

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 4 February 2010

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

Summary

The complainant made a request to the Ministry of Defence for several reports relating to the safety of nuclear weapons. The public authority responded to the request by disclosing redacted versions of the reports. Information was withheld under the exemptions in section 24(1) (National security), section 26(1)(a) and (b) (Defence), section 27(1)(a) (International relations) and section 36(2)(b)(i) (Free and frank provision of advice). The Commissioner has investigated the complaint and has found that the exemptions are engaged and that for most of the information the public interest in maintaining each exemption outweighs the public interest in disclosure. However the Commissioner found that for some information withheld under section 36(2)(b)(i) the public interest in maintaining the exemption does not outweigh the public interest in disclosure. The Commissioner now requires this information to be made available to the complainant within 35 calendar days of the date of this notice. The Commissioner found that in its handling of the complainant's request the public authority breached section 1(1)(b) (General right of access), section 10(1) (Time for compliance), section 17(1)(c) and 17(3) (Refusal of request).

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.

The Request

2. On 11 December 2006 the complainant wrote to the public authority to request the following reports regarding the safety of nuclear weapons:

1. 16 20060921 draft DNSC report AWE
 2. 28 Indian Footprint 06 report
 3. 33 060804-Quarterly report for DNSR-NWR Q3 2006
 4. 139 DNSR Inspection of DLO Nuclear Weapon Convoy Road Movement of Nuclear Weapons 'MO 4051' and Associated COPI: Interim Report
 5. 149 Defence Nuclear Safety Board Annual Report
 6. NWR 2005 annual report
3. The public authority replied on 20 December 2006, it explained that the information in part 5 of the request listed as '149 Defence Nuclear Safety Board Annual Report' was not the report itself but a covering letter sent out with the Defence Nuclear Safety Board's 2005 Assurance report. The complainant was provided with a copy of this letter. The public authority went on to say that the remaining information was believed to fall within the exemptions under sections 24 (National security), 26 (Defence), 27 (International relations), 36 (Prejudice to effective conduct of public affairs), 40 (Personal information) and 43 (Commercial interests) and that further time was needed in order to balance the public interest in disclosure against the public interest in maintaining the exemptions. It advised that it would contact the complainant again on 26 January 2007.
4. On 25 January 2007 the public authority informed the complainant that the public interest balancing exercise was still ongoing but that it would write again by 2 March 2007.
5. On 6 March 2007 the public authority contacted the complainant once more to say that the work to consider the balance of the public interest was taking longer than expected and that it would write further by 20 April 2007.
6. The public authority responded substantively on 11 May 2007. For parts 2 and 6 of the request some heavily redacted information was disclosed. The reports in parts 1, 3 and 4 of the request were withheld in their entirety. At this stage all of the information was withheld under section 36(2)(b)(i) although some information was considered to be additionally exempt under section 24 and section 27.
7. On 11 May 2007 the complainant asked the public authority to carry out an internal review of its handling of his request.
8. The public authority presented the findings of its internal review on 25 February 2008. Firstly, the public authority acknowledged that it had breached the Act in its handling of the request. It apologised for the length of time it had taken to reach a decision on the public interest test and its failure to provide realistic estimates of when it expected to reach a decision regarding the balance of the public interest. The public authority also apologised for sending its final response of 11 May 2007 after the estimate provided in its previous letter and for failing to explain why the exemptions applied.
9. The public authority now went on to re-examine its decision to refuse to disclose most of the information requested by the complainant. For the information

withheld under section 36 the public authority now set out its assessment of the public interest test and explained that whilst it considered the public interest to favour withholding most of the information it now believed that for some relevant information the public interest in disclosure was not outweighed by the public interest in maintaining the exemption. As a result the complainant was provided with redacted copies of the reports he requested.

10. For some of the information that had previously been withheld under section 36, the public authority said that it considered that other exemptions applied and it now sought to rely on the exemptions in sections 24(1), 26(1) and 27(1)(a) of the Act. The public authority briefly explained why sections 24(1) and 26(1) applied and why the public interest favoured maintaining the exemptions. The public authority explained that it could not, pursuant to section 17(4) of the Act, provide details of why section 27(1)(a) applied as to do so would involve the disclosure of the exempt information.

The Investigation

Scope of the case

11. On 4 March 2008 the complainant contacted the Commissioner to complain about the public authority's decision to refuse to disclose most of the information he requested.
12. On 6 February 2009 the Commissioner contacted the complainant to say that it was his understanding that the complainant had received the information in part 5 of the request. Therefore, the Commissioner explained that his investigation would focus on the public authority's decision to withhold information in parts 1, 2, 3, 4 and 6 of the request under the exemptions in sections 36(2)(b)(i), 24(1), 26(1) and 27(1)(a) of the Act. The Commissioner also noted that the complainant, when requesting an internal review, had not challenged the public authority's decision to withhold the names and contact details of individuals featured in the information. Therefore, the Commissioner said that he did not intend to consider this as part of his investigation and asked the complainant to contact him if he had any concerns about how he had interpreted his complaint.
13. On 6 February 2009 the complainant confirmed that he was happy with the Commissioner's approach.

Chronology

14. On 4 February 2009 the Commissioner contacted the public authority with details of the complaint. Firstly the Commissioner asked to be supplied with un-redacted copies of the requested information, clearly marked to show where any exemption(s) applied. The Commissioner then asked the public authority to further explain why each exemption applied to the requested information and to elaborate on its reasons for concluding that the public interest in maintaining each exemption outweighed the public interest in disclosure. Noting that the section 36

exemption had been applied to most of the requested information, the Commissioner asked the public authority the following questions regarding the obtaining of the qualified person's opinion:

- The public authority was asked to confirm that when applying the exemption it had sought the opinion of the qualified person.
 - The public authority was asked to confirm when the qualified person's opinion was sought.
 - The public authority was asked to confirm whether the qualified person gave his opinion verbally or in writing.
 - The public authority was asked to explain what information was placed before the qualified person to allow him/her to reach a decision.
15. The Commissioner did not receive a response within 20 working days and so contacted the public authority again on 12 March 2009.
16. The public authority responded on 23 March 2009 explaining that it had not received the earlier letter of 4 February 2009.
17. The public authority now provided the Commissioner with un-redacted copies of the requested information with the exception of the information withheld under section 27(1)(a) (International relations). It explained that given the particular sensitivity of this information it was not possible to release this information. However the public authority offered to make this information available for the Commissioner to view in situ at its offices.
18. As regards the public authority's application of section 36(2), the public authority explained that the qualified person gave his opinion on 4 May 2007. The public authority provided the Commissioner with a copy of the submission placed before the qualified person along with the response confirming the qualified person's approval of the application of the exemption.
19. The Commissioner subsequently arranged with the public authority to view the information withheld under section 27(1)(a). On 18 June 2009 the Commissioner inspected this information at the offices of the public authority.

Findings of fact

20. The Defence Nuclear Safety Regulator is the public authority's internal, independent regulator for nuclear and radiological safety and environmental protection in the defence nuclear programme. The regulator is accountable to the Chairman of the Defence Nuclear Environment and Safety Board which in turn reports to the Defence Environment and Safety Board, both of which are internal bodies within the public authority.
21. In 2004 the staff magazine of the Ministry of Defence Police, 'Talkthrough', published two articles focusing on the work of the Ministry of Defence Police Special Escort Group which has responsibility for escorting Nuclear Weapons Convoys and Special Nuclear Material Convoys. The articles contained interviews with named Ministry of Defence Police Officers responsible for escorting convoys

and included information on the level of protection afforded to the convoys. The articles included details of the configuration of the convoys, details of the number and types of vehicles used together with the duties of individual members of the police escort. The articles were included in issues 117 and 118 both of which are publicly available on the Ministry of Defence website.¹

Analysis

22. A full text of the relevant statutes referred to in this section is included within the legal annex.

Substantive Procedural Matters

23. The complainant made his request to the public authority on 11 December 2006. The public authority contacted the complainant on 20 December 2006 at which point it explained that the requested information was believed to fall under the exemptions in sections 24 (National security), 26 (Defence), 27 (International relations), 36 (Prejudice to effective conduct of public affairs), 40 (Personal information) and 43 (Commercial interests) but that it needed to extend the time for responding in order to consider the public interest test.
24. Where a public authority is relying on a claim that a qualified exemption applies to a request for information it may provide the complainant with a separate notice under section 17(3) of the Act, within such time as is reasonable in the circumstances, setting out its public interest determination.
25. However, a public authority must still provide the complainant with a notice under section 17(1) within the time for complying with section 1(1). This notice must state that the requested information is exempt, state which exemption(s) applies and state why the exemption(s) applies. In this case the public authority's notice of 20 December 2006, whilst stating that the information was considered to be exempt under various exemptions, failed to state why the exemptions applied which constitutes a breach of section 17(1)(c).
26. The Commissioner has also considered whether the public authority took a reasonable time to arrive at a decision under the public interest test. What is reasonable is not defined in the Act but the Commissioner has issued guidance on this point which states that:

"...our view is that public authorities should aim to respond fully to **all** requests within 20 working days. In cases where the public interest considerations are

¹ http://www.mod.uk/NR/rdonlyres/971CA290-0F9B-4092-A360-2A1B69EB806F/0/tt_118_jun_jul04.pdf, and http://www.mod.uk/NR/rdonlyres/BBD4D320-AD48-47D3-BC6D-6343E5E9663F/0/tt_117_mar_apr04.pdf

exceptionally complex it may be reasonable to take longer but, in our view, in no case should the **total** time exceed 40 working days.”²

27. In this case the public authority only presented its public interest determination with its substantive response of 11 May 2007, almost 5 months after the request was received. Consequently the Commissioner has found that the public authority breached section 17(3) of the Act by failing to provide the complainant with its public interest determination within such time as is reasonable.

Exemptions

28. At the internal review stage the complainant was provided with redacted copies of the remaining reports, having already had the report in part 5 of his request. Further information on the reports is given below together with details of which exemptions are being applied in each case. For reports 1 – 4 the description is taken from the public authority’s response to the complainant dated 11 May 2007.

1. 16 20060921 draft DNSC report AWE

This report is draft input by the Defence Nuclear Regulator’s Staff on the Atomic weapons Establishment to the Defence Nuclear Safety Committee. Information in this report has been redacted under section 26(1) and section 27(1).

2. 28 Indian Footprint 06 report

This is a report of an inspection of the arrangement for a Nuclear Accident Response Organisation by the Principal Inspector Dockyards on the Defence Nuclear Safety Regulator (DNSR) staff. Information in this report has largely been redacted under section 36(2)(b)(i) although section 26(1) and section 27(1) have also been applied in places.

3. 33 060804-Quarterly report for DNSR-NWR Q3 2006

This is a report on Her Majesty’s Naval Base Clyde and the CSSE by DNSR staff. A small amount of information has been redacted under section 27(1).

4. 139 DNSR Inspection of DLO Nuclear Weapon Convoy Road Movement of Nuclear Weapons 'MO 4051' and Associated COPI: Interim Report

This document contains detailed information as to the manner in which Nuclear Weapons Convoy movements are conducted and the Inspector’s comments on a particular movement. Information has largely been redacted under section 36(2)(b)(i) but section 24(1) has also been applied in places.

6. NWR 2005 annual report

² see,

http://www.ico.gov.uk/upload/documents/library/freedom_of_information/practical_application/foi_good_practice_guidance_4.pdf

This is the 2004 – 2005 Annual Report of the Nuclear Weapon Regulator (NWR) for the Chairman of the Defence Nuclear safety Board (DNSB). It addresses safety performance in the Nuclear Weapon Programme (NWP) and the activities of the NWR. Information has largely been redacted under section 36(2)(b)(i) although a small amount of information has been redacted under section 27(1).

Section 36(2)(b)(i) – Free and frank provision of advice

29. Section 36(2)(b) of the Act provides that 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
30. The public authority has applied section 36(2)(b)(i) to redact information from 3 of the remaining 5 reports. The exemption has been applied to withhold the opinions of nuclear safety regulators on the basis that they would be dissuaded from giving frank opinions on the departments or activities they are regulating if the information were to be disclosed.
31. In investigating whether the section 36 exemption is engaged the Commissioner will undertake the following:
- Ascertain who is the qualified person for the public authority
 - Establish that an opinion was given
 - Ascertain when the opinion was given
 - Consider whether the opinion was reasonable in substance and reasonably arrived at.
32. The Commissioner has reviewed the submission provided to the qualified person by his officials together with his response. From this it is clear that the proper qualified person, a Minister of State, gave his opinion on the application of the exemption on 4 May 2007. However the public authority had initially responded to the request on 20 December 2006 and had stated that section 36 applied to the request but it needed further time to consider the public interest test. At this point the exemption should not have been applied as the exemption is only engaged once the qualified person has given his/her opinion. Nevertheless, by the time the public authority issued its substantive response on 11 May 2007 the qualified person's opinion had been obtained and the fact that the opinion was obtained outside of 20 working days does not necessarily undermine the public authority's application of the exemption. Indeed the Information Tribunal has made it clear that the Commissioner is entitled to still consider exemptions in such cases when it said that:

'even if there are flaws in the process these can be subsequently corrected, provided this is within a reasonable time period which would usually be no later than the internal review'.³

33. In the case of *Guardian & Brooke v The Information Commissioner & the BBC*, the Information Tribunal considered the sense in which the reasonable person's opinion under s.36 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".⁴

34. The Commissioner has first considered whether or not the qualified person's opinion was reasonable in substance and notes that the public authority has not explicitly said whether disclosure would OR would be likely to cause the prejudice outlined in section 36(2)(b)(i). In light of this the Commissioner thinks it is appropriate to apply the lesser test, that is to say the exemption will apply if disclosure would be likely to cause the prejudice in section 36(2)(i) of the Act. This approach has found support in the Information Tribunal when it stated:

"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."⁵

35. The Information Tribunal has also considered the meaning of 'would be likely to prejudice' and found that for this to apply:

"the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk."⁶

36. This in turn follows the judgement of Mr Justice Munby in the High Court in which the view was expressed that:

"Likely connotes a degree of probability that 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."⁷

37. Having reviewed the withheld information the Commissioner is satisfied that the opinion of the qualified person was reasonable in substance. In reaching this view the Commissioner has taken into account the sensitive nature of the information and the fact that the reports are intended for a small audience within the public authority and government. It is clear that the information is not intended for wider dissemination and so the Commissioner considers that it is not unreasonable to

³ *McIntyre v Information Commissioner & the Ministry of Defence* [EA/2007/0068], para. 31.

⁴ *Guardian & Brooke v Information Commissioner & the BBC* [EA/2006/0013], para. 64.

⁵ *McIntyre*, para. 45.

⁶ *John Connor Press Associates Ltd v Information Commissioner* [EA/2005/0005], para. 15.

⁷ *R (on the application of Lord) v Secretary of State for the Home Office* [2003] EWHC 2073 Admin

conclude that disclosure would be likely to some extent to affect the frankness with which regulators carry out their work.

38. In deciding whether the opinion was reasonably arrived at the Commissioner notes that the qualified person was provided with a full submission by his officials detailing the requested information, the exchange of correspondence between the complainant and the public authority and the reasons why the information was believed to fall under the section 36(2)(b)(i) exemption. The Commissioner is satisfied that the qualified person gave his opinion after taking into account only relevant factors and that the opinion was both reasonably arrived at and reasonable in substance. Consequently the Commissioner has decided that section 36(2)(b)(i) is engaged for all of the information redacted under this exemption.

Public interest test

39. Section 36(2)(b) of the Act is a qualified exemption and is therefore subject to a public interest test under section 2(2)(b) of the Act. Section 2(2)(b) provides that information to which a qualified exemption applies shall only not be disclosed where, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.

Public interest arguments in favour of disclosing the requested information

40. The complainant has argued that disclosure would serve the public interest as an open and transparent system of regulation leads to better and more effective regulation.
41. The issue of nuclear safety, with the potential for significant health and safety implications, is clearly of great public concern. The Commissioner is of the view that disclosure would also help to serve the public interest as it would provide further information on the resources that government commits to this issue and would provide reassurance that effective systems of regulation are in place.
42. Disclosure would also lead to greater accountability of the public authority and its internal regulators and would lead to greater transparency in the UK's nuclear weapons programme which is a matter of public concern and debate.

Public interest arguments in favour of maintaining the exemption

43. The public authority has argued that assessments produced by the nuclear regulators are crucial to the overall nuclear safety regime and the safety and security of the UK's nuclear deterrent depends on the regulators being able to express their views in as free and frank a manner as possible. It argues that if regulators became aware that their assessments could be published they would be less willing to provide their advice.
44. The public authority has argued that disclosure would reduce the effectiveness of its regulatory processes because it would lead to regulators being "inhibited from identifying areas of concern and robustly expressing objective criticism of the

arrangements for fear of a public outcry before they have had an opportunity to be addressed”.

Balance of the public interest arguments

45. The qualified person has given his opinion on the likelihood of prejudice occurring. Having accepted the reasonableness of the qualified person's opinion the Commissioner has given due weight to this as an important factor in favour of maintaining the exemption. The Commissioner agrees that it is in the public interest that regulators should not be inhibited from providing free and frank advice especially in an area as sensitive and important as nuclear safety. The Commissioner accepts that it is in the public interest that regulators responsible for issues surrounding nuclear safety are able to make robust criticisms and recommendations regarding matters of considerable public interest free from the 'chilling effect' of having those discussions made public. This is especially the case considering the sensitivity surrounding the safety of nuclear weapons. This is a highly politicised issue and there is significant opposition to the government's nuclear policy and nuclear weapons more generally. Whilst it follows that there is consequently a greater public interest in transparency and accountability the Commissioner believes that it also means that the likely inhibition on regulators would be even stronger because of the nature of the debate surrounding this issue.
46. The Commissioner has also considered whether the age of the information would have a bearing on the balance of the public interest. In this case the various reports, for the most part, date from mid to late 2006. One report was produced in early 2005. Therefore the Commissioner is of the view that when the complainant submitted his request in December 2006 this information was still very recent. Whilst the sensitivity of information will generally decline with age, the Commissioner considers that disclosure of recent free and frank advice, in this case almost immediately after it was given, is likely to have a significant inhibitory effect. Furthermore, the Commissioner is mindful that the reports are in most cases part of a wider, ongoing regulatory process and disclosure so soon after the reports were produced would be likely to inhibit any additional advice that the regulators would need to give on the issues and recommendations arising from the reports.
47. Whilst the Commissioner believes that there are significant factors in favour of maintaining the exemption he is also of the view that there is a strong public interest in greater transparency in this case. This is because there is little information available about the work undertaken by the regulators responsible for producing the reports. Indeed the Defence Nuclear Safety Regulator is an internal regulator based within the MoD. The system of nuclear regulation is complex and as far as the Commissioner can ascertain there is little or no independent external oversight of the process. Consequently, when deciding where the balance of the public interest lies the Commissioner has given the factors regarding transparency and accountability particular weight.
48. Whilst acknowledging the public interest in greater transparency the Commissioner has concluded that the extent and severity of the prejudice that

would be caused to the ability of regulatory bodies to give free and frank advice is a more compelling concern. Consequently the Commissioner has decided that for the majority of information withheld under section 36(2)(b)(i) the public interest in maintaining the exemption outweighs the public interest in disclosure.

49. However, the Commissioner has decided that for a small amount of information the public interest in maintaining the exemption does not outweigh the public interest in disclosure. The Commissioner has found that some comments redacted from the reports are more factual observations rather than an assessment or criticism of the activity, process or organisation being reviewed, or else they are more general conclusions or summaries. The Commissioner is of the view that any prejudice that is likely to be caused would be less serious and when considering the public interest in greater transparency the balance falls in favour of disclosure.
50. The Commissioner has also taken into account the facts outlined at paragraph 21 and has found that some of the information withheld under section 36(2)(b)(i) is similar to information which was published by the Ministry of Defence Police. Given that the public authority has chosen to make this information publicly available on its website the Commissioner has concluded that any prejudice on the ability of regulators to give free and frank advice is likely to be slight and therefore the public interest in maintaining the exemption does not outweigh the public interest in disclosure.
51. The Commissioner has clearly identified the information which he considers should be disclosed in a schedule attached to the public authority's copy of this decision notice.

Section 24(1) – National Security

52. Section 24(1) of the Act provides that information is exempt if exemption from section 1(1)(b) is required for the purpose of safeguarding national security.
53. The word 'required' is not defined in the Act. The verb 'require' is defined in the Oxford English Dictionary as 'to need something for a purpose'. The Commissioner is satisfied that in this context it means something more than desirable, in effect it must be *necessary* to apply this exemption for the purposes of safeguarding national security.
54. The Information Tribunal has not yet ruled on this issue, however, given the similarity between Information rights and Human rights the Commissioner feels it is appropriate to consider the case law on the meaning of 'necessary' in article 8(2) of the European Convention on Human Rights which states that there shall be no interference with the right to respect for private and family life except where it is 'necessary in a democratic society in the interest of national security'. The European Court of Human Rights has explained the adjective necessary as something which 'is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable"'. The necessity test is well defined in the Convention jurisprudence

and equates with a pressing social need. Necessity is something less than absolutely essential but does connote a degree of imperative.

55. The Commissioner's view is that the word 'required' sets a high threshold for the use of this exemption. It is not sufficient for information merely to relate to national security, for section 24(1) to be engaged there must be evidence of specific and real threats to national security.
56. In this case section 24(1) has been applied to redact some information from report 4 where the information relates to the movement of nuclear weapons. The public authority has argued that this information would assist a potential attacker of a nuclear convoy. It is the view of the public authority that the information withheld under section 24(1) could be used by 'a hostile power or other mischievous parties to delay, damage or steal material which is fundamental to the uninterrupted delivery of the UK's nuclear deterrent on which effective implementation of the UK National Security Policy is based'. The public authority has argued that the United Kingdom's nuclear deterrent is the ultimate guarantor of the nation's security and therefore any information which, if disclosed, would, or would be likely to prejudice, the safety of that guarantor falls within the scope of the section 24(1) exemption.
57. The term 'national security' is not defined in the Act or indeed in any other statute as far as the Commissioner is aware. However, the Commissioner is mindful of the following statement in the government's white paper; Strategic Defence Review 'New Chapter' (2002):
- "The UK's nuclear weapons have a continuing use as a means of deterring major strategic military threats, and they have a continuing role in guaranteeing the ultimate security of the UK." ⁸
58. The Commissioner agrees with the public authority that, given the importance of the nuclear deterrent to the UK's security policy, the section 24(1) exemption will be required where the disclosure of information would, or would be likely to, prejudice the safety of the nuclear deterrent. In its internal review the public authority explained to the complainant that disclosure of information withheld under this exemption would provide a potential attacker with 'a high degree of knowledge of the security arrangements and timing and routing information, including rest breaks and crew change locations, for one particular convoy movement and, by inference, for other nuclear weapon convoys'. The Commissioner has reviewed the information withheld under this exemption and has found that the level of detail and sensitivity of the information is as described by the public authority. The Commissioner accepts that disclosure would provide a potential attacker with information which would allow them to maximise the effectiveness of an attack on a convoy and that therefore the exemption is engaged.

⁸ http://www.mod.uk/NR/rdonlyres/79542E9C-1104-4AFA-9A4D-8520F35C5C93/0/sdr_a_new_chapter_cm5566_vol1.pdf

Public interest test

59. Section 24 is a qualified exemption and is therefore subject to the public interest test under section 2(2)(b) of the Act.

Public interest arguments in favour of disclosing the requested information

60. The Commissioner considers that the public interest arguments in favour of the disclosure of the information withheld under section 24 are as described at paragraph 40 to 42.

Public interest arguments in favour of maintaining the exemption

61. Disclosure of the level of detail contained within this report, regarding a real convoy movement, would undermine the safety arrangements surrounding Nuclear Weapon Convoys, thereby potentially exposing them to attack. This would put the safety of both the convoy and the general public at risk. The public rightly expect that its government will do all it can to safeguard national security and it is the Commissioner's view that jeopardising the safety of nuclear weapons convoys in this way would clearly not be in the public interest.

Balance of public interest arguments

62. The Commissioner is of the view that the public interest in maintaining the exemption is particularly strong in this case because the nuclear deterrent is fundamental to the national security policy of the UK and therefore any prejudice that would result from disclosure is likely to be more severe. The public interest in maintaining an exemption is bound to be very strong where the consequences of disclosure include the possibility of an attack on a nuclear weapons convoy which could potentially endanger life.
63. The Commissioner recognises that there is a strong public interest in further transparency and accountability in how the nuclear weapons programme is regulated. Indeed the Commissioner considers that these concerns are particularly compelling when it comes to the movement of nuclear weapons which is of particular public concern given the perceived risks of moving nuclear materials on public roads over long distances. However the Commissioner considers that the public interest has to some extent been met by the disclosure of less sensitive information regarding the operation of nuclear weapon convoys. Indeed this point was made by the public authority at the time of the internal review when the complainant was referred to particular information regarding the safety controls governing the movement of nuclear materials.⁹
64. The Commissioner has also taken into account the age of the information. The report in question relates to a recent convoy movement and therefore the Commissioner considers that the public interest in maintaining the exemption is stronger as it is much more likely that the information contained within the report

⁹ http://www.mod.uk/NR/rdonlyres/601A7726-34E4-4925-B4B8-ABA220F535F0/0/nrc_booklet_exsenator05v8.pdf and

will still have operational relevance to the movement of nuclear weapons and nuclear materials.

65. Given the strong public interest in protecting the UK's nuclear weapons programme, the ultimate guarantor of the nation's security, the Commissioner has decided that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.

Section 26(1) – Defence

66. Section 26(1) of the Act provides that information is exempt information if its disclosure would, or would be likely to, prejudice-
- (a) the defence of the British Islands or of any colony, or
 - (b) the capability, effectiveness or security of any relevant forces.
67. In this case the public authority has relied on both elements of section 26(1) to redact a small amount of information from the first two reports. The public authority has said that the withheld information relates to the UK's nuclear deterrent and nuclear powered warships both of which contribute to the capability of the armed forces of the Crown. It has argued that disclosure of the information 'would reveal operational details of both, and – in particular – would jeopardise the effectiveness of nuclear powered warships by revealing information related to their movements and deployments'.
68. Having reviewed the withheld information the Commissioner is satisfied that the information withheld under section 26(1) would reveal sensitive information about the operation of the UK's nuclear deterrent and the deployment of nuclear warships. The Commissioner agrees with the public authority that disclosure would allow for the development of an optimum plan of attack against them. The Commissioner accepts that disclosure of information which would threaten the UK's nuclear deterrent would be likely to prejudice the defence of the British Islands and disclosure of information which would help planning an attack on a nuclear warship would be likely to prejudice the capability, effectiveness or security of any relevant forces. The Commissioner has considered the likelihood of this prejudice occurring and in view of the current security climate, believes that disclosure would be likely to cause the prejudice outlined in section 26(1).
69. The public authority has not explicitly said if disclosure would OR would be likely to, result in the prejudice which the exemption is designed to prevent. However, at the internal review stage it referred the complainant to the Ministry of Justice's freedom of information guidance which states that for the exemption to be engaged, 'the risk that a prejudicial outcome would occur has to be more than fanciful, but need not be probable'.¹⁰ The public authority went on to say that it believed that the test was met in the case of the requested information. This suggests to the Commissioner that the public was seeking to rely on the lesser test of 'would be likely to prejudice' and the Commissioner is satisfied that both limbs of the section 26(1) exemption are engaged on this basis.

¹⁰ <http://www.foi.gov.uk/guidance/exguide/sec26/chap03.htm>

Public interest test

70. Section 26 is a qualified exemption and is therefore subject to the public interest test under section 2(2)(b) of the Act. The Commissioner has carried out a public interest test for both limbs of the exemption together as he believes that the factors under consideration are sufficiently similar for both elements of the exemption.

Public interest arguments in favour of disclosing the requested information

71. Once again the Commissioner considers that the public interest arguments in favour of disclosure are as already stated. Having said this, the Commissioner believes that there is a particular interest in the release of some of this information because it would provide public reassurance specifically about the safety and security of nuclear powered warships.

Public interest arguments in favour of maintaining the exemption

72. The public authority has argued that the public interest in maintaining the exemption outweighs the public interest in disclosure because there is a strong public interest in safeguarding the UK's crucial defence capability from enemy or terrorist attack. The Commissioner also considers that there is a strong public interest in avoiding prejudicing the defence of the UK and the security of its armed forces which is clearly of great importance to the UK and its people.

Balance of the public interest arguments

73. In this case section 26(1) has been relied upon to withhold specific pieces of information relating to the movement of nuclear warships and the operation of the UK nuclear deterrent. The Commissioner recognises that there is a public interest in information regarding the UK's nuclear deterrent and the safety and security of nuclear powered warships, however, the information withheld under this exemption would add little to public understanding of these issues beyond the information that has already been disclosed by the public authority. On the other hand there is a specific public interest in withholding this information because of the risk to the security and effectiveness of UK forces.
74. In reaching a decision on where the balance of the public interest lies the Commissioner has also considered the timing of the request. When the request was received in December 2006 UK forces were engaged in operations both in Iraq and Afghanistan. Domestically, there was a significant terrorist threat with the Home Office's threat level at 'Severe' indicating that the possibility of a terrorist threat on the UK was 'highly likely'. With this in mind the Commissioner considers that the public interest in maintaining the exemption outweighs the public interest in disclosure.

Section 27(1)(a) – International relations

75. The public authority has applied 27(1)(a) to redact a small amount of information from the 1st, 2nd, 3rd and 6th reports. The public authority had claimed that the

information withheld under this exemption was particularly sensitive and therefore the Commissioner arranged to view the information in situ at the offices of the public authority.

76. Section 27(1)(a) provides that information is exempt if its disclosure would, or would be likely to, prejudice relations between the UK and any other state. In this case the public authority declined to inform the complainant with which particular state it considered relations would be prejudiced, explaining that under section 17(4) it was not obliged to explain why an exemption applied, or why the public interest in maintaining an exemption would outweigh the public interest in disclosure if to do so would, in itself, involve the disclosure of exempt information. Therefore the Commissioner has to be careful not to reveal the country in question or the exempt information and consequently he has found it necessary to set out his analysis of this exemption within a confidential annex attached to this decision notice.
77. The Commissioner's analysis has led him to conclude that section 27(1) is engaged and that in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure.

Procedural Requirements

78. The Commissioner has decided that for some information to which the public authority has applied section 36(2)(b)(ii) the public interest in maintaining the exemption does not outweigh the public interest in disclosure. Consequently the public authority breached section 1(1)(b) by failing to make this information available to the complainant and section 10(1) by failing to make the information available within 20 working days.

The Decision

79. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- The public authority dealt with the request in accordance with section 1(1)(b) of the Act to the extent that it correctly withheld requested information under section 36(2)(b)(i), section 24(1), section 26(1)(a), section 26(1)(b) and section 27(1)(a).
80. 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 1(1)(b) to the extent that it incorrectly withheld some of the requested information under section 36(2)(b)(i).
 - The public authority breached section 10(1) of the Act by failing to disclose this information to the complainant within 20 working days.

- The public authority breached section 17(1)(c) by failing to state in its refusal notice why the exemptions applied to the requested information.
- The public authority breached section 17(3) by failing to provide the complainant with a notice setting out its public interest determination, within such time as is reasonable in the circumstances.

Steps Required

81. The public authority shall disclose to the complainant the information listed in the schedule attached to this decision notice.
82. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

83. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Other matters

84. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information. As he has made clear in his *'Good Practice Guidance No 5'*¹¹, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. In this case the complainant asked the public authority to carry out an internal review of his requests on 11 May 2007 yet the internal review was not completed until 25 February 2008. The Commissioner is concerned that the public authority

¹¹http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/foi_good_practice_guidance_5.pdf

took over 9 months to complete the internal review and the Commissioner considers this a significant failure to conform to the Code of Practice.

Right of Appeal

85. 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 4th day of February 2010

Signed

**Gerrard Tracey
Assistant Commissioner**

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

Legal Annex

Section 1(1) provides that -

“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.”

Section 2(2) provides that –

“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”

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Section 17(1) provides that -

“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.”

Section 17(2) states –

“Where–

(a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-

(i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or

- (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
 - (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2, the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.”

Section 17(3) provides that -

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

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

Section 24(1) provides that –

“Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security.”

Section 26(1) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) the defence of the British Islands or of any colony, or
- (b) the capability, effectiveness or security of any relevant forces.”

Section 27(1) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) relations between the United Kingdom and any other State,
- (b) relations between the United Kingdom and any international organisation or international court,
- (c) the interests of the United Kingdom abroad, or
- (d) the promotion or protection by the United Kingdom of its interests abroad.”

Schedule of information

Details of Redaction	Exemption claimed by public authority	Commissioner's decision
Report 2, page 5, para. 11	s.36(2)(b)(i)	Information is exempt under s.36(2)(b)(i) but public interest favours disclosure.
Report 2, page 8, para.30	s.36(2)(b)(i)	Information is exempt under s.36(2)(b)(i) but public interest favours disclosure.
Report 4, page 3, para. 13	s.36(2)(b)(i)	Information is exempt under s.36(2)(b)(i) but public interest favours disclosure.
Report 4, page 8, para. 14	s.36(2)(b)(i)	Information is exempt under s.36(2)(b)(i) but public interest favours disclosure.
Report 4, page 8, para 16, 2 nd sentence	s.36(2)(b)(i)	Information is exempt under s.36(2)(b)(i) but public interest favours disclosure.