

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 October 2012

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

Decision (including any steps ordered)

1. The complainant requested information relating to a proposal for UK/French co-operation on hydrodynamics research. The Ministry of Defence (MOD) disclosed some information but withheld the remainder citing the national security (section 24), defence (section 26), international relations (section 27) and formulation of government policy (section 35) exemptions of FOIA. It also neither confirmed nor denied holding any further information within the scope of the request, citing sections 23(5) (information supplied by or relating to bodies dealing with security matters) and 24(2).
2. The Commissioner's decision is that the exemptions are correctly engaged in this case. He requires no steps to be taken.

Request and response

3. The request in this case relates to a UK-France defence co-operation treaty relating to a joint nuclear facility.
4. The complainant wrote to the MOD on 9 March 2011 and requested information in the following terms:

"I am writing with a request for information about discussions between the governments of the UK and France over the scope of the recently signed defence and security cooperation treaty relating to joint radiographic/hydrodynamics research facilities.

In response to a Parliamentary Question from Caroline Lucas MP, the Minister for Defence Equipment, Support and Technology has stated that preliminary discussions on cooperation in this area took place based on an earlier proposal made in January 2009 (Hansard, 3 February 2011, Column 937W).

I should be grateful if you would provide me with the following information relating to the proposal for co-operation which was made in January 2009:

- A copy of any briefings or minutes to Ministers made in respect of this proposal, together with responses provided by Ministers.*
- A copy of any summary notes or briefings held by the Ministry of Defence reporting on the outcome of the preliminary discussions based on the January 2009 proposal”.*

5. The MOD wrote to the complainant on 5 April 2012 confirming that it held information within the scope of the request. However, it advised that it considered that some of the information fell within qualified exemptions and that further time was required to consider the public interest test.
6. Further to that, and regular correspondence advising the complainant of the continued need for additional time in which to respond, the MOD finally provided its substantive response on 23 December 2011. It confirmed that the information within the scope of the request is contained within six documents. It provided the complainant with some of the requested information but withheld the remainder citing the national security (section 24), defence (section 26), international relations (section 27), formulation of government policy (section 35) and commercial interests (section 43) exemptions of FOIA. It also neither confirmed nor denied holding any further information within the scope of the request, citing sections 23(5) (information supplied by or relating to bodies dealing with security matters) and 24(2).
7. Following an internal review the MOD wrote to the complainant on 3 February 2012 upholding that position in respect of the majority of the withheld information. It advised that it considered that the commercial interests exemption (section 43) had been incorrectly applied, but confirmed that as the information to which that exemption had been incorrectly applied was also covered by other exemptions no additional release was appropriate.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He brought to the Commissioner's attention the fact that a certain amount of technical information about UK-France co-operation on hydrodynamics research is publicly available. He also considered that it is in the public interest to release information where, for example, it relates to US government views on the proposed collaboration, the cost of the project or research on a successor warhead.
9. The Commissioner understands that the hydrodynamics facility gives detailed information about the behaviour of warheads in the extreme conditions of a nuclear explosion; also, that hydrodynamics is used to explore issues such as ageing, for example the effects of changes in material properties over the life of a warhead.
10. During the course of the Commissioner's investigation, the MOD disclosed further information to the complainant.
11. The Commissioner recognises that the complainant has provided helpful and detailed responses to the MOD's correspondence in relation to his request for information, clearly explaining why he considers that the balance of the public interest favours disclosure of what he considers constitutes the remaining withheld information.
12. The Commissioner is aware that in documenting the reasons for reaching his decision in this case, he must strike a balance between taking those arguments into account and being mindful not to comment directly where that comment would, in itself, reveal something about the nature and content of the withheld information.
13. It follows that nothing he says in this decision notice should be taken to confirm, or otherwise, the assumptions made by the complainant as to the nature of the withheld information.
14. The Commissioner considers the scope of his investigation to be the MOD's application of sections 24, 26, 27 and 35 in relation to the remaining withheld information. He notes that some of the information has been withheld by virtue of more than one exemption. He has also considered whether the MOD was correct to neither confirm nor deny holding any additional information within the scope of the request.

Reasons for decision

Section 24 National security

15. Section 24(1) of FOIA states 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".

16. In the Commissioner's view, 'required' in the context of section 24 means 'reasonably necessary'. In effect this means that there has to be a risk of harm to national security for the exemption to be relied upon but there is no need for a public authority to prove that there is a specific, direct or imminent threat.

