

Freedom of Information Act 2000 (Section 50) Environmental Information Regulations 2004

Decision Notice

Date: 9 April 2008

Public Authority: United Kingdom Atomic Energy Authority (UKAEA)
Address: 521 Downs Way
Harwell
Didcot
Oxfordshire
OX11 0RA

Summary

The complainant requested access to 11 files held by the United Kingdom Atomic Energy Authority (UKAEA). UKAEA disclosed the contents of four of the files to the complainant but refused to disclose the remaining seven files under regulation 12(5) (a). The Commissioner has considered the issues and found that regulation 12(5) (a) of the EIR did apply and that in all circumstances the public interest in maintaining the exemption outweighs the public interest in disclosure. However the Commissioner also found that the refusal notice issued was in breach of regulation 14.

The Commissioner's Role

1. The Environmental Information Regulations (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

The Request

2. The complainant has advised that on 1 March 2006 he made the following request from UKAEA:

"Could the UKAEA please provide me with copies of all the documents contained in the files listed below? I am making this request under the

Freedom of Information Act and the Environmental Information Regulations.

If the documents are voluminous or repetitive, I would be happy to discuss refining my request in order to reduce costs.

- 1. D1231 / SC/ PR/ FMSCC – 1 Peer Review D1231 Fissile Material Store Safety Case / 18/03/2002/ 12799*
- 2. DNSC (03) P625 – 2a / Safety Report for D2580 Fissile Materials Store / 01/06/2004 / 17903*
- 3. DSSWP (05) M11 – 1 / Minutes of Meeting 05.11 of the Dounreay Site Safety working Party held on 8 November 2005 / 16/11/2005 / D0983*
- 4. DSSWP (05) M12 – 1 / Minutes of Meeting 05.11 of the Dounreay Site Safety Working Party held on 22 November 2005 / 22/11/2005 / D0983*
- 5. DSSWP (05) P63-1 / D1231 Special Nuclear Material Store Safety Implementation Close – Out Report / 02/08/2005/ D0791.21*
- 6. DSSWP (05) P65-1 / Annual Review of Safety for Radioactive Materials Transport and Movement at Dounreay 2004/2005 (1/7/04 – 30/6/05) / 30/08/2005 / D0791.21*
- 7. OG/ SWP (03) P07, T ASD (02) P117 – 1 / Safety Case, Safety Report for the D2580 Fissile Material Store / 01/01/2003 / D0791.07*
- 8. OG / SWP (03) P100 – 1 / ATO 13 Annual Review of Safety – 1 November 2002 – 31 October 2003 – D2580 Fissile Material Store / 01/12/2003 / D0791.12*
- 9. OG/SWP (03) P74-1 – ATO 91 Annual Review of Safety – 1 July 2002 – 30 June 2003 – D1231 Special Nuclear Materials Store / 01/08/2003 / D0791.11*
- 10. OG / SWP (03) P74-2/ ATO 91 Annual Review of Safety – 1 July 2002 – 30 June 2003 – D1231 Special Nuclear Materials Store / 01/08/2003 / D0791.11*
- 11. T ASD (01) P69 – 1 / D1231 Safety Case Support File – Volume 2 – May 2002 – D1231 Special Nuclear Material Store Hazard Assessment Support.*

For the purposes of this Notice, a numbering system has been added to the request which was not included in the information request; this is for ease of reference within this Notice

3. UKAEA responded on 31 March 2006 enclosing the contents of four files of the files named:

3. DSSWP (05) M11
4. DSSWP (05) M12
5. DSSWP (05) P65
6. DSSWP (05) P63

UKAEA refused to disclose the contents of the remaining seven files under section 24 of the Freedom of Information Act (the Act) 'National security'.

4. On 4 April 2006 the complainant wrote to UKAEA to request an internal review, the complainant specifically asked UKAEA to review the files and check that everything contained within is covered by the national security exemption.
5. UKAEA responded on 7 April 2006 upholding the decision to withhold the remaining files under section 24 of the Act.

