

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 18 May 2015

**Public Authority:** Office for Nuclear Regulation  
**Address:** Redgrave Court  
Merton Road  
Bootle  
Merseyside  
L20 7HS

### Decision (including any steps ordered)

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1. The complainant made a freedom of information request to the Office for Nuclear Regulation (ONR) for training materials under a number of specified headings. The ONR refused the request under the exemption in section 43(2) (commercial interests). For some of the withheld information the ONR also applied the exemptions in sections 21 (information accessible by other means), section 24 (national security), section 31 (law enforcement) and section 40 (personal information).
2. The Commissioner's decision is that the section 43(2) exemption was correctly applied to all of the withheld information and the public interest in maintaining the exemption outweighed the public interest in disclosure.
3. During the course of the investigation the ONR identified some information which it had not applied an exemption to and which it said could be disclosed. The ONR must take the following steps to ensure compliance with the legislation.
  - The ONR shall disclose to the complainant the information which it has not applied an exemption to and which it informed the Commissioner could be released.
4. The public authority must take these steps within 35 calendar days of the date of this Decision Notice. Failure to comply may result in the

Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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5. On 20 December 2013 the complainant made a freedom of information request to the Office of Nuclear Regulation (ONR). This request followed a series of correspondence between the complainant (a training provider) and the ONR regarding concerns that its intellectual Property Rights had been infringed. In summary, the request asked for training documents and related information used by the ONR under a number of specified headings. The request also specified that emails should be searched between a number of named individuals.
6. The ONR responded to the request on 10 January 2014 when it confirmed that it held information falling within the scope of the request. However, it explained that under section 12 of FOIA the request was refused as it estimated that the cost of complying with the request would exceed the appropriate limit of £600.
7. On 26 February 2014 the complainant contacted the ONR again with a refined request which read as follows:

*Copies of all training documents utilised by HSE-NII and HSE-ONR between 1<sup>st</sup> January 2006 and 1<sup>st</sup> January 2009 and between 1<sup>st</sup> July 2012 and 18<sup>th</sup> December 2013 which fall under headings A, C and/or D above.*

*This is a general request that relates to any information and/or data processed by, or on behalf of the HSE/HSE-NII and any of its related agencies, including but not limited to the HSE-ONR/ONR which relates to training documents utilised by HSE-NII and HSE-ONR between 1<sup>st</sup> January 2006 and 1<sup>st</sup> January 2009 and between 1<sup>st</sup> July 2012 and 18<sup>th</sup> December 2013 which fall under headings A, C and/or D above.*

*In relation to emails, you may limit the search to emails between the following individuals during the period between 1<sup>st</sup> January 2006 and 1<sup>st</sup> January 2009 and between 1<sup>st</sup> July 2012 and 18<sup>th</sup> December 2013. However, please ask those listed below, who work for the HSE/ONR, whether they are aware of others who are likely to have exchanged emails containing copies and/or extracts of training documents utilised*

*by HSE-NII and HSE-ONR between 1<sup>st</sup> January 2006 and 1<sup>st</sup> January 2009 and between 1<sup>st</sup> July 2012 and 18<sup>th</sup> December 2013 and which fall under headings A-E above. If so, please search the emails of anyone that they identify as well as those individuals mentioned below.*

8. The headings referred to by the complainant in the request were:
  - The principles of crisis management
  - Principles of command and control
  - Practical aspects of command – the basic tool kit
9. The ONR responded substantively on 23 April 2014 when it explained that it had identified some information falling within the scope of the request. This information was passed to the complainant and the ONR no longer appear to have been relying on section 12 at this stage.
10. The complainant contacted the ONR again on 6 June 2014 to express concern that the information provided was incomplete.
11. The ONR subsequently completed an internal review of its handling of the request and presented its findings on 12 September 2014. The review found that in its previous response the scope of the request had been 'inadvertently narrowed' and that this had excluded the actual training materials that had been requested. However, it said that it had now identified the relevant information but had decided that the information should be withheld under the FOIA exemptions in section 21 (information accessible by other means), section 24 (national security), section 40(2) (personal information) and section 43 (commercial interests). In each case the ONR found that the public interest favoured withholding the requested information.

## **Scope of the case**

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12. On 10 December 2014 the complainant contacted the Commissioner to complaint about the ONR's handling of their request.
13. The Commissioner agreed with the complainant that the scope of his investigation would be to consider whether the ONR was correct to withhold the information to which it applied the sections 21, 24, 40(2) and 43 exemptions.

14. During the course of the Commissioner's investigation the ONR said that it was also seeking to apply the section 31 (law enforcement) exemption to the withheld information. It also identified some information which was suitable for disclosure and which it was not applying any exemption to. As outlined at the beginning of this notice, the Commissioner requires the ONR to make this information available to the complainant.

## Reasons for decision

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### Section 43(2) – Commercial interests

15. The ONR has applied the section 43(2) exemption to the majority of the withheld information and therefore the Commissioner has considered this exemption in the first instance.
16. Section 43(2) provides that information is exempt if disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it. The ONR has said that in its view disclosure would prejudice its own commercial interests and those of its suppliers Berwicks Ltd.
17. The withheld information in this case is a collection of training materials used to train the ONR's staff on issues of command and control, in particular dealing with emergency situations at Nuclear sites, and which was provided by a third party supplier – Berwicks. This includes a number of presentations, scenario documents and case studies. The ONR has said that whilst each piece of information might not necessarily be commercially sensitive when seen in isolation, when taken together they represent what is essentially Berwick's product. The information has been assembled by Berwicks using their expertise and as such is its intellectual Property. The ONR argues that were the information to be disclosed it could be used by other suppliers in order to gain a competitive advantage.
18. Section 43(2) is a prejudice based exemption which means that in order for the information to be withheld the Trust must be able to identify and explain the nature of the prejudice it envisages would be caused by disclosure. Following the test adopted by the Information Tribunal in

*Hogan and Oxford City Council v the Information Commissioner*, this means that the public authority must be able to show that the prejudice claimed is "real, actual or of substance" and that there is some "causal link" between disclosure of the information and the prejudice claimed.

19. In addition, when a public authority is claiming that disclosure of requested information would prejudice the commercial interests of a third party the Commissioner follows the findings of the Information Tribunal decision in the case *Derry Council v Information Commissioner [EA/2006/0014]*. This confirmed that it is not appropriate to take into account speculative arguments which are advanced by public authorities about how prejudice may occur to third parties. Instead, arguments advanced by a public authority should be based on its prior knowledge of the third party's concerns.
20. The Commissioner has reviewed the withheld information and has reached the view that it is commercially valuable and would be of use to a competitor aiming to provide the same services as Berwicks. The Commissioner understands that Berwicks is very successful in the market in which it operates and clearly disclosure would allow a competitor to discover the reasons behind their success and to adapt their own product accordingly. The Commissioner is also aware that the ONR's reasons for applying the exemption are based on Berwicks' own concerns. The Commissioner has been passed copies of communications between the ONR and Berwicks and from this it is very clear that they have genuine concerns that competitors will use the requested information to seek a commercial advantage. Indeed, the Commissioner notes that Berwick's saw fit to inform the ONR that a competitor was seeking to undermine other contracts which it was involved with and it believed that this request was also commercially motivated.
21. The Commissioner has considered the arguments from the ONR and Berwicks and is satisfied that the information would prejudice the Commercial interests of Berwicks. In reaching this view the Commissioner has taken into account the fact that the information is commercially valuable and the competitive nature of the market in which Berwick's operates. For this reason alone the section 43(2) exemption is engaged.
22. However, the ONR also sought to argue that section 43(2) also applies because disclosure would prejudice its own commercial interests. It explained that it was concerned about the risk to its reputation and its ability to obtain services from training providers at the right quality and at competitive cost. This is because training providers would, in its view, be reluctant to enter into contracts with the ONR in future if they believed that their commercial property would not be protected.
23. The Commissioner has considered the ONR's arguments and he accepts that disclosure would prejudice its commercial interests in the way it describes. Ordinarily the Commissioner would be sceptical that a commercial organisation would be easily deterred from tendering for

what are valuable public sector contracts by the prospect of their information being disclosed. However, where the requested information is essentially their product, their commercial offering, there is a greater risk of this happening. Organisations would be understandably wary about dealing with an organisation where there was the prospect that it would disclose information that would hand a commercial advantage to its competitors. This is borne out by Berwicks' strong opposition to disclosure which is apparent from its communications with the ONR and which have been passed to the Commissioner.

24. The Commissioner has found that disclosure would also be likely to prejudice the commercial interests of the ONR and that section 43(2) is engaged.

### **Public interest test**

25. Section 43(2) is a qualified exemption and so the Commissioner has now undertaken a public interest test, balancing the public interest in disclosure against the public interest in maintaining the exemption.

### **Public interest arguments in favour of disclosure**

26. In favour of disclosure, the ONR acknowledged that there was a public interest in openness and transparency to demonstrate to the public that its staff are being trained to an appropriate level to deal with emergency situations at nuclear sites.
27. The complainant did not specifically address the question of the public interest test. However, it is apparent that their concerns are based entirely on protecting the commercial interests of their client in the context of a private dispute with the ONR regarding an alleged breach of intellectual property rights.

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

28. In favour of maintaining the exemption the ONR argued that there is a public interest for it to be able to negotiate contracts with third party suppliers, including those providing ONR with technical support, without those suppliers being concerned that their commercially sensitive information, which has the potential to damage their businesses, may be disclosed to competitors or potential clients.
29. It also said that it was in the public interest for the ONR to continue to be able to access training without the potential for this access to be limited because suppliers are reluctant to bid for work, resulting in a

reduction in the quality of training available and an increase in costs through lack of competition.

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

30. The Commissioner has first considered the arguments in favour of disclosure and has reached the view that these carry only very limited weight, if any, in the particular circumstances of this case. The complainant's case for disclosure clearly focuses on a private interest – pursuing the ONR for an alleged breach of its client's Intellectual property rights. This is not what FOIA was designed for and there is very little wider public interest except in the most general sense in that any disclosure of public information promotes transparency and accountability.
31. Whilst disclosure may demonstrate that the ONR provides appropriate training for its staff, the Commissioner considers that this public interest has been met by the information already released by the ONR. In particular, the Commissioner notes that the tendering documents for the training programme are publicly available and include information about the aims and objectives of the training. Information on the training providers, Berwicks, is also readily available.
32. In contrast, there is a strong public interest in maintaining the exemption. The Commissioner's starting point is that there is a strong public interest in protecting the commercial interests of companies and ensuring that they are able to compete fairly. Companies should not be disadvantaged as a result of doing business with the public sector. These arguments are particularly strong on this case given the very competitive nature of the business concerned.
33. The Commissioner has also given weight to the arguments about ensuring that the ONR is able to obtain training without this being limited by providers being reluctant to bid for fear that their commercially sensitive information might be disclosed. Given the importance and sensitivity surrounding the ONR's work this would potentially have serious consequences if it was unable to obtain the appropriate training for its staff.
34. For these reasons the Commissioner has decided that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.

## Section 21 – Information accessible by other means

35. The section 21 exemption has been applied to several pieces of information such which appear in the training materials but which are publicly available. Section 21 provides that information is exempt if it is accessible to the applicant by other means.
36. In order for section 21 to apply the information must be accessible to the particular applicant who requested the information. Therefore a public authority will need to take into consideration the particular circumstances of the applicant when deciding to apply the exemption.
37. The ONR explained that some of the information contained in the training materials was accessible to the complainant because its client had previously provided training services to the ONR and had tendered, unsuccessfully, for the contract which was awarded to Berwicks. It explained that the aims and objectives of the courses were set out in the tender documents and were therefore were available to any person who tendered for the training contract – this included the complainant's client. Some other general information relating to crisis management and command and control training was available on line at the following addresses.

Nuclear emergency planning

<https://www.gov.uk/government/publications/nuclear-emergency-planning-consolidated-guidance>

Nuclear Operators Licence Conditions

<http://www.onr.org.uk/silicon.pdf>

Aide Memoir for Inspectors for Level 1 Emergency Exercise Evaluation

[http://www.onr.org.uk/operational/tech\\_insp\\_guides/ns-insp-gd-011.pdf](http://www.onr.org.uk/operational/tech_insp_guides/ns-insp-gd-011.pdf)

Tutor biographies

<http://berwicksconsultants.com/who-we-are>

38. The Commissioner is satisfied that all of this information is available online, and therefore accessible to the complainant, or has been passed to the complainant's client as a result of its position as a previous supplier with the ONR and an unsuccessful bidder in the recent tender



for the training contract. The Commissioner's decision is that section 21 is engaged and as this provides for an absolute exemption there is no public interest test to apply and the information was correctly withheld.

39. However, for a very small amount of information which discussed definitions and principles of command and control the Commissioner has decided that section 21 is not engaged. The ONR had suggested that such information was accessible by other means because the complainant could simply rely on dictionary definitions of the term or else use internet sites such as Wikipedia to investigate the meanings of the term. However, this would not necessarily reveal the definitions or interpretations relied on by Berwicks in the training. For example, an online dictionary may well allow you to understand what the term command and control means but it would not necessarily produce the same definitions and interpretations which Berwicks used in its training. For this reason section 21 cannot apply. However, the Commissioner is satisfied that such information would in any event be covered by the section 43 exemption for the reasons already discussed above. The information has been selected by Berwicks and represents their expertise and skills in assembling the material into the form used in their training. It is essentially their 'product' and as such raises the same concerns as the other material to which section 43 has been applied.

### **Other exemptions**

40. The ONR also applied the section 31(1)(g) and section 24 exemptions. The Commissioner has not considered these exemptions as he is satisfied that all of the information to which these exemptions have been applied are exempt under section 43(2) for the reasons explained above.

## Right of appeal

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41. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

42. If you wish to appeal against a Decision Notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
43. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Signed** .....

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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**Cheshire**  
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