



## **Freedom of Information Act 2000 (Section 50)**

### **Decision Notice**

**Dated 26 July 2006**

**Public Authority: Foreign & Commonwealth Office**

**Address: King Charles Street  
London  
SW1A 2AH**

### **Summary Decision and Action Required**

**NOTE: This Decision Notice arises out of two separate requests for information made to the Foreign and Commonwealth Office ("the FCO"). The second request was for information relating to the handling of the first. The Commissioner has dealt with the complaints arising from these requests in tandem for reasons of administrative efficiency.**

**The Commissioner's decision in these matters is that the FCO should have considered the request for information under the Freedom of information Act 2000 ("the Act") rather than the Environmental Information Regulations 2004 ("the EIR").**

**The Commissioner considers that the Foreign and Commonwealth Office ("the FCO") has not dealt with the complainant's first request in accordance with Part I of the Act in that it has failed to comply with its obligations under section 1(1). The Commissioner considers that non-compliance with this provision arose directly from a failure to correctly consider the public interest in maintaining the exemption at s.27 of the Act. This exemption relates to prejudice to international relations.**

**In respect of the second request, although he is satisfied that the relevant information has been provided to the complainant, the Commissioner considers that there was a failure to comply with section 10 of the Act.**

**Section 1(1) of the Act establishes the right for any person to be informed in writing by a public authority whether it holds the information specified in a written request and, if so, to have that information communicated to him.**

**Section 10 provides that a response to a request for information must be provided promptly or, in any event, within 20 working days unless an extension to this period is required in order to consider whether the public interest requires the maintenance of any qualified exemption from disclosure.**



**The Commissioner requires the FCO to provide the complainant with a copy of the information which has been withheld or a full summary thereof.**

**1. Freedom of Information Act 2000 (the 'Act') – Application for a Decision and the Duty of the Commissioner**

1.1 The Information Commissioner (the 'Commissioner') has received an application for a decision whether, in any specified respect, the Complainant's request for information made to the Public Authority has been dealt with in accordance with the requirements of Part I of the Freedom of Information Act 2000 (the 'Act').

1.2 Where a complainant has made an application for a decision, unless:

- a complainant has failed to exhaust a local complaints procedure, or
- the application is frivolous or vexatious, or
- the application has been subject to undue delay, or
- the application has been withdrawn or abandoned,

the Commissioner is under a duty to make a decision.

1.3 The Commissioner shall either notify the complainant that he has not made a decision (and his grounds for not doing so) or shall serve a notice of his decision on both the complainant and the public authority.

**2. The Complaint**

2.1 The Complainant has advised that on 6 January 2005 the following request was made of the FCO in accordance with section 1 of the Act.

'Please would you let us know whether the issue of the importation of US Naval Vessels (Ghost Ships) was referred to in any discussions or correspondence between the FCO and the US State Department between September and December 2003 (inclusive), at the levels of Secretary of State, Minister or Senior Civil Servants and provide details of any such discussions or correspondence including:

- date of such communication
- form of communication
- personnel involved on each side
- substance of communication.'

2.2 On 20 January, 2005 the FCO informed the complainant that it required additional time to consult the US authorities regarding the "FOI request" submitted on 6 January. The complainant responded by letter on 27 January, arguing strongly that



the request should be considered under the EIR as the requested information was clearly environmental.

- 2.3 This argument was accepted by the FCO which refused the letter on 3 February 2005 on the ground that the requested information fell under the exception in (Regulation) 15(5)(e) of the EIR.
- 2.4 The request was further considered by the FCO following an application for an internal review of the decision to refuse. On 14 March 2005, the complainant was provided with information as to the date and form of communication but the refusal of the other elements of the request was confirmed.
- 2.5 The complainant contacted the Commissioner on 23 March 2005. In addition to complaining about the refusal of the elements of the request indicated above, the complainant also drew the Commissioner's attention to further requests for information submitted on 15 February 2005 in the course of requesting an internal review of the refusal. The information requested was:
- “1. details of exactly what steps were taken in dealing with our original request; and  
2. in particular, the details of communications with the US authorities in relation to our request;  
3. file names of files held by the FCO and containing information on the US Ghost Ships.”
- 2.6 On 19 May 2005, the complainant advised the Commissioner that in respect of the first of these three questions, he had been informed that contact had been made with the US authorities with a view to determining their attitude toward the potential release of the information. The complainant questioned the FCO reliance on the EIR exception relating to international relations before having consulted the US Authorities.

### **3. Relevant Statutory Provisions**

#### **3.1 Environmental information** is defined in Regulation 2 of the EIR as:

“...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 the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);”

3.2 **Section 39** of the Act provides that requests for environmental information are exempt under the Act but should be considered under the EIR.

3.3 **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.”

3.4 **Section 2(2)** provides –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that-

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

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

3.5 **Section 27** provides that –

“(1) 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,

(b) relations between the United Kingdom and any international organisation or international court...



(2) Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.”

#### **4. Review of the case**

- 4.1 The background to the request for information lies in the public controversy surrounding the import in the UK of 4 redundant US naval vessels for dismantling in Hartlepool. In particular, questions were raised by environmental groups and the media as to the environmental hazard presented by the ships, as to whether the necessary official permissions to import the vessels were in place at the relevant times, and as to the compliance by the UK with relevant international agreements and regulations. These concerns led to comprehensive reviews of the regulatory structures within which the ships were imported. (The relevant reports can be found on the web site of Defra which was the lead department in these matters.)
- 4.2 The Commissioner initially dealt with the complaint through correspondence with the FCO. As noted, the FCO dealt with the complainant's request under the EIR. The complainant agreed with this approach. Having viewed the information that has been withheld, the Commissioner now takes the view that the requests properly fell under the Act rather than the EIR. (See “The Commissioner's Decision” below for reasons.) Nevertheless, much of the correspondence with the public authority concerned the implications of this apparently having been a request under the EIR. In particular, the correspondence dealt with the question of whether the public authority was entitled to claim an extension of the normal period of 20 working days allowed for response to a request and whether the wording of the EIR implied that the test of whether an exception to the duty to provide information on request was only engaged if an adverse affect of disclosure was certain or merely “likely”.
- 4.3 The Commissioner was provided with a copy of the information that had been refused, and the correspondence also focused, therefore, upon the substantive reasons for the refusal to disclose the requested information, namely the contention that the disclosure of the information would have an adverse affect on or would be likely to prejudice relations between the UK and US governments. The FCO was able to cite in its support confirmation from the US State Department that the release of the requested information would have a detrimental affect on the climate of confidence that supports good diplomatic relations. The US State Department also offered the opinion that equivalent information would not be disclosed under the US Freedom of Information Act. The FCO did not provide any specific arguments as to why the disclosure of this information rather than any other information generated in course of discussions between the two governments would have an adverse affect.
- 4.4 Preliminary Decision Notice



- 4.4.1 As indicated above, correspondence over this case had become somewhat protracted as a result of the discussion of differences between the EIR and the Act. In an attempt to draw together the different threads of the investigation, the Commissioner issued a Preliminary Decision Notice to the FCO on 6 April 2006. A response was received from the FCO on 28 June 2006. The representations did not cause the Commissioner to substantially amend the proposed notice.
- 4.4.2 The Commissioner has, however, attempted to distinguish more systematically between the complainant's two requests for information. As noted in paragraph 2.5 (above) the complainant made a subsequent request for information from the FCO on 15 February 2005. This related closely to the request of 6 January. The Commissioner has chosen to deal with the first and second requests and the complaints arising from them within a single Decision Notice. The FCO argued that the complaint arising out of the second request should have been dealt with through a second notice and that it should have been given the opportunity to conduct an internal review of the case before the Commissioner accepted it as a complaint under section 50.
- 4.4.3 The Commissioner accepts that the second request and complaint could have been dealt with separately. However, he remains of the view that, given that the cases are closely related, it was easier to deal with both together.
- 4.4.4 By the admission of the FCO no response to the second request was given until 16 May 2006. The response was thus self evidently not given within the period provided by section 10. No offer to conduct an internal review was made. The Commissioner considers that in principle it would be unfair to insist that a complainant goes through the process of seeking a review when one was not originally offered. In any event, the Commissioner notes that section 50(2)(a) gives him a discretion not to make a decision if a complainant's procedure has not been exhausted. He is by no means barred from making a decision in appropriate cases.
- 4.4.5 The FCO did not advance any arguments specific to this particular case as to why disclosure of the requested information would prejudice international relations.
- 4.4.6 The FCO also made further representations as to why the public interest favoured maintenance of the exemption provided by section 27. These are referred to in the Commissioner's decision, below.

## **5. The Commissioner's Decision**

- 5.1 In reaching his decision the Commissioner considered three key questions. These were:
- Was the FCO correct to consider the request under the EIR?





- Has the FCO established that release of the requested information would (or would be likely to) prejudice international relations?
- Has the FCO correctly applied the public interest test?

### **Was the FCO correct to consider the request under the EIR**

5.3 In arguing that the request should be considered under the EIR, the complainant may have made the assumption that a significant quantity of information falling within his request was held. It is easy to see how, if the FCO held information as to its view of compliance with the various international instruments concerned with environmental protection or had submissions from the US State Department as to why permission should be granted for the import of the redundant ships in the UK, the information would indeed fall within the definition in Regulation 2.

5.4 However, having inspected the withheld information the Commissioner is satisfied that it does not in fact fall within the definition provided in Regulation 2. In taking this view, the Commissioner distinguishes between environmental information and information whose disclosure might have a bearing upon an environmental matter but is not itself environmental. The Commissioner does not consider, in other words, that the requested information constitutes “information ... on” any of the matters listed in Regulation 2.

### **Prejudice to International Relations**

5.5 The exemption relating to international relations has two parts. S.27(1) is engaged if (among other things) there would be prejudice to relations between the UK and any other state or between the UK and any other international organization. S.27(2) is engaged if the information requested was obtained in confidence from a state other than the UK or from an international organization.

5.6 In its refusal of the request, the FCO stressed:

- The adverse affect which the disclosure of information relating to communications between Ministers and senior officials would prejudice the effective conduct of international relations, and
- The importance of respect for confidences in building trust.

5.7 Although some additional information was released on internal review, no further arguments as to why the remaining information engaged the exemption were given, although the FCO did confirm that it had no records of any specific undertakings of confidentiality given in relation to the discussions with the US authorities.



- 5.8 As noted earlier, the FCO did obtain a statement from the US State Department that it would prefer the information to be withheld on the grounds of its sensitivity. It offered the opinion that access to the information would be refused under the US Freedom of Information Act.
- 5.9 Although the Commissioner is not entirely persuaded that the relations between the UK and US governments would be prejudiced by the disclosure of the requested information, he does take seriously the expertise of the FCO in judging when prejudice is likely to occur, the view of the Foreign Secretary who was consulted personally by FCO officials on this matter, and the statement made by the US State Department. On balance he accepts that the exemption is engaged and that the withheld information is exempt by virtue of s.27 of the Act.
- 5.10 In its representations made in response to the Preliminary Decision Notice, the FCO stressed that it occupies a unique position in being able to assess the complexities of the effect that disclosure would have on its relations with our international partners. In its support, the FCO cited a number of legal precedents which suggest that the courts (and by implication the Information Commissioner) do not have the tools to evaluate judgments taken in the context of a foreign policy decision.
- 5.11 The Commissioner is grateful for the FCO in bringing these precedents to his attention even though, as the FCO itself concedes, these relate primarily to the formulation of internal policy rather than the conduct of diplomatic relations. In effect the precedents reinforce the Commissioner's general approach which is to recognise the peculiar expertise of the FCO in assessing the circumstances under which prejudice to international relations may arise.

### **The public interest test**

- 5.12 In its refusal of the request, the FCO stresses the importance of preserving confidences and thereby maintaining relationships of trust with other governments. The FCO also emphasises the practical importance of this in allowing for the free and frank exchange of views. The Commissioner accepts that in principle these are important considerations.
- 5.13 However, the Commissioner draws a distinction between confidential relationships which give rise to obligations of confidence protecting all of the information generated in the course of those relationships, and those where the central consideration is the sensitivity of particular pieces of information. An example of the former is the patient-doctor relationship which gives rise to a general obligation of confidence. The Commissioner does not consider that the relationship between the UK government and other states gives rise to a general obligation of this sort. Whereas a medical practitioner will rightly refuse to answer any questions about the





health or medical condition of a patient without the consent of the patient, government departments or Ministers can be expected to provide answers to the media or others about matters discussed with other governments or other third parties. Clearly cases will vary. However, it is reasonable to suppose that in some cases answers will have been agreed in advance with the third parties but that in others an independent judgement will be made based upon the sensitivity of the information in question and the impact on the government or department of disclosure. It does not appear to the Commissioner that any such assessment has been carried out in this case.

- 5.14 It may be that particular sensitivities arise in relation to the personnel involved in discussions between the UK and US Governments. For instance it may be felt that information as to the seniority of the participants in a discussion may reveal information about the importance attached to the issue under discussion. In this particular instance, however, it is clear that the issue of the import of the redundant ships to the UK already enjoyed a high profile and it is difficult to see how information as to the seniority of the participants could give rise to any particular prejudice. Indeed, if decisions as to disclosure were routinely to become focused upon the seniority of individuals involved in discussions and decision making, there is a considerable risk that public authorities would choose never to disclose such information because of the inferences that could be drawn from disclosure in one case and refusal in another.
- 5.15 In the Commissioner's view, just as the FCO has failed to provide any specific public interest arguments in favour of support of the maintenance of the exemption, it has failed to properly consider any specific public interest favouring disclosure over and above a general acknowledgement of the value of the transparency and the fact that the issue giving rise to the request was relatively high profile.
- 5.16 The background to the request has been described briefly above. As indicated, as a result of the controversy around the import of the ships, two enquiries were carried out by Defra and the Environment Agency and reports issued setting out the chronology of the events, an analysis of how particular decisions came to be taken and an account of the relevant regulatory framework including the various international instruments dealing with environmental protection. In the Commissioner's view, the FCO assessment of the public interest in this case should have taken into account not only the general public debate but also the importance of the issue recognised by the lead players. In particular it should have considered the extent to which the information which it holds would have borne out the conclusions of these reports and, conversely, the extent to which the information which it holds may suggest that the enquiries leading to the reports were defective. It should also have considered the extent to which the refusal of the request may give the impression that the account provided by Defra and the Environment Agency tells only part of the story.



- 5.17 Having reviewed these matters, the Commissioner is satisfied that there is a substantial public interest in the release of the requested information. While accepting the FCO view that there is likely to be some prejudice to relations with the US, the Commissioner, considers that such prejudice would be slight and that there is a much stronger public interest informing the wider public debate about this issue.
- 5.18 In its representations made in response to the Preliminary Notice, the FCO goes on to record its disappointment that the Commissioner disagrees with its judgment on the particular facts of this case. The expertise of the FCO in assessing the impact of disclosure upon international relations is accepted. The Commissioner cannot, however, accept that the FCO is uniquely placed to apply the public interest test required by the Act. That assessment requires an assessment which necessarily involves balancing the impact of disclosure against other factors, such as the public interest in giving reasons for decisions, which are not necessarily areas in which the FCO has unique expertise.

#### **Other requested material**

- 5.19 In addition to the request submitted on 6 January 2005, the complainant submitted a supplementary request on 15 February 2005 for:
- “1. details of exactly what steps were taken in dealing with our original request; and  
2. in particular, the details of communications with the US authorities in relation to our request;  
3. file names of files held by the FCO and containing information on the US Ghost Ships.”
- 5.20 In respect of the first two of these questions, the Commissioner is satisfied that the complainant was informed that the FCO intended to consult its US counterpart. The Commissioner has also been advised in the FCO response to the Preliminary Notice that a response to the request of 15 February 2005 was made on 16 May 2005. It is self evident that this response was given outside the 20 working day period provided in the Act. The Commissioner therefore finds that there was a contravention of the requirement of section 10 of the Act in respect of this request.
- 5.21 Given the Commissioner's decision that the substantive information first requested by the complainant must be communicated to the complainant, the issues raised by the second request may now be irrelevant. No specific reasons for withholding the files names have been offered by the FCO. The Commissioner is unaware of any reason why these should not be disclosed. However, he makes no decision on this point at this stage.

#### **6. Action Required**



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and protecting your personal information

6.1 The Commissioner requires the FCO to communicate to the complainant the remainder of the information requested on 6 January 2005. The Commissioner notes that the US Authorities have expressed a concern not only about the information itself but also about the headings of emails. The Commissioner considers that the information may be supplied therefore either as a copy of the documents held or by way of a full summary.

6.2 The FCO is required to take these steps within 30 days of receipt of this notice.

## **7. Right of Appeal**

7.1 Either party has the right to appeal against this Decision Notice to the Information Tribunal (the "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](mailto:informationtribunal@dca.gsi.gov.uk)

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

**Dated the 26th day of July 2006**

**Signed .....**

**Graham Smith**  
**Deputy Commissioner**

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