

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 January 2012

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

Decision (including any steps ordered)

1. The complainant requested the projected spending figures for funding for the Nuclear Warhead Capability Sustainment Programme up to and including the financial year 2024/2025 as submitted to HM Treasury as part of the Comprehensive Spending Review process.
2. The Information Commissioner's decision is that the MOD were incorrect to determine that the public interest favoured the withholding of the information in respect of section 35(1)(a) and that it was also incorrect to rely on section 43(2), which the Information Commissioner found was not engaged.
3. The Information Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Disclose the withheld information.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply 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.

Request and response

5. On 19 July 2010, the complainant wrote to the MOD and requested information in the following terms:

"Projected spending figures for the Nuclear Warhead Capability Sustainment Programme to the financial year 2024/2025, as submitted to HM treasury as part of the Comprehensive Spending Review process".

6. Following correspondence between the MOD and the complainant on 23 October 2010 the complainant clarified that his request for information on the costs was:

"The most up to date costings for the Nuclear Warhead Capability Sustainment Programme as agreed with HM Treasury. Please provide total programme costs for each year of the entire projected programme (best estimates will suffice if precise data is not available) plus:

- a. In the case of past years of the programme, actual expenditure achieved for each year;*
- b. In the case of current and future years of the programme, expected underspend/overspend against the budget for each year".*

7. The MOD responded on 21 January 2011 and disclosed some information relating to part (a) of the request on past spending, but refused to disclose the remainder relating to part (b) of the request on future spending by reference to section 35(1)(a) and 43(2).
8. Following an internal review the MOD wrote to the complainant on 30 March 2011. It stated that it was maintaining its reliance on the cited exemptions.

Scope of the case

9. On 3 May 2011 the complainant contacted the Information Commissioner to complain about the way his request for information had been handled. He asked:
- "Whether the Ministry of Defence has followed the law and relevant guidance and given sufficient consideration to the relevant factors in applying a public interest test to disclosure of the documents I requested.*
 - Whether the balance of the public interest lies in favour of disclosure of information which has so far been withheld.*

- *Whether the delays in responding to my request and undertaking the internal review of the case were reasonable; and what management action is required by the Ministry of Defence to ensure similar delays are not repeated when handling subsequent requests”.*
10. The Information Commissioner asked the MOD to provide its reasoning for withholding the information together with a copy of the withheld information.
 11. The Information Commissioner’s investigation focussed specifically on whether the MOD were correct to rely on the exemptions claimed in respect of part (b) of the request (the projected future spending figures), and whether the public interest arguments favoured disclosure of the withheld information. The Information Commissioner also considered the length of time taken to handle the request.

Reasons for decision

12. The Information Commissioner notes that the MOD has claimed reliance on two exemptions for the same information. It claims that the information is exempt from disclosure under both section 35(1)(a), formulation of government policy, and also section 43(2), disclosure would or would be likely to prejudice to commercial interests.

Section 35

13. The Information Commissioner has firstly looked at section 35(1)(a) which deals with the formulation of government policy. This exemption is a class-based exemption which means that if the information relates to government policy then the exemption is engaged.
14. It is the Information Commissioner’s view that the term ‘relates to’ should be broadly interpreted. This means it can include any information which is concerned with the formulation or development of the policy in question and not information specifically on the formulation of that policy.
15. In this case the complainant requested the projected spending figures for each of the years up to 2024/2025, on the Nuclear Warhead Capability Sustainment Programme, and in particular the expected under spend or overspend against budget.

16. The Information Commissioner considered the withheld information, which can best be described as a table of high level monetary figures representing periods of years.
17. The MOD stated that the information related to the formulation of government policy. It told the Information Commissioner that the Nuclear Weapon Capability Sustainment Programme (NWSCP) is an improvement programme to refresh nuclear weapons facilities at the Atomic Weapons Establishment (AWE). It said that although NWSCP is not a policy in itself it is a major part of the government's overall policy for management of its nuclear weapons programme
18. The MOD told the Information Commissioner that there is a clear link between the projected costs of the programme and the overall government policy. It said that the projected costs of the programme represent the budget that the government set aside for the programme both before, and subsequently in light of, the government's comprehensive spending review and the strategic defence review.
19. The MOD argued that the projected figures did not represent the actual amounts that would be spent or set aside because assumptions on planning are subject to change. It argued that, if the figures were released about projected future spending and then those figures changed, that there could be an assumption made that the government had changed its policy on its nuclear weapons programme or that something else had happened to influence a change to the policy resulting in an impact on the spending.
20. The MOD also argued that the revised projected figures resulted from the strategic defence spending review as part of the government's overall comprehensive spending review announced in 2010 and, as such, the efforts of having to manage within the new revised budgets could result in policy changes along the way in order to deliver best value for money. To make any such changes to the policy both Ministers and officials would need to be able to debate without hindrance or intervention.
21. The complainant argued that the withheld information did not relate to the formulation of government policy. In particular he argued that the information, in his view, was factual information rather than advice or opinion. He argued that he could not understand what policy remains to be determined in respect of the NWSCP in particular as the government had awarded AWE a 25 year contract to manage the establishment.

22. The Information Commissioner, having considered the withheld information together with all of the arguments, accepts the MOD's arguments that the information in question relates to the formulation of government policy. As already stated it is the Information Commissioner's view that the term 'relates to' should be broadly interpreted. This means it can include any information which is concerned with the formulation or development of the policy in question and not information specifically on the formulation of that policy. In this case the financial information was used to formulate the policy albeit that the information is not the policy in itself.
23. The Information Commissioner has therefore determined that section 35(1)(a) is engaged in relation to the withheld information and has gone on to consider the public interest arguments associated with the exemption.

Public interest arguments in favour of disclosure

24. The MOD argued that there is a public interest in transparency of financial planning and decision making processes which in turn make government more accountable. It also said that the disclosure of the information could demonstrate the MOD's commitment to openness. It also argued that the United Kingdom's nuclear deterrent programme is of significant public interest and that disclosing the planned expenditure on that deterrent is of public interest.
25. The complainant told the Information Commissioner that he believed there was little likelihood of modification of the government's policy during the life of the current government as the policy on AWE is clear, unchanging and highly unlikely to change in the short or medium term. The complainant argued that disclosure of the information would increase transparency and accountability of government activities. He also argued that it would facilitate scrutiny and demonstrate whether value for money had been obtained and lead to increased trust in government.
26. The Information Commissioner accepts the argument that there is a general public interest in transparency of government decision making and use of public funds. However, being specific to the circumstances of this case, he particularly notes the public interest in understanding how public money is being spent in light of the government's comprehensive spending review and the strategic defence review. At the time of the request the public were highly aware of the direct or indirect impact that decisions about public spending could have on them.

27. He also recognises the significance of the public interest in the debate about the costs of the UK's nuclear programme when considerable reductions had to be made to the defence budget and the overall public spending. It is a strong argument that the public required this information at the date of the request to take part in debate about public spending choices, previous spending data was not sufficient to inform this debate. The public interest in disclosure was therefore particularly high at this point in time, above and beyond other points in the past, or possibly other points in the future. Public debate about public spending will be significantly informed by relevant information about past and projected spending. These public interest arguments in favour of disclosure carry significant weight.
28. The Information Commissioner has also considered whether the specific subject matter of the government's nuclear weapon programme could be seen to add weight to the argument for disclosure. He also finds that the information would inform the debate on the future cost and benefits of the UK nuclear deterrent. For this reason the Information Commissioner adds additional weight to the public interest argument for disclosure.

Public interest in maintaining the exemption

29. The MOD argued that it was not in the public interest if ministers and officials were not given the space to modify and develop effective plans that may be subject to future changing circumstances. It argued that this was a fundamental part of the formulation and development of policy. It also argued that appropriate consultation would be required in the event that circumstances would change that impacted on the funding. It said that disclosing the projected spending figures now would encourage uninformed speculation about the MOD's financial situation and any future spending at AWE. This in turn could cause difficulties in the effective management of the department's budget as a whole.
30. The MOD also argued that disclosure of projected spending figures could cause unwarranted attention should it become known in the future that the figures had changed or financial allocations revised. It argued that assumptions could be made about the government's intention not only on spending on its nuclear programme but on its policy on a nuclear deterrent as a whole. It told the Information Commissioner that if the circumstances did change then ministers and officials would need to be able to discuss changes without interference or hindrance from external sources. It said that it was in the public interest that there was safe space to debate any such changes.

31. The Information Commissioner accepts that the withheld information can be seen as representative of a policy of spending on a significant defence initiative such as NWCSP. He accepts the MOD's arguments that some aspects of the programme and spending could be subject to change, and in the event of any change in circumstances, the projected figures may need to be revised following debate. Any known difference between the projected and potentially revised figures could potentially be used to make assumptions on the government's policy on the NWCSP and as a result may impact on the ability of ministers and officials to debate and discuss any amendments or adjustments to the policy on the programme.
32. The Information Commissioner would counter these arguments by focusing on the unique circumstances that existed at the time of the request; disclosure would not set a precedent that further future spending on the programme would have to be disclosed. It is therefore not clear that the differences between projected figures will be revealed in future. Additionally, the Information Commissioner notes that the information requested is at a high, general level and information related to different allocations within the programme has not been requested.
33. The Information Commissioner does accept that disclosure could increase the possibility of public intervention in policy debates and therefore impact on the safe space for future discussion, but he does not believe this will have the significant impact argued by the MOD. It is reasonable to characterise the information as the outcome of a policy decision that has been made but has clear relevance and use in future policy considerations. It is therefore important to acknowledge that the need for safe space in relation to one set of spending decisions has passed, but some weight should be given to future requirements.

Balance of public interest arguments

34. The Information Commissioner has inspected the withheld information and has considered the arguments put forward by the MOD and the complainant. He understands the public interest in transparency of government and decision making, and also in the expenditure of public money, and accepts that significant weight is attributed to those arguments. There is an increased public interest in all significant areas of government spending as a result of the comprehensive spending review. He also attributes significant weight to the ability of the public to be informed on such a significant issue as the cost of a nuclear weapons programme, and that by being informed the public would be better able to understand and take part in any debate on that subject. He has

placed considerable emphasis on the particular importance of informing the public at the time of the request.

35. The Information Commissioner accepts that there is a general need for safe space to allow free and frank debate and that this exists to ensure that any decisions are reached without being significantly hindered by external comment or intrusion. However, he further accepts that in the current economic climate the MOD and other government departments must live within current revised or future revised budgets to ensure that value for money is constantly and consistently achieved. He has accorded weight to maintaining the exemption as he accepts the possibility of disclosure some disruption to the policy process, but not the extent the MOD argue. However, he finds these arguments do not outweigh the specific and very strong public interest in the expenditure of public money and informed the public debate about the UK's Nuclear deterrent at the time of the request.
36. The Information Commissioner concludes that the public interest in maintaining the exemption does not outweigh the public interest in disclosing the information.

Section 43

37. As the MOD has relied additionally on section 43(2) to the withheld information the Information Commissioner has proceeded to consider the arguments for this exemption.
38. Section 43(2) states that information is exempt from disclosure if it would or would be likely to prejudice the commercial interests of any person including the authority holding that information.
39. For the commercial interests exemption to apply to this information, there must be prejudice which must not be trivial or remote but real, actual or of substance to the commercial interests of a relevant body.
40. The MOD told the Information Commissioner that the information in question was commercial as it related to the projected funding as part of a commercial agreement between itself and AWE. It argued that should this information be disclosed it would prejudice its commercial interests as it would compromise its ability to provide value for money in the future when negotiating future contracts when the current one ended. The Information Commissioner notes that the current contract for AWE

ML was extended to 2025¹. However he accepts that there will be continued negotiation about aspects of that contracts and specific projects as programme develops over the period. The MOD explained that it had a long term contract with AWE and that it would not be cost effective to make firm pricing decisions as there is continual policy development and financial planning carried out during the lifetime of the contract. It argued that as a result, frequent reviews were undertaken with AWE to ensure value for money. It also argued that any disclosure of forecasting or budgeting would prejudice the ability of the MOD to successfully negotiate future budgets with AWE and that this would also prejudice AWE reputation and market interests.

41. The Information Commissioner can see some potential for the disclosure of the information to prejudice the commercial interests of AWE of the MoD but he finds that this argument has not been convincingly explained in terms of a causal link between disclosure of the information and prejudice to commercial interests, to the extent that there is a real and significant risk. The MOD has not addressed the specifics of the information or its high level nature.
42. Accordingly the Information Commissioner has concluded that the exemption at section 43(2) is not engaged and so he has not gone on to consider the public interest arguments.

Other matters

43. The complainant drew attention of the Information Commissioner to the delays in handling his request. Such delays are beyond the limits set out in his good practice guidance. The Information Commissioner also notes that the MOD did update the complainant regularly while it first offered advice and assistance to the complainant in clarifying his request and then secondly whilst it considered the public interest arguments. However, the Information Commissioner wishes to remind the MOD of the importance of following his guidance on public interest test and internal review timescales.

¹ http://www.awe.co.uk/aboutus/the_company_eb1b2.html

Right of appeal

44. 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

45. 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.
46. 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

Steve Wood
Head of Policy Delivery
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF