

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

### **Decision Notice**

**Date: 14 December 2010**

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

### **Summary**

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The complainant requested from the public authority information comprising briefings and summary reports following site visits by the Atomic Weapons Establishment (AWE) staff to the Y – 12 facility regarding the proposed development of an enriched uranium facility at AWE Aldermaston. The public authority relied on the exemptions contained in sections 24, 27 and 38 the Act to withhold information. After viewing the withheld information the Commissioner found that section 27(1)(a) is engaged and that the public interest in maintaining the exemption outweighed the public interest in release.

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

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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").
2. 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 Act are imported into the EIR. This Notice sets out his decision.

## Background

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3. The Atomic Weapons Establishment provides and maintains the warheads for the United Kingdom's nuclear weaponry. The Y – 12 facility, in the United States of America, provides and stores nuclear material for that country's military forces.

## The Request

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4. On 17 October 2008 the complainant made a request, both under the Act and EIR, to the Atomic Weapons Establishment ("AWE") to be provided with the following information-

*Briefings and summary reports following site visits by the Atomic Weapons Establishment (AWE) staff to the Y – 12 facility regarding the proposed development of enriched uranium facility at AWE Aldermaston.*

5. The AWE, in a letter dated 24 October 2008 informed the complainant that it was not a public authority for the purposes of the Act and asked if he wanted them to pass his request on to the Ministry of Defence ("the public authority"). The public authority received the information request on 6 November 2008. On 4 December 2008 the complainant received an acknowledgement from the public authority that it had received his information request and that it did hold the requested information. However it was of the view that the information was exempt from the duty of disclosure by virtue of sections 24, 27 and 38 (it did not specify the relevant sub-sections it was relying on) but it needed further time to consider the public interest test.
6. The public authority provided its next substantive response to the complainant on 3 April 2009 in which it confirmed that it did hold the requested information and that, in its view, the exemptions afforded by sections 24, 27 and 28 were engaged. The public authority explained that upon applying the public interest test it had concluded that the test favoured maintaining the exemptions and accordingly it would not communicate the information to him.
7. The complainant by way of an email dated 12 April 2009 asked the public authority to undertake an internal review of its decision. The public authority undertook the review and communicated the findings to the complainant in a letter dated 10 July 2009. The review findings

were to uphold the public authority's decision to withhold the requested information though it did provide clarification by specifying that sections 24 (1) and 27 (1)(a) were engaged. It went on to say that it no longer relied on section 38 to withhold information.

## **The Investigation**

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### **Scope of the case**

8. On 6 August 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant has specifically asked the Commissioner to consider the following points:
  - Whether the Ministry of Defence had misjudged the balance of the public interest in relation to the release of the information by neglecting issues relating to the Nuclear Non-Proliferation Treaty and as regards transparency on matters of public expenditure during a time of economic recession.
  - Whether the requested information is environmental and therefore should have been considered under the Environmental Information Regulations (EIR).

### **Chronology**

9. Regrettably, due to the volume of complaints received at the Commissioner's office, there was a considerable delay before the Commissioner's investigation got underway. The Commissioner began his substantive investigation by writing to the public authority on 18 June 2010 requesting that it provide him with a copy of the withheld information and further explanations of its reliance on the exemptions. On 18 August 2010 the public authority wrote to the Commissioner providing him with a copy of the withheld information and further details regarding its reliance on exemptions not to communicate the information to the complainant.

## Analysis

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### Is the information environmental?

10. Having viewed the information held falling within the scope of the requests the Commissioner takes the view that it is not environmental information as defined by the Environmental Information Regulations (EIR).
11. The definition of “environmental information” is set out in regulation 2(1) of the EIR. This states that:

“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 –

(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 the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c).....”

12. The Commissioner considers that the phrase “any information ... on” should be interpreted widely and that this is in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enacts. Therefore ‘any information on’ will usually include information concerning, about or relating to a particular measure, activity, or factor in question. In other words, information that would inform the public about the matter under consideration and would therefore facilitate effective participation by the public in environmental decision making is likely to be environmental information.
13. Having viewed the information held falling within the scope of the requests the Commissioner takes the view that the information request is not environmental information as defined by the Environmental Information Regulations (EIR). This is because the information is about the operation of plant and machinery and operating cost. As such it is sufficiently remote from factors to be considered environmental so as not to fall within the ambit of the EIR. Similarly the withheld information is sufficiently remote from any relevant measures or activities likely to affect the environment so as not to fall within the definition of environmental information as laid out in regulation 2(1). The Commissioner next considered the applicability of the Act.

### **Section 27(1) – International relations**

14. Section 27(1) (a) provides that information is exempt if disclosure would, or would be likely to, prejudice relations between the United Kingdom and any other State.
15. The public authority states that releasing the withheld information would or would be likely to prejudice relations between the United Kingdom and the United States of America. The prejudice identified was that being caused by, if the information was released, the perceptions and fears of the United States that the United Kingdom would or could not maintain its confidences.
16. The public authority has failed to state whether the prejudice specified in section 27(1)(a) would or would be likely to occur. The Commissioner’s view, having regard to the dicta of the Information Tribunal in *McIntyre v The Information Commissioner and the Ministry of Defence (EA/2007/0068)*, is that where a public authority has failed to specify the level of prejudice at which an exemption has been engaged the lower threshold of “likely to prejudice” should be applied, unless there is clear evidence that it should be the higher level. The Commissioner therefore next considered whether the releasing of

information would likely prejudice the relations between the United Kingdom and any other State.

17. In considering the nature of prejudice which this exemption is designed to prevent, the Commissioner is guided by the following comments of the Information Tribunal (Campaign against the Arms Trade v The Information Commissioner and Ministry of Defence [EA/2006/0040]), in respect of section 27:

“...we would make clear that in our judgment prejudice can be real and of substance if it makes relations more difficult or calls for particular diplomatic response to contain or limit damage which would not otherwise have been necessary. We do not consider that prejudice necessarily requires demonstration of actual harm to the relevant interests in terms of quantifiable loss or damage.”

18. The Commissioner notes that the withheld information consists of reports that were generated by AWE staff as a result of visiting the Y - 12 facility and comprises observations and comments on the said facility by AWE staff. Having considered the withheld information the Commissioner agrees with the public authority's assertion that its release would be likely to prejudice relationships with the United States. That is, its release would, in all probability require a “particular diplomatic response to contain or limit damage which would not otherwise have been necessary”.

19. Section 27 is a qualified exemption and therefore is subject to a public interest test under section 2(2)(b) of the Act. Section 2(2)(b) provides that where a qualified exemption applies, information shall only be withheld if in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure. Laid out below are public interest arguments put forward by the public authority and the complainant in respect of this case.

20. **Public interest arguments in favour of disclosing the requested information**

- The facilitation of scrutinising the relationship between AWE and foreign organisations;
- Facilitating the accountability of AWE;
- Aiding the public's understanding of the scientific and diplomatic links between the United Kingdom and United States;

- Transparency on matters of public expenditure during a time of economic recession.

21. **Public interest arguments in favour of maintaining the exemption**

- Assisting the United Kingdom in maintaining good relations with the United States;
- Assisting the AWE in maintaining good relations with the United States Department of Energy National Nuclear Security Administration.

**Balance of the public interest**

22. The Commissioner notes the complainant's comments to him that the public authority's application of the public interest test was, in the complainant's view, perfunctory, predicated on unsubstantiated generalisations and was otherwise incomplete.
23. The Commissioner gives significant weight to the considerations that releasing the information would facilitate the public's appraisal of the AWE and its relationship with the Y -12 facility. However he is also conscious that the exemption is engaged and therefore it has already been accepted that releasing the withheld information would be likely to prejudice the relationship between the United Kingdom and the United States and that the said prejudice is not trivial or insignificant.
24. The Commissioner is of the view that the public interest factors in favour of release are not, in the context of the withheld information, particularly compelling. The withheld information, being a report on a facility, will not provide much insight into the relationship between the AWE and the Y-12 facility. As to the public accountability of AWE, this will not be significantly increased by the release of the withheld information, again given that the information is concerned with a report on a facility not under the ownership or control of the AWE. Similarly the public interest in relation to improving the transparency, accountability and public understanding of the proposed development of an enriched uranium facility at AWE will not be greatly added to by this report. The complainant maintains that the public authority, in weighing up the public interests, did not give due weight or consideration to the government's obligations under the Non-Proliferation of Nuclear Weapons Treaty<sup>1</sup> and "proliferation issues" in

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<sup>1</sup> <http://www.un.org/disarmament/WMD/Nuclear/NPT.shtml>

general. In particular he maintains that governments have an obligation to ensure that expertise and materials which might enhance the proliferation of nuclear weapons are not transferred between states. Disclosing the withheld information would shed light on whether the United Kingdom is complying with its obligations. The Commissioner accepts that this argument has merit and may carry considerable weight, for example in the event that withheld information might apparently show that the United Kingdom government was breaching treaty obligations. However there is no suggestion of that in relation to the withheld information in this case and therefore the weight of the public interest in disclosure is not enhanced.

25. By contrast, and in any event, the withheld information if released would likely give rise to the prejudices feared, as expressed by the public authority, and that would not be in the public interest. This is because the Commissioner's view is that releasing the information might well call for a diplomatic response to the comments, perceptions or observations within the withheld information, as well as to the very fact of the release of the withheld information, that would not otherwise be necessary. The Commissioner further notes that maintaining the exemption will assist the United Kingdom in maintaining good relations with the United States of America which in turn facilitates scientific exchanges and co-operation as exemplified by the AWE visit to the Y-12 facility. These factors are such that, in this case, the Commissioner's decision is that those public interest factors in favour of maintaining the exemption outweigh those factors that favour releasing the information.
26. As the Commissioner has decided that the public authority correctly applied section 27(1) (a) to all the information falling within the scope of the request, he has not gone on to consider the applicability of the other exemptions cited by the public authority.

### **Procedural Requirements**

The public authority's failure to specify to the complainant, within 20 working days of receiving his request, the subsections or specific provisions of the sections it was relying on to withhold information, places them in breach of section 17(1) of the Act.

27. Under section 10(3) of the Act a public authority may extend the time for compliance where it is necessary to do so in order to properly consider the public interest in maintaining an exemption. In such cases the public authority is still required to cite and explain the exemption claimed within the 20 working days. The extension can only be for as long as is reasonable in all the circumstances. The Commissioner's



Good Practice Guidance 4 indicates that in no case should this be more than an additional 20 working days, i.e. 40 working days in total. Therefore where a public authority takes longer than 40 working days to comply with a request it will have breached section 10(1) unless the Commissioner is persuaded that such an extension is reasonable because of exceptional circumstances.

28. The Commissioner notes that in this matter the information request was made by the complainant on 6 November 2008 but the public authority did not complete its public interest test deliberations until 3 April 2009. The process therefore took in excess of 100 working days. The public authority has explained (in its review decision letter to the complainant dated 10 July 2009) that the reason for this was the need to consult, due to the highly confidential nature of the withheld information, with authorities in the United States of America. Notwithstanding this explanation the Commissioner is not satisfied that it amounts to such exceptional circumstances so as to warrant such a delay to consider the public interest test. Accordingly the Commissioner finds that the delay amounted to a breach of section 17(3) of the Act.

## The Decision

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29. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act, save for the procedural breach as set out above.

## Other matters

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30. 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, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, 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 has decided 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. The Commissioner expresses his concerns that the review request was made on 12 April 2009 yet the review outcome was not conveyed to the complainant until 10 July 2009 which is in excess of 40 working days.

## Right of Appeal

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31. 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](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 sent.

**Dated the 14<sup>th</sup> day of December 2010**

**Signed .....**

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

## Legal Annex

### General Right of Access

**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."

### Time for Compliance

**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."

### Refusal of Request

**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,

(a) specifies the exemption in question, and

(b) 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

(i) 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 17(4) provides that -**

"A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

**Section 17(5) provides that –**

"A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact."

**Section 17(6) provides that –**

“Subsection (5) does not apply where –

- (a) the public authority is relying on a claim that section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.”

**Section 17(7) provides that –**

“A notice under section (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.”

**National Security**

**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.”