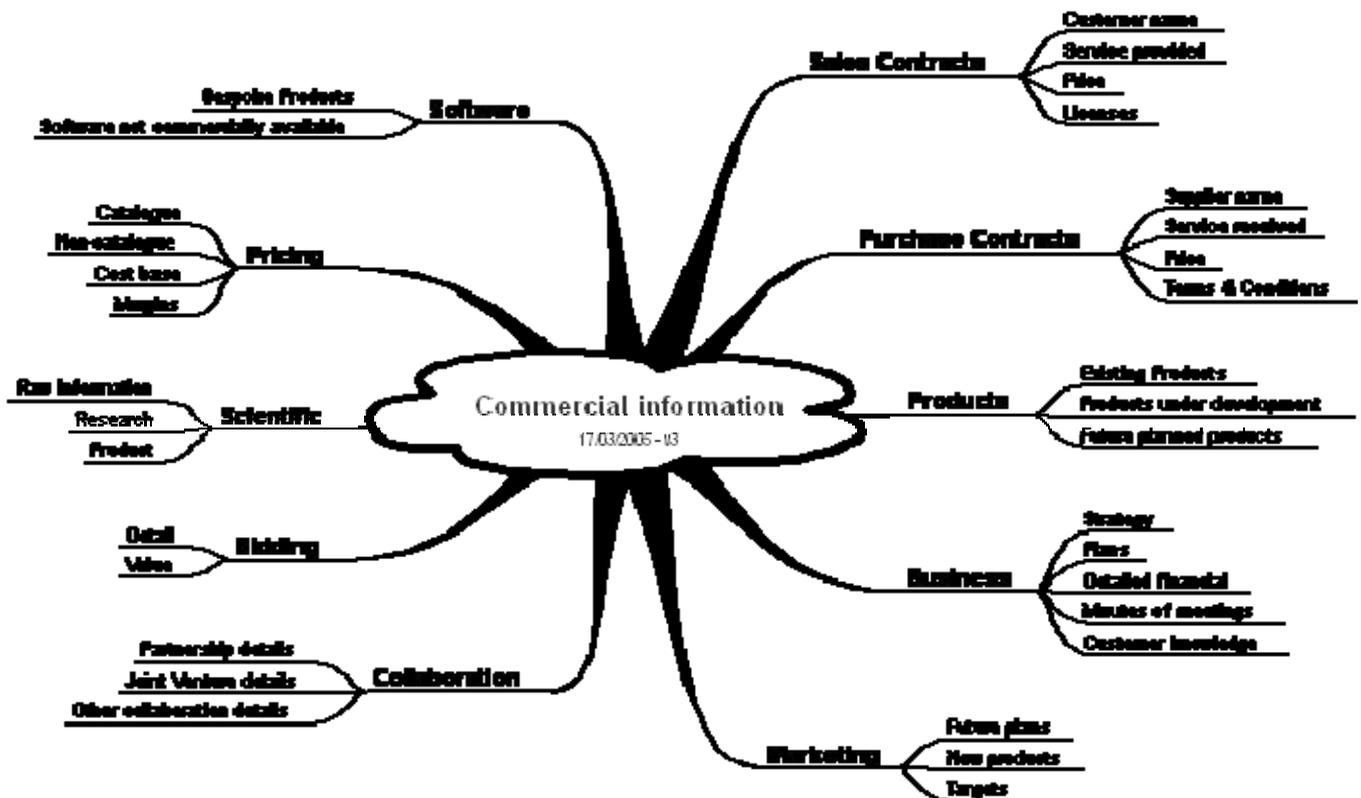


Figure 1 highlights a range of information categories that could be regarded as commercially sensitive information; this is by no means an exhaustive list.

