

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 8 May 2012

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

#### Decision (including any steps ordered)

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1. The complainant requested a copy of the Ministry of Defence's (MOD) risk register for the defence nuclear programme. The MOD provided the complainant with a redacted version of the register explaining that the withheld parts were exempt from disclosure on the basis of numerous exemptions contained within The Freedom of Information Act (FOIA).
2. The Commissioner has concluded that the majority of the withheld information is in fact exempt from disclosure on the basis of either section 24 (national security) or section 27 (international relations). The exceptions to this are small parts of the register which have only been withheld on the basis of section 43 (commercial interests) or section 28 (relations within the UK). This Commissioner does not accept that these exemptions provide a basis to withhold such information.
3. The Commissioner therefore requires the public authority to disclose to the complainant the following information in order to ensure compliance with the legislation:
  - The text redacted from the 'CAUSE' box for risk EC7;
  - The text redacted from the 'MITIGATION' box for risk EC7;
  - The text redacted from the 'CAUSE' box for risk DP1.
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 pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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5. On 17 December 2009 the complainant wrote to the MOD and submitted the following request:

*'A copy of the up-to-date risk register held by the Defence Nuclear Executive Board Secretariat for the defence nuclear programme.'*

6. The MOD issued a substantive response on 26 February 2010 in which it explained that the requested information was being withheld on the basis of the exemptions within FOIA: section 24(1) – national security; sections 26(1)(a) and (b) – defence; and section 27(1)(a) – international relations. However, the response did confirm that the risk register was broken down into six areas: Nuclear Policy; Force Delivery; Delivery of Submarine Programme; Equipment Capability; Technology and US Cooperation; and Nuclear Security. (The response noted that this did not imply that risks existed, or did not exist, within each of these general area headings).
7. The complainant submitted a request for an internal review on 10 March 2010. However, it subsequently transpired that the MOD did not receive this request for a review and therefore the complainant resubmitted it on 9 April 2011.
8. The MOD informed the complainant of the outcome of the review on 26 August 2011. The review explained that in addition to the exemptions cited in the refusal notice, the MOD also considered parts of the register to be exempt from disclosure on the basis of the exemptions contained at sections 27(2) and (3) – international relations; 28(1) – relations within the UK and 43(2) – commercial interests. However, the review also concluded that some parts of the register could be disclosed. The complainant was therefore provided with a copy of the register with certain parts redacted on the basis of the aforementioned exemptions. (The copy of the register provided to the complainant was a version dated 9 October 2009.)

## Scope of the case

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9. The complainant contacted the Commissioner on 10 October 2011 to complain about the way his request for information had been handled. The complainant asked the Commissioner to establish whether any further information could be disclosed from the risk register. In particular the complainant argued that the information on the likelihood and impact of risks, control ratings and forecasts should be released for all of the separate risk entries. Additionally, the complainant argued that there were two specific issues where he believed that the public interest favoured full disclosure of any relevant information: Firstly, information about the costs and affordability of the nuclear weapons programme and secondly any information in the register which discussed the issue of Scottish independence.
10. The Commissioner notes that a significant amount of time elapsed between the date of the request and date by which the MOD completed the internal review. The Commissioner's position, following that advocated by the Information Tribunal, is that a public authority must consider the application of any exemptions at the date of the request or at least within the statutory time for compliance with a request i.e. within 20 working days of receiving the request.<sup>1</sup> The Commissioner has therefore considered the various exemptions as they applied in December 2009. The Commissioner notes that the redacted version of the register disclosed by the MOD in August 2011 dated from October 2009 and thus the MOD's approach to this issue is in accord with approach he has taken.

## Reasons for decision

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11. In its internal review the MOD informed the complainant that in relation to its application of sections 24, 26 and 27 it could not provide him with full details of why it considered these exemptions to apply because to do so would involve the disclosure of information which it considered to be exempt. The Commissioner finds himself in a similar position in setting out his reasoning in this notice. However, although the Commissioner's reasoning which is set out below is not particularly detailed, this does not mean that he has not fully considered the submissions of both

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<sup>1</sup> [Department for Business, Enterprise and Regulatory Reform and the Friends of the Earth v The Information Commissioner](#) (EA/2007/0072), paragraph 110.

parties and their relevance to the actual information that has been withheld. Where the Commissioner feels that it has been necessary to elaborate on why he has reached a particular finding he has included this in a confidential annex which has been provided to the MOD only.