The Investigation

Scope of the case

6. On 12 April 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider if all the information contained within the files is covered by the exemption.

Chronology

7. On 26 June 2007 the Commissioner initiated his enquiries by writing to UKAEA. The Commissioner asked for a copy of the information being withheld; for a summary and description of the information contained within the files; for further details regarding the application of the exemption; and for UKAEA to carry out the public interest test in relation to the withheld information. The Commissioner also asked UKAEA to consider if the information was environmental information as defined in the Environmental Information Regulations (EIR).
8. UKAEA responded on 15 August 2007. UKAEA provided: an explanation of the type of information contained within the files; further explanation regarding the application of section 24 of the Act; and outlined the public interest test carried out concluding that the public interest favoured maintaining the exemption. UKAEA also explained that in addition to the exemption at section 24 of the Act it also felt that sections 38 and 44 applied to all the files and in relation to one of the files section 41. UKAEA informed the Commissioner that it does not believe the information falls within the definition of environmental information but that if it did the same considerations would apply. Under the EIR UKAEA stated the information would be exempt under Regulation 12(5) (a) and also 12 (5) (g).
9. The Commissioner telephoned UKAEA on 21 August 2007 to enquire further about the information contained within each withheld file.

10. The Commissioner then wrote on 29 August 2007 to ask UKAEA further questions regarding the application of section 24 and the public interest test.
11. UKAEA responded on 31 August 2007 providing a summary of the contents of each of the files being withheld.
12. The Commissioner viewed all the withheld information on the 20 September 2007 and following this wrote to the UKAEA on 21 September 2007 for further explanation regarding the application of the exemption to all the withheld information.
13. UKAEA responded on 22 October 2007 providing further detail to the Commissioner and an explanation regarding the applicability of section 24 to all the withheld information.
14. After further consideration and following a telephone call to UKAEA on 31 October 2007 UKAEA obtained further advice and found that some of the information did not fall to be exempt. On 4 January 2008 UKAEA, having reviewed its application of section 24 to the withheld information, disclosed to the complainant the information previously withheld which it now found should be disclosed. UKAEA also provided to the Commissioner a copy of the information now being disclosed.

Findings of fact

15. Fissile material is isotopes which will, if brought together and not completely controlled, create a nuclear chain reaction. This phenomenon is known as 'criticality'. Such a reaction would give of a lethal dose of radiation to any personnel within the vicinity and would result in a nuclear explosion.
16. Special nuclear material is those isotopes which cannot create a nuclear chain reaction but can be used to sustain a reaction with the same results as those for fissile material.
17. The seven files relate to Safety Cases and Safety Reports on the storage facilities of fissile and special nuclear material. Safety Cases and related information are intended to identify the hazards associated with the relevant facilities. They provide details of the facility structure and layout, including the uses of different areas. They also provide details of the different systems and management arrangements, designed to ensure control of the facilities and the materials they contain: this includes details of manning arrangements and security systems. Safety cases are also required to set out the strengths and weaknesses of the facility arrangements and the impact of failure of any of these arrangements.
18. File OG/SWP (03) P07 (file number 7) is a Safety Case and Safety Report. The Safety Case demonstrates that sufficient defence in depth is provided by multiple layers of protection including robust physical containment of the inventory and strong safety management arrangements. For this purpose the report includes details of the building layout and specific location of fissile materials and the systems for their protection.

19. File DNSC (03) P625 (file number 2) contains similar information as in file OG/SWP (03) P07 updated to reflect changes in the plant and its operation.
20. File D1231 Peer Review Fissile Material Store Safety Case (file number 1) is a Peer Review by suitably qualified and experienced personnel to ensure that the fissile material store Safety Case adequately addresses all relevant considerations, including the plant description, operation limits and identifiable hazards. It contains all the information associated with a Safety Case as well as additional details needed to review the Safety Case.
21. File TASD (01) P69 (file number 11) is a hazard assessment support document for D12131 and details the hazard assessments associated with normal operations and accident conditions for the facility. It contains details of operation assumptions (such as type of containment for specified materials).
22. File OG / SWP (03) P100 (file number 8) reviews safety issues for the facility and file OG / SWP (03) P74 – 1 (file number 9) contains detailed descriptions of the building, including layout and named personnel. File OG / SWP (03) P74 - 2 (file number 10) is an amended version of the file above.

Analysis

Legislation

23. UKAEA has dealt with this request for information under the Act and cited section 24 to refuse to disclose the information sought. The complainant however, made his application under both the Act and the EIR, the Commissioner's first task therefore is to consider under which legislation this matter should be determined.
24. Regulation 2(1) of the EIR defines 'environmental information' in the following terms:

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on-

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;*

- (d) reports on the implementation of environmental legislation;*
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c);*
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);*

25. It is the Commissioner's view that the information sought by the complainant can be said to fall within 2(1)(c) as the information is on a Safety Case and the aim of this measure is derived from the wider context of Nuclear Health and Safety, the overall aim of a Safety Case is to protect against threats and risks to national security, public and employee safety and the environment. Therefore it is a measure designed to protect elements of the environment.

Procedural Matters

26. Section 14(1) of the EIR states that if a request for environmental information is refused by a public authority under the regulations the refusal shall be made in writing. Regulation 14(2) states that the refusal must be made no later than 20 working days after the date of the request. 14(3) states that the refusal shall specify the reasons not to disclose the information including (a) any exception relied on under regulations 12(4), 12(5) or 13, and (b) the matter the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b).
27. In the case of *Archer v Information Commissioner & Salisbury District Council (EA/2006/0037)*, in which the information was not considered under the EIR until it reached the Information Tribunal, the Tribunal ruled that, although the public authority in that case had acted in good faith in dealing with the matter under the Act, it was unquestionably the case that the public authority had not carried out the procedural requirements of the EIR, the legislation under which the request should have been considered. The same situation applies here. In this case UKAEA has breached the requirements of regulations 14(3) of the EIR in that it did not issue a refusal notice stating which exceptions under the EIR it was relying in order to justify its refusal.

Exception 12 (5) (a) 'International Relations, defence, national security or public safety'.

28. Under the EIR a public authority may refuse to disclose information if one or more exceptions apply and if, in all circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in disclosing the information. Although the public authority relied on the Act to refuse to disclose the information requested, they did inform the Commissioner that should he decide the information was environmental information that it considered the exception at 12(5)(a) would apply.

29. Regulation 12(5)(a) states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect: international relations; defence, national security or public safety. UKAEA in this case, maintain that disclosure would adversely affect national security and public safety.
30. In the case of *'Baker vs. Information Commissioner and the Cabinet Office'* the Information Tribunal attempted to define the term 'national security', in doing so it referred to a House of Lords decision (*Secretary of State for the Home Department v Rehman [2001] 1 AC 153*) which makes a number of useful observations on the issue:
- 'national security' means the 'security of the United Kingdom and its people'
 - the interests of national security are not limited to action by an individual which can be said to be 'targeted at the UK, its system of government of its people
 - the protection of democracy and the legal and constitutional systems of the state is part of national security as well as military defence
 - action against a foreign state may be capable indirectly of affecting the security of the United Kingdom.
 - Reciprocal co-operation between the United Kingdom and other states in combating internal terrorism is capable of promoting the United Kingdom's national security.
31. UKAEA explained that the information held relates to the storage and safety of both fissile nuclear material and special nuclear material. Some of the files are also Safety Cases which provide details of the facilities, structures, potential hazards, staffing arrangements and security systems of the facilities storing the materials. UKAEA explained that as holders of such material (fissile and special nuclear material) it has to protect against a range of security threats including:
- Dispersal / combustion of the material in situ with risks to personnel on and in the vicinity of the site;
 - Theft of the material for use elsewhere e.g. as a dirty bomb. This could, they state, contribute to nuclear proliferation if material with weapons grade potential were obtained by third parties; and
 - Holding the material for ransom e.g. by threatening to create a dirty bomb or to hand it over to an unfriendly power.
32. UKAEA explained, in support of its application of regulation 12(5) (a), that their staff are required to heed section 79 of the Anti Terrorism, Crime and Security Act 2001 under which it is an offence to disclose any information or things where such disclosure might prejudice the security of any nuclear site or nuclear material.
33. UKAEA also explained that its activities at the Dounreay site are subject to regulation by the Office for Civil Nuclear Security (OCNS) which regulates compliance with the relevant standards, the Nuclear Industries Security Regulations (NISR) (2003). Under this UKAEA is required to 'maintain such security standards, procedures and arrangements as are necessary for the

purpose of minimising the risk of loss, theft or unauthorised disclosure of, or unauthorised access to, any sensitive nuclear information within his possession or control'.

34. UKAEA argue that by releasing the documents they would be providing information which could enable terrorists or other attackers to gain access to fissile and special nuclear materials. By gaining access to these they would have the opportunity to carry out the security threats listed in paragraph 24 and in addition have the leverage to undermine foreign policy and affect the economic well being of the country.
35. Having considered the arguments put forward by UKAEA the Commissioner finds that the information relates to national security and that disclosure of the information would adversely affect both national security and public safety. The Commissioner has considered that the files directly relate to the storage facilities of nuclear material, details of the building layout and the security arrangements at those sites, the Commissioner accepts that it is necessary to withhold this information on the basis that disclosure could enable persons to gain access to materials which if used in any of the ways described by UKAEA could have a far reaching impact on the national security of the UK.

Public Interest Test

36. Regulation 12(1) states that a public authority may refuse to disclose information requested if (a) an exception applies and (b) in all circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information.
37. UKAEA informed the Commissioner that it had carried out a thorough consideration of the public interest test and that it was considered by a UKAEA group of representatives.
38. UKAEA acknowledged that there are a number of factors which favour disclosure, including contribution to public knowledge and debate and to public understanding of health and safety issues. However UKAEA found that such benefit was outweighed by the major potential security and safety hazard at national or even international level.
39. In deciding where the balance of public interest lies the Commissioner has considered the argument put forward by UKAEA. The Commissioner also recognises that there is a strong public interest inherent in safeguarding national security.
40. The Commissioner considered the document 'Finding a Balance: Guidance on the Sensitivity of Nuclear and Related Information and its disclosure' issued by the Office for Civil Nuclear Security April 2005. This document recognises that members of the public have a legitimate interest in information about nuclear facilities and operations but that information needs to be protected where it relates to nuclear material and operations. The document goes on to discuss the reconciliation of the conflicting requirements and states that case-by-case

judgements are required. The guidance states the following should be considered: is it in the public interest to provide access to the information; should the information be provided only to those who can secure it; and can the information be edited so it is less sensitive? UKAEA explained: that it had determined that the public interest lay in maintaining the exemption so any public interest in providing access to the information was outweighed; that the request was being made under the Act and so the second consideration did not apply (because disclosure under the Act would be to the public generally); and that it had considered editing the information but did not consider this was possible as so much would need to be removed the remaining information would be limited and meaningless.

41. The guidance document goes on to provide tables detailing the topic of information held, sensitivity and reason for protecting it (if not releasable). Safety Cases and Other Safety or Environmental Information are contained within the table and deemed to be not releasable. The reasoning for this is stated as ‘the type of detailed information contained in Safety Cases would be of great use as an aid to a potential attacker for choosing targets and planning an operation.’
42. The Commissioner has considered these arguments and agrees that the public interest in maintaining the exemption outweighs any public interest in disclosing the information. In reaching this decision the Commissioner has considered the strong public interest inherent in safeguarding national security and has been persuaded that the potential harm from disclosure of the information outweighs the public interest in promoting public understanding of the health and safety issues associated with the storage of special and fissile nuclear material.

The Decision

43. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Regulations:

The application of regulation 12(5) (a) to the information requested.

44. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Regulations:

The issuing of a refusal notice in accordance with regulation 14.

Steps Required

45. The Commissioner requires no steps to be taken.

Right of Appeal

46. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 9th day of April 2008

Signed

**Graham Smith
Deputy Commissioner**

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

Regulation 2 - Interpretation

Regulation 2(1) In these Regulations –

“the Act” means the Freedom of Information Act 2000(c);

“applicant”, in relation to a request for environmental information, means the person who made the request;

“appropriate record authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“the Commissioner” means the Information Commissioner;

“the Directive” means Council Directive 2003/4/EC(d) on public access to environmental information and repealing Council Directive 90/313/EEC;

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);

“historical record” has the same meaning as in section 62(1) of the Act;

“public authority” has the meaning given in paragraph (2);

“public record” has the same meaning as in section 84 of the Act;

“responsible authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“Scottish public authority” means –

- (a) a body referred to in section 80(2) of the Act; and
- (b) insofar as not such a body, a Scottish public authority as defined in section 3 of the Freedom of Information (Scotland) Act 2002(a);

“transferred public record” has the same meaning as in section 15(4) of the Act; and
“working day” has the same meaning as in section 10(6) of the Act.

Regulation 12 - Exceptions to the duty to disclose environmental information

Regulation 12(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –

- (a) an exception to disclosure applies under paragraphs (4) or (5); and
- (b) in all circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Regulation 12(2) A public authority shall apply a presumption in favour of disclosure.

Regulation 12(3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

Regulation 12(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

- (a) it does not hold that information when an applicant's request is received;
- (b) the request for information is manifestly unreasonable;
- (c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;
- (d) the request relates to material which is still in course of completion, to unfinished documents or to incomplete data; or
- (e) the request involves the disclosure of internal communications.

Regulation 12(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

- (a) international relations, defence, national security or public safety;
- (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
- (c) intellectual property rights;
- (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
- (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
- (f) the interests of the person who provided the information where that person –
 - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;

- (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from the Regulations to disclose it; and
 - (iii) has not consented to its disclosure; or
- (g) the protection of the environment to which the information relates.

Regulation 12(6) For the purpose of paragraph (1), a public authority may respond to a request by neither confirming or denying whether such information exists and is held by the public authority, whether or not it holds such information, if that confirmation or denial would involve the disclosure of information which would adversely affect any of the interests referred to in paragraph (5)(a) and would not be in the public interest under paragraph (1)(b).

Regulation 12(7) For the purposes of a response under paragraph (6), whether information exists and is held by the public authority is itself the disclosure of information.

Regulation 12(8) For the purposes of paragraph (4)(e), internal communications includes communications between government departments.

Regulation 12(9) To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs (5)(d) to (g).

Regulation 12(10) For the purpose of paragraphs (5)(b), (d) and (f), references to a public authority shall include references to a Scottish public authority.

Regulation 12(11) Nothing in these Regulations shall authorise a refusal to make available any environmental information contained in or otherwise held with other information which is withheld by virtue of these Regulations unless it is not reasonably capable of being separated from the other information for the purpose of making available that information.

Regulation 14 - Refusal to disclose information

Regulation 14(1) If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.

Regulation 14(2) The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.

Regulation 14(3) The refusal shall specify the reasons not to disclose the information requested, including –

- (a) any exception relied on under regulations 12(4), 12(5) or 13; and
- (b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).

Regulation 14(4) If the exception in regulation 12(4)(d) is specified in the refusal, the authority shall also specify, if known to the public authority, the name of any other public

authority preparing the information and the estimated time in which the information will be finished or completed.

Regulation 14(5) The refusal shall inform the applicant –

- (a) that he may make representations to the public authority under regulation 11;
and

of the enforcement and appeal provisions of the Act applied by regulation 18