

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 31 October 2011

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

Summary

The complainant requested a copy of the report presented to the Ministry of Defence's (MOD) Defence Board concerning the successor submarine project. The MOD provided the complainant with a redacted version of the report but withheld the remaining parts on the basis of the exemptions contained at sections 26(1)(a), 27(1)(a), 36(2)(b)(i), 36(2)(b)(ii), and 43(2) of the Act. The Commissioner has concluded that all of these exemptions have been relied on correctly.

The Commissioner's Role

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

Background

2. In March 2007, Parliament approved the government's proposals to renew the UK's existing Vanguard class of ballistic missile submarines (SSBN) which carry the Trident nuclear ballistic missile.
3. The successor SSBN programme began a two year 'Concept Phase' in September 2007 with the 'Initial Gate' decision targeted for September 2009. At the Initial Gate stage one of design options for the new SSBN would be taken to through to the detailed design stage.

4. However it did not prove possible to develop recommendations for the Initial Gate decision within this timeframe and the Concept Phase was extended. The Initial Gate decision was announced by the Secretary of State for Defence in May 2011.

The Request

5. On 8 January 2010 the complainant asked the Ministry of Defence (MOD) to provide him with the following information:

'A copy of the Defence Board report (09)62 Future Deterrent by Guy Lester, Cap DER.'

6. The MOD responded on 5 February 2010. It confirmed that it held information relevant to the request but it considered it exempt from disclosure on the basis of sections 24, 26, 27, 35, 41 and 43 of the Act. However, it needed a further 20 working days to determine the balance of the public interest test.
7. The MOD contacted the complainant again on 5 March 2010 and provided him with a small amount of the information which fell within the scope of his request. The remaining information was withheld on the basis of the exemptions contained at sections 26, 27, 35 and 43 of the Act. For each of the exemptions the MOD had concluded that the public interest favoured withholding the information.
8. The complainant contacted the MOD on 18 March 2010 and asked it to conduct an internal review of his request.
9. The MOD informed the complainant of the outcome of the review on 28 February 2011. The MOD provided the complainant with further information which fell within the scope of his request but explained that it had concluded that the remaining information was exempt from disclosure on the basis of the following specific exemptions: sections 26(1)(a), 27(1)(a), 36(2)(b)(i), 36(2)(b)(ii), 40(2) and 43(2).

The Investigation

Scope of the case

10. On 29 April 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant disputed the MOD's reliance on sections 26(1)(a), 27(1)(a), 36(2)(b)(i), 36(2)(b)(ii), and 43(2) and provided the Commissioner with submissions to support his view that public interest

did not favour maintaining these exemptions. However, the complainant did not dispute the MOD's application of section 40(2).

11. The following five documents comprise the report which the complainant requested:
 - Document 1: A covering paper entitled *Successor Submarine Project Update* by Cap DER, dated 24 November 2009;
 - Document 2: Annex A – *Successor Submarine Project Review Note* by Hd DUW and Hd FSM dated 23 July 2009;
 - Document 3: Appendix 1 - *FSM Platform and NP Extension of Concept Phase – Costs of Options*;
 - Document 4: Annex B – *Submarine Concept Options*;
 - Document 5: Annex C – *Successor SSBN: Safety Regulator's Advice on the Selection of the Propulsion Plant in Support of the Future Deterrent Review Notice* by DNSR [Defence Nuclear Safety Regulator], dated 4 November 2009.

12. By the time of the internal review the complainant had been provided with redacted copies of all five documents. The only redactions made to document 1 were on the basis of section 40(2) and therefore the Commissioner has only considered the redactions applied to the latter four documents. The redactions in question being:
 - Document 2 - sections 26(1)(a), 27(1)(a) and 36(2)(b)(ii);
 - Document 3 - sections 27(1)(a), 36(2)(b)(ii) and 43(2);
 - Document 4 - sections 26(1)(a) and 43(2); and
 - Document 5 – sections 26(1)(a), 27(1)(a) and 36(2)(b)(i).

