

## **Freedom of Information Act 2000 (Section 50)**

### **Decision Notice**

**Date: 8 March 2010**

**Public Authority:** Health and Safety Executive  
**Address:** Redgrave Court  
Merton Road  
Bootle  
Merseyside  
L20 7HS

### **Summary**

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The complainant contacted the Health and Safety Executive (HSE) on 03 August 2009 to request information used in the nuclear safety case relating to the expansion of Lydd Airport and the potential for aircraft strike on the nuclear facility at Dungeness. Information sought included aircraft mix and frequency; aircraft reliability figures; mathematical calculations and the quantification of the target area. To date the complainant has received no substantive response. The Commissioner therefore finds the public authority to be in breach of section 10(1) of the Act and instructs the HSE to provide a substantive response or issue a valid refusal notice in accordance with section 17 of the Act.

### **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"). This Notice sets out his decision.

### **The Request**

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2. On 03 August 2009 the complainant contacted the Health and Safety Executive requesting various pieces of information relating to the

expansion of Lydd Airport and the potential for aircraft strike on the nuclear facility at Dungeness. The complainant wrote:

*"...You have published the general equations that you used to estimate the probability of a collision...We therefore request the following items under the freedom of information act:*

*1)a) Documents provided to you by Lydd Airport and/or British Energy which specify the precise aircraft mix and frequency to be used in the Nuclear Safety Case...*

*1)b) Documentation showing the aircraft mix and frequency figures actually used in the Nuclear Safety Case if different. Again to be provided for both the 500,000 and 2 million passengers per annum cases*

*2) Documentation quantifying the target area used in the Nuclear Safety Case. (...not site specific information therefore no national security issues)*

*3) Documentation defining the aircraft reliability figures, by aircraft category, that were used in the Nuclear Safety Case*

*4) Documentation defining the background crash rates for England which were used in the Nuclear Safety Case*

*5) Documentation defining the distances from the airport runway to the Nuclear Power Station Complex that were used in the Nuclear Safety Case (...Easy for any party to measure therefore no national security issues)*

*6) Documentation showing the full mathematical calculations of the Nuclear Safety Case, together with the relevant assumptions, which lead NII to an assertion that the probability of an aircraft colliding with the power stations is less than 1 in 10 million*

*7) Documentation showing the full risk assessment covering how these equations were adapted to take account of the specific operating conditions surrounding Lydd Airport, including the bird strike risk, sensitivity checks and so on which your previous communications claim were conducted and exist."*

3. The public authority acknowledged receipt of the request on 03 August 2009.

4. The public authority contacted the complainant on 02 September 2009 to provide an update regarding the progress of the request. The HSE wrote:

*"After undertaking an initial search a number of documents have been identified...that relate to your request. These have been the subject of a previous Freedom of Information request from other requestors. On that occasion a decision was taken to release some information however the documents were significantly redacted and subject to scrutiny by the Ministry of Justice (MoJ)...some of the information is potentially being withheld on the grounds of national security.*

*If a significant amount of time has passed since the earlier request when a new request is received we need to look at the released information again along with any new additional information identified to see what can be released. This process is currently being undertaken by our Decision Makers.*

*...any additional documentation that relates to your request...may need to be passed onto colleagues at the MoJ for their consideration..."*

## **The Investigation**

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### **Scope of the case**

5. On 14 September 2009 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
  - The HSE's response falling outside the twenty working day time limit
  - The HSE's failings to provide a substantive response

### **Chronology**

6. The Commissioner wrote to the public authority on 08 October 2009 reminding it of its duties under the Act and instructed the HSE to respond to the complainant within ten working days of receipt of the letter.
7. The Commissioner stated the response should either provide the information or issue a valid refusal notice. The Commissioner highlighted the failings of the HSE's first response as the initial refusal

did not state a relevant exemption and therefore was not issued in accordance with section 17 of the Act.

8. The Commissioner's letter was acknowledged by the public authority on 08 October 2009.
9. The public authority responded to the Commissioner on 14 October 2009. The HSE wrote:

*"HSE will be in a position to release some information to [the complainant] by your deadline however other information identified as falling within the scope of her request will not be released by this date...the additional information identified is likely to be subject to redaction on the grounds of national security and HSE are required to forward all requests that attract this exemption to the Ministry of Justice for consultation...a partial response to her request will be disclosed by the 21<sup>st</sup> October."*

10. The complainant contacted the public authority on 14 October 2009 chasing a substantive response, highlighting the HSE's failings so far in its handling of her request and asking for her request to be dealt with within the next five working days.
11. The public authority provided a brief reply on 16 October 2009 apologising for the delay and promised to address her complaint on Monday 19 October 2009.
12. On 20 October 2009 the public authority contacted the complainant addressing each of her concerns and complaints in turn in a detailed response. The HSE stated the following:
  - It apologised for the continued delay
  - It was unable to say whether information was held or not due to still being in the process of searching for relevant documents
  - It was not possible to identify relevant documents in the interim response
  - The requested information was still awaiting checks by the HSE's legal team and MoJ however no new date stating when a response was likely was given.
13. On 27 October 2009 the complainant acknowledged the HSE's response and sought clarification on a related matter. The complainant enquired about public access to information released to a government body from a company or organisation and whether the company or organisation was able to ask for it to be withheld.

14. The HSE replied to the complainant on 16 November 2009 with the following:

*"...it is the public body which is approached for information which has the responsibility under the FOIA however...it is good practice to consult third parties to seek their representations. This is agreed policy for HSE and indeed many other public bodies when dealing with requests for information where there is a third party interest. This is particularly important when we are dealing with requests where there may be issues pertaining to national security, confidentiality and commercial interests..."*

*We continue to progress your FOI request as outlined last month, and had hoped to be able to release at least part of the information by now, but please be assured we are giving this all the priority we can."*

15. Following contact with the Commissioner in the New Year, the HSE provided confirmation of a telephone conversation. The public authority stated it was progressing the response and that currently it was under consideration by its Legal Advisor's Office (LAO). The HSE confirmed:

*"...Subject to the LAO's response, we hope to respond to [the complainant] next week [week commencing 25 January 2010]..."*

16. Following the passing of the deadline the Commissioner contacted the public authority on 02 February 2010 to discuss the case. The HSE informed the Commissioner that the situation remained the same and that the information was still awaiting clearance with the LAO and ultimately the MoJ.
17. On 15 February 2010 the Commissioner, having received no further update on the progress of the request, contacted the public authority to enquire about its position and press for an imminent response. The HSE described a similar position to the past few months with no response being ready to be provided to the complainant.

## **Analysis**

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### **Procedural Requirements**

18. Section 10(1) (full wording in legal annex) of the Act states the following:

*"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."*

By the date of this notice the public authority has failed to provide a substantive response to the complainant within the statutory time period contained within the provisions set out in section 10(1).

## **The Decision**

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19. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act. The Commissioner finds the public authority to be in breach of section 10(1) of the Act.

## **Steps Required**

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20. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- Provide a substantive response to the complainant or
  - Issue a valid refusal notice in accordance with the requirements of section 17 of the Act.
21. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

## **Failure to comply**

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22. 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.

## Right of Appeal

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23. 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 served.

**Dated the 8<sup>th</sup> day of March 2010**

**Signed .....**

**Gerrard Tracey  
Assistant Commissioner**

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

## **Legal Annex**

### **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.”

**Section 10(2)** provides that –

“Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.”

**Section 10(3)** provides that –

“If, and to the extent that –

- (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
- (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.”

**Section 10(4)** provides that –

“The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.”

**Section 10(5)** provides that –

“Regulations under subsection (4) may –

- (a) prescribe different days in relation to different cases, and
- (b) confer a discretion on the Commissioner.”

**Section 10(6)** provides that –

“In this section –

“the date of receipt” means –



- (a) the day on which the public authority receives the request for information, or
- (b) if later, the day on which it receives the information referred to in section 1(3);

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.”