Principles

3. When considering whether or not to release information, under FOI or EIR, Trading Funds should adopt the following principles:

- a) start from the presumption that the information should be disclosed;

- b) be prepared to explain in detail the commercial operating environment of a Trading Fund to the requestor and the Information Commissioner, should a decision to withhold information become the subject of an appeal;
- c) consider refusal to disclose information if you consider it would, or would be likely to, cause harm to or adversely affect the Trading Fund, a customer or partner;
- d) consider refusal to disclose information if you can demonstrate a reasonable case for expecting it would lead to a successful claim for an actionable breach of confidentiality (remember the confidentiality exemption does not protect trading fund generated information);
- e) consider refusal to disclose information if you can prove it would give the Trading Fund's competitors, or those of a customer or partner an unfair advantage;
- f) consider refusal to release information if disclosure would adversely affect Intellectual Property Rights (including copyright);
- g) remember the Public Interest Test: this must show the public interest for as well as against release, and unless the case for withholding is GREATER the information must be released;
- h) as a supplier consider a far wider spectrum of information as commercially sensitive (as shown in figure 1) than is normal for the MOD as a purchaser.

Exemptions And Exceptions

4. When a request for information is received a Trading Fund must consider whether there would be any commercial harm or adverse affect to the business of the Trading Fund, customer or partner in releasing the information. Commercial harm could be actual or potential loss of revenue, loss of contract, loss of competitive advantage, loss of market share. FOI has a series of exemptions, while EIR has a series of exceptions of which one or many could be applied to protect information. A subset of these which could be applied to commercially sensitive information is listed below. One significant difference between FOI and EIR is that there are no absolute exceptions under EIR. All non-absolute exemptions/exceptions would be subject to a Public Interest Test.

FOI/EIR	Section No	Exemption/Exception	Public Interest
FOI	41	Information provided in confidence	No
FOI	43	Commercial interests	Yes
EIR	12-5c	Adversely affect Intellectual Property Rights	Yes
EIR	12-5e	Adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest	Yes

5. Trading Funds must consider **all implications of releasing information** and whether other exemptions may be applicable. For example, experience in other parts of MOD has shown that commercial information can also have implications for International Relations or Defence (guidance can for these exemptions can be found in the MOD FOI Guidance), and Trading Funds may hold personal information about customers, which would be subject to the Data Protection Act. This guidance will concentrate on the four above exemptions/exceptions, looking specifically at how they may be applied to protect the commercial viability of a Trading Fund as a supplier.

6. The following guidance is aimed specifically at Trading Funds, but applies to other areas of MOD, where they might find themselves acting as a supplier in a commercial environment. It complements the guidance given in the Annex A and highlights differences in Trading Fund procedures.

FOI Section 41: Information Provided In Confidence

7. Section 41 of the Freedom of Information Act states:

"Information provided in confidence 41. - (1) 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.

(2) The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence."

What Does The Act Say?

8. Section 41 of the Act sets out an exemption from the "right to know": if the information in question was provided to the Trading Fund in confidence. There are two components to the exemption:

a) The information must have been obtained by the Trading Fund from another person. A person may be an individual, a company, a public authority or any other "legal entity". The exemption does not cover information which the Trading Fund has generated itself although another exemption may apply (e.g. section 43 where the information may prejudice the commercial interests of the Trading Fund itself.).

b) Disclosure of the information which may give rise to breach of confidence, which in itself could be actionable. In other words, if the Trading Fund disclosed the information the provider or a third party could take the Trading Fund to court with a reasonable prospect of success.

9. In trying to decide whether information received from a third party falls within this exemption, it may be necessary to think about two questions:

- a) "Can the Trading Fund disclose the information?" and,
- b) "Can the Trading Fund confirm or deny the existence of the information?" (i.e. it is possible that in some circumstances it would be inappropriate to confirm or deny the existence of information – for example, if the information related to a third party's new product, not yet patented). However, it is essential to be very careful to be consistent when using Neither Confirm Nor Deny (NCND). Only using NCND when you have something to protect might provide a strong indication about what you are trying to protect, particularly if there is a pattern of requests. For example, MOD always replies NCND when we receive an enquiry about whether we are considering an industry merger or acquisition before the stock market announcement.