13. During the course of the Commissioner's investigation the MOD explained that, without prejudice to how it originally responded to the request, it had reviewed whether in light of recent developments more information would be disclosed if the same request was submitted again. In light of this review the MOD concluded that a further small amount of information contained in documents 3 and 4 would be disclosed if it received this request again and therefore in the spirit of openness and transparency the MOD disclosed this information to the complainant. Therefore the Commissioner has not considered the MOD's original decision to withhold these particular pieces of information.

Chronology

14. The Commissioner contacted the MOD on 23 May 2011 and asked to be provided with a copy of withheld information and submissions to support its application of the various exemptions.
15. The MOD provided the Commissioner with this information on the same date.
16. The Commissioner contacted the MOD again on 23 June 2011 in order to seek further details about its reasoning for withholding the requested information.
17. The MOD provided the Commissioner with this further clarification on 29 July 2011.

Analysis

Exemptions

18. As noted above the MOD has applied various exemptions to the four documents which are in the scope of this complaint. Rather than consider the redactions applied on a document by document basis the Commissioner has considered the application of each exemption in turn. In respect of all of the exemptions, the Commissioner wishes to note that the MOD has provided him with submissions which make detailed reference to the content of the redacted information itself. Therefore, although the Analysis which follows does not always refer to the MOD's detailed submissions the Commissioner's conclusions are based upon these more detailed submissions and not simply those replicated below.

Section 36 – effective conduct of public affairs

19. The full text of section 36 is included in the legal annex attached to this notice. As the text of the legislation indicates, section 36 operates in a slightly different way to the other prejudice based exemptions contained in the Act. For section 36 to be engaged, information is exempt only if, in the reasonable opinion of a qualified person, disclosure of the information in question would, or would be likely to prejudice any of the activities set out in sub-sections of 36(2).
20. When investigating cases involving the application of section 36, in order to establish whether the exemption has been applied correctly the Commissioner has:

- Ascertained who is the qualified person or persons for the public authority in question;
 - Established that an opinion was given;
 - Ascertained when the opinion was given; and
 - Considered whether the opinion given was reasonable.
21. With regard to the fourth criterion, in deciding whether the opinion was 'reasonable' the Commissioner has been led by the Information Tribunal's decision in the case *Guardian Newspapers & Brooke v Information Commissioner & BBC* (EA/2006/0011 & EA/2006/0013) in which the Tribunal considered the sense in which the qualified person's opinion is required to be reasonable. It concluded that 'in order to satisfy the sub-section the opinion must be both reasonable in substance and reasonably arrived at' (paragraph 64). In relation to the issue of reasonable in substance, the Tribunal indicated that 'the opinion must be objectively reasonable' (para 60).
22. The Commissioner has also been guided by the Tribunal's findings in which it indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus 'does not necessarily imply any particular view as to the *severity* or *extent* of such inhibition [or prejudice] or the *frequency* with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant'. Therefore, in the Commissioner's opinion this means that when assessing the reasonableness of an opinion the Commissioner is restricted to focussing on the likelihood of that inhibition or harm occurring, rather than making an assessment as to the severity, extent and frequency of prejudice or inhibition of any disclosure.
23. With regard to the degrees of likelihood of prejudice the Commissioner has been guided on the interpretation of the phrase 'would, or would be likely to' in a number of Information Tribunal decisions. In terms of 'likely to' prejudice, the Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (Tribunal at paragraph 15). With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026 & 0030) commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (Tribunal at paragraph 36).
24. Practically then in order to assess whether an opinion provided by a qualified person was reasonably arrived at the Commissioner asked the public authority to provide:

- A copy of the submissions given to the qualified person in order for them reach their opinion.
 - Confirmation as to whether the qualified person was provided with any contrary arguments supporting the position that the exemption was not engaged.
 - A copy of the reasonable opinion which was subsequently provided.
25. In response to his enquiries the MOD provided the Commissioner with a copy of the submission made to the Secretary of State's office dated 5 January 2011 (the Secretary of State being the qualified person). The submission sets out in the author's opinion why parts of the documents should be withheld on the basis of sections 36(2)(b)(i) and (ii) – albeit that the submission does not always clearly delineate between the two separate sub-sections of the exemption. The submission does not specify which limb of prejudice should be relied upon but asks the qualified person to reach a decision on this point. The qualified person was also provided with annotated copies of the requested documents indicating which parts the MOD wished to apply section 36 to.
26. The qualified person provided his opinion on 16 February 2011. The opinion is very clear that section 36(2)(b)(ii) applies to document 2, 3 and 4 and that section 36(2)(b)(i) applies to document 5. The opinion also clearly states that the Secretary of State believes that in respect of both limbs of the exemption the higher threshold of likelihood is met. In essence the opinion argues that because the Initial Gate decision had yet to be taken, and as there remained ongoing work to be undertaken in advance of that decision, disclosure of the redacted information would undermine the safe space that the participants needed to engage in free and frank discussion without concerns that their activities would be subject to public scrutiny.
27. The Commissioner accepts that the opinion was one that was reasonably arrived at for the following reasons: the qualified person was provided with a detailed submission and the opportunity to view the information that was being withheld, along with the parts of documents that were being disclosed in order to provide some context, and furthermore the opinion was given prior to the internal review outcome being issued.
28. The Commissioner also accepts that the opinion was one that was reasonable in substance for the following reasons: Firstly, the Commissioner accepts the general logic of the argument that decision makers need a safe space in which to debate 'live' decisions away from external scrutiny; at the time of the request the discussions surrounding the Initial Gate decision were clearly ongoing. Secondly, in the circumstances of this case there was significant public interest in

the successor submarine project which arguably increases the need for such a safe space. Thirdly, the comments that have been redacted are genuinely frank in nature. Fourthly, the severity and scope of the prejudicial effect envisaged by the MOD's are significant when one considers that this project relates to its core functions and involves decisions about the future of the UK's nuclear deterrent which will be in place for decades to come.

29. In reaching this conclusion the Commissioner recognises that the complainant informed him that the MOD had not previously applied section 36(2)(b)(i) to withhold nuclear safety assessments which he had previously requested under the Act. He also informed the Commissioner that under the Act the Health and Safety Executive had provided him with documents produced by and for the DNSR. The complainant therefore argued that it was illogical for the MOD to rely on section 36 to withhold the information that he requested in this case. In response to these points the Commissioner wishes to emphasise that all requests must be considered on their own merits and the manner in which a public authority had handled a similar request in the past did not set a precedent which had to be followed in future cases. Moreover, as explained above for the Commissioner to accept that section 36 is engaged he simply has to find that the opinion is one that is 'objectively reasonable'. For the reasons that are set out above he is satisfied that this indeed the case in respect this qualified person's opinion in this case.

Public interest test

30. Section 36(2) is a qualified exemption and therefore the Commissioner must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure of the information. The Tribunal in *Guardian & Brooke* indicated the distinction between the consideration of the public interest under section 36 and consideration of the public interest under the other qualified exemptions contained within the Act:

'88. The application of the public interest test to the s 36(2) exemption involves a particular conundrum. Since under s 36(2) the existence of the exemption depends upon the reasonable opinion of the qualified person it is not for the Commissioner or the Tribunal to form an independent view on the likelihood of inhibition under s36(2)(b), or indeed of prejudice under s 36(2)(a) or (c). But when it comes to weighing the balance of public interest under s 2(2)(b), it is impossible to make the required judgment without forming a view on the likelihood of inhibition or prejudice.'

