

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 14 July 2011

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

Summary

The complainant requested information from the Ministry of Defence (MoD) about its proposals to develop a new enriched uranium facility at AWE Aldermaston. The MoD provided some information, withholding the remainder citing the exemptions in sections 24 (national security) and 43 (commercial interests). The Commissioner has investigated and found that some of the information withheld under section 43 was incorrectly withheld and orders its disclosure. He also identified a series of procedural shortcomings on the part of the public authority relating to delay (sections 1 and 10) and failure to explain application of exemptions (section 17).

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. The Atomic Weapons Establishment (AWE) has two major sites, one of which is AWE Aldermaston in Berkshire. The Aldermaston site is owned by the Ministry of Defence (MoD) and used for defence purposes. Formerly a wartime airfield, the site now provides research, design and manufacturing facilities.

The Request

3. The complainant wrote to the MoD on 17 October 2008 requesting information about proposals to develop a new enriched uranium facility at AWE Aldermaston:

"I should be grateful if you would provide me with copies of the following document:

- *The Initial Gate Business Case for the proposed enriched uranium facility at AWE Aldermaston, including the user requirement document and investment appraisal document."*
4. The MoD initially advised the complainant that it required additional time to consider the public interest test in relation to qualified exemptions which it considered applicable. Having sent a series of holding letters to him, the MoD finally responded on 23 June 2009, more than eight months after the request was made. In its response, the MoD disclosed redacted copies of two relevant documents: a business case and an investment appraisal document. It withheld some information in these documents on the basis of the exemptions in sections 24 (national security), 38 (health and safety), 40 (personal information) and 43 (commercial interests).
 5. The MoD confirmed that it did not hold a specific User Requirement document for the Enriched Uranium Facility.
 6. The complainant wrote to the MoD on 19 August 2009 in relation to the exemptions cited, requesting an internal review.
 7. The MoD eventually provided its internal review response on 7 June 2010. At this stage, it confirmed that, given the passage of time, some further information could be disclosed. However, it continued to withhold some information, citing the exemptions in sections 24 and 43. The MoD confirmed it was no longer citing the exemptions in sections 38 and 40, explaining that it considered the information previously exempted under these sections was in fact outside the scope of the request.

The Investigation

Scope of the case

8. The complainant contacted the Commissioner on 15 July 2010 to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:

"Whilst I accept that it may be necessary to withhold some parts of the content of these documents, I am not convinced that it is in the public interest for all of this information to be withheld.... I am also concerned about the length of time it has taken the Ministry of Defence to respond to my request and complete the internal review of this case."

9. Whilst accepting that it may be appropriate to withhold some parts of the contents of the documents, the complainant provided the Commissioner with details of specific parts of the documents that he considered may have been withheld incorrectly.
10. The Commissioner wrote to the complainant on 29 October 2010 advising him that he was commencing his investigation. At that stage, he told the complainant that the scope of the investigation would be to consider the MoD's citing of sections 24 and 43 and the timeliness with which it had handled the request.
11. Following the Commissioner's intervention, on 14 April 2011 the MoD, having reconsidered the information it had continued to withhold, released a substantial amount more to the complainant.
12. As a result of the further release of information by the MoD, as outlined in the *Chronology* section below, the Commissioner wrote to the complainant inviting him to withdraw his complaint. In light of his response, the Commissioner has focussed his Decision Notice on the remaining small amount of withheld costs information in relation to which the MoD is citing the exemption in section 43 (commercial interests).

Chronology

13. The Commissioner has set out the key correspondence between his office, the complainant and the MoD below.
14. The Commissioner wrote to the MoD on 29 October 2010 asking for further explanation of its reasons for citing sections 24 and 43 in relation to the request, including its reasons for concluding that the public interest in maintaining the exemptions outweighs the public interest in disclosure of the information requested.
15. The MoD responded on 24 November 2010.
16. Having had the opportunity to consider the withheld information, and the arguments put forward by the MOD, the Commissioner wrote to the MoD on 15 February 2011, asking to be provided with further representations about the implications of disclosure in the context of the withheld information.

17. On 7 March 2011, the MoD provided further arguments in support of withholding the information, based on a preliminary review of the information. A meeting involving the MoD and the Commissioner was held on 17 March 2011 at which the withheld information was viewed and considered in detail.
18. On 14 April 2011, the MoD released a substantial amount of the remaining withheld information to the complainant.
19. The Commissioner wrote to the complainant on 19 April 2011, following the latest disclosure, inviting him to withdraw his complaint. Although acknowledging the recent release of information, the complainant responded on 26 April 2011 explaining why, in his view, the MoD "*should be able to release further information about the costs of this project*".

Analysis

Exemptions

Section 43 Commercial interests

20. Section 43(2) of the Act provides:

"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)".

Applicable interests

21. When identifying the applicable interests in this case, the Commissioner must consider whether the prejudice claimed is to the interest stated. In this case, as the MoD is citing section 43(2), the prejudice it is claiming is to "*the commercial interests of any person (including the public authority holding it)*".
22. The term 'commercial interests' is not defined in the Act. However the Commissioner has considered his Awareness Guidance on the application of section 43. This comments that:

"... a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services";

and

"The underlying motive for these transactions is likely to be profit, but this is not necessarily the case, for instance where a charge for goods or the provision of a service is made simply to cover costs".

23. The MoD argued that the release of costs beyond the assessment phase would potentially undermine its negotiating position. It also referred the Commissioner to instances where disclosure would undermine the commercial interests of a third party. In other words, it said that the MoD's own commercial interests as well as third party commercial interests were involved in this case.
24. On the basis of the arguments put forward by the MoD, and the latest representations put forward by the complainant with respect to his complaint, the Commissioner considers the applicable interests in scope are those of the MoD.

Nature of the prejudice

25. In the Commissioner's view, the term "prejudice" implies not just that the disclosure of information must have some effect on the applicable interest, but that this effect must be detrimental or damaging in some way.
26. The MoD argued that there are still commercial negotiations to take place. It provided the Commissioner with its arguments as to why it considers that the release of the cost information at issue would prejudice its negotiating position.
27. The Commissioner is satisfied that the MoD has demonstrated that disclosure of the information could affect the applicable interest in this case, putting the MoD at a disadvantage in future negotiations.

Likelihood of prejudice

28. With respect to the withheld cost information, the MoD told the Commissioner that the release of costs:

"would prejudice the MoD's negotiating position".

29. The MoD argued that disclosure of the cost information at issue in this case would prejudice the MoD as it would weaken its ability to get value for money.
30. Furthermore, the MoD argued that disclosure would allow a contractor to make inferences about its cost calculations which would undermine its ability to negotiate.

Is the exemption engaged?

31. In the case of *Hogan v Oxford City Council & The Information Commissioner* (EA2005/0026) the Tribunal found that the

“prejudice test is not restricted to ‘would be likely to prejudice’. It provides an alternative limb of ‘would prejudice’. Clearly this second limb of the test places a much stronger evidential burden on the public authority to discharge.”

32. “Likely to prejudice” means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote, whereas “would prejudice” places a much stronger evidential burden on the public authority and must be at least more probable than not.
33. In determining whether or not the disclosure would cause prejudice to the commercial interests of the MoD itself, the Commissioner has considered the nature and likelihood of harm that would be caused.
34. In this case, although the Commissioner is satisfied that the MoD has provided evidence in support of its arguments in relation to the likelihood of prejudice as a result of disclosure, he is not satisfied that the MoD has demonstrated sufficiently that prejudice ‘would’ as opposed to ‘would be likely to’ be caused by disclosure.
35. However, having duly considered the arguments put forward by the MoD about the impact on its negotiating position of the release of the cost details at issue in this case, the Commissioner’s view is that the lower level of ‘would be likely to prejudice’ has been demonstrated.
36. The requested information in this instance relates to costs associated with proposals to develop a new facility at AWE Aldermaston. The Commissioner understands that a number of development options were considered. The Commissioner accepts that the requested information is commercially sensitive and that its release would be likely to weaken the MoD’s position in a way that is detrimental to its commercial interests.
37. He therefore finds the exemption engaged in relation to the information withheld by virtue of section 43 and he has carried this lower level of likelihood through to the public interest test.

The public interest test

38. Having established that the section 43 exemption is engaged, the Commissioner must go on to consider the public interest test as set out in section 2(2)(b) of the Act.

39. In the Commissioner's view, the public interest arguments the MoD provided to the complainant both at the initial refusal and internal review stage were limited. He is therefore not surprised that the complainant was left in some doubt as to whether the MoD had given sufficient consideration to the relevant public interest factors before concluding that it was not in the public interest to disclose information within the scope of his request.

Public interest arguments in favour of disclosing the requested information

40. When he first contacted the Commissioner about this matter, the complainant indicated that he considered it was in the public interest for further information about the costs of the project to be released, in order to demonstrate that value for money had been obtained:

"The costs of the enriched uranium facility at Aldermaston will run into hundreds of millions of pounds. This represents a significant item of public expenditure on a controversial project, especially in the current financial climate. I believe that this provides an over-riding reason to justify release of information on costs".

41. Subsequently, after further information had been released, he told the Commissioner that, as some information about costs of the assessment phase of the project had been released, he considered the MoD should be able to release the summary information about full project option costs. He told the Commissioner:

"I consider it would be in the public interest to release this information to demonstrate that value for money has been obtained in the choice of option".

42. The MoD told the complainant that public interest factors that favour disclosure focus on the public's interest in the effectiveness of the management of AWE. Specifically, it accepted that there is a public interest in the accountability of the MoD, demonstrating that value for money is being obtained for taxpayers through effective contractual processes being in place.

43. It also acknowledged that the release of cost information would demonstrate its commitment to openness and transparency, within the constraints of national security, regarding the operations of AWE.

Public interest arguments in favour of maintaining the exemption

44. Arguing against disclosure, the MoD initially told the complainant that the release of pre-contract or estimated cost information would potentially undermine its negotiation and contractual decisions. The

Commissioner notes that it did not provide any further explanation or evidence in support of this statement.

45. At the time of its further review of the withheld information, the MoD provided the Commissioner with arguments in support of its citing of the exemption with respect to the information it continued to withhold. For example, it argued that disclosure of the cost of options that were not selected could be used to deduce information about the costs of the selected option. In its view, this would undermine the MoD's negotiating position.
46. Although the MoD did not provide any further evidence for concluding that the public interest in maintaining the exemption outweighed the public interest in disclosure of the information requested, the Commissioner understands the MoD's argument is that anything that undermines its negotiating position, and therefore its ability to obtain value for taxpayer's money, would not be in the public interest.

Balance of the public interest arguments

47. The Commissioner considers that there is clearly a public interest in financial transparency and accountability of public authorities. He gives weight to the argument that, where government-funded projects are concerned, the interests of the public are served by ensuring that public money is spent appropriately and that financial discipline is seen to be being exercised.
48. In this case, the Commissioner accepts that there is a weighty public interest in the MoD demonstrating that value for money has been obtained. He considers it appropriate in cases, such as this, which involve significant government-funded expenditure, to take account of the financial climate as well as the commercial sensitivities of the project.
49. He has also taken into account the argument that most of the costs have still to be incurred. As a result, he gives weight to the factor that there are still commercial negotiations to take place with respect to costs for those stages of the proposed development beyond the assessment phase.
50. With respect to the argument that disclosure of the cost of options that were not selected could be used to deduce information about the costs of the selected option, the Commissioner considers that the public interest in withholding this information is diminished with respect to the summary information that is not broken down into its constituent parts.
51. Where more detailed information is concerned, the Commissioner recognises that figures arising from a cost modelling exercise are not

necessarily the same as those in contracts. For example, levels of risk and uncertainty can be factored into modelled costs. He therefore gives weight to the argument that disclosure of such information could reveal to a contractor the margin allowed for such factors and therefore the level of funding available. Undermining the MoD's ability to seek value for money by revealing the level of cost growth it was able to accept would not, in the Commissioner's view, be in the public interest.

52. Having balanced the opposing public interest factors in this case, which he considers are finely balanced, the Commissioner has concluded that the public interest in disclosure of some of the information, namely the summary cost information, outweighs the public interest in maintaining the exemption under section 43(2).

Procedural Requirements

Section 1 General right of access

Section 10 Time for compliance

53. Section 1(1) of the Act states:

"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."

54. The Commissioner notes that in this case, during the course of its handling of the request and again during his investigation, the MoD accepted that some of the requested information was not exempt and accordingly released that information to the complainant. He considers that some credit should be given to the MoD for having recognised, albeit belatedly, that its response to the request was incorrect. However, the Commissioner takes the view that the MoD breached section 1(1)(b) of the Act in failing to provide some information until after the complainant had approached the Commissioner, and he has also concluded that other relevant information should now be disclosed. In addition, since the MoD failed to provide the information within the statutory time limit it also breached section 10(1) of the Act.

Section 17 Refusal of request

55. Section 17(1)(c) places an obligation upon the public authority that its refusal notice states why, if not otherwise apparent, the exemption

applies. In this case, the Commissioner notes that, in his internal review correspondence, one of the issues raised by the complainant was that the MoD has not shown why the bulk of the redacted material was exempt from release.

56. The Commissioner takes the view that in this case the MoD failed to explain to the complainant adequately how the exemptions applied to the requested information. In failing to do so, the Commissioner finds the MoD in breach of section 17(1)(c).
57. Section 17(2) provides that a public authority may extend the time limit where it is still considering the public interest after 20 working days, as long as certain measures are taken. However, where any additional time beyond the initial 20 working days is required, the public authority must still serve a 'refusal notice' under section 17 of the Act within 20 working days of a request, state the exemption(s) being relied on and, if not apparent, the reasons why they apply, and give an estimate of the time by which the final decision will be reached
58. The date for statutory compliance is usually 20 working days after the date of the request. Where a public authority claims and explains the application of an exemption and seeks a further reasonable period of time to consider the public interest test, the Commissioner's guidance indicates that this should take no more than 20 working days. Therefore, the statutory time for compliance will usually be set at a maximum of 40 working days unless the Commissioner is persuaded that further time taken is reasonable given any exceptional circumstances highlighted by the public authority.
59. In this case, although the MoD provided the complainant with a refusal letter dated 14 November 2008 – in other words extending the time limit for responding in accordance with the Act – it did not provide its substantive refusal until 23 June 2009. While noting the particular complexity and sensitivity of the requested information, the Commissioner considers this delay is clearly in breach of section 17(3) of the Act.

The Decision

60. 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:
 - it correctly applied section 43(2) in relation to some of the withheld information.

61. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- it incorrectly applied section 43(2) to some of the information;
 - it breached 1(1)(b) by not providing the complainant with the requested information by the time of the completion of the internal review;
 - it breached section 10(1) by not providing the complainant with the requested information within 20 working days of the request; and
 - it breached section 17(1), 17(1)(c) and 17(3) by failing to issue the refusal notice within the statutory time limit and by failing to provide the details required by that section within 20 working days.

Steps Required

62. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- disclose the summary cost information in the table at paragraph 60 of the Investment Appraisal document.
63. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

64. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Other matters

65. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.
66. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, published in

February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it took over 9 months for an internal review to be conducted, despite the publication of his guidance on the matter.

Right of Appeal

67. 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.

Website: www.informationtribunal.gov.uk

68. 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.

69. 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 14th day of July 2011

Signed

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

Legal Annex

General Right of Access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him."

Time for Compliance

Section 10(1) provides that –

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

Section 10(2) provides that –

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

Section 10(3) provides that –

"If, and to the extent that –

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

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

Refusal of Request

Section 17(1) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies."

Section 17(2) states –

"Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached."

Section 17(3) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

(a) that, in all the circumstances of the case , the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

Commercial interests

Section 43(1) provides that –

"Information is exempt information if it constitutes a trade secret."

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)."