



## Ministry of Defence

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The Revd John Ainslie  
(Via e-mail to: [john.ainslie@banthebomb.org](mailto:john.ainslie@banthebomb.org))

28 February 2011

Dear Revd Ainslie,

### **FREEDOM OF INFORMATION ACT 2000 – INTERNAL REVIEW**

1. I am writing in response to your e-mail to me of 18 March 2010 in which you requested an internal review under the Freedom of Information Act 2000 (the Act) of this Department's handling of your request for 'A copy of the Defence Board Report (09)62 Future deterrent by Guy Lester, Cap DER. This report is mentioned in the agenda of the Defence Board meeting on 26 November 2009'. I have now conducted a review, looking at both the handling of your request and the substance of the response you received from the directorate of the Capability Director Equipment Resources (Cap DER). The purpose of this internal review is to consider whether the requirements of the Act have been fulfilled. The scope of the review is defined by Part VI of the Code of Practice under s45 of the Act, which can be found at: [www.foi.gov.uk/reference/impref/codepafunc.htm#partVI](http://www.foi.gov.uk/reference/impref/codepafunc.htm#partVI). I am sorry that I have very considerably overshot my target date for completing reviews and thank you for your patience.

#### **Handling**

2. In conducting my review of the handling of your request, I have focussed on the following requirements of the Act in particular:

- a. Section 1(1)(a) which, subject to certain exclusions, gives any person making a request for information to a public authority the entitlement to be informed in writing by the public authority whether it holds information of the description specified in the request;

- b. Section 1(1)(b) which, subject to certain exemptions, creates an entitlement to receive the information held by the public authority;
- c. Section 10(1) which states that, subject to certain provisions allowing extensions of time, the public authority must comply with the requirements of section 1(1) promptly, and in any event not later than the twentieth working day following the date of receipt;
- d. Section 17(1) which states that, where it claims that information is exempt information, the public authority must, within the time for complying with section 1(1), give the applicant a notice which states the fact, specifies the exemption(s) in question and states why the exemptions applies;
- e. Section 17(2) which states that the notice under section 17(1) must, if applicable, state that a decision has not yet been made whether the public interest in maintaining an exemption outweighs the public interest in disclosing the information and give an estimate of the date that the authority expects such a decision will be made;
- f. Section 17(3)(b) which states that, where the public interest in maintaining the exemption outweighs the public interest in disclosing the information, the public authority must state the reasons for claiming this.

3. Your request for information was received on 8 January 2010; a substantive response was therefore due not later than 5 February 2010. You were sent a response on the twentieth day informing you that the MOD held the information related to your request but that it fell within the scope of the following qualified exemptions: section 24 (national security), section 26 (defence), section 27 (international relations), section 35 (formulation of government policy), and section 43 (commercial interests), and as such it was necessary to take a further 20 working days in order to complete the testing of the public interest in relation to these exemptions. The letter also referred to the potential application of the use of the absolute exemption at section 41 (information provided in confidence) and advised you of your right to appeal to the Head of Corporate Information for an independent internal review to be conducted and, if you remained discontent following the internal review, to appeal to the higher authority of the Information Commissioner in accordance with section 50(1) of the Act.

4. The Department's substantive response was sent to you on 5 March 2010 (40 days from receipt of the request). Given the need to test the public interest in relation to several qualified exemptions, I am satisfied that it was reasonably prompt. You were again advised of your rights to appeal in this letter. Although it explained that the balance of the public interest lay in the application of a section 35 exemption, the response lacked explanation for the use of other exemptions at sections 26, 27, and 43. The response should also have included explanation of where the balance of the public interest lay in relation to the application of each of these exemptions. I am sorry for these failures to comply with the Act. In summary, your response was not handled fully in accordance with the legislation.



## Substance

5. As part of this internal review I have considered the application of exemptions from first principles and have concluded that the application of the section 35 exemption, which provides for the withholding of information relating to the formulation of government policy, was inappropriate. The renewal of the nuclear deterrent with a successor Ship Submergible Ballistic Nuclear (SSBN) armed with Trident missiles had already been decided upon and approved by Parliament, and Initial Gate for the successor SSBN was the first key milestone in implementing the policy. In November 2009 the Defence Board considered the report to which you refer. The report consisted of a number of documents relating to the programme:

- the covering paper entitled *Successor Submarine Project Update* by Cap DER, dated 24 November 2009;
- Annex A - *Successor Submarine Project Review Note* by Hd DUW and Hd FSM dated 23 July 2009;
- Appendix 1 - *FSM Platform & NP Extension Of Concept Phase – Costs Of Options*;
- Annex B - *Submarine Concept Options*;
- Annex C - *Successor SSBN: Safety Regulator's Advice On The Selection Of The Propulsion Plant In Support Of The Future Deterrent Review Note* by DNSR, dated 4 November 2000.

6. I have concluded that the use of the section 36 exemption would have been more appropriate than section 35 in this case, as release would be prejudicial to the effective conduct of public affairs. I have set out below a more detailed explanation of the application of the section 36 exemption, together with an explanation of the use of other appropriate exemptions at sections 26, 27, 40 and 43 of the Act.

### Use of Section 26

7. Section 26(1) of the Act provides that information is exempt if its disclosure would, or would be likely to, prejudice (a) the defence of the British Islands or any colony, or (b) the capability, effectiveness or security of any relevant forces. The redacted information relates to the various technical options being considered in relation to the SSBN as part of Initial Gate. Its disclosure would threaten the present credibility and assuredness of the UK's SSBN programme which is part of the wider UK nuclear deterrent. Release of this information would adversely affect our defence activities in that it would permit the identification of relative vulnerabilities and weaknesses in our submarine programme and the development of an optimum plan of attack. The exemption at section 26 is qualified and the balance of the public interest must be considered. Release of the information in the interests of furthering public understanding of the delivery of the UK's nuclear deterrent has to be weighed against both the threat to defence that such a release would pose and the safety/effectiveness of the relevant forces deployed on defence activities. I have concluded that the balance of the public interest lies in favour of withholding the

information in the interests of maintaining the effectiveness of the UK's defences under section 26(1)(a).

#### Use of Section 27

8. Section 27(1)(a) of the Act provides that information is exempt if its disclosure would, or would be likely to, prejudice relations between the UK and any other State. MOD recognises that there is public interest in the extent to which the UK co-operates with partners on nuclear matters and release of the information would provide greater understanding, openness and transparency about the nature of that co-operation. However, given the level of defence co-operation between UK and other states, release of the information would undermine the trust and confidence that exists between the UK and her allies, potentially reducing the future exchange of technology and data, and so adversely impacting upon the SSBN project and the UK's defence capability itself. The balance of the arguments is thus in favour of withholding this information. I regret that I cannot provide any further explanation since to do so would necessarily involve the disclosure of exempt information.

#### Use of Section 36

9. Some of the information is withheld with reliance on the exemption at section 36(2)(b), which provides that information is exempt if, in the reasonable opinion of a qualified person, disclosure of the information would, or would be likely to, inhibit the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation. The assessment of the Defence Nuclear Safety Regulator (DNSR) is crucial to the success of the future SSBN programme and it is essential that they are able to express their views in as free and frank a manner as possible. If the regulators became aware that their assessments could be published, they could be less willing to express their views. I believe that assessments of this type need to be unrestrained, frank and candid if they are to be fully effective. I am satisfied therefore that releasing some information in the Safety Regulator's Advice paper (Annex C to the Defence Board report (09)62) would be likely to inhibit the provision of free and frank advice to the Board, and that section 36(2)(b)(i) of the Act is therefore engaged in relation to it. In doing so, I have taken into account the fact that this information is the subject advice from the regulator rather than regulatory findings derived from an inspection that the regulator has regulatory powers to undertake. In the latter circumstances there is likely to be a stronger public interest in disclosure.

10. With regard to the other documents that are in scope of your request, I am satisfied that releasing some of the information would be likely to inhibit the free and frank exchange of views for the purposes of deliberation where officials need space in which to express their views and identify areas of concern, free from external scrutiny and pressure to dilute such assessments for public consumption and that consequently the exemption at section 36(2)(b)(ii) applies.

11. The use of the exemption under section 36 of the Act is subject to an assessment of the balance of the public interest. I recognise that there is a strong public interest in the disclosure of information which would enhance an understanding of decision-making regarding the renewal of any equipment



associated with the UK's nuclear deterrent, including insight into the public expenditure implications and the decisions at Initial Gate stage, particularly where the Concept Phase been extended. However, the Initial Gate decision has yet to be made by officials and Ministers and there remains ongoing work in advance of a decision. It is very much in the public interest that the Defence Board has the necessary space to engage in free and frank discussion - and the DNSR free and frank provision of advice - including identifying further areas of work before achieving Initial Gate, without concerns that their views will be subject to public scrutiny. Moreover, the public interest in disclosing details of the SSBN project is met by the proactive publication of information detailing the decision on the Initial Gate when work is complete. The Defence Board is equally pro-active in its publication of a summary of its meetings on the Defence website and through Ministers is accountable to Parliament. On balance, I judge that the public interest is clearly in favour of use of the section 36 exemption and withholding some relevant information within the documents requested.

12. The use of section 36 of the Act requires the prejudice to the effective conduct of public affairs to be established "in the reasonable opinion of the qualified person". The Secretary of State is such a person, and has formed the opinion that disclosure of the information would be likely to inhibit the free and frank exchange of views for the purposes of deliberation - and, in the case of the propulsion paper, the free and frank provision of advice.

#### Use of Section 43

13. Section 43(2) provides that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interest of any person, including the public authority holding the information. I recognise that that there is a general public interest in disclosing information about public expenditure and that release of information in these documents would provide a greater understanding of forecast costs relating to the future SSBN project. However, its release would be likely to damage MOD's position in the commercial sector. It would risk prejudicing the letting of future commercial contracts at a competitive rate generally and the pursuit of possible commercial options in this specific project given that the data held in the scope of your request held relates to a project that is still only at the Initial Gate stage. I therefore find that the balance of the public interest lies in withholding the commercially sensitive information because it would jeopardise the MOD's commercial position in relation to this and other commercial projects.

#### Use of Section 40

14. I am satisfied that a small amount of personal information within the documents you requested falls within the scope of section 40(2) of the Act in accordance with the Department's policy on the protection of the identity of junior officials. This is an absolute exemption with no requirement to consider the balance of the public interest.

## **Disclosed Information**

15. In light of the above and in accordance with section 1(1)(b) I am releasing to you the information within scope of your request that is not subject to any of the exemptions which I have explained above. This amounts to a version of the report that is less redacted than the version sent to you previously.

16. I note your concern about whether it would have been more appropriate for this request to have been dealt with under the requirements of the Environmental Information Regulations (EIR) 2004. As you know, the EIR and the Act both give a general right of access to recorded information (subject to various exemptions/exceptions) and a general right of appeal to the Public Authority and a further right of appeal to the Information Commissioner. I consider that the engaging of the exceptions in the EIR rather than the exemptions in the FOI Act would have made no difference to the outcome of this request.

## **Conclusion**

17. In summary, I find that:

- Your request for information was not handled fully in accordance with the Act, for which I have apologised;
- Some information is withheld under sections 36(2)(b)(i) and 36(2)(b)(ii);
- In addition, some information is withheld on the basis of the exemptions at 26(1)(a), 27(1)(a), 40(2) and 43(2);
- A less-redacted version of the information requested is provided herewith.

18. If any aspect of this review is unclear, I should be happy to explain it. If you are dissatisfied with the review, you may make a complaint to the Information Commissioner under the provisions of section 50 of the Act. Further details of the role and powers of the Commissioner can be found on his website at: [www.ico.gov.uk](http://www.ico.gov.uk). His address is: Information Commissioner's Office, Wycliffe House, Water Lane, WILMSLOW, Cheshire, SK9 5AF. Fax 01625 524 510.

*yours sincerely,*  
*Katie deSoucie*