31. As noted above, the Tribunal indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus 'does not necessarily imply any particular view as to the *severity* or *extent* of such inhibition [or prejudice] or the *frequency* with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant'. Therefore, in the Commissioner's opinion this means that whilst due weight should be given to the reasonable opinion of the qualified person when assessing the public interest, the Commissioner can and should consider the severity, extent and frequency of prejudice or inhibition to the subject of the effective conduct of public affairs.

Public interest in maintaining the exemptions

32. The MOD argued that it was very much in the public interest that the Defence Board had the necessary space to engage in free and frank discussions - and the DNSR free and frank provision of advice – without concerns that their views will be subject to public scrutiny.
33. The MOD also argued that if the withheld information was disclosed there would be no doubt that in the future officials involved in the Defence Board would not be willing to participate in the free and frank exchange of views to Ministers and senior managers.
34. Moreover, the MOD argued that the public interest in disclosing details about the SSBN project was met by the proactive publication of information detailing the decision on the Initial Gate when work is complete. It noted that the Defence Board is equally proactive in its publication of summaries of its meetings on the MOD website and through Ministers accountable to Parliament.

Public interest in disclosure of the information

35. The MOD acknowledged that there was a strong public interest in disclosure of information which would enhance the public's understanding of decision making regarding the renewal of any equipment associated with the UK's nuclear deterrent, including insight into public expenditure implications and decision at Initial Gate stage, especially where the Concept Phase has been extended.
36. The complainant argued that in respect of all of the redactions made on the basis of section 36 the MOD had not given due regard to the significant level of public interest in the replacement of Trident, which the complainant notes had been a major issue in the General Election of 2010.

37. The complainant also argued that there was a particular public interest in disclosure of document 5 given that the focus of this document was the nuclear safety issues relating to SSBN reactors.
38. The complainant also asked the Commissioner to consider the points made in his submission to the Information Tribunal regarding an earlier decision notice. This notice had involved an earlier request to the MOD, submitted by another individual, for reports concerning the safety of nuclear weapons which had also been refused on the basis of section 36. In summary the complainant's key points were that:
39. There was a public interest in safety regulation being transparent. Restriction of such information contributes to a culture of secrecy and runs contrary to the need for transparency which is an essential component of any safety scheme. This was particular true when considering safety issues in a nuclear context.
40. In the unique situation of defence nuclear regulation the MOD is self-regulating; the DNSR is responsible to the government Minister who is in charge of the activity he is regulating. Given this lack of independence which could increase the risk of conflicts of interest, the public interest in transparency is increased in order to ensure public confidence in the regulatory process.
41. Finally, the complainant also argued that the MOD's suggestion that it was proactive in publishing summaries of Defence Board meetings was misleading; the summary of the meeting on 26 November 2009, to which the requested information related, was not placed on the website until 20 May 2010.

Balance of the public interest test

42. The Commissioner believes that the MOD's arguments surrounding the need for a safe space deserve to be given significant weight in cases such as this where the decision making process is live and the requested information relates directly to that decision making. In the Commissioner's opinion it is clearly in the public interest that the MOD is able to candidly discuss the various options and issues associated with the successor SSBN, prior to announcing the Initial Gate decision, away the from public scrutiny.
43. With regard to the chilling effect arguments, the Commissioner notes that these arguments can encompass a number of related scenarios:
 - Disclosing information about a given decision making process, whilst that process is still live, will affect the frankness and candour with which relevant parties will make to future contributions to that process;

- The idea that disclosing information about a given decision making process, whilst that process is still live, will affect the frankness and candour with which relevant parties will contribute to other future, different, decision making processes; and
 - Finally an even broader scenario where disclosing information relating to a decision making process (even after that process is complete), will affect the frankness and candour with which relevant parties will contribute to other future, different, decision making.
44. Clearly, in this case as the decision making in respect of the Initial Gate was ongoing at the time of the request, the third scenario is not relevant. In considering the weight that should be attributed to the first two scenarios the Commissioner has taken into account the comments of a number of Tribunal and High Court decisions which discussed the concept of the chilling effect. As a consequence of these pieces of case law, and bearing in mind the underlying principles set out above, the Commissioner believes that the actual weight attributed to chilling effect arguments have to be considered on the particular circumstances of each case and specifically on the content of the withheld information itself. Furthermore, a public authority would have to provide convincing arguments and evidence which demonstrates how disclosure of the information in question would result in the effects suggested by the public authority.
45. As noted above, the Commissioner accepts that the withheld information contains genuinely frank comments and therefore accepts that some weight should be attributed to the suggestion that those involved in contributions to discussions about the Initial Gate would be less candid with their future contributions to this process if their comments were disclosed at the time of the request. Furthermore the Commissioner recognises that the decision making relating to the Initial Gate cannot be easily separated off from future decision making about the SSBN project. In the circumstances of this case he is prepared to accept that disclosure of this information could have some level of chilling effect on future decisions about the SSBN beyond discussions simply relating to the Initial Gate. However, the Commissioner believes that in respect of both scenarios the level of weight that should be attributed should be limited because as the Tribunal has argued it is reasonable to expect civil servants to continue to provide independent and robust advice: 'we are entitled to expect of [civil servants] the courage and independence that ... [is]...the hallmark of our civil service' as they are 'highly educated and politically sophisticated public servants who well understand the importance of

their impartial role as counsellors to ministers of conflicting convictions.’¹

46. With regard to the MOD’s reference to the information about the SSBN project that it proactively publishes, in the Commissioner’s opinion there will always be a public interest in the disclosure of further information as there is a public interest in providing a full picture behind any decision making. Furthermore, simply because a department, via its Minister, is accountable to Parliament does not in the Commissioner’s opinion mean that the public interest favouring the disclosure of the information has already been met.
47. With regard to attributing weight to the actual public interest factors in favour of disclosure identified above, the Commissioner recognises that they are ones which are regularly relied upon, i.e. they focus on openness, transparency, accountability, contributing to the public debate and improving public confidence in government decision making. However, this does not diminish their importance as they are central to the operation of the Act and thus are likely to be employed every time the public interest test is discussed. Nevertheless, the weight attributed to each factor will depend upon a number of circumstances.
48. The Commissioner agrees that the significance of the project, both in terms of its cost and its centrality to the UK’s defence strategy for decades to come, means that these generic arguments should be given notable weight. Furthermore disclosure of the withheld information would contribute significantly to the public’s understanding of the decision making process around the Initial Gate process, including why the delays to the Initial Gate decision occurred. In attributing this weight the Commissioner recognises the complainant’s arguments around the safety of nuclear regulation. In particular, in respect of document 5 the Commissioner recognises the public interest in disclosure of a document which could reveal information about the safety aspects of the design and operation of reactors on submarines, both those currently in service and those being designed.
49. However, the Commissioner believes that for those involved in the decision making concerning the SSBN project, both at the Concept Stage, Initial Gate and beyond, the process will only be at its most effective if those involved have the space needed to discuss issues freely and frankly. Whilst the Commissioner recognises the level of interest in the SSBN project, particularly in the parts of the information

¹ See EA/2006/0006 paragraph 75(vii).

which discuss the safety aspects of the submarines' reactors, in his opinion this free and frank debate will be the best way in which the complex, sensitive and multifaceted issues surrounding this project can be discussed and resolved. Therefore despite the strong arguments in favour of disclosure and the limited weight attached to the chilling effect (as explained in paragraph 45), the Commissioner believes that the prejudice which would flow from disclosure of the information would have a severe and far reaching detrimental effect on the conduct of public affairs. This is because of the infringement to the safe space needed for discussions on this project, as considered above. Consequently the Commissioner has concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Section 26 - defence

50. Section 26(1)(a) 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'

51. In order for a prejudice based exemption, such as section 26, to be engaged the Commissioner believes that three criteria must be met:

- Firstly, the actual harm which the public authority alleges would or would be likely to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption.
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance.
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e. disclosure would be likely to result in prejudice or disclosure would result in prejudice. If the likelihood of prejudice occurring is one that is only hypothetical or remote the exemption will not be engaged.

The MOD's position

52. The MOD has argued that the redacted information relates to the various technical options being considered in relation to the SSBN as part of Initial Gate. Disclosure of this information would – not simply

be likely to – threaten the credibility and assuredness of the UK's SSBN programme which is part of the wider UK nuclear deterrent. Release of this information would adversely affect its defence activities in that it would permit the identification of relative vulnerabilities and weaknesses in our submarine programme and the development of an optimum plan of attack.

The Commissioner's position

53. The Commissioner accepts that the actual harm which the MOD believes would occur if the redacted information was disclosed is clearly relevant to the applicable interests which fall within section 26(1)(a). The first criterion is therefore met. In relation to the second criterion the Commissioner is satisfied that disclosure of withheld information can be clearly linked to the prejudice at section 26(1)(a) and furthermore the prejudice will not be trivial or insignificant but real and of substance. In relation to the third criterion having considered the content of the withheld information itself, along with the MOD's detailed submissions to the Commissioner, the Commissioner is satisfied that the higher threshold is met.

Public interest test

54. However section 26 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of maintaining the exemption

55. The MOD argued that there was a strong public interest in protecting the safety and effectiveness of forces deployed on defence activities.

Public interest arguments in favour of disclosing the requested information

56. In the Commissioner's opinion the public interest arguments in favour of disclosing this information are very similar to those discussed above in relation to section 36 and therefore he has not reproduced them here.

Balance of the public interest arguments

57. As discussed in relation to section 36, the Commissioner recognises that there are strong arguments for disclosure of information that could further the public's understanding of decisions taken during the Initial Gate phase of the SSBN project. More specifically, disclosure of the information withheld on the basis of section 26(1)(a) would provide the

public with more technical details about the various different submarine concept options that were under consideration. However, the Commissioner believes that these considerations are outweighed by the very strong and compelling public interest in ensuring that the UK's defence capabilities are not undermined. In attributing such weight to these arguments the Commissioner notes that disclosure would not just present a risk to the operation of the new SSBN's but also to the SSBN's currently in service. The Commissioner is therefore satisfied that in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Section 27 – International relations

58. Section 27(1)(a) states 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'*

The MOD's position

59. The MOD has argued that given the level of defence co-operation between the UK and other states, disclosure of the redacted information would – not just be likely to – undermine the trust and confidence that exists between the UK and her allies, potentially reducing the future exchange of technology and data, and so adversely impacting on the SSBN project and the UK's defence capability itself.

The Commissioner's position

60. The Commissioner accepts that the MOD's argument that disclosure of the information would effect its relations with other states is relevant to the interests contained at section 27(1)(a). The first criterion within the three limb test set out about at paragraph 51 is therefore met. In respect of the second criterion the Commissioner accepts that disclosure of withheld information can be clearly linked to the prejudice at section 27(1)(a) and furthermore the prejudice will not be trivial or insignificant but real and of substance. In relation to the third criterion having considered the content of the withheld information itself and in particular the MOD's detailed submissions to the Commissioner, the Commissioner is satisfied that higher threshold is clearly met.

Public interest test

61. However section 27 is also a qualified exemption and therefore the Commissioner must again consider whether in all circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of maintaining the exemption

62. The MOD argued that there was a strong public interest in the UK maintaining strong relations, based upon mutual trust and confidence, with its allies.

Public interest arguments in favour of disclosing the requested information

63. In the Commissioner's opinion the public interest arguments favour of disclosing this information are very similar to those discussed above in relation to section 36 and therefore he has not reproduced them here.