What Is Confidentiality?

10. A duty of confidence arises when one person (the "confidant") is provided with information by another (the "confider") in the expectation that the information will only be used or disclosed in accordance with the wishes of the confider. If there is a breach of confidence, the confider or any other party affected (for instance a person whose details were included in the information confided) may have the right to take action through the courts.

11. For the purposes of FOI, the key issue is likely to be the disclosure rather than the use of information. In trying to determine whether an obligation of confidence has arisen in a particular case, it is likely to be necessary to think first about the circumstances under which information was provided to the Trading Fund and second about the nature of that information.

The Circumstances Under Which The Information Was Provided

12. There are essentially two cases:

a) When the confider provides information to the Trading Fund, explicit conditions are attached to its subsequent use or disclosure. This may take the form of a contractual term or non-disclosure agreement or may be agreed in a bespoke letter; this could be information provided by a commercial customer of a Trading Fund to enable that Trading Fund to provide a service covered by such a confidentiality agreement, e.g. the temperature forecast at which a supermarket chain removes fizzy drinks from prominent positions and replaces them with still drinks.

The letter is the more difficult example because it depends on how it is written and the circumstances under which we received the letter. A caveat at the end of the letter or e-mail is not enough. Companies generate such caveats as a matter of routine with no regard to the sensitivity of the information. Therefore, the text must be bespoke. Moreover, receiving a letter that states something is confidential does not imply acceptance. Accordingly, there must be some sort of tacit agreement, otherwise, it is an implied obligation of confidence

b) Conditions are not stated explicitly but are obvious or implied from the circumstances; this could be similar information to that sighted in the example above, but without the protection of a formal agreement.

13. The second case is more likely to give rise to some uncertainty since there is always the risk that the expectations of the confider and the confidant may be different. Some of the circumstances which typically give rise to obligations of confidence are reasonably well

known. In any event it will be appropriate to consult whoever may be affected by the requested disclosure of information.

The Nature Of The Information

14. Information which is protected from disclosure by an obligation of confidence must have the necessary "quality of confidence". There are two key elements to this:

a) The information need not be highly sensitive. However, nor can it be trivial. It must have some sort of value to the owner. The preservation of confidences is recognised by the courts to be an important matter and one in which there is a strong public interest. This notion is undermined if it is argued that even trivial matters are covered.

b) The information must not be readily available by other means.

When Can Confidential Information Be Disclosed?

15. While the exemption in section 41 is an absolute exemption, the duty of confidence is not absolute and the courts have recognised three broad circumstances under which confidential information may be disclosed. These are as follows:

a) Disclosures with consent. If the person to whom the obligation of confidentiality is owed (whether an individual or an organisation) consents, disclosure will not lead to an actionable breach of confidence.

b) Disclosures which are required by law. "Law" in this context includes statute, rules of law, court orders etc.

c) Disclosures where there is an overriding public interest, for example, a serious wrong doing. There are no hard and fast rules here. The important thing to note, however, is that the courts have generally taken the view that the grounds for breaching confidentiality must be strong ones. Confidentiality is recognised as an important thing in itself. In balancing confidentiality against the public interest, the task is not to weigh up the impact upon the individual against the good of society, but rather the good of society in revealing the information against the importance to society of preserving confidences. In any case a decision for or against disclosure should not be sanctioned without first seeking a legal opinion.

"Actionable" Breaches Of Confidence

16. Trading Funds relying upon the exemption must be satisfied that any breach of confidence would be actionable. "Actionable" means that an aggrieved party would have the right to take the authority to court, with a reasonable chance of success, as a result of the disclosure. There are essentially two considerations:

a) The Trading Fund must be satisfied the information in question is in fact confidential. If in doubt, it may be necessary to take advice, including from the person affected. In the final analysis, however, the authority itself must be satisfied that an obligation of confidence exists: there is no veto given to third parties who object to disclosure.

b) The aggrieved party must have the legal standing to take action. For instance, it is important to note that one government department or one Northern Ireland department cannot sue another.

17. Remember that information provided in confidence specifically excludes the Trading Fund's own information and the exemption can therefore only be applied to third party supplied information. This is likely to be information provided to allow the Trading Fund to act as a supplier, or information provided in order to allow the Trading Fund to bid for the delivery of a product or to deliver a service to the third party. Protective markings or descriptors (e.g. Restricted – Commercial or Commercial-in-Confidence), while being a guide, should not be relied upon when making decisions on whether or not to withhold information.

18. An example of application of the Section 41 - Information Provided In Confidence exemption is set out below:

- **Enquiry:** Please provide me with all information held relating to the development of your de-icing service for ABC airline
- **Document containing relevant information:** ABC airline's statement of requirements

Questions to ask:

- Is the information protected by a formal obligation of confidence or contractual condition, e.g. non-disclosure agreement?
 - Yes
- If not, is there an implied obligation of confidence?
 - N/A
- Does the third party consent to disclosure?
 - No
- Is there a legal requirement to disclose?
 - No
- Is there an overriding public interest in disclosure?
 - No
- Does the information have the necessary "quality of confidence"?
 - Yes, the information is from the current financial year and contains statements which could be used by competitors to their advantage
- Would release of the information constitute an actionable breach?

- Yes – given the information above
- Would confirmation or denial of the existence of the information constitute an actionable breach?
- No
- Is it possible to redact the confidential material and release the remainder of the information?
- No

Decision: Confirm that the information is held, but do not disclose it.

FOI Section 43: Commercial Interests

19. Section 43 of the Freedom of Information Act states:

"Commercial interests 43.- (1) Information is exempt information if it constitutes a trade secret.

(2) 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).

(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2)."

20. Section 43 of the Act sets out an exemption from the right to know if:

- a) the information requested is a trade secret, or
- b) release of the information is likely to prejudice the commercial interests of any person. (A person may be an individual, a company, the Trading Fund itself or any other legal entity.)

21. Where the information requested constitutes a trade secret, there is no need to consider the harm its release may cause. The very fact that the information is a trade secret is reason enough to withhold the information (**subject to the public interest test**). Information which does not constitute a trade secret can only be withheld under this exemption if the public authority is satisfied that to release the information would damage someone's commercial interests. This is referred to as the prejudice test.

22. The "right to know" really refers to two rights. The Act provides that in responding to a request for information a Trading Fund is obliged to inform the applicant whether it holds the information (known as "the duty to confirm or deny"), and if so to communicate it to them. In relation to trade secrets, section 43 does **not** remove the obligation to inform an applicant whether it holds the information that constitutes the trade secret. By contrast, where the information requested is likely to prejudice commercial interests other than trade

secrets, section 43 provides a potential exemption from both the obligation to communicate the information to the applicant and also from the requirement to inform the applicant whether the information is held. However a Trading Fund can only refuse to confirm or deny whether it holds such information where this would in itself prejudice commercial interests.

23. This is a qualified exemption. That is, it is subject to the public interest test which is set out in section 2 of the Act. Even where a Trading Fund is satisfied that the information requested is a trade secret or that its release would prejudice someone's commercial interests it can only refuse to provide the information if it believes the public interest in withholding the information outweighs the public interest in disclosing it.

Trade Secrets

24. Disclosure of a trade secret would, by definition, prejudice a commercial interest. In one respect, however, the Act treats trade secrets differently than other information whose disclosure might harm a commercial interest in that whether or not it is decided to disclose, the public authority must always confirm or deny that it holds the information.

25. The term "trade secret" is not defined in the Act although it is one which is not difficult to understand. Perhaps the most important thing to grasp is that the term can have a fairly wide meaning. Many people often think of trade secrets as being secret formulae or recipes. While such information is certainly likely to be included in the term, it may also extend, for example, to ideas and plans for new products or new product launches, which if released, or even confirmed or denied that information is held, could allow competitors into a market area far more quickly, and sometimes even ahead of the company/Trading Fund, eroding the company's/Trading Fund's "competitive edge" Other areas which may be classed as trade secrets, but on which advice should be sought, include pricing policy and strategy, if these are not generally known and is a source of competitive advantage to the company/Trading Fund.

26. In attempting to decide whether information is, in fact a trade secret it may be helpful to ask a number of questions including:

- a) Is the information used for the purpose of trade? Information may be commercially sensitive without being the sort of secret which gives a company a "competitive edge" over its rivals.
- b) Is it obvious from the nature of the information or, if not, has the owner made it clear that he or she considers releasing the information would cause them harm or be advantageous to their rivals?
- c) Is the information already known? If the information is known beyond a narrow circle, it is unlikely to constitute a trade secret.
- d) How easy would it be for competitors to discover or reproduce the information for themselves? Generally the less skill, effort, or innovation that was required to generate the information in the first place, the less likely the information is to constitute a trade secret.

Commercial Interests

27. Trade secrets are one example of commercial interests. The concept is, however, far wider. A commercial interest relates to a person's ability to successfully participate in a commercial activity, i.e. the purchase and sale of goods or services.

28. While the essential feature of commerce is trading, the information which falls within the exemption may relate only indirectly to the activity of buying and selling.

29. There is an important distinction to be drawn between commercial interests and financial interests. While there will be many cases where prejudice to the financial interests of a Trading Fund may affect its commercial interests, this is not necessarily the case.

30. In order to apply the exemption it is necessary to consider whether the release of such information would prejudice someone's (where someone could be either the Trading Fund or a third party) commercial interests, i.e. it is necessary to apply the test of prejudice. It will then be necessary to apply the public interest test.

31. When deciding whether the release of information would, or would be likely to, harm someone's commercial interests it will be necessary to properly consider all the circumstances in question. To determine whether releasing information would prejudice someone's commercial interests it is necessary to ask the following questions:

a) Does the information relate to, or could it impact on, a commercial activity?

As discussed above there is a distinction between commercial interests and financial interests. Commercial information relates to the activity of buying or selling goods and services. Some information may have a very direct relationship with commercial activity e.g. the price at which goods or services are offered for sale. Other information may have a less direct link to a commercial transaction, for example, information that a company is considering relocating or the minutes of a Board meeting discussing commercial strategy.

b) Is that commercial activity conducted in a competitive environment?

The level of competition within an industry will effect whether the release of information will harm someone's commercial interests. Where a company/Trading Fund enjoys a monopoly over the provision of the goods or services in question it is less likely that releasing the information will have a prejudicial impact on that organisation.

c) Would there be damage to reputation or business confidence?

There may be circumstances where the release of information held by a Trading Fund could damage a company's reputation or the confidence that customers, suppliers or investors may have in a company. It may be that releasing such information has a significant impact on revenue. In these circumstances the commercial interest exemption may be engaged. However it should be noted that there is no exemption for embarrassment, only where there is a real risk of commercial harm being caused could the exemption be engaged. There may also be circumstances where release of information would damage the Trading Fund's reputation for respecting implied confidences [short of a breach of confidence] and thus have a negative impact on its future relations with that or other companies/ suppliers.

d) Whose commercial interests are affected?

In many cases it will be clear whose commercial interests may be prejudiced by a disclosure of information however in other circumstances more thought may be required to identify the stakeholders. Could the release of information operate to the disadvantage of the Trading Fund? Could the information prejudice the bargaining position of the Trading

Fund? Will the information impact on the commercial interests of contractors, suppliers or investors?

e) Is the information commercially sensitive?

Companies and Trading Funds compete by offering something different from their rivals. That difference will often be the price at which the goods or services can be delivered but the difference may also relate to quality or specification. Information which identifies how a company/Trading Fund has developed that unique element is likely to be commercially sensitive. For example where a company/Trading Fund competes on price, it may be that the final price charged is readily available, however information disclosing how the company is able to offer the product at that price may not be. That is information revealing profit margins is therefore more likely to be commercially sensitive. This argument can extend to working practices etc that allow a quality of service to be more efficiently delivered.

f) What is the likelihood of the prejudice being caused?

Deciding whether or not a particular disclosure would be likely to cause prejudice will often require the exercise of judgement. It will be necessary to judge, in other words, what may be the nature of the harm that would be caused and, also, the likelihood of that harm. While the "prejudice" that may be caused by disclosure may not be substantial, nor should it be completely trivial. As for likelihood, "likely" must connote a significantly greater degree of probability where there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there 'may very well' be prejudice to those interests, even if the risk falls short of being more probable than not.

32. An example of the Section 43 -Commercial Interests exemption is set out below:

Question: "Under the Freedom of Information Act, I would be grateful if you could supply me with any information held by the Example Trading Fund (ETF) relating to the proposals to close its Holby office. These should include any analysis of the pros and cons of doing so, including the cost benefits and the effect on the commercial arm, which has contracts with large companies with local operations."

Document: Revenue Impact Analysis

- Does the information relate to, or could it impact on a commercial activity?
 - Yes
- Is that commercial activity conducted in a competitive environment?
 - Yes
- Would there be damage to reputation or business confidence?
 - Yes, if we released this information contract values could be identified and customers or potential customers may not want to transact with us in the future
- Whose commercial interests are affected?

- The commercial interests of the ETF would be affected.
- Is the information commercially sensitive?
- Yes:
 - releasing revenue figures by sector would give competitors an unfair advantage in assessing market size. As the ETF does not know competitors' sector revenues, this would be unfair.
 - Releasing revenue and potential loss figures might enable competitors to identify contract values; this would give them an unfair advantage in understanding ETF pricing policy and could undermine our relationship with the customers.
 - The information contained is detailed enough to enable specific contracts to be identified
- What is the likelihood of the prejudice being caused?
- Extremely likely.

Decision: Do not disclose (subject to the result of a public interest test) – given that the option of closing the office was in the public domain, so the community to be possibly affected were aware of this option, it was considered that the prejudice caused would outweigh the public interest by releasing this background information (see below).

FOI: The Public Interest

33. Whether the information requested forms a trade secret or relates to another type of commercial interest, a Trading Fund considering relying upon the section 43 exemption must consider the public interest in providing the information. In practice this is likely to involve weighing the prejudice caused by possible disclosure against the likely benefit to the applicant and the wider public.

34. The factors highlighted here are not the only ones that should be considered. However, they illustrate the sort of approach that Trading Funds should take. Although there is a strong public interest in openness, this does not necessarily override all other considerations:

- a) Accountability for the spending of public money
- b) Protection of the public
- c) Circumstances under which the public authority obtained the information
- d) Competition issues

35. There is a public interest in ensuring that companies and Trading Funds are able to compete fairly.

36. Very often, in a commercial environment, the timing of the disclosure will be of critical importance. The application of any exemption has to be considered in the circumstances

that exist at the time the request is made. Circumstances may change over time and if so a different decision may be taken on a subsequent later request for the same information.

EIR – 12(5)(c) Intellectual Property Rights.

37. In broad terms, this exception will protect information that forms the basis of registered rights such as patents, trademarks and designs, unregistered rights, such as copyright, and unregistered design rights. It does not cover confidential information that does not benefit from such legal protection, although other trade secrets may be protected. The exception should only be applied where there is a real risk that the disclosure (or further dissemination after disclosure) would seriously undermine the rights concerned. If the information would enjoy protection, even after disclosure, from the Copyright Designs and Patents Act, for instance, the case against disclosure would be considerably weaker. The Trading Fund should also consider whether release of information is mandated through the application of the Re-use of Public Sector Information Regulations 2005.

38. Trading Funds should be aware that information that is disclosed under FOI or the EIR might be subject to copyright protection. If an applicant wishes to use any such information in a way that would infringe copyright, for example by making multiple copies, or issuing copies to the public, he or she would require a licence from the copyright holder. This really is the primary protection for commercially sensitive environmental information owned by the Trading Fund; however, consideration should also be given to the EIR exceptions for internal communications (12(4)(e)) or confidentiality of proceedings (12(5)(d)). The commercial interests exception, described below only relates to third party information, unless it is environmental information supplied to a third party, the disclosure of which would adversely affect the commercial interests of that third party.

39. It is difficult to frame a question which would have EIR IPR protection. However, the definition of Environmental information is very wide and would include information which relates to:

a) The state of elements of the environment – such as air, water, soil, land, landscape and natural sites, flora and fauna, including cattle, crops, GMOs, wildlife and biological diversity – and it includes any interaction between them.

b) Measures and activities affecting, or likely to affect, or intended to protect the state of the elements of the environment and the interaction between them. This includes administrative measures, policies, legislation, plans, programmes and environmental agreements.

So, for example, the intention to erect a new building or communications mast could be considered to be environmental information.

40. Questions to ask:

a) Is the information requested related to the state of the environment?

Should the request be treated as EIR or FOI – this will determine the exemptions/exceptions to be considered, but the lines of demarcation will not always be clear cut. For example, the expected financial outcome from a change in the environment, such as the erection of a new building, could be treated as FOI rather than EIR, while other aspects of the project – such as emissions from the building – would fall under EIR.

b) Is the information protected by a registered or unregistered right?

If the information is subject to a patent, copyright, or other registered or unregistered rights then this exception should be considered.

c) Will the information continue to enjoy the protection after disclosure?

If for example, the information is protected by Crown Copyright and the enquirer would require a licence to reuse the information then the level of protection is weakened.

d) Would disclosure violate the protection?

Here, if the disclosure does violate the protection then the decision, subject to performing a Public Interest Test, should be not to disclose. In addition to this protection, it may be necessary to consider the intended audience of the information. If, for example, the information was produced under contract for a third party, then 12(5)(e) confidentiality of commercial or industrial information (below) would need to be considered, but remembering the necessity to explain to the enquirer and, if necessary, the Information Commissioner, the commercial environment in which the Trading Fund operates. Remember that the existence of a contract will not guarantee confidentiality. However, that the wording of 12(5)(d) or (e) do not require an actionable breach of confidence to be shown, for these exceptions to apply.

41. An example:

Question: "Please provide me with all the documents and information you hold relating to the impacts of climate change on international mining operations."

Document to be considered: "Climate Change - Prepared for EFG Mining" Prepared by Dr. A, Senior Climate Change Consultant, 23 July 2004

- Is the information requested related to the state of the environment?
 - Yes
- Is the information protected by a registered or unregistered right?
 - Yes, the paper is protected by Crown Copyright
- Will the information continue to enjoy the protection after disclosure?
 - Yes, it would, but the information is commercially sensitive for the client
- Would disclosure violate the protection?
 - Theoretically the information could be disclosed under licence, but as it was produced for a client on an exclusive basis under commercial contract, 12(5)(e) would be seen as protection, therefore in this case 12(5)(c) cannot be cited but 12(5)(e) would and the questions outlined in the guidance on section 41 of the FOIA would be applied.

In this case the questions would follow the following route:

- Is the information protected by a formal obligation of confidence or contractual condition, e.g. non-disclosure agreement?
 - Yes
- If not, is there an implied obligation of confidence?
 - N/A
- Does the third party consent to disclosure?
 - No
- Is there a legal requirement to disclose?
 - No
- Is there an overriding public interest against disclosure?
 - Yes. Although there is a high public interest in matters relating to climate change, this particular information is specialised and framed in the context of a particular company. Given the commercial environment in which the Trading Fund operates, disclosure could have an adverse affect on the ability of the Trading Fund to secure similar contracts in the future. This would not be in the public interest.
- Does the information have the necessary "quality of confidence"?
 - Yes, the information was produced exclusively for the client and contains statements which could be used by their competitors to their advantage
- Would release of the information constitute an actionable breach?
 - Yes – given the information above
- Would confirmation or denial of the existence of the information constitute an actionable breach?
 - No
- Is it possible to redact the confidential material and release the remainder of the information?
 - No

Decision: Confirm the information is held, but do not disclose this document but consider what else is held pertinent to the question which may be released Reason for withholding document - Information is protected by Crown Copyright and was produced under commercial contract for EFG Mining.

EIR – 12(5)(e) Confidentiality Of Commercial Or Industrial Information (Excluding Information Relating To Emissions)

42. The Information Commissioner's view is that this exception protects legitimate economic interests of third parties, which would normally be affected by information supplied under a duty of confidence by a third party. However, information generated by a public authority for a third party may also fall into this category, e.g. the release of environmental information generated for one customer of a Trading Fund or even the price paid for it, may, if released to a competitor of that customer, be said to have an adverse affect on the economic interests of that customer. The guidance provided above in the context of FOI exemptions may prove helpful in deciding whether or not the information is confidential. However it should be remembered that unlike FOI, where an actionable breach of confidentiality with a reasonable chance of success constitutes an absolute exception, under EIR the Public Interest Test must be applied. Any acceptance of confidentiality provisions from third parties must be for good reasons and capable of being justified to the Information Commissioner.

EIR – The Public Interest

43. The public interest test applicable to EIR exceptions is the same as the FOI public interest test.

Releasing Or Withholding Information

44. The process of releasing or withholding information is well defined. The commercial guidance sets out the consultation and authorisation procedures for the majority of the MOD. However, given the higher degree of autonomy granted to Trading Funds in their framework documents, the varying levels of local expertise available and the wider range of commercially sensitive information, there will be some procedural differences in considering requests for the release of commercial information within the Trading Fund environment.

45. The internal consultations should be with commercial officers within the Trading Fund, with the option of consulting with groups within appropriate areas of the parent Department (e.g. Directorate of Commercial Law within the Defence Procurement Agency, within MOD).

46. External consultation must take place with any third parties whose commercial interests would be at risk of being affected by release of the information. Where the requested information has been provided by or mentions a third party, that party should in all but the most unusual circumstances be informed of exactly what information has been requested. The MOD has made a commitment to defence industry that where the MOD is considering disclosing information about or supplied by a defence company then the MOD will consult the defence company. The third party who might be affected by release of the information should also be specifically asked:

- a) whether they believe they would or would be likely to be harmed by release in any way and if so, for what reasons (Note: the term "harm" relates solely to FOI, for EIR please read "adverse affect" as cited in EIR 12(5));
- b) the chances that the harm might occur (i.e. whilst harm need not be certain, there must be a reasonable risk rather than a remote possibility of harm);
- c) the seriousness of the harm; and
- d) whether the risk of harm will apply now or in the future.

47. If the third party wishes to make a case for non-disclosure, they should be asked to set out their reasons objectively. A simple objection is not sufficient to help the Trading Fund make its decision. Wherever there is a view that harm might be suffered, it is important to establish to which specific parts of the information this applies, so that redaction (i.e. removal) of just that part of the information can be considered. Whilst the identification of harm by the third party will assist the Trading Fund in making its decision, there may be certain cases where the Trading Fund decides that the public interest lies in disclosure.

48. Should a decision be made to disclose information against the wishes of a third party, 2 days notice must be given to the third party prior to release of the information, to enable them to take legal action to prevent disclosure or make further representations to the Trading Fund.

49. Authorisation for release or withholding of information should be by the equivalent of the Chief Commercial Officer or a delegated officer with an equivalent level of understanding.

50. Until more case law develops around FOI and EIR cases, this guidance, as with most other guidance, is subject to amendment.