17. From the correspondence he has reviewed, the Commissioner notes that the MOD does not appear to have explained to the complainant why it considers that the exemption is engaged. Notwithstanding this, taking into account the subject matter of the request, he considers that the information withheld by virtue of this exemption is required for the purpose of safeguarding national security.

18. Having considered the withheld information and the public authority's submissions, the Commissioner is satisfied that retention of the information at issue is 'required to safeguard' national security, since there is a specific and direct application to which such information might be put which could potentially be damaging to national security. The information therefore has the necessary quality to fall within the definition of section 24(1).

19. Since section 24 is a qualified exemption it is subject to a public interest test under section (2)(2)(b) of the Act. This favours disclosure unless, *"in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information"*.

Public interest arguments in favour of disclosing the requested information

20. In correspondence with the complainant, the MOD acknowledged that release of the information at issue:

"would broaden an understanding of the measures that MOD takes to maintain a credible nuclear deterrent".

21. In this respect, arguing in favour of disclosure, the complainant said:

"I consider it unlikely that the documents contain specific information on warhead capabilities. Information on research capabilities should be released because ... it is in the government's interest to show that its nuclear weapons remain serviceable and therefore credible".

Public interest arguments in favour of maintaining the exemption

22. The MOD told the complainant that disclosure in this case would provide sensitive information on specific capabilities and vulnerabilities of nuclear weapons. It went on to argue that this, in turn:

"would inform new states, non-states and terrorists of the measures undertaken to maintain a credible nuclear deterrent and give them the ability to threaten the United Kingdom directly in the future".

Balance of the public interest arguments

23. When balancing the opposing public interests in a case, the Commissioner is deciding whether it serves the public interest better to disclose the requested information or to withhold it because of the interests served by maintaining the relevant exemption. If the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information in question must be disclosed.

24. In reaching his decision in this case, the Commissioner is mindful of the fact that matters of national security, including information relating to the nuclear deterrent and related research, are issues of concern and interest to the public. He therefore gives some weight to the argument that disclosure in this case would further the understanding of, and participation in, public debate of issues of the day.

25. However, he considers that recent relevant disclosures, together with the information already in the public domain about the treaty, evidence the willingness to disclose information in such a way as to satisfy the public interest without jeopardising national security issues.

26. In the circumstances of this case, the public interest in protecting the national security of the UK is, in the Commissioner's opinion, clearly a very strong and compelling one. Given that disclosure could expose sensitive information on the capabilities and vulnerabilities of nuclear weapons, the Commissioner has concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the information withheld on the basis of section 24(1).

Section 23(5) and 24(2)

27. Section 23(5) of FOIA provides that a public authority is not required to confirm or deny if information is held where the information falling within the scope of the request relates to, or was supplied by, any of a list of security bodies specified in section 23(3). Consideration of this exemption requires forming a conclusion as to whether, if the MOD does hold information falling within the scope of the request, this information would relate to, or have been supplied by, any of the security bodies listed in section 23(3).
28. Section 24(2) provides an exemption from the duty to confirm or deny where this is required for the purpose of safeguarding national security. Consideration of this exemption is a two-stage process: first, the exemption must be engaged as a result of the exclusion of the duty to confirm or deny being required for the purpose of national security and, secondly, this exemption is qualified by the public interest. This means that the confirmation or denial should be provided unless the public interest in the maintenance of the exemption outweighs the public interest in confirming or denying.
29. The MOD has neither confirmed nor denied holding any further information within the scope of the request by virtue of section 23(5) (information supplied by or relating to bodies dealing with security matters) and section 24(2) (national security).
30. The MOD appeared to be citing sections 23(5) and 24(2) jointly. Unlike the related exemptions provided by sections 23(1) and 24(1), sections 23(5) and 24(2) are not mutually exclusive. This means that they can, where appropriate, both be cited in response to a request.
31. In relation to both sections 23(5) and 24(2), the MOD argued that confirmation or denial of whether there is or is not security or intelligence interest and /or capability:

"could be exploited by individuals or organisations with consequent damage to national security".
32. In the case *Metropolitan Police v IC* (EA/2010/0008) the Information Tribunal stated that *"...the probability that the requested information, if held, came through a section 23 body"* (paragraph 20) was a sufficient basis on which to conclude that section 23(5) was engaged. Taking this approach here, the Information Commissioner concludes that it is probable that any information held by the MOD that falls within the scope of the request would relate to, or have been supplied by, one or more of the security bodies listed in section 23(3) of the FOIA. The exemption provided by section 23(5) is, therefore, engaged.

