

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 18 August 2010**

**Public Authority:** Department of Energy and Climate Change  
**Address:** 3 Whitehall Place  
London  
SW1A 2AW

### Summary

---

The complainant made a freedom of information request to the Department of Energy and Climate Change (DECC) to request risk registers relating to the Government's Carbon Capture and Storage Demonstration Project. DECC refused the request under the exemptions in section 43(2) (Commercial interests), and section 36(2)(b)(i) and (ii) (Prejudice to the effective conduct of public affairs). The Commissioner has investigated and has found that all of the requested information was exempt under section 43(2) and that the public interest in maintaining the exemption outweighed the public interest in disclosure. The Commissioner also found that in its handling of the request the public authority breached sections 17(1) and 17(1)(b) (Refusal of a request) but requires no steps to be taken.

### 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 10 March 2009 the complainant wrote to the public authority with a request for copies of any risk registers relating to the construction of new coal-fired power stations and carbon capture and storage (CCS).

The complainant explained that he was making his request under both the Act and the Environmental Information Regulations 2004.

3. On 6 April 2009 the public authority wrote to the complainant and informed him that a qualified exemption applied to the requested information but that it had not yet reached a decision on where the balance of the public interest lies. It explained that where a qualified exemption applies to a request a public authority can extend the normal 20 working day deadline for responding until such time as is reasonable in the circumstances. In this case the public authority informed the complainant that the specific exemption which applied to the request was section 43 (Commercial interests) and that it aimed to have a substantive response by 8 May 2009.
4. On 14 May 2009 the public authority wrote to the complainant with its substantive response. It now confirmed that it held one risk register falling within the scope of the request which related to the 'CCS Demonstration procurement project'. It explained that it did not hold any other risk registers relating to CCS or coal-fired power stations.
5. However, it now said that the information it did hold was also being withheld under the exemption in section 36 of the Act because it was the public authority's qualified person's opinion that disclosure of the information would, or would be likely to, inhibit both the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation. The public authority confirmed that in its opinion the public interest in maintaining the exemption outweighed the public interest in disclosure and it now outlined the factors it had taken into account when balancing the public interest.
6. It also confirmed that the section 43 exemption was being applied because disclosure would prejudice the public authority's commercial interests and that it considered that the public interest in maintaining this exemption also outweighed the public interest in disclosure.
7. On 14 May 2009 the complainant asked the public authority to carry out an internal review of its handling of the request.
8. The public authority presented the findings of the internal review on 4 August 2009 at which point it upheld the initial decision to refuse the request under sections 36 and 43 of the Act.

## The Investigation

---

### Scope of the case

9. On 8 October 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the public authority's decision to refuse to disclose the risk register relating to the CCS Demonstration procurement project. The complainant also suggested that there was a precedent for disclosure of the information because in a previous case another Government department (the Department for Transport) had released risk registers relating to the proposed third runway at Heathrow Airport.

### Chronology

10. On 11 November 2009 the Commissioner wrote to the public authority with details of the complaint and asked it to provide him with copies of the withheld information, with details of where any exemptions were being applied.
11. The public authority provided the Commissioner with copies of the requested information on 1 February 2010. It also provided a summary of its handling of the request, some background information regarding the Government's CCS demonstration project and further details on its reasons for withholding the information.
12. On 30 March 2010 the Commissioner wrote to the public authority again with some supplementary questions on its application of the section 36 and section 43 exemptions. As regards section 36, the Commissioner asked the public authority to respond to the following points.
  - The Commissioner asked the public authority to confirm if, when applying the section 36 exemption, it had sought the opinion of the qualified person.
  - The Commissioner asked the public authority to confirm when the qualified person's opinion was sought.
  - The Commissioner asked the public authority to confirm whether the opinion was given in writing or verbally. If the opinion was given in writing the Commissioner asked to be provided with a copy.
  - The Commissioner asked the public authority to explain what other

materials or information were placed before the qualified person to allow him/her to reach their decision.

- The Commissioner asked the public authority to elaborate on its reasons for concluding that the public interest in maintaining the exemption outweighed the public interest in disclosure.
13. The public authority had previously explained that the section 43 exemption was engaged as disclosure would be likely to undermine its bargaining position and its ability to negotiate a competitive deal with bidders. The Commissioner now asked the public authority to clarify exactly how its bargaining position would be undermined as a result of disclosure.
14. The public authority responded to the Commissioner's questions on 18 May 2010.

### **Findings of fact**

15. In the 2007 Budget, the then Department of Trade and Industry announced that a competition would be launched to develop the UK's first full-scale Carbon Capture and Storage (CCS) demonstration project. CCS is seen as an important technology in helping to reduce carbon dioxide emissions from coal-fired power stations, and will have the benefit of contribution to the UK's future energy needs.
16. The 2007 Energy White Paper, "Meeting the Energy Challenge", provided more details, and the competition was launched in November 2007. According to the public authority the demonstration project, when selected, will be one of the first of its kind and is on course to demonstrate the full chain of CCS activities – capture, transport and storage. Although separate aspects of the process have been demonstrated individually, the full chain of CCS technologies has yet to be demonstrated at commercial scale on a power station.
17. The competition is being run as a public procurement exercise, following the negotiated procedure set out in the Public Contract Regulations 2006. Negotiations are currently underway with the two remaining consortia in the competition, led by E.ON and Scottish Power. The next step is to assess the bids before awarding contracts to undertake detailed design work. £90 million has been allocated by the Government for the purpose of enabling the production of Front End Engineering and Design (FEED) studies. According to the public authority, the total value of the public funds awarded to the winner of the competition is a matter for negotiation with the bidders but is likely to be many hundreds of millions of pounds.

## Analysis

---

18. A full text of the relevant provisions of the Act referred to in this section is contained within the legal annex.

### Substantive Procedural matters

#### Is the Information environmental?

19. The complainant made his request under both the Act and the Environmental Information Regulations 2004 (EIR). The public authority dealt with the request solely under the Act and the complainant did not question this in his request for internal review or in his complaint to the Commissioner. However, for the sake of clarity the Commissioner has considered whether the public authority was correct to deal with the request under the Act rather than the EIR.

20. Environmental information is defined in regulation 2 of the EIR. The Commissioner has considered whether the requested information is environmental within the meaning of regulation 2(1)(c) which provides 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-

(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.'

21. The factors referred to in (b) include:

(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).

22. The Commissioner considers that once up and running the CCS demonstration project would fall within regulation 2(1)(c) because it would then be a programme likely to affect factors listed in regulation 2(1)(b) such as energy and emissions. However, the risk register relates more to the earlier procurement exercise – i.e. the competition to select a preferred bidder to carry out the demonstration project. It

focuses on risks to the successful completion of the procurement project rather than risks relating to the viability of the CCS project itself. The Commissioner is of the view that this is sufficiently removed from the actual measure affecting the environment and so cannot be considered as environmental information.

## Exemptions

### Section 43 – Commercial interests

23. Section 43(2) provides that information is exempt if its disclosure would, or would be likely to, prejudice the Commercial interests of any person. The public authority has applied section 43(2) to all of the withheld information.
24. For the purposes of section 43, 'Person' has the same meaning as in the Interpretation Act 1978 which states that this should be interpreted as 'a body of persons corporate or unincorporated'.
25. In this case the public authority has argued that disclosure would or would be likely to prejudice its own commercial interests as it would undermine its bargaining position and thus its ability to negotiate a competitive deal with the bidders in the competition.
26. The public authority has not explicitly said if disclosure would, OR would be likely to, prejudice its commercial interests and therefore the Commissioner considers it appropriate to apply the lesser test, that is to say the exemption will be engaged where disclosure would be likely to prejudice the exercise of its functions. 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."<sup>1</sup>
27. The Information Tribunal has also considered the meaning of 'would be likely to prejudice' and found that for this to apply:

---

<sup>1</sup> McIntyre v Information Commissioner & Ministry of Defence [EA/2007/0068], para. 45.

"the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk."<sup>2</sup>

28. 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."<sup>3</sup>

29. The public authority has explained that the procurement process for the CCS demonstration is still ongoing and that it is engaging with the two bidders (E.ON and Scottish Power) to discuss the contractual terms and conditions for the main project contract. Once the two bidders have submitted their final designs for the projects the public authority will evaluate the two designs and final project contract negotiations with the preferred bidder will be concluded. The public authority explains that a key aim of the negotiations will be to secure the best value for money for the use of public funds and that if the information in the risk register was disclosed it would be disadvantaged in its relationship and dealings with the bidders because its bargaining position would be undermined.
30. The information contained within the risk register includes commercially sensitive information about potential risks to the delivery of the project. The Commissioner must be careful not to release the content of the information and so is limited in what he can say in this decision notice. However, the Commissioner does accept that a bidder may be able to use it as part of its bargaining strategy to obtain a more favourable deal with the Government and the public authority. This is because the bidders may be able to point to certain risks or 'unknowns' associated with the project to negotiate contract terms that it would not otherwise have been likely to achieve. There is also the danger that a bidder might actually withdraw from the competition if any risks identified by the public authority were released. This would be likely to prejudice the commercial interests of the public authority as the competitiveness of the bidding process would be reduced.
31. For these reasons the Commissioner has decided that the section 43(2) exemption is engaged.

---

<sup>2</sup> John Connor Press Associates Ltd v Information Commissioner [EA/2005/0005], para. 15.

<sup>3</sup> R (on the application of Lord) v Secretary of State for the Home Office [2003] EWHC 2073 Admin

### **Public interest test**

32. Section 43 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 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.

### **Public interest arguments in favour of disclosing the requested information**

33. The complainant has argued that carbon capture is central to what he describes as 'the controversial issue of the construction of new coal-fired power plants in the UK'. Given this controversy the complainant argues that there is a strong public interest in disclosure of the requested information.
34. The complainant has also suggested that a precedent exists for the disclosure of this information because the Department for Transport had previously disclosed risk registers which it held regarding the proposed third runway at Heathrow Airport.
35. The public authority has itself acknowledged that the benefits of disclosure include:
- Ensuring public money is being used effectively, and that departments are getting value for money when purchasing goods and services;
  - Departments' commercial activities, including the procurement process, being conducted in an open and honest way.

### **Public interest arguments in favour of maintaining the exemption**

36. The public authority has argued that if its ability to negotiate a competitive deal with bidders was prejudiced this would result in the less effective use of public money which would not be in the public interest.
37. Carbon Capture and Storage is an important technology which, if successful, will contribute to the UK's future energy needs. Consequently the UK's energy policy would be damaged if the public authority was unable to successfully negotiate a contract with the bidders.



## Balance of the public interest arguments

38. The Commissioner considers that there is a very strong public interest in ensuring that public authorities are able to achieve value for money for UK taxpayers, especially given the current economic climate. Therefore the Commissioner is of the view that there must be equally strong arguments in favour of disclosure to justify the risk that public money will be used less effectively.
39. In this case the complainant has argued that disclosure would be of 'great public interest, especially given the recent launch of a consultation into coal policy with a particular focus on the viability of CCS'. However, the public authority has made the point, and this was apparent to the Commissioner when reviewing the information, that the risk register does not contain any risks relating to the viability of CCS or the consultation into coal policy. Instead the register focuses on risks to the successful completion of the demonstration procurement project.
40. The complainant has also suggested that a precedent has been set by the disclosure of risk registers relating to the proposed third runway at Heathrow Airport. However the Commissioner does not consider himself to be bound by the Department for Transport's decision to release risk registers in response to a request under the Act because he considers that the circumstances between the two cases are quite different. In particular, the risk registers for Heathrow did not relate to a competitive tender and commercial procurement process, unlike the register in this case.
41. The Commissioner does accept that disclosure would serve the public interest by aiding public understanding of the way in which the Government approaches major projects of this kind – providing reassurance that any risks to the success of the project are identified in advance. However, the Commissioner feels that the arguments in favour of disclosure are not sufficient to weigh the public interest in favour of disclosure.
42. In balancing the public interest the Commissioner has also had regard to the timing of the request which was received by the public authority in March 2009 at a sensitive point in the procurement process when discussions between the public authority and the bidders on the contractual terms and conditions of the project were ongoing. The Commissioner is also mindful of the amount of public funds involved in this exercise which the public authority has said will in all likelihood run to hundreds of millions of pounds. Given the sums involved there is a greater public interest in avoiding prejudicing the commercial interests

of the public authority and thereby ensuring that it can negotiate a deal that represents value for money.

43. 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.

### **Other exemptions**

44. The Commissioner is satisfied that the requested information is all exempt on the basis of section 43 of the Act and that the public interest in maintaining the exemption outweighs the public interest in disclosure. Therefore the Commissioner has not gone on to consider the public authority's application of section 36.

### **Procedural Requirements**

45. When the public authority initially responded to the request on 6 April 2009 it informed the complainant that the exemption which applied to the request was section 43 of the Act. It was not until it responded substantively on 14 May 2009 that it also informed the complainant that section 36 was also being applied. By failing to cite this exemption within 20 working days of receiving the request the public authority breached section 17(1) of the request.
46. In its responses to the complainant the public authority said that it was relying on the exemptions in section 43 and section 36 of the Act and described the exemptions. However, it did not specifically state that it was seeking to rely on section 43(2) and section 36(2)(b)(i) and (ii).
47. Section 17(1)(b) provides that a refusal notice issued by a public authority shall specify the exemption in question. Where a multi-limb exemption is being relied on a public authority should specify the section, sub-section, paragraph and sub-paragraph because without this information the complainant cannot be certain of the grounds on which the information is being withheld. Therefore, by failing to state which specific exemption it was relying on the public authority breached section 17(1)(b) of the Act.

### **The Decision**

---

48. 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 the Act to the extent that it correctly refused the request under section 43(2).
49. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- The public authority breached section 17(1) of the Act by failing to cite its reliance on section 36(2)(b)(i) and 36(2)(b)(ii) within 20 working days of receiving the request.
  - The public authority breached section 17(1)(b) of the Act for failing to inform the complainant which specific exemptions it was relying upon.

## Steps Required

---

50. The Commissioner requires no steps to be taken.

## Other matters

---

51. 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<sup>A</sup>*, 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 on 14 May 2009. The public authority did not present the findings of its internal review until 4 August 2009 and the Commissioner is concerned that it took over 2 ½

---

<sup>4</sup>[http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/foi\\_good\\_practice\\_guidance\\_5.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/foi_good_practice_guidance_5.pdf)

months to complete the review. The Commissioner considers this a significant failure to conform to the code of practice.

## Right of Appeal

---

52. 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 18th day of August 2010**

**Signed .....**

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

## Legal Annex

---

**Section 2(1)** provides that –

“Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that either –

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

section 1(1)(a) does not apply.”

**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 36(2)** 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-

- (a) would, or would be likely to, prejudice-
  - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
  - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
  - (iii) the work of the executive committee of the National Assembly for Wales,

- (b) would, or would be likely to, inhibit-
  - (i) the free and frank provision of advice, or
  - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

**Section 43(2)** provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”