

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

### **Decision Notice**

**Date: 31 July 2008**

**Public Authority:** Nuclear Decommissioning Authority ('NDA')  
**Address:** Herdus House  
Ingwell Drive  
Westlakes Science & Technology Park  
Moor Row  
Cumbria  
CA24 3HU

### **Summary**

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The complainant requested a copy of a draft report produced by the Nuclear Decommissioning Authority (NDA) which focused on storage methods for radioactive waste. (The final version of this report had already been placed in the public domain.) The NDA argued that the draft version was exempt by virtue of the exceptions contained at regulations 12(4)(d) and 12(4)(e) of the Environmental Information Regulations and that for both exceptions the public interest favoured withholding this information. The Commissioner has concluded that the draft report does not fall within the scope of 12(4)(d). However he has also decided that the draft report does fall within the scope of 12(4)(e) and is satisfied that in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information.

### **The Commissioner's Role**

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1. 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 Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

## The Request

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2. On 22 August 2007 the complainant submitted the following request to the NDA:  

‘Please can you provide the following information/draft report –  
  
Potential Areas of Future Geosphere Research, in the form it existed in January 2004. I believe this is a prior version of the Nirex report of the same name which was subsequently published in February 2006’.
3. The NDA acknowledged receipt of this request on 22 August 2007.
4. On 14 September 2007 the NDA contacted the complainant in order to explain that it had recently refused to disclose a copy of the draft report in response to an earlier, separate request. However, it was currently conducting an internal review of this decision and anticipated concluding its deliberations by 25 September 2007. Until it had completed this review, the NDA explained that it was unable to proceed with this request.
5. The NDA informed the complainant on 26 September 2007 that it had completed the aforementioned internal review. The NDA explained that it had considered this request under the EIR rather than under the Act. The NDA also explained that as the requested document was a draft version of a report it fell within the scope of the following exceptions of the EIR: 12(4)(d) because the report was unfinished and still in the course of being completed; and 12(4)(e) internal communications, as this version was still being reviewed internally and did not represent the settled view of the authority. The NDA explained that it had considered the competing public interest issues and had concluded that for both exceptions the public interest favoured withholding the requested information. The NDA invited the complainant to appeal directly to the Commissioner if she was unhappy with this decision, given that the NDA had so recently upheld a decision to withhold the requested information.

## The Investigation

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### Scope of the case

6. On 2 October 2007 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant argued that the public interest favoured disclosing the requested information.

### Chronology

7. The Commissioner contacted the NDA on 3 March 2008. The Commissioner asked the NDA to provide him with a copy of the requested information. The

Commissioner also asked the NDA to provide a detailed explanation of why it considered the requested information to be exempt from disclosure on the basis of the exceptions contained at regulations 12(4)(d) and 12(4)(e) of the EIR.

8. On 21 April 2008 the Commissioner received a response from the NDA in which it enclosed a copy of the draft report requested by the complainant. In this response the NDA also provided an explanation as to why it believed that this draft report fell within the scope of the exception contained at regulation 12(4)(d) of the EIRs along with an explanation as to why the public interest favoured withholding the information. The NDA's response did not mention whether it still considered the information to be exempt on the basis of regulation 12(4)(e).
9. On 9 May 2008 the Commissioner contacted the NDA and explained that having reviewed the draft version of the report he had concluded that this document did not fall within the scope of regulation 12(4)(d) (the Commissioner's reasoning for this is detailed at paragraphs 24 to 26 below). The Commissioner therefore asked the NDA to confirm whether it still considered the exception contained at regulation 12(4)(e) to apply or indeed whether the NDA wished to rely on any other exceptions in order to withhold the draft report.
10. The NDA contacted the Commissioner on 22 May 2008. The NDA confirmed that it remained of the view that the draft report fell within the scope of the exemption contained at regulation 12(4)(d) and that the public interest favoured withholding this information. The NDA also confirmed that it also wished to rely on the exemption contained at regulation 12(4)(e) to withhold the draft report and consequently provided the Commissioner with an explanation as to why it considered the public interest, in relation to 12(4)(e), favoured withholding the draft report.

### **Findings of fact**

11. The NDA has strategic responsibility for the UK's nuclear legacy, a role which involves decommissioning a number of civil public sector sites safely, securely, and cost effectively, whilst protecting the environment.
12. In April 2007 a new directorate called 'Radioactive Waste Management Directorate' was created within the NDA. This directorate took over the functions of an organisation called Nirex which since April 2005 had been a limited company owned by Defra and the DTI. The role of Nirex had been to examine safe, environmental and economic aspects of deep geological disposal of intermediate and low level nuclear waste.
13. In February 2006 Nirex published a report entitled Potential Areas of Future Geosphere Research. This report is in the public domain and can be viewed at: <http://www.nda.gov.uk/documents/loader.cfm?url=/commonspot/security/getfile.cfm&pageid=10607>
14. The complainant's request asked for a copy of the draft version of the report as it existed in January 2004.

## Analysis

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### Procedural matters

15. Regulation 14(1) provides that:

‘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.

(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.

(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).’

16. The complainant submitted her request on 22 August 2007. The NDA acknowledged receipt of this request on the same day.

17. The NDA contacted the complainant again on 14 September 2007 in order to explain that it had recently refused to disclose a copy of the draft report in response to another request. However, it was currently conducting an internal review of this decision and anticipated concluding its deliberations by 25 September 2007. Until it had completed this review, the NDA explained that it was unable to proceed with this request. On 26 September 2007 the NDA provided the complainant with a refusal notice explaining why it considered this information to be exempt from disclosure on the basis of the exceptions contained at regulations 12(4)(d) and 12(4)(e).

18. Although the Commissioner is satisfied that this refusal notice complied with the requirements of regulation 14(3), this notice was not provided to the complainant within 20 working days following the date of receipt of her request and therefore the Commissioner considers that in responding to this request the NDA breached the requirements of regulation 14(2).

### Exceptions

#### Regulation 12(4)(d)

19. Regulation 12(4)(d) provides that a public authority may refuse to disclose information to the extent that ‘the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data’.

20. This exception is class based, therefore if information falls within the scope of regulation 12(4)(d) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to any particular purpose.
21. The NDA has argued that the draft report falls within the scope of this exception because it constitutes an unfinished document and the January 2004 draft was 'still in the course of being completed'.
22. As indicated above in paragraph 9 above, the Commissioner does not accept that the draft report falls within the scope of regulation 12(4)(d). He has reached this conclusion for the following reasons:
23. The Commissioner considers 12(4)(d) to be akin to the exemption contained at section 22 of the FOI Act in that it is designed to exempt information that is essentially intended for future publication. Regulation 14(4) of the EIR would appear to support this line of argument as it specifically suggests that if a public authority relies on 12(4)(d) to refuse a request, it should, if known, give an indication as to when the requested information will be finished. Clearly, the argument that a draft version of report still falls within the scope of 12(4)(d), even when the final version has been completed by the time a request under the EIR is received, as is the case here, does not sit comfortably with the requirements of 14(4).
24. The Commissioner also believes that the wording of regulation 12(4)(d) implies that the draft report in this case does not fall within the scope this exception. The exemption begins 'The request **relates** to...' [emphasis not in original] and in the Commissioner's opinion this should be interpreted to mean that where, at the date of the request, a final version of a report exists, the request for the earlier draft can only be said to relate to **completed** material/finished documents rather than to uncompleted/unfinished documents.
25. Furthermore, the Commissioner notes that Article 4.2 of the EC Directive which implements the EIR states that 'the grounds for refusal...shall be interpreted in a restrictive way'.<sup>1</sup> The Commissioner believes that this supports a narrower reading of the exception which would indicate that when a public authority receives a request for a draft version of a report, and the final version has been completed, drafts of that report will not fall within the scope of regulation 12(4)(d).
26. On the basis of the above the Commissioner has concluded that the draft report is not exempt on the basis of regulation 12(4)(d).

Regulation 12(4)(e)

27. Regulation 12(4)(e) provides that a public authority may refuse to disclose information to the extent that 'the request involves the disclosure of internal communications'.

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<sup>1</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF>

28. As with regulation 12(4)(d), 12(4)(e) is a class based exemption; if the information constitutes internal communications, it will be exempt – there is no need for a public authority to demonstrate that disclosure will cause any prejudice.
29. In order to support its position that the draft report fell within the scope of regulation 12(4)(e) the NDA argued that:

‘The version of the draft report requested, was at an early stage of development, and did not yet represent the settled view of the authority. When produced, it was intended for internal review within Nirex (now part of the NDA). We therefore regard it to be an “internal communication” and 12(4)(e) exception to be applicable’.
30. The Commissioner notes the draft version of the report was produced by a particular Nirex employee and the report was then checked and approved by two other Nirex employees essentially in a standard peer review process. On this basis the Commissioner accepts the NDA’s argument that the draft version of the report can be viewed as an internal communication because it is a communication created by one colleague and then passed to two further colleagues.
31. Consequently, the Commissioner accepts that the draft report is exempt by virtue of the exception contained at 12(4)(e).
32. However, regulation 12(4)(e) is a qualified exception and therefore subject to the public interest test set out at regulation 12(1)(b) of the EIR which states that internal communications can only be withheld if in all of the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

### **Public interest test**

#### *Arguments in favour of non-disclosure*

33. The NDA has advanced the following arguments in support of its position that it is not in the public interest to disclose the requested information:
34. The NDA has explained that the draft report relates to a field of research that is still in development and one that remains subject to internal policy discussion. In order to carry out this ongoing research effectively, the NDA has argued that it needs freedom to consider the relevant areas of research and conduct some internal debates in private. It is in the public interest that NDA employees working in sensitive areas of research, such as that covered by the report, are allowed a private thinking space to explore and record ideas, some of which may ultimately prove to be incorrect.
35. These internal debates require authors and reviewers to fully participate in frank and candid exchange of views and opinions. Disclosure of draft documents would inhibit this exchange of views which would risk damaging the internal peer review

and consultative process which form a key part of the NDA's ability to develop its thinking, make assessments and scrutinise ongoing research programmes.

36. Finally, if researchers knew that their early thoughts and advice might be made public then they would be more circumspect in expressing their views and this could compromise the quality of their research reports. In the long term this could compromise the internal NDA debate crucial to such an important and sensitive area of research. In the long run, such types of disclosure could risk prejudicing policy development in the area of radioactive waste management.

#### *Arguments in favour of disclosure*

37. The Commissioner believes that there is a strong public interest in improving people's understanding of decisions made by public authorities, particularly decisions that may have a direct and significant influence on their lives. Such an argument could be said to be particularly relevant to this case given the potentially wide ranging and dangerous consequences if problems develop with the way in which radioactive waste is stored. Disclosure of the draft report could further the public's understanding of how the NDA developed its position on how research into geosphere storage for radioactive waste should be focused.
38. In light of this further understanding, disclosure of the draft report could also allow interested parties to have a greater influence on research developments in this particular area. Indeed the Commissioner notes that the introduction to the final version of the report actually explains that it is being published 'to enable interested parties to have access to and influence on its future programmes'.
39. The Commissioner also believes that disclosure of the draft report may increase public confidence in the quality of scientific research and consideration on this issue. Essentially disclosure would demonstrate the thoroughness of the NDA's internal review process by allowing the public to compare the draft report of January 2004 with the final version of the report published in February 2006.
40. The Commissioner also accepts that it could be argued that if those who were compiling such research were aware of the fact that it was possible that their draft reports or early research would be disclosed in the future, this may in fact improve the level of argument or debate contained in the drafts because the authors would know that their initial research may be disclosed at some point and therefore open to public scrutiny.

#### *Balance of public interest arguments*

41. The Commissioner does recognise the key role free and frank internal discussion of initial research ideas plays not only the NDA's research process but also the role it plays in scientific research conducted by other organisations. Furthermore, the Commissioner accepts that it is logical to argue that disclosure of free and frank comments contained in early drafts of reports may result in future authors or contributors to such reports being less willing to be candid or honest in future reports, and that such inhibition would undermine the effectiveness of future

research. The Commissioner therefore accepts the general thrust of the NDA's reasoning as to why disclosure is not in the public interest.

42. However, in the Commissioner's opinion one possible consequence of the NDA's arguments for non-disclosure as outlined above is that all draft versions of all research will be exempt from disclosure under the EIR (or indeed the FOI Act) because it is possible that *any* disclosure will significantly harm future research projects. However, regulation 12(4)(e) is a qualified exemption and subject to the public interest test and therefore the Commissioner notes that there are clearly some circumstances when disclosure of such information is in fact in the public interest.
43. In fact the Commissioner has established that there are a number of papers published on the NDA's website which detail the findings of NDA's peer review of a number of reports produced on topics in the area of radioactive waste disposal.<sup>2</sup> Consequently, the Commissioner would suggest that the NDA would appear to accept that in some cases disclosure of information which reveals draft or early versions of particular reports, along with peer review comments, can be disclosed without any significant prejudice or harm to the NDA's processes.
44. The Commissioner believes that these examples emphasise the point that a decision on disclosure of draft reports containing details of early research must be made on a case by case basis.
45. This approach is supported by Mr Justice Mitting's comments in his decision in the High Court case *Export Credit Guarantee Department v Friends of the Earth* [2008] EWHC 638 (Admin) (17 March 2008) judgement which considered an EIR request submitted to the ECGD by Friends of the Earth. The ECGD had relied on the exception contained at regulation 12(4)(e) to withhold a number of communications between government departments. In his judgment Mr Justice Mitting drew on two Information Tribunal decisions as a guide to the consideration of the public interest test in relation to the exceptions contained at regulation 12 of the EIR. The key section of the judgment reads:

26. The approach which the authority, the Commissioner and the Tribunal should adopt to those provisions [regulations 12(4) and 12(5)] was set out in two decisions of the Tribunal. First, in *Department for Education and Skills v Information Commissioner and the Evening Standard*, a decision promulgated on 19th February 2007 and, secondly, in *Secretary of State for Work and Pensions v Information Commissioner*, a decision promulgated on 5th March 2007. In the first case the Tribunal observed in paragraph 75(i) of its decision that:

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<sup>2</sup> Examples include <http://www.nda.gov.uk/documents/upload/Nirex-review-of-CoRWM-Document-No-682-Deep-Disposal-Current-Position-with-Respect-to-Safety-2005.pdf> and <http://www.nda.gov.uk/documents/upload/Nirex-review-of-CoRWM-Document-No-683-Phased-Deep-Disposal-Costs-June-2005.pdf>



"The central question in every case is the content of the particular information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case."

27. In the second case, in paragraphs 23 and 24 the Tribunal observed:

"23. The exemption in section 35(1)(a) [of the 2000 Act] is a 'class' exemption rather than a prejudice-based exemption. That is to say, in order for the exemption to be engaged the public authority does not need to demonstrate that any specific prejudice or harm would flow from the disclosure of the information in question.

24. Nevertheless, because this is a qualified exemption it is necessary to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure of the information sought. In carrying out this exercise it is relevant to consider what specific harm would follow from the disclosure of the particular information in question."

28. I commend both of those statements of principle. Although they are expressed under the 2000 Act, they apply word for word and with equal force to decisions under regulation 12 of the regulations.'

46. With regard to the specific document being requested in this case, the Commissioner notes that the draft report in many places appears to contain the personal views of the particular author rather than the official position of NDA on the status of geosphere research. Moreover, these comments could be correctly described as candid and direct comments about the nature of the geosphere research that had been conducted to date. In general the Commissioner does not normally accept that civil servants would be easily deterred from offering candid opinions through the fear of disclosure under the EIR or under the Freedom of Information Act. However, in the circumstances of this case the Commissioner accepts that if this particular draft report was disclosed it is reasonable to argue that authors of such reports in the future may be less willing to be equally candid when compiling similar studies because of concerns that their comments may be placed in the public domain.
47. The Commissioner has also taken into account the fact that the NDA has published the final version of the report when it was completed in February 2006. Therefore any parties interested in understanding and contributing to the NDA's future research and activities in relation to geosphere storage of radioactive waste will be able to review the final version of the report. This final version obviously provides a more up to date, and therefore arguably more useful guide to where NDA's intends to focus its future activities in this particular area.

48. Consequently, while the Commissioner accepts that disclosure of the draft report would contribute to the public's understanding of what the NDA's initial thinking in relation to geosphere storage was in 2004, given that the final report is now in the public domain, the usefulness of this document has to some extent diminished. If the public wish to be informed about or contribute to NDA's work, the final report provides the much more appropriate reference document.
49. In conclusion, the Commissioner believes that the public interest test in this case is finely balanced; usually the Commissioner is reluctant to accept that the public interest is satisfied simply because of information that is already in the public domain. However, in this case a key reason for the disclosure of the draft report is to contribute to the public's understanding of NDA's research in this area in order to influence and shape policy in this area. However, this draft report now essentially represents a dated review of the NDA's position. Nevertheless, given the content of this particular draft the Commissioner is satisfied that its disclosure would be likely to lead to researchers being less willing to be as open and honest in such papers and thus the policy formulation not only in the area of geosphere storage but also in other areas of scientific research may be harmed, something which is clearly not in the public interest.
50. On the basis of the above, the Commissioner has concluded that in this case the public interest in maintaining the exception contained at regulation 12(4)(e) of the EIR outweighs the public interest in disclosing the information.

## The Decision

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51. The Commissioner has decided that the following elements of the request were not dealt with in accordance with the EIR:
  - The NDA failed to provide the complainant with a refusal notice within 20 working days of her request and therefore breached the requirements of regulation 14(2).
  - The Commissioner has also decided that the requested information is not exempt on the basis of exception contained at regulation 12(4)(d).
52. However, the Commissioner has also decided that the following elements of the request were dealt with in accordance with the EIR:
  - The requested information is exempt on the basis of the exception contained at 12(4)(e) and in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information.

## Steps Required

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53. The Commissioner requires no steps to be taken.

## Right of Appeal

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54. 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](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://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 31<sup>st</sup> day of July 2008**

**Signed .....**

**Gerrard Tracey  
Assistant Commissioner**

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

## Legal Annex

### 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

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- (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 7(1)** Where a request is made under regulation 5, the public authority may extend the period of 20 working days referred to in the provisions in paragraph (2) to 40 working days if it reasonably believes that the complexity and volume of the information requested means that it is impracticable either to comply with the request within the earlier period or to make a decision to refuse to do so.

**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 circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

**Regulation 12(2)** A public authority shall apply a presumption in favour of disclosure.

**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 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 –

- (c) any exception relied on under regulations 12(4), 12(5) or 13; and
- (d) 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).