

**TEMPLATE FOR SUBMISSION OF TEXTUAL PROPOSALS DURING THE 28TH SESSION:
COUNCIL - PART I**

Please fill out one form for each textual proposal which your delegation(s) wish(es) to amend, add or delete and send to council@isa.org.jm.

1. Name of Working Group:

Informal Working Group on Institutional Matters

2. Name(s) of Delegation(s) making the proposal:

The Pew Charitable Trusts

3. Please indicate the relevant provision to which the textual proposal refers.

DR 89

4. Kindly provide the proposed amendments to the regulation or standard or guideline in the text box below, using the “track changes” function in Microsoft Word. Please only reproduce the parts of the text that are being amended or deleted.

89. Confidentiality of Information

1. ~~There shall be a presumption that any~~ **All** data and information regarding the Plan of Work, exploitation contract, its schedules and annexes or the activities taken under the exploitation contract ~~are shall be~~ public, other than Confidential Information.

2. “Confidential information” means:

(a) ~~Data and information that have been designated as Confidential Information by a Contractor in consultation with the Secretary General under the Exploration Regulations and which remains Confidential Information in accordance with the Exploration Regulations;~~

(b) Data and information relating to personnel matters, the health records of individual employees or other documents in which employees have a reasonable expectation of privacy, and other matters that involve the privacy of individuals;

(c) Data and information which have been categorized as Confidential Information by the Council; and

(d) Data and information designated by the Contractor as Confidential Information at the time it was disclosed to the Authority, provided that, subject to paragraph 5 below, such designation is deemed to be well founded by **the Secretary-General** on the basis that there would be substantial risk of serious or unfair economic prejudice **risk of harm** if the data and information were to be released.

(e) Documents exempt from disclosure due to attorney-client legal privilege].

3. "Confidential Information" does not mean or include data and information that:

- (a) Are generally known or publicly available from other sources;
- (b) Have been previously made available by the owner to others without an obligation concerning its confidentiality;
- (c) Are already in the possession of the Authority with no obligation concerning its confidentiality;
- (d) Are required to be disclosed under the Rules of the Authority ~~to protect the Marine Environment or human health and safety~~;
- (e) Are necessary for the formulation ~~from time to time~~ by the Authority of rules, regulations and procedures ~~and decision of the Authority~~ concerning the protection and preservation of the Marine Environment and safety, other than equipment design data;
- (f) ~~Relate to the protection and preservation of the Marine Environment, [provided that unless] [the Secretary General] may [agree that designate] such information is regarded as Confidential Information for a reasonable period[, subject to such conditions as may be appropriate,] [which shall under no circumstances exceed a period of [2] [4] years] where [the Commission agrees] there are bona fide academic reasons for delaying its release [on the terms proposed by the Secretary General, and the decision including the reasons are reported to Council];~~ Are environmental data, which include, inter alia, all baseline information and all monitoring data produced in the course of a Contractor implementing its Environmental Management and Monitoring Plan
- (g) Are an award or judgment in connection with activities in the Area (save in relation to any Confidential Information contained in such award or judgment which may be redacted);
- (h) The Contractor has given prior written consent to its disclosure;
- (i) Relates to an area no longer covered by an exploitation contract; provided that following the expiration of a period of 10 years after it was passed to the Secretary- General, Confidential Information shall no longer be deemed to be such unless otherwise agreed between the Contractor and [the Secretary-General] [in accordance with the relevant Standard and taking account of Guidelines,] and save any data and information relating to personnel matters under paragraph 2 (b) above; or
- (j) ~~Are in a category designated by the Council as not being Confidential Information].~~

4. Confidential Information will be retained by the Authority and the Contractor in strictest confidence in accordance with regulation 90 and ~~the data management strategy of the Authority~~ shall not be disclosed to any third party ~~[without reasonable cause or]~~ without the express prior written consent of the Contractor, which consent shall not be unreasonably withheld, conditioned or delayed, save that Confidential Information may be used by the Secretary-General and staff of the Authority's secretariat, as authorized by the Secretary-General, and by members of the Commission ~~[as necessary]~~ for and relevant to the effective exercise of their powers and functions.

5. In connection with paragraph 2 (d) above, a Contractor shall, upon transferring data and information to the Authority, designate by notice in writing to the Secretary- General the Information or any part of it as Confidential Information- ~~describing, in general and non-prejudicial terms, any information redacted or required to be withheld from publication on the basis of confidentiality with an explanation of the reasons.~~ The Secretariat shall publish a copy of any such notice received upon receipt. If the Secretary- General, a member State or other Stakeholder objects to such designation ~~[within a period of 30 Days]~~, the parties shall consult

upon the nature of the data and information and whether it constitutes Confidential Information under this regulation. During the consultations, the Secretary-General shall take into account any relevant [Standards](#) or policy guidance from the Council. [The Secretary-General shall report to the Council regarding the types and quantities of data that are designated confidential in accordance with this paragraph.](#) Any dispute arising as to the nature of the data and information shall be dealt with [\[through the administrative procedure described in *\[insert here cross-reference to relevant provisions or Annex of the Regulations setting out administrative decision review procedures\]*.\]](#) ~~in accordance with Part XII of these regulations.~~

6. Nothing in these regulations shall affect the rights of a holder of intellectual property.

3. Please indicate the rationale for the proposal. [150-word limit]

Regarding paragraph 2, we would delete sub-paragraph (a). Applying two separate data classification regimes for Exploration and Exploitation simultaneously may lead to inconsistencies and confusion. It is unclear why information relating to an exploration contract would not be disclosable after that contract has expired, and the relevant Contractor has commenced an exploitation contract. If there is any data from Exploration that the Contractor considers should remain confidential, this can be managed under sub-paragraphs (b)-(d). On sub-paragraph e, we believe that legal privilege should only apply to communications between a contractor (or ISA) and in-house or external lawyers, in which confidential legal advice is being sought or provided, though we do not know if the concept (and specific limitation of attorney-client legal privilege) is universally understood and/or applied consistently globally. If not, then this provision could benefit from more description, to ensure the exemption is not overly subject to subjective interpretation and/or abuse.

For paragraph 3(d), the provision could simply state ‘Are required to be disclosed under the Rules of the Authority’. The Seabed Mining Register, for example, in DR92 requires specific information and documents to be published. Also draft regulation 38 on annual reporting. Under sub-paragraph e, an applicant may designate information confidential save where it is “necessary for the formulation by the ISA of rules, regulations and procedures” concerning the marine environment or safety. As such, adding ‘and decisions of the Authority’ would avoid the possibility that portions of an applicant’s EIS not related to rule-making, might be deemed confidential. Typically, confidentiality exceptions are usually very narrow for EIAs.

With regards to sub-paragraph (f), we believe all ‘environmental data’ should be treated as non-confidential as a default. What comprises environmental data should be clearly defined, to include, for example, all baseline information collected during an EIA, all monitoring data produced in the course of implementing EMMPs, all environmental Incident reports and lessons learned from investigating the Incident and the results of environmental inspections and audits. Where exceptions to rules are deemed to be necessary, the ISA should establish clear criteria in advance, as opposed to decisions being made on a case-by-case basis by the Secretary-General.

In paragraph (4) we propose that confidential information will also be managed in accordance with the ISA’s data management strategy.

Lastly, we note that paragraphs (2)(d) and (5) could potentially create loopholes for the Contractor to declare large amounts of data and information as confidential. Please see proposed amendments to counter this possibility.