12. The majority of the information that has been redacted has been withheld on the basis of the exemption contained at section 24(1). Although other exemptions have also been applied to some parts of the same information, most notably section 26(1), in light of the Commissioner's findings in respect of section 24(1) he has only considered the application of the national security exemption to such information.
13. The remaining information not withheld on the basis of section 24(1) comprises information redacted from three separate risks. The information from each of these risks has been withheld on the basis of three separate exemptions, namely sections 27, 28(1) and 43(2) respectively. That is to say one exemption has been applied to one risk, another exemption to another risk etc rather than all three exemptions having been applied to all three risks. The Commissioner has also set out below his findings in relation the application of each exemption to each risk.

### **Section 24(1) – national security**

14. Section 24(1) 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'.*

15. The term 'required' is not defined within FOIA and the Commissioner's view concerning the degree to which the section 24 exemption is required for the purposes of safeguarding national security has evolved with experience in applying FOIA in specific cases. The Commissioner had previously taken the view that for the exemption to apply there must be evidence of specific and real threats to national security. He now accepts that that threshold was too high and that there does not need to be evidence of a direct or imminent threat. The Commissioner draws on the approach set out by the House of Lords in a non-freedom of information case, *Secretary of State for the Home Department v Rehman* (Lord Slynn) at paragraph 16:

*'To require the matters in question to be capable of resulting 'directly' in a threat to national security limits too tightly the discretion of the executive in deciding how the interests of the state, including not merely military defence but democracy, the*

*legal and constitutional systems of the state need to be protected. I accept that there must be a real possibility of an adverse effect on the United Kingdom for what is done by the individual under inquiry but I do not accept that it has to be direct or immediate'.*

16. He added:

*'If an act is capable of creating indirectly a real possibility of harm to national security it is in principle wrong to say that the state must wait until action is taken which has a direct effect against the United Kingdom.'*

17. Therefore the Commissioner now interprets "required" in the context of section 24 to mean '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 specific, direct or imminent threat.
18. In the internal review in order to explain its reliance on section 24(1) the MOD explained that releasing information relating to the operational capability of the UK's nuclear forces would be likely to identify specific areas of potential vulnerability in the nuclear programme thereby undermining the credibility of the deterrent, which is the primary factor in safeguarding national security.
19. In its submissions to the Commissioner the MOD provided more specific descriptions of how this harm could occur based upon the content of each of the risks that has been withheld under section 24(1). The MOD also explained why it believed that release of the likelihood and impact of each risk, along with past, current and future control rating could harm national security.
20. Having considered the MOD's explanation for relying on section 24(1), in particular the specific and focused submissions provided directly to him, and taking into account the threshold for engaging the exemption, the Commissioner is satisfied that the information withheld under section 24(1) is exempt from disclosure. The MOD is therefore entitled to rely on the exemption for the purpose of safeguarding national security.
21. Although the Commissioner has concluded that the exemption is engaged, section 24 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**

22. The MOD has argued that it was strongly in the public interest that the information was withheld as it was clearly not in the public interest that the UK's national security was undermined by its adversaries having access to information which could allow them to exploit any potential weaknesses in the nuclear programme.

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

23. The MOD acknowledged that FOIA contained a presumption in favour of disclosure and that there was also a legitimate interest in the defence nuclear programme.
24. As noted above, in his submissions to the Commissioner the complainant argued that it was strongly in the public interest for any information contained on the register about the costs and affordability of the nuclear weapons programme to be disclosed. The complainant suggested that given the current economic situation has led the government to limit public spending until at least 2015 there was a substantial public interest in the costs, benefits, and risk associated with major high-cost spending programmes such as the nuclear weapons programme.

### **Balance of the public interest arguments**

25. The Commissioner agrees that there is a weighty public interest in disclosure of information about the various risks associated with the UK's nuclear defence programme. Although the programme does not have a tangible impact on the day to day lives of those who live in the UK, the programme forms a key part of current UK defence policy. The public therefore has an inherent interest in the reliability of the programme and consequently its deterrent capability. Furthermore, from the redacted version of the register that has been disclosed it is clear that the remaining sections contain information about issues which have a more direct impact upon the public, for example the environmental risks associated with the programme and the consequences of decisions regarding the programme upon industry. Moreover, the Commissioner would agree with the complainant's line of argument that in the current economic climate, there is a strong interest in the government being open and transparent about areas of public spending such as this where significant sums of money are involved.
26. However, the Commissioner believes that the degree to which disclosure of the material withheld on the basis of section 24(1) would genuinely serve the public interests identified above, particularly the complainant's

arguments in relation to costs and affordability, is somewhat limited. Moreover, in the Commissioner's opinion the public interest in protecting the national security of the UK is clearly a very strong and compelling one. Given the specific ways in which disclosure of the withheld information could expose the potential vulnerability of the nuclear programme and the role the nuclear deterrent plays in UK defence policy, 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 27(1)(a) – international relations**

27. 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,*

28. In order for a prejudice based exemption, such as section 27(1), 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; and
- 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.

29. Furthermore, the Commissioner has been guided by the comments of the Information Tribunal which suggested that, in the context of section 27(1), prejudice can be real and of substance 'if it makes relations more



difficult or calls for a particular damage limitation response to contain or limit damage which would not have otherwise have been necessary'.<sup>2</sup>

30. In its responses to the complainant the MOD explained that disclosure of the information withheld under this exemption would be likely to severely jeopardise the UK's close relationship with a key strategic ally because it contains sensitive information about bilateral technical exchange programmes.
31. In its submissions to the Commissioner the MOD provided more detailed points to support this position. It also confirmed that it was relying on the lower threshold of prejudice, i.e. that disclosure 'would be likely', as opposed to the higher threshold of 'would', to engage the exemption. On the basis of these submissions the Commissioner is satisfied that the three criteria above are met in respect of the information withheld from the risk in question. That is to say, disclosure of the information withheld on the basis of would be likely to prejudice the UK's relations with another State.
32. Section 27 is also a qualified exemption and therefore the Commissioner must consider the application of the public interest test.

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

33. The MOD has explained that the UK's bilateral exchange programmes were an important aspect of the nuclear defence programme and it would therefore not be in the public interest to risk damaging the UK's relations with other countries by disclosing any information associated with these programmes.

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

34. In addition to the public interest arguments set out above in respect of section 24, the complainant argued that the technical exchange programme between the UK and US had been subject to criticism as a potential breach of the Non Proliferation Treaty. Release of the requested information could help to show whether the UK was complying with its Non Proliferation Treaty obligations and this was a powerful factor in release of the requested information.

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<sup>2</sup> [Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence](#) (EA/2006/0040), paragraph 81.



### **Balance of public interest arguments**

35. As discussed above, in general, the Commissioner believes that there is a strong public interest in disclosure of information in order to increase transparency about the nuclear deterrent programme. However, in relation to the information that has been redacted from this particular risk the Commissioner believes that the extent to which it would actually increase transparency about aspects of the programme, particular those suggested by the complainant, are limited. In contrast the Commissioner believes that it is clear how disclosure of the redacted information would be likely to harm the UK's relations with key allies in respect of the nuclear programme, an outcome which the Commissioner considers to be strongly against the public interest. The Commissioner has therefore concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

### **Section 28(1) – relations within the UK**

36. Section 28(1) states that:

*'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice relations between any administration in the United Kingdom and any other such administration'.*

37. As this exemption is a prejudice based one, for it to be engaged the three criteria at paragraph 28 have to be met.

38. The MOD has explained that in respect of this exemption it is relying on the higher threshold to engage the exemption, i.e. that prejudice would occur if the withheld information was disclosed.

39. The Commissioner accepts that the first limb of the test is met; the nature of the prejudice which the MOD envisages would occur falls within that which section 28(1) is designed to protect. However, having considered the submissions put forward to him by the MOD and the parts of the risk description that have been redacted on the basis of section 28(1), the Commissioner does not accept that the second limb of the test is met. This is on the basis that the MOD has not demonstrated a causal relationship between disclosure of the redacted information and prejudice to relations within the UK. As the Commissioner's reasoning for reaching this conclusion requires reference to the content of the withheld information itself he has not elaborated here but has done so in the confidential annex.

### **Section 43(2) – commercial interests**

40. 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).'*

41. The MOD has argued that disclosure of the information withheld on this basis would be likely to occur because it refers to the performance of contractors. Disclosure of this information could give other commercial organisations an unfair advantage in their dealings and could also damage the MOD's relations with its key suppliers.
42. The Commissioner accepts that the first limb of the test is met; the nature of the prejudice which the MOD envisages would occur falls within that which section 43(2) is designed to protect. However, once again having reviewed the part of the risk description that has been withheld on the basis of section 43(2) the Commissioner is not persuaded that there is any causal relationship between the disclosure of the information and the prejudice which the MOD believes would be likely to occur. In the Commissioner's opinion the redacted information is of such a general nature that it is very difficult to envisage how publication of such information, in addition to that already disclosed by the MOD would impact on the contractor's commercial relations with the MOD. The Commissioner also believes that it is very difficult to envisage, again because of the general nature of the comment, how disclosure of the redacted information would genuinely provide other commercial organisations with any sort of competitive advantage.

## Right of appeal

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43. 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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

44. 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.
45. 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**  
**Deputy Commissioner**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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