

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 30 March 2010

Public Authority: Ministry of Defence
Address: Main Building
Whitehall
London
SW1A 2HB

Summary

The complainant requested a copy of the Ministry of Defence (MOD) Exercise Senator report 2005. The MOD withheld some of the information, citing section 36 of the Act. The Commissioner finds that the exemptions under sections 36(2)(b)(i) and (ii) are engaged, and that the public interest in maintaining the exemptions outweighed the public interest in disclosing the information. The Commissioner also found that in its handling of the request the MOD breached section 17(1) and section 17(1)(b) of the Act.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the Act). This Notice sets out his decision.

Background

2. Exercise Senator is a regular UK nuclear weapon transport accident exercise that enables the MOD, civil agencies and emergency services to test and evaluate plans for responding in the unlikely event of a release of radioactive material during the movement of nuclear weapons by road. The reports produced on Exercise Senator reflect the assessment by the Nuclear Weapon Regulator (NWR) of all aspects of the exercise, such as the MOD's nuclear accident response

capability, communications and provision of health and safety advice. This enables the MOD to continually improve its plans and procedures to ensure the safety of the public in the event of an accident occurring during the transport of nuclear weapons.

3. The complainant had previously made a request to the MOD Exercise Senator reports, and the MOD had provided some information to the complainant in response to that request. The request which is the subject of this Decision Notice arises out of the information provided by the MOD in response to the complainant's previous request.

The Request

4. The Commissioner has received a complaint which states that, on 27 October 2005 the complainant made the following request for information to the MOD in accordance with Section 1 of the Act:

"Thank you for the six documents you provided in response to my freedom of information request for reports summarising the lessons learnt from all Senator emergency exercises since 1990. Can I please ask a couple of follow-up questions?

You provided reports on Senator exercises in 1996, 1997, 2000 and 2001. Would it be right to assume that – until the Senator exercise took place in Edinburgh on 14-15th September this year – there have been no other Senator exercises since 2001?

With regard to the recent Edinburgh exercise, presumably a 'lessons learnt' report on this is currently being prepared. Can you tell me when it is likely to be completed? And could I please have a copy when it is ready?" ("the requested information").

5. On 31 October 2005, the MOD acknowledged receipt of the complainant's request.
6. On 14 November 2005, the MOD stated that it was extending the time limit for response in order to consider the public interest test and would respond to the complainant in the week commencing 5 December 2005.
7. On 9 December 2005, the MOD advised the complainant that it was further extending the time to consider the public interest test until the week commencing 9 January 2006.

8. On 13 January 2006, the MOD advised the complainant that it was further extending the time to deal with his request until the week commencing 6 February 2006. On 7 February 2006, the MOD further extended this time until 27 February 2006 and subsequently further extended it until 11 April 2006.
9. On 11 July 2006 the MOD issued a refusal notice to the complainant. That notice stated that the requested information consisted of 2 reports – the Exercise Senator 2005 All Agency report (“the All Agency report”) and the Nuclear Weapon Regulator Exercise Senator 2005 Assessment (“the NWR Report”). The MOD advised that the All Agency report was exempt under section 21(1) of the Act as it had already been published and was available on the MOD’s website.
10. The MOD advised that the NWR Report was exempt under section 36 of the Act (prejudice to the effective conduct of public affairs). The MOD stated that the exemptions under section 24 (national security), section 26 (defence) and section 40 (personal information) had been initially considered in relation to the NWR Report, however it did not further discuss these as it considered that the exemption under section 36 applied to the whole of the NWR Report.
11. On 17 July 2006 the complainant requested an internal review of the MOD’s decision to withhold the NWR Report. The MOD acknowledged receipt of that request on the same date and wrote to the complainant on 18 July, stating that it would aim to respond to his request for internal review by 11 September 2006.
12. On 12 September 2006 the MOD wrote to the complainant to advise him of the outcome of the internal review. That letter stated that the reviewer upheld the original decision to withhold the information and that the section 36 exemption provided such a strong argument for withholding the NWR Report that there was no need to expend further public funds in examining the use of the other exemptions.

The Investigation

Scope of the case

13. On 12 September 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the MOD’s application of the public interest test in relation to the NWR Report. The complainant did not refer to the All Agency

Report, therefore the Commissioner has not considered that part of the request in this Decision.

Chronology

14. On 11 April 2008 the Commissioner wrote to the MOD requesting a copy of the NWR Report and further details on its refusal of the request.
15. Following further correspondence with the Commissioner, the MOD provided its substantive response on 24 September 2008. The MOD advised the Commissioner that it had re-examined the NWR Report and the covering letter attached and had ascertained that certain portions of these were of a factual nature and were already in the public domain. The MOD therefore agreed to disclose this information to the complainant. However the MOD remained of the view that sections 36(2)(b)(i) and (ii) were engaged in relation to the remainder of the NWR Report and that the balance of public interest lay in maintaining those exemptions.

Analysis

Exemptions

Section 36 - prejudice to the effective conduct of public affairs

16. Sections 36(2)(b)(i) and (ii) provide that information is exempt if its disclosure would, or would be likely to, inhibit the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation. Section 36(2)(c) provides that information is exempt if its disclosure would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
17. When investigating cases involving the application of section 36, in order to establish whether the exemption has been applied correctly the Commissioner considers it necessary to:
 - Ascertain who is the qualified person or persons for the public authority in question;
 - Establish that an opinion was given;
 - Ascertain when the opinion was given; and
 - Consider whether the opinion given was reasonable.
18. With regard to the fourth criterion, in deciding whether the opinion was

'reasonable' the Commissioner has been led by the First-tier Tribunal's (Information Rights) decision in the case *Guardian Newspapers & Brooke v Information Commissioner & BBC* [EA/2006/0011 & EA/2006/0013] in which the Tribunal considered the sense in which the qualified person's opinion is required to be reasonable. It concluded that 'in order to satisfy the sub-section the opinion must be both 'reasonable in substance and reasonably arrived at' (paragraph 64). In relation to the issue of reasonable substance, the Tribunal indicated that 'the opinion must be objectively reasonable' (paragraph 60).

The engagement of section 36

19. Section 36(5)(a) states that in relation to information held by a government department in charge of a Minister of the Crown, the qualified person includes any Minister of the Crown. In this case the Commissioner has established that the reasonable opinion was given by Mr Adam Ingram MP, who at the time of this request was Minister of State for the Armed Forces. The Commissioner is therefore satisfied that Mr Ingram was a qualified person for the purposes of section 36 of the Act.
20. In its submissions to support the application of section 36, the MOD has explained that the process by which this opinion was provided was as follows: the qualified person's opinion was sought on 11 May 2006, before a substantive response was sent to the complainant in this case. On 15 May 2006 the qualified person approved the use of section 36 in relation to some of the withheld information.
21. The MOD provided the Commissioner with a summary of the factors it had submitted to the qualified person to take into account in reaching his opinion that certain documents were exempt on the basis of section 36. In addition to this the MOD provided the Commissioner with a detailed explanation as to why it considered the information to be exempt on the basis of section 36. The MOD, in its submission to the qualified person, had set out the background to Exercise Senator and the information falling within the scope of the complainant's request. It explained that the All Agency report would be provided to the complainant and the information for consideration under section 36 was the assessment by the NWR. The submission also set out how it had carried out the public interest test, its conclusion and requested the qualified person's opinion on its application of section 36. The MOD advised that it had not specified in its submission to the qualified person exactly which subsection of section 36 it was relying upon, however it confirmed to the Commissioner that it was relying on subsections (2)(b)(i) and (ii).