Balance of the public interest arguments

64. Again, as discussed in relation to section 36, the Commissioner recognises that there are strong arguments for disclosure of information that could further the public's understanding of decisions taken during the Initial Gate phase of the SSBN project. More specifically, disclosure of the information withheld on the basis of section 27(1)(a) could provide further insight into the UK's level of engagement with her allies in developing the SSBN project. However, the Commissioner believes that these considerations are outweighed by the public interest in ensuring that the UK can maintain such relationships not only to ensure the success of the SSBN project but also the UK's relationships with these allies in the context of other defence projects. The Commissioner is therefore satisfied that in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Section 43 – Commercial interests

65. Section 43(2) states 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).'

The MOD's position

66. The MOD argued that disclosure of the information would be likely to (rather than would) prejudice its own commercial interests. This prejudice could occur because the redacted information contained detailed cost information which would either reveal MOD estimates as to future costs to industry or reveal the costs of existing contracts to competitors of the current supplier. If the MOD's costs estimates were revealed, future negotiations would be undermined as industry would be aware of these values and adjust their bidding and negotiating positions accordingly. By understanding what the MOD has allocated for future work, or has already paid completed contracts, industry can use their associated detailed knowledge of the programme to obtain competitive advantage. The MOD emphasised that this issue is particularly important in the submarine industry where the market place is dominated by monopolies which already have a strong bargaining position due to their commercial position.

The Commissioner's position

67. The Commissioner accepts that the MOD's argument that disclosure of the information would be likely to affect its commercial interests is clearly relevant to the interests contained at section 43(2). The first criterion within the three limb test set out about at paragraph 51 is therefore met. In respect of the second criterion the Commissioner accepts that disclosure of withheld information can be clearly linked to the prejudice at section 43(2) and furthermore the prejudice will not be trivial or insignificant but real and of substance. In relation to the third criterion having considered the content of the withheld information itself, and in particular the MOD's detailed submissions to the Commissioner, the Commissioner is satisfied that the exemption is engaged, albeit at the lower level of likelihood.

Public interest test

68. However section 43 is also a qualified exemption and therefore the Commissioner must again consider whether in all circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of maintaining the exemption

69. The MOD has argued that it was in the public interest that it was able to secure value for money when securing contracts for the SSBN project.

Public interest arguments in favour of disclosing the requested information

70. In the Commissioner's opinion the public interest arguments favour of disclosing this information are very similar to those discussed above in relation to section 36 and therefore he has not reproduced them here.

Balance of the public interest arguments

71. Again, as discussed in relation to previous exemptions, the Commissioner recognises that there are weighty arguments for disclosure of information would could further the public's understanding of decisions taken during the initial gate phase of the SSBN project. More specifically, disclosure of the information withheld on the basis of section 43(2) could provide the public with a greater understanding of the forecast costs associated with the SSBN project. However, the Commissioner believes that these considerations are outweighed by the public interest in ensuring that the MOD can maintain the best value for money when securing contractors for this project. The Commissioner is therefore satisfied that in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

The Decision

72. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

73. The Commissioner requires no steps to be taken.

Other matters

74. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
75. 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. In this case the complainant requested an internal review on 18 March 2010 and the MOD did not inform him of the outcome until 28 February 2011. The Commissioner expects that the MOD's future handling of internal reviews will conform to his recommended timescales.

Right of Appeal

76. 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,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

77. 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.

78. 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 31st day of October 2011

Signed

**Alexander Ganotis
Group Manager – Complaints Resolution
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."

Section 2(3) provides that –

"For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

- (a) section 21
- (b) section 23
- (c) section 32
- (d) section 34
- (e) section 36 so far as relating to information held by the House of Commons or the House of Lords
- (f) in section 40 –
 - (i) subsection (1), and
 - (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
 - (iii) section 41, and
 - (iv) section 44"

Defence

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.”

International Relations

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.”

Prejudice to effective conduct of public affairs.

Section 36(1) provides that –

“This section applies to-

- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

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.

Commercial interests

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).”