33. Turning next to consider the MOD's citing of section 24(2), given the close relationship between the ability of the security bodies to function effectively and the safeguarding of national security, the Commissioner accepts that in many cases where section 23(5) is engaged, confirmation or denial of the involvement of security bodies would also undermine national security.
34. In this case the Commissioner would accept that, were any security body involved in matters relating to international co-operation in defence and security matters, this would have been with the aim of safeguarding national security. He would also accept that in general disclosing the focus of security bodies could result in detriment to national security. For these reasons the conclusion of the Commissioner is that the exemption provided by section 24(2) does apply here.
35. Having found that this exemption is engaged it is necessary to go on to consider the balance of the public interest. In forming a conclusion on the balance of the public interest here the Commissioner has taken into account the public interest in the transparency and openness of the public authority, as well as the public interest inherent in the exemption in avoiding harm to national security.
36. Covering first those factors that favour disclosure of the information, the Commissioner accepts that there is a public interest in understanding more about the measures the MOD takes to maintain a credible nuclear deterrent. Confirmation or denial would assist this in that it would provide an indication of the nature of those measures.
37. Turning to those factors that favour maintenance of the exemption, having accepted that it is reasonably necessary for the purpose of safeguarding national security to withhold this information from disclosure, the Commissioner must also accept the strong public interest inherent in the exemption and that this carries very significant weight in favour of maintenance of the exemption.
38. Whilst the Commissioner has recognised a degree of public interest in disclosure of the information in question, the public interest inherent in this exemption is clearly very strong and, where this exemption is engaged, it is likely that this public interest will outweigh all but the weightiest factors in favour of disclosure. In this case the view of the Commissioner is that the public interest factors in favour of disclosure are not sufficiently weighty and so his conclusion is that the public interest in the maintenance of the exemption clearly outweighs the public interest in disclosure.

39. Given this conclusion on section 24(2) and that above on section 23(5), the MOD is not required to confirm or deny if it holds further information falling within the scope of the complainant's request.

Section 27 International relations

40. The MOD is citing section 27(1)(a) of FOIA. That subsection of the legislation 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".

41. In the Commissioner's view, in order for a prejudice based exemption, such as section 27(1), to be engaged:

- 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;
- 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, and furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
- it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met.

42. The Commissioner notes that the complainant asked the MOD to approach the US and French governments:

"to ask whether they will consent to release of sections of the document which are considered to be covered by the section 27 exemption".

43. In the Commissioner's view, it is the responsibility of the public authority to decide whether or not the exemption applies. The public authority was under no obligation to comply with the complainant's request to contact the US and French governments. However, he notes that it would have been good customer service to have replied to the complainant on this point.

44. The MOD has argued that disclosure would prejudice the UK's relations with the wider international community because it would create the perception that the UK was unwilling to honour its sharing agreements with international partners. Such partners would, as a consequence, be

unwilling to assist the UK or share sensitive information with it in similar circumstances in the future.

45. Having considered the submissions the MOD provided during the course of his investigation and having viewed the withheld information, the Commissioner is satisfied that the MOD's argument that disclosure of the information would affect its relations with other states is relevant to the interests contained at section 27(1)(a). Furthermore, he considers that the prejudice will not be trivial or insignificant but real and of substance.
46. Although restricted in what he is able to say because of the nature of the withheld information, having duly considered the arguments put forward by the MOD, the Commissioner's view is that at least the lower level of 'would be likely to occur' has been demonstrated. He therefore finds the exemption engaged in relation to the information withheld by virtue of section 27(1)(a) and he has gone on to consider the public interest test.

Public interest arguments in favour of disclosing the requested information

47. In this case, the MOD acknowledged that disclosure would further understanding of and participation in the public debate on the UK's nuclear deterrent. It recognised that:

"the public has a legitimate interest in high level foreign and defence engagements".

48. In favour of disclosure the complainant expressed the view that:

"There is a particular public interest in releasing information about US government views on the proposed collaboration, given suggestions that the USA might wish to veto decisions by the UK on the UK's supposedly independent nuclear weapons".

49. The Commissioner understands that media reports have suggested that a treaty between the UK and France is not supported by large sections of the American defence community.

50. Arguing that there is already information in the public domain about UK/US collaboration, that information having been released by the US authorities, the complainant told the Commissioner:

"There is a public interest in revealing the extent to which the nuclear weapons programmes of the two nations are interdependent."

Public interest arguments in favour of maintaining the exemption

51. Arguing strongly in favour of maintaining the exemption, the MOD told the complainant:

"The information in scope relates both to the UK's relationship with France and with the United States. Additionally, information withheld under this exemption relates to the bi-lateral relationships with both the US and France and it would be inappropriate to disclose this information as it would be likely to damage relations between the UK, France and the US".

Balance of the public interest arguments

52. The Commissioner considers that, when applying the public interest test to information withheld under section 27(1), the content of the information is likely to have a significant bearing on the decision whether or not to disclose. There must be some detriment to the public interest arising from disclosure for the balance of the test to justify maintaining the exemption.
53. The Commissioner recognises that there is a legitimate public interest in matters concerning UK/French co-operation in the area of defence. Furthermore, he accepts that it is strongly in the public interest that the UK enjoys effective relations with foreign States
54. However, he considers that that legitimate public interest is outweighed by the risk of significant damage to the UK's bilateral relationships with both France and the US as a result of disclosure.
55. In his view, the public interest would clearly be harmed if those international relationships were made more difficult, for example by undermining the UK's reputation for honouring its sharing agreements or inhibiting other State's willingness to share sensitive information with the UK in the future.
56. Having balanced the opposing public interests, the Commissioner has concluded that the MOD correctly applied section 27 and the public interest in maintaining the exemption outweighs that in disclosure. The MOD was therefore entitled to withhold the information.

Section 35 Formulation of government policy

57. The Commissioner has next considered the MOD's citing of section 35(1) in relation to the withheld information not covered by sections 24 and 27.

58. Section 35 of FOIA exempts information from the right to know by virtue of it being held by a government department and relating to:
- (a) the formulation or development of government policy; and
 - (b) ministerial communications.
59. The thinking behind this exemption is that it is intended to prevent harm to the internal deliberative process of policy-making. The arguments for maintaining the privacy of this information are essentially that the threat of public exposure of this information will lead to less candid and robust discussions about policy, a fear of exploring extreme options, poorer recordkeeping, hard choices being avoided, and good working relationships and the neutrality of the civil service being threatened. Ultimately the quality of government policy making could be undermined.
60. When requesting an internal review, the complainant told the MOD:
- "Given that the treaty on hydrodynamics research co-operation between the UK and France has been ratified by both nations, the issue can no longer be considered to be policy under formulation and thus the section 35 exemption should not apply".*
61. In response, the MOD explained that:
- "Policy formulation in this respect relates to ongoing debates concerning UK defence and the UK's relationships with foreign states. The ratification of the treaty your request relates to does not represent the closure of this area of policy since debate over the future of the UK's nuclear deterrent remains a live issue".*
62. The Commissioner notes that, as a result of the MOD failing to explain this from the outset, the complainant was, understandably, unclear as to why, in the circumstances of this case, the MOD considers this exemption is engaged.
63. Section 35 is a class-based exemption. This means that if, as a matter of fact, information falls within either of the categories listed above, it is exempt.
64. Having considered the withheld information, which includes information contained in a paper by Cabinet Office officials and the minutes of a National Security Council (Nuclear) meeting, the Commissioner is satisfied that the exemption is engaged. He has therefore gone on to consider the public interest test. In doing so, he notes that the public interest arguments put forward by the MOD are broadly similar in relation to both subsections of the exemption it is relying on.

Public interest arguments in favour of disclosing the requested information

65. The MOD acknowledges that release would demonstrate greater transparency and make government appear more accountable, thus increasing the trust of the electorate.

Public interest arguments in favour of maintaining the exemption

66. In favour of maintaining the exemption, the MOD argued that officials' candour in considering the drawbacks of various options would be affected by their assessment of whether the content of such discussions would be disclosed in the future. It also raised the matter that disclosure risked sensitive exchanges of views not being recorded for the written record.
67. With respect to 'ministerial communications' it argued that release in this case:

"would undermine the principal of collective Government responsibility by disclosing interdepartmental considerations. It would limit the ability of civil servants to give free and frank advice to departments and ministers in an open environment, without undermining final collective decisions".

Balance of the public interest arguments – section 35(1)(a)

68. The Commissioner recognises the public interest in openness, transparency and accountability, particularly in relation to policy decisions taken by the government.
69. The Commissioner also recognises that the content and context of the requested information will invariably be important factors when balancing the opposing public interests. In this respect he acknowledges that the information at issue relates to UK defence and international relationships and, as such, includes ministerial communications relating to the formulation of significant international policy.
70. The MOD argued that there is a significant public interest in protecting a safe space to allow the options in formulating and developing policy in this area to be considered and in preventing the chilling effect on free and frank discussions that might occur from disclosure
71. When considering the safe space argument, the Commissioner will look at the age of the requested information and whether the formulation and development of the policy in question was still underway at the time of the request.

72. In this case, the Commissioner gives weight to the argument that the debates regarding the UK's defence policy are ongoing.
73. Given that the debate over the UK's nuclear deterrent remains a live issue, the Commissioner must give significant weight to the arguments relating to harm to the policy development process through disclosure of this information and to the public interest in avoiding such harm.
74. Having balanced the arguments for maintaining section 35(1)(a) against the arguments in favour of disclosure, he considers that the balance of public interest in this case favours maintaining the exemption.

Balance of the public interest arguments – section 35(1)(b)

75. The MOD is citing section 35(1)(b) in relation to the same information for which it is citing section 35(1)(a). As he has concluded that the MOD was correct to withhold the information under section 35(1)(a), and as the arguments put forward by the MOD in relation to section 35(1)(b) are essentially the same, the Commissioner has not gone on to articulate separately the public interest arguments in relation to section 35(1)(b).

Section 26 Defence

76. The Commissioner has next considered the remaining small amount of withheld information – information withheld only by virtue of section 26.
77. Section 26 of FOIA sets out an exemption from the right to know if the disclosure of information would or would be likely to prejudice:
 - the defence of the British Islands (i.e. the UK, Channel Islands and the Isle of Man) or any colony;
 - the capability, effectiveness or security of the armed forces or that of any forces cooperating with them.
78. In this case, the MOD is arguing that both those elements of the exemption apply.
79. In the Commissioner's view, the exemption is not for defence information but for information whose disclosure would or would be likely to prejudice defence matters. In simple terms, information will be covered by the exemption if its disclosure would assist or be likely to assist an enemy or a potential enemy.
80. In correspondence with the complainant, the MOD described the harm that disclosure would cause, explaining that disclosure in this case would allow a potential adversary to gain an advantage contrary to the defence

of the UK and its overseas territories. It further argued that release of the information at issue could expose potential weaknesses to a hostile force.

81. The Commissioner is satisfied that the first of limb of the prejudice test, described above, is clearly met as the nature of the prejudice that the MOD envisages occurring falls squarely within the scope of the exemption. The Commissioner is also satisfied that there is a causal link between disclosure of the information and prejudice occurring and furthermore that such prejudice is real and of substance. Finally, the Commissioner is satisfied that disclosure would prejudice the defence of the British Isles and the capability, effectiveness or security of its armed forces. The Commissioner has reached this conclusion given the content of the information itself which includes assessments about current and future UK defence capabilities.
82. Section 26 is a qualified exemption and therefore the Commissioner must consider the balance of the public interest test.

Public interest arguments in favour of disclosing the requested information

83. The MOD acknowledges that release would demonstrate openness, transparency and provide a frank provision to the public of information on the maintenance of the UK's nuclear deterrent.

Public interest arguments in favour of maintaining the exemption

84. Arguing strongly in favour of maintaining the exemption, the MOD told the complainant:

"Release of information on the effectiveness and capability of warheads and the status of the equipment used to measure safety and performance could expose potential weaknesses to a hostile force".

Balance of the public interest arguments – section 26(1)(a)

85. The Commissioner gives weight to the arguments that disclosure in this case would further the understanding of and participation in the public debate of issues of the day. He recognises that issues surrounding defence - and nuclear capability in particular - are difficult and sensitive issues faced by governments and matters of concern to the public. He accepts that there is a strong public interest in having an informed debate about such matters, although one that must be balanced against the prejudice that might be caused in relation to the nuclear deterrent.
86. However, in all the circumstances of this case, the Commissioner is firmly of the opinion that the public interest favours maintaining the

exemption. Accordingly he finds that the information was correctly withheld.

Balance of the public interest arguments – section 26(1)(b)

87. As the Commissioner has concluded that the information was correctly withheld by virtue of section 26(1)(a), he has not considered the MOD's citing of section 26(1)(b) in relation to the same information.

Right of appeal

88. 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

89. 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.
90. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Graham Smith
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