22. The Commissioner has first considered whether the qualified person's opinion was reasonably arrived at and notes that he was provided with a submission from his own officials detailing the request, the background to the request, the public interest test carried out and the conclusion of that test. It asked for the qualified person's opinion on the application of section 36 to the withheld information. However, the Commissioner notes that, whilst the submission appears to have outlined the factors provided to the qualified person to assist him in reaching his decision, no evidence has been provided as to the factors that he considered in forming the view that disclosure of the withheld information would be likely to inhibit the free and frank provision of advice or exchange of views.
23. In considering whether the opinion was reasonable in substance the Commissioner has taken into account the fact that the information is an assessment report by the NWR, which may be amended and reissued. The continued effectiveness of the MOD's plans and exercise strategies depends on the NWR being able to express his views in as free and frank a manner as possible. If the NWR became aware that his assessments could be published, he could become less willing to express those views and dialogue between the NWR and the MOD could be inhibited. The Commissioner considers that it was reasonable for the qualified person to conclude that a possible effect of disclosure was that it would be likely to stifle any future candid assessments which might be produced to the MOD by the NWR or by others within the organisation of the Defence Nuclear Safety Regulator. This could prejudice the effectiveness of the MOD's plans and exercise strategies. The Commissioner therefore considers that the qualified person's opinion is reasonable in substance. The Commissioner notes that the process as to how the opinion was arrived at appeared to have some flaws but the opinion can be regarded as overridingly reasonable in substance. This position is in line with the approach proposed by the Tribunal in the case of *McInyre v Information Commissioner and MoD [EA/2007/068]*.
24. The MOD submission to the qualified person refers to the need for the NWR to provide an unrestrained, frank and candid assessment and a free and frank exchange of views. The Commissioner is therefore satisfied that, even though the submission did not specify the subsections of section 36 upon which the MOD wished to rely, the language used in the submission would have been clearly identified as relating to sections 36(2)(b)(i) and (ii).
25. The Commissioner has been guided by the Tribunal's findings in the case of *Guardian & Brooke* referred to at paragraph 18 above, in which it indicated that the reasonable opinion is limited to the degree of

likelihood that inhibition or prejudice may occur and thus 'does not necessarily imply any particular view as to the *severity* or *extent* of such inhibition [or prejudice] or the *frequency* with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant'. Therefore, in the Commissioner's opinion this means that when assessing the reasonableness of an opinion the Commissioner is restricted to focusing on the likelihood of that inhibition or harm occurring, rather than making an assessment as to the severity, extent and frequency of prejudice or inhibition of any disclosure.

26. The Commissioner notes that Mr Ingram has not explicitly said whether disclosure would **or** would be likely to cause the prejudice outlined in sections 36(2)(b)(i) and (ii). Therefore the Commissioner, mindful of the findings of the Tribunal referred to at paragraph 25 above and the findings of the Tribunal in the case of *McIntyre v Information Commissioner and MoD [EA/2007/068]*, has decided that the lesser test should be applied. The Tribunal in *McIntyre* commented at paragraph 45 that:

'we consider that where the qualified person does not designate the level of prejudice, that Parliament still intended that the reasonableness of the opinion should be assessed by the Commissioner but in the absence of designation as to level of prejudice that the lower threshold of prejudice applies, unless there is other clear evidence that it should be at the higher level.'

27. The Commissioner is therefore satisfied that the exemptions under sections 36(2)(b) (i) and (ii) are engaged.

Public Interest Test

28. Section 2(2)(b) of the Act states that a public authority may refuse to disclose information requested if in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
29. Section 36(2) is a qualified exemption and therefore the Commissioner must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure of the information. The Tribunal in *Guardian & Brooke* indicated the distinction between consideration of the public interest under section 36 and consideration of the public interest under the other qualified exemptions contained within the Act:

"The application of the public interest test to the s 36(2) exemption involves a particular conundrum. Since under s 36(2) the existence of the exemption depends upon the reasonable opinion of the qualified

person it is not for the Commissioner or the Tribunal to form an independent view on the likelihood of inhibition under s36(2)(b), or indeed of prejudice under s 36(2)(a) or (c). But when it comes to weighing the balance of public interest under s 2(2)(b), it is impossible to make the required judgment without forming a view on the likelihood of inhibition or prejudice."

30. The Commissioner agrees with the view of the Tribunal in paragraph 31 above. The fact that it is "not for the Commissioner to form an independent view..." does not prevent him from considering the severity, extent and frequency of any prejudice or inhibition which might occur when he is assessing the public interest. Whilst the Commissioner can and should give due weight to the reasonable opinion of the qualified person when assessing the public interest, he can and should also consider the severity, extent and frequency of the likely prejudice or inhibition which would be likely to be caused by disclosure of the information withheld under section 36 and any relevant subsections.

Public interest arguments in favour of disclosing the requested information

31. The MOD acknowledged that there a number of factors which favour disclosure, including openness and transparency of government activities, contribution to public knowledge and debate and assurance to the public that nuclear weapons are stored and transported in a safe and secure manner and that suitable plans are in place to deal with the consequences of reasonably foreseeable incidents involving nuclear weapons.
32. The MOD acknowledged that there is a strong public interest in openness and transparency in relation to government activities. The MOD advised that, to this end, it had proactively published as much material as it believed it could safely publish to explain measures taken to ensure the safety of nuclear weapons, for example the Local Authority and Emergency Services Information Document ("LAESI") regarding those measures. The MOD had also published assessment reports for earlier Senator exercises. Details of Exercise Senator 2005 were made public while the exercise was underway and received wide coverage in the local media.
33. The Commissioner agrees that there some general weight can be placed on the importance of openness and transparency in relation to government activities. He also considers that disclosure of the withheld information could increase public understanding of and

confidence in the measures taken to ensure public safety in relation to nuclear weapons.

Public interest arguments in favour of maintaining the exemption

34. Although the MOD had published previous Senator Exercise reports, it considered that the information contained in previous Senator exercise reports was historical and could not reasonably be said to inhibit free and frank provision of advice or exchange of views in relation to current nuclear safety arrangements. The MOD considered that Exercise Senator 2005 was different in that it was the most recent exercise of its kind and the assessment was still current at the time of the complainant's request. In addition to this, the NWR who compiled the report was still in post and he agreed that the release of the report would be likely to stifle any future candid assessments he or others might produce. It is the Commissioner's view that this stifling effect would be likely to cause severe prejudice to future nuclear safety arrangements as it would be likely to harm future discussions and proposals in relation to those arrangements, which could lead to improvements not being made to them.
35. The MOD explained that the NWR's assessment is important to the overall nuclear safety regime of the United Kingdom and to the continued effectiveness of the MOD's plans and exercise strategies in relation to nuclear weapons. Disclosure of the withheld information could inhibit dialogue between the NWR and the MOD and therefore be prejudicial to the continual improvement of nuclear safety plans and procedures.
36. Given the importance of the NWR's assessment process, the Commissioner agrees that there is a strong public interest in maintaining the integrity of that process in order to preserve the ability of the MOD to work with the NWR in order to better discuss and improve their plans and procedures in relation to nuclear safety.

Balance of the public interest arguments

37. In deciding where the balance of public interest lies the Commissioner has considered the arguments put forward by the MOD. The Commissioner also recognises that there is a strong public interest inherent in maintaining the continued effectiveness of the MOD's plans and exercise strategies in relation to reasonably foreseeable incidents involving nuclear weapons.

38. The MOD has made several public interest arguments in reliance upon section 36 of the Act both for and against disclosure of the requested information.
39. Having reviewed the withheld information, the Commissioner considers that the advice given and the views exchanged by the MOD and the NWR were expressed in a free and frank manner. In relation to any inhibition of the frankness of future advice and exchange of views by officials, the Commissioner believes that the guiding principle is the robustness of those officials, i.e. they should not be easily deterred from carrying out their functions properly in order to ensure the safety of the public. However, such arguments must be considered on a case by case basis and on this case the Commissioner accepts that an effect would be likely and weight must be given to protecting the process in question. The Commissioner accepts that the timing of the request and the fact that the information related to the most recent exercise was a significant factor in giving weight to the effects and their severity.
40. The Commissioner acknowledges that disclosure of the withheld information could provide the public with further information regarding measures taken by government officials to ensure their safety in the event of an incident involving nuclear weapons. However, the Commissioner considers that the disclosure of the withheld information would not significantly add to the other materials previously disclosed such as the LAESI document mentioned above. He considers that, while disclosure of the withheld information would provide the public with the most up-to-date knowledge regarding those measures, this benefit to the public would be outweighed by the disadvantage to it, i.e. the resulting prejudice to future discussions and to the effectiveness of future exercise strategies.
41. The Commissioner has considered the arguments both for and against disclosure of the withheld information and agrees that the public interest in maintaining the exemption outweighs any public interest in disclosing the withheld information. In reaching this decision the Commissioner has considered the strong public interest inherent in maintaining nuclear safety. He has also considered the likely extent, severity and frequency of any prejudice to nuclear safety arrangements which would result from disclosure of the withheld information.
42. The Commissioner has been persuaded that disclosure of the information would be likely to inhibit the free and frank provision of advice and exchange of views in an area where this would have a direct bearing on the maintenance of nuclear safety. He considers that inhibition of advice being provided and views being exchanged in a free

and frank manner would be likely to cause severe prejudice to nuclear safety. The extent of that prejudice would be widespread, as the nuclear safety arrangements apply to the whole of the United Kingdom. That prejudice would also be likely to be frequent, as it would appear that exercises of this nature have been carried out at least every three years.

43. The Commissioner therefore considers that the likely extent, severity and frequency of the prejudice arising from disclosure of the Exercise Senator report and the ensuing prejudice likely to be caused to the nuclear safety of the United Kingdom public outweighs the public interest in promoting public understanding of and confidence in the measures in place for an emergency response to the release of radioactive material during the movement of nuclear weapons by road.

Procedural Requirements

Section 17 - Refusal of request

44. Where a public authority refuses a request for information it is required under section 17(1) of the Act to provide the applicant with a 'refusal notice' explaining the exemption or exemptions relied upon (see the legal annex for more details). This notice must be provided within the timescale set out in section 10(1), no later than twenty working days following the date the request was received. Section 17(3) provides that a public authority may take additional time to consider the public interest in relation to a qualified exemption, if the authority is satisfied that the exemption is engaged. However the refusal notice issued under section 17(1) must still contain the following elements:
- i) an explanation as to which exemptions are being applied, and why
 - ii) confirmation that the public interest test is still under consideration
 - iii) an estimate of the date by which the authority expects to reach a decision in relation to the public interest test
 - iv) details of the applicant's right of appeal under section 50 of the Act.
45. The complainant submitted his request to the MOD on 27 October 2005. The MOD responded to the request on 31 October 2005 stating that it needed further time to consider the public interest test. However the MOD did not at this stage explain which exemption it sought to rely on. The MOD wrote a further four times to the complainant stating that it needed still more time to consider the public interest test,

before finally providing a substantive response to the complainant's request on 11 July 2006.

46. The last date on which the MOD told the complainant that it needed further time to consider the public interest test was 14 March 2006. The opinion of the qualified person was not sought until 11 May 2006.
47. The Commissioner considers that, in relation to the section 36 exemption, the exemption is not engaged until the opinion of the qualified person has been provided. Therefore, in the absence of an engaged qualified exemption, the MOD could not consider the public interest factors in relation to that exemption.
48. The Commissioner therefore considers that the correspondence which the MOD sent to the complainant between 27 October and 14 March 2006 could not constitute an extension of time to consider the public interest. Therefore he must consider the MOD's substantive response on 11 July 2006 to the complainant's request to be a refusal notice issued outside of the 20 working day time limit as set out in section 10(1) of the Act. The MOD has therefore breached section 17(1) and section 17(3) of the Act.
49. In its refusal notice of 11 July 2006 the MOD cited section 36 as a basis for withholding the NWR Report, however it did not explain which subsections were being relied upon. Therefore the Commissioner also finds that the MOD breached section 17(1)(b) of the Act.

The Decision

50. The Commissioner's decision is that the MOD dealt with the request in accordance with the Act to the extent that it correctly withheld requested information under sections 36(2)(b)(i) and (ii) of the Act.
51. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
 - The public authority breached section 17(1)(b) by failing to specify which particular sub-section it was relying on for each of the exemptions it cited.
 - The public authority breached section 17(1) by failing to cite section 36(2)(b)(i) and (ii) within 20 working days of receiving the request.

- The public authority breached section 17(3) by failing to provide a refusal notice stating that it was relying on a claim that subsection 2(b) applied to the requested information within 20 working days of receiving the request.

Steps Required

52. The Commissioner requires no steps to be taken.

Right of Appeal

53. Either party has the right to appeal against this Decision Notice to the First- tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

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

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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

Dated the 30th day of March 2010

Signed

Steve Wood
Assistant Commissioner

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

Legal Annex

1. General right of access to information held by public authorities

(1) Any person making a request for information to a public authority is entitled—

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

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

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

(3) Where a public authority—

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.

(4) The information—

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.

(5) A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).

(6) In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.

2. Effect of the exemptions in Part II

(1) Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either—

(a) the provision confers absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information, section 1(1)(a) does not apply.

(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

17. Refusal of request

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

(a) states that fact,

(b) specifies the exemption in question, and

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

(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—

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

36. Prejudice to effective conduct of public affairs

(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—

(b) would, or would be likely to, inhibit—

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

(5) In subsections (2) and (3) “qualified person”—

(a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown.