



**IN THE MATTER OF AN APPEAL TO THE FIRST-TIER
TRIBUNAL (INFORMATION RIGHTS)**

**UNDER SECTION 57 OF THE FREEDOM OF
INFORMATION ACT 2000**

Case No. EA/2011/0004

**GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

On appeal from:

**The Information Commissioner's
Decision Notice No: FS50263570
Dated: 14 December 2010**

Appellant: Peter Burt

Respondent: Information Commissioner

**Additional
Respondent:** Ministry of Defence

Representation: The Appellant in person
For the Commissioner: Robin Hopkins
For the Ministry of Defence: Charles Bourne

Before

David Marks QC
Tribunal Judge

Nigel Watson
John Randall

Subject matter: Section 24 of FOIA (National Security) and Section 27 of FOIA (International Relations)

DECISION

The Tribunal substitutes the Decision Notice of the Information Commissioner (the Commissioner) in this case dated 14 December 2010 and the reference number FS50263570 by supplementing and amending the same in terms more particularly set out in a closed judgment which is related to this open judgment. In the circumstances the Tribunal dismisses the Appeal.

REASON FOR DECISION

General

1. The Appellant who is the original Complainant requested from the Ministry of Defence (the MoD) as the relevant public authority information about briefings and the summary reports following site visits by the UK Atomic Weapons Establishment (AWE) staff to a United States atomic energy facility called the Y-12 facility regarding the proposed development of an enriched uranium facility at AWE Aldermaston. Initially the MoD relied on the provisions of sections 24, 27 and 38 of the Freedom of Information Act (2000) (FOIA). Section 24 deals with information which is wholly exempt if it relates to what is required for the purposes of safeguarding national security. Section 27 is a so called qualified exemption which deals with information likely to compromise international relations whilst section 38 which is another qualified exemption deals with information which is likely to endanger physical or mental health and safety. Insofar as the public interest was a factor the MoD stated that the relevant public interest was in its view in favour of a maintenance of exemptions. The information sought was therefore not disclosed.

2. The matter was referred to the Commissioner. In his Decision Notice which is dated 14 December 2010 and bears the reference FS50263570 the Commissioner dealt with only one FOIA exemption, namely that arising under section 27. Apart from a public interest consideration the exemption also entails a requirement that a disclosure would or would be likely to prejudice the relationship between the United Kingdom and another State. The Commissioner took the view in the Notice that it was likely that the UK's relationship with the United States would be likely to be prejudiced. Insofar as the balance of the competing public interests was concerned, the applicable factors militated in favour of maintaining exemption.
3. The present appeal has involved evidence from three relevant parties including the Appellant. Two witnesses have been provided by the MoD. The MoD placed great reliance not only on section 27 but also on section 24 and continued to contend that although some information has now been disclosed since the date of its initial refusal no further disclosure should take place. Reliance was also being placed on section 27.
4. The Commissioner has maintained that at the time of the Decision Notice the information sought consisting of two reports arising out of the United States visits, was exempt in its entirety by virtue of section 27 and the public interest test. As for section 24 the Commissioner has contended that the remaining redactions now contended for by the MoD should stand.

The relevant background

5. In a letter sent to the AWE and dated 17 October 2008 the Appellant asked for copies of the following, namely:

“Briefings to management and summary reports produced following site visits by AWE staff to the Y-12 facility in connection with the proposed development of a new enriched uranium facility at AWE Aldermaston.”

The background to the request has already been alluded to. A visit had been made to the facility in the United States called the Oak Ridge Y-12 facility by AWE representatives over development of an enriched Uranium facility at Aldermaston and a uranium production facility at Y-12.

6. In its written response the MoD explained further that AWE ran an Enriched Uranium Facility, licensed and monitored by the UK Nuclear Installations Inspectorate designed it was said “solely to handle enriched uranium” (emphasis in original). The MoD further formally confirmed that although the process of uranium enrichment has never been undertaken by AWE enriched uranium is used in Trident war head systems as well as in submarine reactor fuel. In addition AWE as at 2009 (and the Tribunal presumes since then) had the capability to store, cast, machine and recycle enriched uranium in its uranium Handling Facility. As at 2009 (and again from what the Tribunal has heard, since that date) these capabilities are stated as being required for the foreseeable future. In addition a programme exists which is considering the replacement of the handling facility at the AWE.
7. At the request of the Appellant, the MoD conducted an internal review. It concluded and confirmed in a lengthy written response to the Appellant dated 10 July 2009 that it upheld its original decision. Reliance was placed on the various exemptions already referred to at the outset of this judgment, namely sections 24, 27 and 38 as well as section 40.
8. The Appellant took issue with a number of the MoD’s conclusions in its letter. He addressed the same to the Commissioner in a letter dated 6 August 2009. In particular he referred to section 24 and one of the MoD’s main contentions that release of the information requested “would make the nuclear weapons programme vulnerable”. He concluded that no case had been made out to show what threats the programme might be subject to or how it could become vulnerable to such threats. In particular he argued that the documents requested

related to the pre-design stage of work on plants planned in the United States and in the United Kingdom from manufacturing uranium components and as such were unlikely to contain detailed information on security arrangements, location or inventories of nuclear material and he therefore maintained that “[p]arts of the document sent which do not contain specific information of this nature should be released”. The Appellant had already pointed out that information about the proposed uranium facility at Aldermaston and at the Y-12 facility had already been placed in the public domain. He therefore claimed that the security risk laid claim to was “substantially less than alleged” by the MoD.

9. With regard to section 27 the MoD had previously stated that the United States had requested that information supplied to the United Kingdom on this issue should be kept in confidence. As already indicated in the period occurring between the Decision Notice and the hearing of this present appeal a good deal of the information otherwise not disclosed has been released. The same was effected as a result of the United States affording its consent in general terms to the said release taking place.

The requested information

10. The Tribunal has been shown copies of the two Reports which are in question and which relate to the site visits. They can be referred to as report numbers 3960 and 4480 and bear the dates of 27 July 2006 and 23 November 2007 respectively. In their redacted forms they were disclosed in the wake of the Commissioner’s Decision Notice. In round terms in the latest version as mentioned above there are very few reactions which are attributable to section 27 the balance being attributable to the claim that section 24 alone applies to those remaining redactions.

The evidence

11. As stated above the Tribunal heard from three witnesses. The first was the Appellant himself. Much if not most of a lengthy witness statement dated 19 May 2011 put in by the Appellant and summarised in his oral evidence by him consisted of argument and will be revisited later in this judgment with regard to the issues which the Tribunal regards as being material.
12. However, out of respect to the fact that the Appellant is not a lawyer and mindful of the careful way he marshalled his contentions before the Tribunal the Tribunal feels that it is perhaps appropriate at this stage to touch on a number of matters raised in his evidence.
13. With regard to section 24 the Appellant raised the issue of the security classification borne out of the fact that on the face of the two reports a security classification was marked at the top of each page. The marking consisted of the word “confidential” said by the Appellant to be the second lowest of the four non-atomic security classifications used in the United Kingdom. The definition includes an express reference to the quality of the confidentiality which the information bearing that designation attracts, i.e. it is defined as confidential if it would otherwise lead to the unauthorised disclosure of information which would be prejudicial to the interests of the nation.
14. In the Tribunal’s judgment it is perhaps self evident that the mere fact of information otherwise being the subject of a FOIA request bearing the said classification cannot of itself be indicative of any determination of whether and if so to what extent the exemption under section 24 otherwise applies. That question can only be answered by taking into account all the relevant circumstances and factors. Indeed it may well be clear in most cases the security classification borne on the face of the document may have no impact at all in relation to that critical question.

15. The Appellant also contends in his written statement that the MoD has not at any stage obtained a ministerial certificate to demonstrate that the information contained in the two reports should not be released for national security reasons. Consequently he claimed that the failure to have acquired such a certificate in his words "... must cast doubt upon whether the information in the reports is really so sensitive as to compromise national security".
16. Again in the Tribunal's judgment much the same response should be given to this allegation as is given in relation to the point raised which has previously been addressed. Admittedly, the provision of a ministerial certificate would normally be conclusive. However, the section does not compel the public authority to produce let alone make a request in that respect.
17. In relation to section 27 the Appellant referred at paragraph 31 of his statement to the 1968 Treaty entitled the "Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America for the co-operation on the uses of Atomic Energy for Mutual Defence Purposes", commonly referred to as the US-UK Mutual Defence Agreement on MDA (Cmmd 537-1958). The MDA is said by the Appellant to be illustrative of a strong degree of mutuality with regard to the relationship, peer review advantages, other benefits as well as the trust, shared relationship and knowledge between the two countries. These elements are said in turn to justify the conclusion that release of all the information here sought to be disclosed would be, in the words of the Appellant, "a trivial matter given the depth and breadth of the relationship between the two countries" (see his witness statement at paragraph 39).
18. In other words disclosure would have a minimal effect, if any, on the relationship between the two countries and the relevant agencies with a similar minimal risk of deterioration on what the Appellant called "the nuclear weapons relationship". Equally, the risks to any construction

programme again according to the Appellant would also be minimal, if not non-existent.

19. The Tribunal finds it sufficient to state at this stage that it notes the existence and nature of the various sources referred to above and cited by the Appellant. However, as will be seen the Tribunal has come to the clear conclusion that the relevant analysis in this case has to be undertaken in the light of the specific information in question as viewed against the particular evidence it has received with regard to the information. It is to that evidence which the Tribunal will now turn.

The evidence

20. Apart from the Appellant himself, the Tribunal heard evidence from representatives of the MoD. In the case of one of the MoD's two witnesses, the witness gave evidence both in open and closed session based on open and closed witness statements.
21. The first of the said witnesses was Ms Katherine de Bourcier who is Head of Corporate Information at the MoD. She is a senior civil servant and part of her responsibility lies in relation to the handling of FOIA requests. She formally confirmed the history of the manner in which the Appellant's request had been dealt with.
22. The second of the two witnesses was Stephen John Welch who is employed by the MoD in the Strategic Weapons Project Team under the title Group Leader Logistics and Materials. He states in his open witness statement that his responsibilities concern the management of the Defence Nuclear Material Strategy. He further states that he and his team are charged with the responsibility of ensuring that sufficient nuclear and what he calls "special" material is available to satisfy the requirements of the Defence Nuclear Programmes. He is a trained mechanical engineer and his stated area of expertise covers warhead component manufacture to the function reflected in his present role in relation to nuclear material management.

23. He confirmed that since the MoD's initial formal response to the Appellant's appeal, the MoD had consulted further with the United States with regard to the two reports which form the basis of the request. The US have been asked whether their release would or would be likely to damage the United States' relationship with the United Kingdom. During a telephone conference with one of the US officials, the latter informed Mr Welch and/or his colleagues that the US policy on the release of certain aspects of the United States' nuclear programme had been revised since the initial request was made. He and his colleagues were then given "an indication" to use his expression, that the US had no objection to the release of information but that individuals' names should be redacted.
24. The Tribunal was shown a copy of a letter dated 19 May 2011 from the US Department of Energy in Washington which confirmed that exchange in general terms.
25. He then dealt with information contained in one of the reports that was viewed by the MoD as engaging section 27. Mr Welch stated that that particular information was not supplied to the US at the time of consultation with the American officials in the belief that that release would impair the relationship between the two countries.
26. He then confirmed that he considered that a small amount of information within both requests remained subject to the provisions of section 24 as involving the identification of certain processes and procedures. Although he recognised there was a need to acquaint the public with information regarding the safety and effectiveness of AWE in his words as put in paragraph 10 of his witness statement:

"... the release of information about some facilities, production and procedures within the nuclear programme would assist hostile individuals or groups with a proliferation of nuclear weapons, and could also enable a potential adversary to gain an insight into AWE's capabilities, processes and procedures, thereby risking the integrity of

the UK's nuclear deterrent and increasing the risk of nuclear proliferation. This is particularly significant when relating to the handling of enriched uranium, which is an important development of the development of nuclear weapons. Furthermore, it would potentially breach the UK's obligations under Article 1 of the Non-Proliferation Treaty" (This last mentioned Treaty is a reference to the Treaty on the Non-Proliferation of Nuclear Weapons dated 1 July 1968).

27. Mr Welch then went on to recognise that although there were some stages and procedures that are already either widely known or sufficiently fundamental there are in addition other procedures and stages in the manufacturing process, the identification of which, or the manner in which they occur would assist those who might make nuclear weapons or might have a consequential adverse effect upon and threat to national security and to wider proliferation (see paragraph 11). Mr Welch then prayed in aid what is commonly called the mosaic effect as such that if release of information requested was combined with other material then what he called "a complete picture" might emerge and be available to parties whose interests were inimical to national security. Mr Welch provided a closed statement which will be referred to in the closed judgment and which accompanied his open judgment.

The law: section 27(1)

28. Section 27(1) of FOIA which bears the heading "international relations" reads in relevant part as follows, namely:

"(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 court,
- (c) the interests of the United Kingdom abroad, or

(d) the promotion or protection by the United Kingdom of its interest abroad”

29. This is a prejudice-based exemption. Disclosure can be justified if in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

30. The Tribunal was referred in argument to a consideration of these relevant principles by a differently constituted Tribunal in this jurisdiction in *Campaign against the Arms Trade v Information Commissioner and the Ministry of Defence* (EA/2006/00040) especially at paragraphs 80 and 81. The Tribunal feels that it is important to set out these paragraphs in full, namely:

“80. As a matter of approach the test of what would or would be likely to prejudice relations or interests would require consideration of what is probable as opposed to possible or speculative. Prejudice is not defined, but we accept that it imports something of detriment in the sense of impairing relations or interests or their promotion or protection and further we accept that the prejudice must be “real, actual or of substance” as described in *Hogan* (EA/2005/0026/30 para 30).

81. However, we would make clear that in our judgment prejudice can be real and of substance if it makes relations more difficult or calls for diplomatic response to contain or limit damage which would not otherwise have been necessary. We do not consider that prejudice necessarily requires demonstration of actual harm to the relevant interests in terms of quantifiable loss or damage. For example, in our view there would or could be prejudice to the interests of the UK abroad or the promotion of those interests if the consequence of disclosure was to expose those interest to the risk of an adverse reaction from the KSA [Kingdom of Saudi Arabia] or to make them vulnerable to such a reaction, notwithstanding that the precise reaction of the KSA would not be predictable either as a matter of probability or certainty the prejudice would lie in the expose and vulnerability to that

risk. Similar considerations would apply to the effect on relations between the UK and the KSA (compare the approach of the Australian Administrative Appeal Tribunal in Maher at para 14 (AATAD No V.84/291(B))). Finally in this respect we note that it is the relations of the UK and the interests of the UK with which section 37(1) is concerned and not directly the interests of individual companies or enterprises as such.”

31. The present Tribunal has no reason to depart from that analysis. Unsurprisingly the MoD maintains that the contentions made by Mr Welch summarised above constitute a sufficient justification for concluding that release of redacted information within the two reports would lead to the kind of adverse reaction referred to in the passage quoted from the Tribunal’s decision set out above. The MoD claim that this would be so even though the fact that the precise nature of such a reaction might be neither predictable nor certain. It must be stressed, however, that as indicated above those items which are claimed to attract the exemption here in question were considerably minimised after the exchange described by Mr Welch with the US authorities.
32. It follows that the Tribunal is therefore entirely content to accept submissions made by the Commissioner to the effect that section 27 would necessarily be engaged if there was a real and substantial risk that the disclosure of the two reports without the approval of the US would either:
 - (1) make relations with the US more difficult, and/or
 - (2) call for a particular diplomatic response which would otherwise have been unnecessary; and/or
 - (3) elicit an adverse reaction from the United States itself.
33. The Tribunal would also agree and duly confirms that in its view section 27(1)(c) addresses state to state relationships and dealings and that the presence of one or more of the three enunciated risks set out immediately above would represent an issue whereby section 27(1)

would be readily engaged even though the subject of the relationship touched and concerned those states' respective nuclear weapon programmes and agencies.

34. As stated above, section 27(1) is a qualified exemption. The ingredients of those types of public interest which might be thought to be inherently or otherwise relevant would of course remain infinitely varied. However, a number of general observations can be made with particular regard to the overall circumstances of the present case.
35. First, although it is important to have regard to the general attitude taken by a foreign State to disclosure of information which is generated by a public authority in the United Kingdom, care must be taken not to confuse what is more properly seen as that foreign State's public interest with the type or types of public interests which is or are pertinent to FOIA.
36. Second, and by way of corollary to the point just made, and it is perhaps axiomatic that the foreign State will take the United Kingdom as it finds it including but not limited to the effect of its own domestic disclosure laws. It follows that there may well be cases where information otherwise imparted in confidence from a foreign State to a United Kingdom authority would need to be considered on its own merits as to whether some form of disclosure should be made or ordered whether under FOIA or under similar analogous legislation or principles such as the UK data protection principles.

The law: section 24

37. With regard to section 24 the relevant provisions which are headed "National Security" are as follows, namely:

 “(1) 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.

(2) The duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security.

(3) A certificate signed by a Minister of the Crown certifying that exemption from section 1(1)(b), or from section 1(1)(a) to (b) is, or at any time was, required for the purpose of safeguarding national security shall, subject to section 60, be conclusive evidence of that fact”.

38. It has already been pointed out that no certificate of the type addressed by section 24(3) has been issued in the present case.
39. With regard to section 24 the Tribunal notes that it is not sufficient for the information merely to relate to national security. The exemption expressly provides that the said information must be “required” for such a purpose. In *Kalman v IC and Department of Transport* (EA/2009/0111) especially at paragraph 33 it was observed by a differently constituted Tribunal that use of the term “required” entailed the interpretation that the term essentially signified or signifies that recourse to the exemption is or should be “reasonably necessary” for the purpose of safeguarding national security. The Tribunal has not heard argument to dispute that proposition nor can it conceive of any issue which in any way undermines the correctness of that analysis.
40. It also appears to be commonly accepted (certainly in the absence of an argument to the contrary in this appeal) that any threat to or other prejudice to the safeguarding of national security need not be immediate or direct. See generally *Secretary of State for the Home Department v Rehman* [2003] 1 A 153 particularly per Lord Slynn at 182 C-F (“... a real possibility of an adverse effect upon the United Kingdom ...”).
41. Section 24 is of course a qualified exemption. However the public interest balance test will still be applicable.

The Treaty on the Non-proliferation of Nuclear Weapons

42. Part of the MoD's argument was that the revelation of some of the information otherwise claimed to be covered by section 27 would result in a breach of the terms of the above Treaty.

43. Article VI of the Treaty and in the form opened for signature in London, Moscow and Washington on 1 July 1968 provides as follows, namely:

“Each of the parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and for nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.”

44. The Tribunal pauses here to state that it can find nothing in the words or apparent intent of Article VI which impinges on any of the issues put before it on this appeal.

45. Mr Welch claimed that disclosure of information regarding procedures within the nuclear programme might breach the UK's obligations under Article I of the same Treaty. Article I provides as follows, namely:

“Each nuclear-weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices.”

46. In connection with Article I the Tribunal is satisfied that the risk of a possible breach of this Article is a factor which should be put into the equation regarding competing public interests under section 24 and due account will be taken of the clear principles which Article I reflects in the closed judgment which accompanies this open judgment.

Conclusions

47. As stated above, since the date of the Decision Notice the issues have narrowed considerably. There is now only a relatively small quantity of text which has been redacted from the two reports as things present stand. The names of the individuals referred to are redacted by agreement with the Appellant.
48. The Tribunal respectfully agrees with the Commissioner that in accordance with the terms of the Decision Notice section 27(1) was properly engaged. In keeping with earlier comments made in this judgment the Tribunal duly finds and confirms the conclusions of the Commissioner and the contentions made by him in this appeal that provided relations between the UK and the US are exposed to a risk of a real and substantial prejudice, section 27(1)(a) is engaged irrespective of whether the focus of those relations is for example those countries' respective nuclear weapons agencies, facilities and programmes.
49. The Tribunal also agrees with the overall contention made by the Commissioner as well as by the MoD that despite what can be viewed as a mature and robust relationship in terms of the co-operation enjoyed by both countries with regard to nuclear related issues, the same does not mean that disclosure of those reports and of the remaining redacted portions will have no material effect.
50. As regards the risks involved, although the Tribunal accepts the Commissioner's contention that it is right in the circumstances to give due weight to the general consideration that disclosure of the reports would contribute to the public's appraisal of AWE and its activities, equally the Tribunal fully accepts that the Commissioner was in general correct in concluding that the particular information he had before him would not substantially further that objective.
51. Subject to what is said with regard to the few remaining disputed items considered in the accompanying closed judgment the Tribunal would

therefore agree that the Commissioner was in general right in concluding that there was a limited public interest in disclosure of these reports but was also correct in the determination eventually made in the terms of the final decision notice.

52. As the present versions of the reports clearly show, they are primarily of a technical nature, containing assessments and observations as to the operation of plant, machinery and procedures and processes. In particular they deal with operational processes at a US facility. It follows from that factor alone that they can hardly be said to be likely to shed light let alone substantial light on AWE's activities in the United Kingdom.
53. The Tribunal therefore concludes in general terms that overall there was and is a very limited public interest in disclosure which needs to be weighed against a real risk of disclosure reflecting a possible or anticipated adverse reaction from the United States. As has been made clear above, the United States has finally expressed its desire to maintain proper confidence in what it regards as a sensitive area.
54. The Tribunal therefore formally determines that it endorses the approach taken by the Commissioner with regard to the Decision Notice.
55. In respect of section 24(1) the Tribunal has received evidence in closed session from Mr Welch. As set out above Mr Welch expressed the MoD's concerns about possible assistance to hostile individuals or groups and the possible enabling of potential adverse groups to gain an insight into AWE's capabilities or processes. Mr Welch also invoked the mosaic effect. The Tribunal agrees with both the Commissioner and the MoD in their submissions on this appeal to the effect that overall section 24 is engaged even if there is now a very limited number of redacted items of information still in issue.
56. The balancing test which applies in relation to section 24 is much the same as that in play with regard to section 27, i.e. in general terms the

need for openness as against the factors which can be considered to be reasonable and necessary for the purposes of safeguarding national security.

57. The findings of the Tribunal are of necessity set out in the closed judgment dealing in some detail with the remaining redacted items. That judgment accompanies this open judgment but is available to the Commissioner and to the MoD alone.

Signed:

David Marks QC
Tribunal Judge

Dated: 20th September 2011

Decision reviewed on 25th October 2011