

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 30 August 2007

**Public Authority:** Health and Safety Executive  
**Address:** Rose Court  
2 Southwark Bridge  
London SE1 9HS

### Summary

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The complainant wished to have released to him information held by the Health and Safety Executive relating to computer modelling exercises carried out to examine the likely outcomes of the impact of a terrorist attack on a major nuclear facility in the UK. HSE refused to release this information, initially citing sections 24 and 38 of the FOI Act. Subsequently, HSE said that it should have dealt with the matter under the EIR and cited regulation 12(5)(a) to justify its refusal to release the information. The commissioner is satisfied that this exception is engaged and that, in all the circumstances, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

### The Commissioner's Role

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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

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2. On 29 September 2005 the complainant wrote to the Health and Safety Executive (HSE) to request, under the Freedom of Information Act 2000 (the Act), the following:

*'Given that that (sic) a terrorist attack on a nuclear installation in this country is now a very real threat post 9/11, please could you tell me what your modelling work shows to be the result of catastrophic failure (and consequent total loss of radionuclide inventory) at the largest(in terms of total radionuclide*

*inventory)nuclear facility in the United Kingdom. I am interested in short and long term effects on human health and the environment and also on the economy'.*

3. On 25 October 2005 HSE replied. HSE said that it had decided not to disclose the information and cited section 38 of the Act (Health and safety) in justification. HSE said that it had taken into account the public interest but had decided that it operated on this occasion in favour of maintaining the exemption rather than in disclosing the information. While recognising the public interest and concern surrounding the issue, HSE believed that the information sought would, if released, be of great value to potential terrorists. HSE said that its judgement had been based on guidance entitled 'Finding a Balance' issued by the Office for Civil Nuclear Security of the (then) Department of Trade and Industry.
4. On the same day the complainant sought a review of the decision. He said that much of the nuclear industry was based in the region in which he lived and that, given the wish to expand the nuclear energy generating programme, it was important that the potential impact of any catastrophic incident was understood by those most likely to be affected by it. HSE replied on 1 December 2005 and confirmed its original decision. HSE said that disclosure under the legislation was not to an individual but to the public at large and that it therefore needed to consider the implications of such information being made available to someone who might wish to commit a terrorist attack. As well as confirming its reliance upon section 38, HSE also said that it was applying section 24 (National security). Further reference was made to 'Finding the Balance', in particular to section 3.1 and the guidance table under category 0801a. HSE said that it had considered whether or not it would be possible to issue a redacted version of the information sought but had concluded that it would not be possible to do so without releasing information that would be helpful to a potential terrorist.

## **The Investigation**

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### **Scope of the case**

5. On 17 January 2006 the complainant contacted the Commissioner to complain about the way in which his request for information had been handled.

### **Chronology**

6. The Commissioner began his investigation of this matter on 20 March 2007. In the course of the investigation one of his staff examined the information that formed the subject of the request. Following that examination HSE wrote to the Commissioner to make its formal submission. In the course of that submission HSE said that it had now come to the conclusion that it should

have dealt with this request by reference to the Environmental Information Regulations (EIR) rather than through reference to the Act: in its view it would now be appropriate to withhold the information under regulation 12(5)(a) of the EIR. HSE said that it believed that this exception equated in practical terms to sections 24 and 38 of the Act and that, if the Commissioner was not of the view that the EIR applied, that it would continue to rely as before on those sections of the Act.

## Findings of fact

7. 'Finding the Balance' is a publicly available document produced by the Office for Civil Nuclear Security: it is sub-titled 'Guidance on the sensitivity of nuclear and related information and its disclosure'. The current edition was published in April 2005. Part 3 consists of Guidance Tables which set out the different kinds of information that might be requested and provides advice as to whether they should or should not be released: in the latter case, the justification for withholding the information is also set out. The information sought by the complainant is judged by HSE to fall within category 0800 (Safety Cases and Other Safety or Environmental Information), in particular sub-category 0801a (Safety cases of all classes). All information falling into this category is considered non-releasable on the grounds that 'it would be of great use as an aid to a potential attacker for choosing targets and planning an operation'.

## Analysis

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### Legislation

8. In its initial consideration of this matter HSE dealt with the request under the Act and cited section 38 to justify its refusal to release the information sought. At review stage this approach was maintained, although HSE additionally cited section 24. However, in a subsequent submission to the Commissioner dated 10 July 2007, HSE changed its mind (although this does not appear to have been communicated to the complainant) and decided that it ought to have considered the matter under the EIR instead. Its view now was that regulation 12(5)(a) of the EIR applied to the information sought, leading to the identical outcome that the information should not be released. The Commissioner's first task is therefore to consider under which legislation this matter should be determined.
9. 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);*
10. It is the Commissioner's view that the information sought by the complainant can clearly be said to fall within a number of the categories listed in this definition, in particular categories 2(1)(b),(c) and (f). If the information comes within the scope of the EIR, as the Commissioner believes that it does, then it is exempt information under the Act by the operation of section 39 and falls to be dealt with under the EIR. On that basis it is the Commissioner's view that this request should have been dealt with under the EIR rather than under the Act.

## **Procedural Matters**

11. It remains of course the case that, as far as the complainant is concerned, this matter was dealt with under the Act. The Commissioner is satisfied that HSE carried out the procedural requirements of the Act properly and he has no comment to make about that. However, HSE now believes (correctly, in the Commissioner's view) that this request should have been dealt with under the EIR. 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 perfectly 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 the present case HSE has breached the requirements of regulations(14)(2) and (3) of the EIR in that it did not issue a refusal notice within the prescribed period of 20 working days, nor did it tell the complainant under which exceptions of the EIR it was relying in order to justify its refusal.

## Exception

12. Under the EIR a public authority may refuse to disclose information if one or more exceptions apply and if, in all the circumstances of the case, the public interest in maintaining the exception or exceptions outweighs the public interest in disclosing the information. It should however be noted that, under regulation 12(2) of the EIR, it is specifically stated that there is a presumption in favour of disclosure.
13. In order to withhold the information sought in this case HSE has cited regulation 12(5)(a). The text of this exception appears in the legal annex. However, in broad terms, this exception allows a public authority to refuse to release information if its disclosure would adversely affect international relations, defence, national security or public safety. It should be noted that, while dealing with this case under the Act, HSE initially cited section 38, on the grounds that disclosure of the information would, or would be likely to, endanger the physical or mental health, or the safety, of any individual. Subsequently, at review stage, HSE additionally cited section 24(1) of the Act, which exempts information in cases where exemption is required for the purpose of safeguarding national security. In its letter of 10 July 2007 HSE suggested that, in terms of the considerations that might apply, there was effectively no practical difference in terms of outcome between dealing with the case under regulation 12(5)(a) or dealing with it under a combination of sections 24 and 38 of the Act.
14. The Commissioner has examined the information held by HSE that is considered to fall within the parameters of the complainant's request. The information, by its nature, is focused on the nature and extent of various types of vulnerability. Having carried out his examination, the Commissioner is satisfied that the information would – to adopt the language of 'Finding the Balance' - be of great use as an aid to a potential attacker for choosing targets and planning an operation. He is accordingly satisfied that disclosure of the information would adversely affect national security and public safety. The exception is therefore engaged. This exception, however, is a qualified exception and therefore attracts the public interest test.

## The Public Interest

15. The complainant said that, after the events of 11 September 2001, he believed a terrorist attack on a nuclear installation in this country to be a very real possibility. Given that the government was now seriously contemplating a renewed investment in nuclear power, and that much of the country's nuclear industry was based in his area, it was here that any such attack was most likely to occur. On that basis he took the view that information relating to the risks and benefits of such proposals should be made available in the public interest so that those potentially most affected could be made aware of what the outcomes of such an attack might be.
16. HSE fully recognised that there was currently a vigorous debate about the future of nuclear energy, with strong opinions on both sides. HSE accepted

that there was therefore a case for saying that it would be in the public interest to increase awareness and understanding of the hazards and risks of nuclear activities, including an understanding of what the outcomes of a catastrophic incident of the kind described by the complainant might actually look like. These were good arguments in favour of disclosure.

17. HSE, however, had to take into account that any disclosure under the EIR was a disclosure to the public at large. The exception under regulation 12(5)(a) refers to issues of national security. HSE took the view that, were information of the kind requested by the complainant to be released into the public domain, there was a very real risk that the information could be used by terrorists to mount an attack on a nuclear installation in a way that would cause maximum damage. Even if the risk of this happening were not considered to be very high the consequences of such an event if it did occur would be so grave that HSE was in no doubt that the balance of the public interest in this case fell clearly in favour of maintaining the exemption rather than disclosing the information. Regulation 12(5)(a) also refers to public safety. HSE took the view that the potential harm to public safety that might be caused were the information to be released was so serious that the arguments for withholding the information in the public interest significantly outweighed the public interest arguments in favour of disclosure. HSE also said that its decision to withhold the information had been made in accordance with the guidance set out in 'Finding a Balance'.
18. HSE said that it had considered the possibility of releasing a redacted or summarised version of the information sought. However, in its view, so much information would need to be redacted in order to avoid the concerns expressed in the previous paragraph that any redacted document that emerged from such a process would, in effect, be meaningless.
19. The Commissioner has considered very carefully the public interest arguments on both sides of this request, and has also taken account of the guidance in 'Finding a Balance'. He recognises that nuclear power is a contentious subject. He also recognises that, at the time the request was made, the chances of a terrorist attack occurring in the United Kingdom were high and that the possibility of such an attack being made upon one of our nuclear installations was clearly, as the complainant himself identified, a significant possibility. It is not the Commissioner's view that this situation has since altered. The Commissioner is in no doubt at all that there is a strong public interest in as much information as possible being made available which will enable members of the public to come to an informed view about the ultimate value of nuclear power in the country's energy programme: further, that such an informed view can only be obtained when both proponents and opponents of nuclear power are, in effect, put in an equal position in the debate. In the Commissioner's view, that provides a strong argument for disclosure, in the public interest, of information of the kind sought by the complainant.

20. However, the Commissioner is also in no doubt that protection of its citizens is the first duty of a government and, therefore, that the release of any information which might make that task more difficult to carry out would not be in the public interest. The Commissioner has considered the information sought by the complainant. As recorded above, he has concluded that it would be of great use as an aid to a potential attacker for choosing targets and planning an operation. He is satisfied that release of that information into the public domain, where it would be accessible to anybody, would be of immeasurable assistance to anyone contemplating a terrorist attack of the kind to which the complainant has referred. Indeed, he would accept the argument that the nature of the information is such that its release might in fact help to precipitate such an action, or at least help attackers to maximise their impact. He also accepts the view that it would not be possible to produce a redacted version of the information that would contain any information useful to the complainant that would not also be helpful to the potential terrorist. Taking all these factors into account, the Commissioner is therefore of the view that on this occasion – despite the presumption - the public interest in maintaining the exception clearly outweighs the public interest in disclosing the information.

## The Decision

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

the information was correctly withheld under regulation 12(5)(a)

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

by failing in the first instance to deal with the request under the EIR, HSE breached the procedural requirements of regulation 14(2) and (3) of the EIR

## Steps Required

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- 22 The Commissioner requires no steps to be taken

## Right of Appeal

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23. 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](mailto: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 30<sup>th</sup> day of August 2007**

**Signed .....**

**Richard Thomas  
Information Commissioner**

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



## Legal Annex

### Exceptions to the duty to disclose environmental information

**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 the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

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(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;

### Refusal to disclose information

**14.**

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