

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date 16 June 2008

**Public Authority:** United Kingdom Atomic Energy Authority  
**Address:** Marshall Building  
521 Downs Way  
Harwell  
Didcot  
Oxfordshire  
OX11 0RA

### Summary

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The complainant requested information held by the UKAEA in connection with its meetings with its PR firm. UKAEA refused to disclose the information held stating it was exempt under section 40, 41 and 43 of the Act. During the course of the Commissioner's investigation UKAEA disclosed the information withheld under sections 40 and 43 but continued to withhold some information under section 41. The Commissioner investigated the application of section 41 and has found that the exemption is not engaged. The Commissioner requires the public authority to disclose the information withheld under section 41 within 35 calendar days of this notice.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

### The Request

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2. The complainant has advised that on 20 February 2006 he made the following request for information to the United Kingdom Atomic Energy Authority (UKAEA):

*"I would like copies of all correspondence, memos, notes of telephone conversations and minutes of meetings between you and:*

- *Press/public relations companies, and*
- *Political lobbying companies,*

*contracted to work for you between January 1 2004 and February 20 2006.*

*This includes copies of any reports produced for you by such companies”*

3. UKAEA acknowledged the request on 21 March 2006 and informed the complainant that his request for information was very wide ranging and could exceed the cost limit. UKAEA asked the complainant to refine the request in order to bring it within the cost limit.
4. The complainant responded on 22 March 2006 refining his request to the period 1 January 2005 to 22 March 2006.
5. On 24 April 2006 UKAEA issued a substantive response to the complainant's request. UKAEA concluded that the correspondence and advice constituted confidential information under section 43(2) of the Act and was therefore exempt. UKAEA did explain that its public affairs work is primarily to explain its work at sites and not to lobby on issues. UKAEA therefore enclosed to the complainant the specifications for contracts and agendas since January 2005.
6. On 1 May 2006 the complainant wrote requesting a review of the decision to withhold the requested information. The complainant highlighted to UKAEA that the refusal notice had not explained why the exemption applied, had not outlined or indicated that a public interest test had been conducted and did not inform him of his rights of appeal. Further, the complainant asked UKAEA to now conduct a public interest test and outlined the public interest arguments he considered favoured disclosing the information.
7. UKAEA conducted an internal review of its decision and communicated it to the complainant on 9 June 2006. UKAEA acknowledged that the refusal notice was deficient in explaining in sufficient detail why the exemptions applied or explaining its reasons for finding the public interest in maintaining the exemption outweighed the public interest in disclosure.
8. UKAEA explained to the complainant in more detail why the exemption at section 43 was appropriate. It stated that the advice and analysis that the public affairs and public relations consultancies provide is their 'stock-in-trade' which if released could provide competitors or others with valuable information which could damage their ability to sell their work. UKAEA outlined the public interest arguments considered and concluded that the public interest lay in maintaining the exemption.

## The Investigation

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### Scope of the case

9. On 16 June 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant informed the Commissioner that whilst he had raised the deficiencies of the refusal notice with the UKAEA, that as they had responded to his concerns he now considered this part of his complaint closed and did not want the Commissioner to investigate this matter.
10. The complainant specifically asked the Commissioner to investigate UKAEA's application of section 43 querying if all the correspondence held could be covered by the exemption.

### Chronology

11. The Commissioner began his investigation by writing to UKAEA on 3 August 2007. In his letter the Commissioner asked UKAEA for further explanation regarding the application of the exemption, specifically regarding the likelihood of prejudice, and an expansion on the public interest test. The Commissioner also requested a copy of the withheld information.
12. UKAEA spoke to the Commissioner on 30 August 2007 explaining that it had reviewed the information being withheld and now considered that the majority of the information could be disclosed to the complainant. On 5 September 2007 UKAEA disclosed to the complainant the majority of this information but withheld the names of officials under section 40 and two documents under section 41 and 43.
13. The Commissioner wrote to UKAEA on 11 September 2007 asking it to explain in more detail its application of sections 41 and 43 to the documents withheld and its application of section 40 to the redactions in the disclosed information.
14. UKAEA responded on the 15 October 2007 explaining that it now felt that section 40 did not apply and it was preparing to disclose to the complainant the information already disclosed in full. It further explained in more detail why sections 43 and 41 applied to the remaining withheld information.
15. On 26 October 2007 the Commissioner wrote to UKAEA explaining that it required further detail regarding the application of section 43 and 41 to the remaining withheld information.
16. UKAEA responded on 4 December 2007. UKAEA explained that the information withheld under section 43 could now be disclosed to the complainant due to the passage of time but concluded that the information withheld under section 41 still needed to be withheld. UKAEA provided further arguments to the Commissioner regarding the application of section 41.

## Findings of fact

17. The information withheld under section 41 is a contact list provided to UKAEA by its public relations firm. The contact list is an extract taken from a database of information prepared by the UKAEA's public relations firm. It includes contact details of personnel, actions to date and planned actions with individuals. It is a working document for the use of the UKAEA and the public relations (PR) firm.

## Analysis

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### Procedural matters

#### Section 1: General Right of access

18. Section 1(1) states that any person making a request for information to a public authority is entitled to be informed in writing as to whether the public authority holds the information and if so have the information communicated to him. The complainant made his request on the 20 February 2006 and complained to the Commissioner on 16 June 2006. The UKAEA withheld information under sections 40 and 43 of the Act but during the Commissioner's investigation disclosed some this information to him.
19. The Commissioner finds that the failure of the UKAEA to provide this information by the date of the complaint to the Commissioner is a breach of section (1)(b). In reaching this finding the Commissioner has followed the decision of the Information Tribunal in the case of King v Information Commissioner and DWP:

*The Tribunal agrees that in cases of delay there are separate breaches which can be recorded under sections 10 and 17 FOIA, but is satisfied that a failure to provide disclosable information by the date of a complaint to the Commissioner should be properly categorized as a breach of section 1 FOIA as well as a breach of section 10 or 17 FOIA.*

#### Section 10: Time for compliance

20. Section 10 requires that a public authority must comply with section 1 (1) promptly and in any even no later than the twentieth working day following the date of receipt. Section 1(1) states that any person making a request for information to a public authority is entitled to be informed in writing as to whether the public authority holds the information and if so have the information communicated to him.
21. The complainant made his request on the 20 February 2006. The UKAEA withheld the information under sections 40 and 43 of the Act but during the Commissioner's investigation disclosed this information to him.

22. In failing to supply some of the information requested in line with the requirements of part 1 (1) of the Act, within twenty working days from receipt of the request, the Commissioner finds the UKAEA breached section 10 of the Act.

**Exemption: Section 41 'Information provided in confidence'.**

23. Section 41 provides that information is exempt if it was obtained by the public authority from any other person and the disclosure of the information to the public would constitute a breach of confidence actionable by the other person.
24. In relation to the application of the section 41 exemption, the Commissioner must first consider whether or not the requested information was in fact obtained from another person. This is to satisfy the requirements of section 41(1)(a).
25. The Commissioner notes that the redacted information was provided to the UKAEA by the PR firm. The Commissioner notes that the contact list is more than a list of people and organisations who are stakeholders within the UKAEA, it is a working document used by the PR firm and UKAEA to assess and reassess those individuals who should be involved, and how, in certain aspects of the UKAEA's work and how best to approach them. In light of this explanation the Commissioner considers that the contact list could be considered as a 'shared working document' which both parties use and jointly provide information to, in order to keep the document up to date and relevant. However, as the UKAEA have confirmed that the information is obtained by the PR firm from their database and is created using the PR firms working knowledge of UKAEA's business he is willing to accept that the information is 'obtained' from the PR firm.
26. The requirements for a claim for breach of confidence are set out in the case of *Coco v Clarke*. A claim for breach of confidence can be established where:
- (1) the information has the necessary 'quality of confidence',
  - (2) was imparted in circumstances giving rise to an obligation of confidence, and
  - (3) there has been (or would be) an unauthorised disclosure of the information.

All three elements must be present for a claim to be made out

**The necessary 'quality of confidence'**

27. The Commissioner has had sight of the information withheld under section 41 and has carefully considered whether or not it had the necessary quality of confidence at the time of the request. Information will have the necessary quality of confidence if it is not otherwise accessible, or if it is more than trivial. Information which is known only to a limited number of individuals will not be regarded as being generally accessible, though will be if it has been disseminated to the general public. Information which is of importance to the confider will not be trivial.
28. The Commissioner accepts that the information is not trivial, however this is only one aspect to the quality of confidence and emphasis should also be placed on

whether the information in the contact list is otherwise accessible. The Commissioner considers that some of the information is common knowledge in relation to who the stakeholders are who would likely be involved or consulted in relation to the work undertaken by UKAEA, however he does accept that information on their actions to date or planned actions in this role is now otherwise accessible. In deciding whether the information has the necessary quality of confidence the Commissioner considers this to be a borderline case. Whilst it is possible some of the information might be common knowledge it is clear that not all of it is.

29. UKAEA explained that none of the information, in the form it is held, is available in the public domain. Whilst the fact that an individual MP is an MP for a given constituency is in the public domain the fact that he or she may be on a contact list is not. The information is important to the UKAEA as part of its strategy for engagement with stakeholders and should not be dismissed as trivial. The PR firm also explained that it is important to them as part of their professional product, the sort of information that an employee would be barred from copying if they were resigning to join another company. The Commissioner does not accept that copyright restrictions are a relevant factor in considering whether the information has the necessary quality of confidence.
30. After careful consideration the Commissioner finds that although some information about UKAEA's contacts may be in the public domain, this specific information and organised in this way is not in the public domain. He is therefore satisfied the necessary quality of confidence has been met in this case.

### **Obligation of confidence**

31. The Commissioner has also considered whether the withheld information was imparted in circumstances giving rise to an obligation of confidence. UKAEA contend that the information was supplied under a contract and is subject to restrictions on its use. UKAEA also argue that it is an implied term of any contract that there will be an underlying trust between parties without which normal commercial interchange would be severely constrained. Specifically UKAEA explained the terms of the PR firm's contract stated that 'all recommendations, proposals and reports submitted by the consultancy to the client shall be confidential to the client and shall not be disclosed to a third party without the written permission of the consultancy'.
32. The Commissioner finds that that is not clear that the contact list falls within the definitions listed in the contract. He considers that it is not reasonable to assume that this confidentiality clause would apply to information supplied to the UKAEA, telling it who its stakeholders are and when they have or should be contacted. It is reasonable to assume that the UKAEA would use this information as they see fit as the client and may publicly disclose who their stakeholders are and their relationship with them as necessary. The Commissioner therefore finds that the withheld information was not imparted in circumstances giving rise to an obligation of confidence



## Detriment

33. Although not a pre-requisite in every case the Commissioner has considered whether there would be a detriment to the PR firm in the event that such information was to be disclosed.
34. UKAEA provided further information explaining how disclosure of the information would be of detriment to the PR firm. It explained that the PR firm's competitors could benefit commercially from access to the information as it shows their knowledge and skill as a political strategy company. The contact list was put together using the firm's resources and knowledge of the key people relevant to the UKAEA's sector; the PR firm's knowledge of how best to contact these people; and their knowledge of previous interaction between the UKAEA and the individuals. If this information were released into the public domain it could be accessed at no cost by current or potential commercial competitors and would put them in a strong position to outbid the PR firm. UKAEA explained that whilst anyone can look up contacts it takes knowledge and experience to identify the right contacts for the right organisation and the best way to approach such contacts. UKAEA believe that disclosure would force the PR firm to take legal action against it for breach of confidence.

However, the Commissioner considers that this type of contact list used would be a standard format PR firms use and he does not believe that the document alone would put rival bidders in a strong position to outbid. He also notes that the contact list is basic operational information about approaches and does not reveal a detailed insight into tactics or strategy. The Commissioner therefore finds that there would not be a significant detriment to the PR firm if the information were to be disclosed.

## Public interest defence

35. Although he has already found that the information was not imparted in circumstances that imported an obligation of confidence, for completeness the Commissioner has gone on to consider the public interest defence. A claim for breach of confidence can be successfully defended where there is a public interest which requires disclosure. There is an assumption that information should be withheld unless the public interest in disclosure outweighs the public interests in maintaining the confidence. If the Commissioner finds that the public interest defence overrides the duty of confidence then disclosure would not constitute an actionable breach of confidence.
36. In *Derry City Council v The Information Commissioner* EA/2006/014 the Tribunal interpreted a court of appeal decision (*London Regional Transport v The Mayor of London*). In this case the judge at first instance said that an exceptional case had to be shown to justify a disclosure which would otherwise breach a contractual obligation of confidence. The case then went to the court of appeal, who did not expressly overturn this view but left the question open and allowed disclosure. The Tribunal interpreted this as meaning:

- No exceptional case has to be made to override the duty of confidence that would otherwise exist.
  - All that is required is a balancing of the public interest in putting the information into the public domain and the public interest in maintaining the confidence.
37. UKAEA have stated that there is no public interest in disclosing information which would result in the PR firm taking legal action against it. UKAEA did acknowledge that disclosure would, to a limited degree, further the public understanding of the workings of the UKAEA and its PR firm and add to its accountability and transparency with the public. The Commissioner finds that there is a significant public interest in knowing who the UKAEA (as a major player in the UK nuclear industry) sees as stakeholders and their contacts with them. Disclosure would also enable greater transparency of the relationships UKAEA have with third parties. He does not consider that the detriment outlined by UKAEA, which would be caused by disclosure is a sufficient factor to support maintaining the confidence and outweigh the public interest in disclosure.
38. For all the reasons above the Commissioner finds that section 41 is not engaged.

## The Decision

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39. The Commissioner's decision is that the public authority has not dealt with the request for information in accordance with the Act:
- (i) The public authority breached section 1(1)(b) as it misapplied section 41 to the information being withheld.
  - (ii) The public authority breached sections 1(1)(b) and 10 by failing to provide disclosable information by the date of the complaint to the Commissioner.

## Steps Required

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40. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- (i) Disclosure the information withheld under section 41.
41. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.



## Right of Appeal

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42. 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 16th day of June 2008**

**Signed .....**

**Steve Wood**  
**Assistant Commissioner**

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