

**Freedom of Information Act 2000 (FOIA)**  
**Environmental Information Regulations 2004 (EIR)**  
**Decision notice**

**Date:** 11 September 2014

**Public Authority:** Ministry of Defence  
**Address:** Main Building  
Whitehall  
London  
SW1A 2HB

**Decision (including any steps ordered)**

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1. The complainant submitted a request to the Ministry of Defence (MOD) for information about its discussions with the University of St Andrews concerning the latter's proposed development of six wind turbines and the impact of this development on the radar systems at RAF Leuchars.
2. The MOD withheld the requested information on the basis of regulations 12(5)(a) (national security and public safety) and regulation 12(5)(e) (confidentiality of commercial information) of the EIR.
3. The Commissioner's decision is that the requested information is exempt from disclosure on the basis of regulation 12(5)(e) and that in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information. The Commissioner has, however, concluded that the MOD breached regulation 11(4) by failing to complete the internal review within 40 working days.

## Background

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4. This request focuses on a planning application submitted by the University of St Andrews (the University) to erect six wind turbines on land at Kenly Farms, Fife. The MOD initially objected to the application because of the interference the turbines would cause to the radar systems at RAF Leuchars. However, the University worked with the MOD to produce a proposal to mitigate the impact on the radar systems and also to agree a draft planning condition.
5. The Scottish Government granted the planning application in October 2012 subject to 40 conditions. The eighteenth condition required the University to submit a 'Radar Mitigation Scheme' to both the planning authority and the MOD; this scheme then had to be approved by the latter two parties. This scheme needed to set out the appropriate measures needed to mitigate the impact of the proposed wind turbines on the radar system at RAF Leuchars.
6. The complainant's request relates to information provided to the MOD for the purpose of agreeing to the radar condition as set out in the planning decision. That is to say the requested information is distinct from the Radar Mitigation Scheme itself.
7. The withheld information consists of a report produced by an aviation consultant (the consultant) which sets out a radar mitigation proposal for the MOD to consider. This report was commissioned by the University.

## The Request and response

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8. The complainant submitted the following request to the MOD on 8 October 2013:

*'This application [Fife Council Planning Reference 11/02799/EIA] was granted on appeal by a Scottish Government Reporter this week. It is subject to a "radar condition" (No 18) and the decision is attached.*

*In your letter to Fife Council of 5 July 2012, you stated that the "applicant has worked with the MoD to produce a proposal to mitigate the unacceptable effects of the development on the radar at RAF Leuchars".*

*Please provide under the Freedom of Information (Scotland) Act 2005, or alternatively under the Environmental Information (Scotland)*

*Regulations 2004 information disclosing what the nature of the proposal is; how it will work; and how it will serve to mitigate the unacceptable effect of the radar at RAF Leuchars.'*

9. The MOD responded on 6 November 2013 and confirmed that it held the requested information but considered it exempt from disclosure on the basis of the exemptions contained at sections 41 (information provided in confidence) and 43 (commercial interests) of FOIA.
10. The complainant contacted the MOD on 10 November 2013 and raised the possibility of informally resolving this matter.
11. Having received no further response from the MOD, the complainant contacted it again on 10 December 2013 to ask for an internal review of its decision to withhold the information he had requested.
12. The MOD acknowledged receipt of his request for an internal review on 6 January 2014. The MOD sent him further updates, the last one being on 4 March 2014, explaining that it needed further time to complete the internal review.
13. The MOD informed the complainant of the internal review on 2 May 2014. The review concluded that the requested information constituted 'environmental information' as defined by the EIR and thus the request should be considered under that access regime rather than under FOIA. The MOD concluded that the requested information was exempt from disclosure on the basis of regulation 12(5)(e) of the EIR.

### **Scope of the case**

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14. The complainant initially contacted the Commissioner on 12 March 2014 to complain about the MOD's failure to provide him with the information he requested and indeed its failure to complete the internal review. The focus of the Commissioner's investigation has therefore been to determine whether the information is exempt from disclosure under the EIR. During the course of the Commissioner's investigation, the MOD explained that it also considered the withheld information to be exempt from disclosure on the basis of the exception contained at regulation 12(5)(a) in addition to regulation 12(5)(e).

## Reasons for decision

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### The definition of environmental information

15. Regulation 2(1) of the EIR provides a definition of environmental information. Regulations 2(1)(a) to (c) state that 'environmental information' is information 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;'*

16. In the internal review the MOD explained that it considered the withheld information to fall within the description of environmental information at regulation 2(1)(c). This was because the information related to activities pursuant to determining planning permission consent for a wind farm and it was undeniable that the granting of planning permission will have an impact on the state of the landscape in the region of the wind farm site.
17. The Commissioner agrees that this request should be considered under the EIR for the reasons set out by the MOD.

### Regulation 12(5)(e) – confidentiality of commercial information

18. This regulation states that a public authority may refuse to disclose information to the extent that its disclosure would affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
19. In order for the exception to be engaged, four criteria must be met:

- The information is commercial or industrial in nature.
- Confidentiality is provided by law.
- The confidentiality is protecting a legitimate economic interest.
- The confidentiality would be adversely affected by disclosure.

20. The Commissioner has set out below the MOD's submissions to justify why this exception is engaged and then summarised his position in relation to this exception.

### The MOD's position

21. With regard to the first criterion the MOD explained that the withheld information, ie the report, was commissioned by the University as part of a commercial undertaking, from the consultant. Furthermore, it explained that the information in the report set out the consultant's unique methodology for how the University can successfully develop a wind farm that meets the planning restrictions set by the MOD in relation to military radar coverage.

22. With regard to the second criterion the MOD explained that the consultant provided the report to it with an explicit expectation that it would not be shared with third parties without the consent of the consultant. This is reflected in the following statement in the report itself:

*'You [ie the University] are authorised to open and view any electronic copy we [the developers] send you of this document within your organisation and to print a single copy. You are authorised to print and distribute copies to the appropriate to the MOD. Otherwise the material may not in whole or in part be copied, stored electronically or communicated to third parties without the prior agreement of [the consultant].'*

23. The MOD also argued that although the information had been provided to it by the consultant, there was also an implied duty of confidence to the University that it would not share information received from the University as part of the planning consent process without their consent. Moreover, the MOD explained that although there was information in the public domain about this project, this did not include the information which was the focus of this request.

24. With regard to the third criterion, the MOD argued that disclosure of the withheld information would prejudice the commercial interests of the consultant. This was because although the technical mitigation solutions in the report are to a certain extent bespoke to this particular wind farm, the report contains technical solutions which are unique to the consultant and which will provide its competitors with useful information

about mitigation solutions which could be used at other wind farm sites. Acquisition of such information would save competitors time and effort in research which would put them at a commercial advantage in any competition to provide advice on future developments.

25. The MOD also argued that disclosure of the withheld information would prejudice the interests of the University. This was on the basis that other wind farm developers could use the mitigation proposal (if accepted) to advance and secure their planning applications where similar radar objections exist. Therefore, other wind farm developers could gain a commercial advantage as they would have access to commercially valuable information that would save them time and money on preparing their own mitigation solutions. The MOD argued that disclosure of the information would reveal the exact location of the proposed mitigation solution, and its viability, and this would also harm the University's commercial interests.

#### The Commissioner's position

26. With regard to the first criterion, the Commissioner's view is that for the information to be commercial in nature it will need to relate to a commercial activity, either of the public authority or of a third party. A commercial activity will usually involve the sale or purchase of goods and services, usually for profit. As the requested information consists of a report which was commissioned by the University from the consultant it is clearly information which relates to a commercial activity. Furthermore, the Commissioner also accepts that the information can be described as commercial in nature given that it details the consultant's unique technical solution for mitigating the effect of wind farms on aviation radar.
27. With regard to the second criterion, the Commissioner accepts that confidentiality provided by law can include a confidentiality imposed on any person by the common law duty of confidence, contractual obligation, or statute.
28. In the circumstances of this case the Commissioner is satisfied that, in light of the comment in the report as quoted above, the consultant had an explicit expectation that the withheld information would not be disclosed by the MOD. Furthermore, the Commissioner accepts that given the nature of the withheld information it has the quality of confidence given that it is not publicly available and is clearly more than trivial. Therefore, the Commissioner accepts that the second criterion is met.
29. With regard to the third criterion, the Information Rights Tribunal confirmed that to satisfy this element of the test, disclosure of the

confidential information would have to adversely affect a legitimate economic interest of the person to whom the confidentiality is designed to protect. It is not enough that disclosure might cause harm to an economic interest; rather a public authority needs to establish that disclosure would cause harm. That is to say, the likelihood of harm occurring is more probable than not.

30. The Commissioner recognises that legitimate economic interests could relate to retaining or improving market position, ensuring that competitors do not gain access to commercially valuable information, protecting a commercial bargaining position in the context of existing or future negotiations, avoiding commercially significant reputational damage, or avoiding disclosures which would otherwise result in a loss of revenue or income.
31. Having considered the MOD's submissions, and the content of the withheld information, the Commissioner is satisfied that disclosure of the information would harm the commercial interests of the consultant. In the Commissioner's opinion it is reasonable to argue that a competitor of the consultant could draw upon the mitigation solution proposed in the withheld report and use that commercial intellectual capital to advance their own work. In the Commissioner's opinion it is clear that such a position would result in the consultant losing their competitive advantage in relation to this technology. In terms of the likelihood of this harm occurring, the Commissioner recognises that the number of companies capable of supplying solutions that allow wind farms to be deployed in close proximity to civilian and military radar sites is small, albeit that the size of the renewable energy sector is significant. Consequently, potential competitors to the consultant would be highly likely to find the withheld information of particular use.
32. However, the Commissioner is not persuaded that disclosure of the withheld information would harm the commercial interests of the University in the manner described. Whilst the Commissioner does not doubt that other wind farm developers who face similar mitigation issues in terms of interference with aviation radar would find the withheld report to be of interest, it seems highly unlikely that the report could be used on its own to advance and secure their own planning applications. Rather any planning application process – and consultation with the relevant air traffic control operators – would presumably require details of any mitigation proposals to be detailed and specific to any site proposed by other developers. This would presumably still require other developers to contract, as the University has done, their own consultants to design a sufficiently robust mitigation solution that fits their particular wind farm. Consequently access to the withheld information seems unlikely to save other developers particularly time or money.

33. In any event, even if other wind farm developers could utilise the withheld information in the way envisaged, the Commissioner does not accept that such a position would necessarily result in the University suffering any commercial detriment as a result. The University has already incurred the cost of commissioning this report; if another developer were to make use of this report, whilst this may save that developer money, such a situation does not automatically mean that the University is itself at a commercial disadvantage.
34. Furthermore, based upon the submissions he has received, the Commissioner is not at all clear how disclosure of the exact location of the proposed mitigation solution, and its viability, would directly impact on the University's commercial interests.
35. Nevertheless, for the reasons set out above, the Commissioner is satisfied that the third criterion is met because disclosure of withheld information would harm the commercial interests of the consultant.
36. With regard to the fourth criterion, in the Commissioner's opinion once the first three criteria are met it is inevitable that the fourth criterion will also be met. This is because disclosure of truly confidential information into the public domain would inevitably harm the confidential nature of that information by making it publicly available, and would also harm the legitimate economic interests that have already been identified.

### **Public interest test**

37. Regulation 12(5)(e), like all of the exceptions contained within the EIR, is a qualified exception and therefore the Commissioner must consider whether the public interest in maintaining the exception outweighs the public interest in disclosing the requested information.

### **Public interest in favour of maintaining the exception**

38. The MOD advanced the following arguments to support its position that the public interest favoured maintaining the exception:
39. It argued that it was not in the public interest that those who are consulting with it on a private matter are unable to rely on the ability of public authorities to maintain the confidentiality of information provided to them.
40. It was not in the public interest to undermine the commercial position of the consultant who produced the report.
41. The MOD explained that discussions regarding the radar mitigation scheme remained ongoing. Disclosure of the withheld information at this stage could disrupt such discussions by making the University less



willing, or less candid, in the information it shares with the MOD. A reduction in the quality and quantity of information exchanged would impede the University's ability to work with the MOD and this would not be in the public interest.

42. The MOD emphasised that the planning application in question is dependent on an acceptable radar mitigation scheme being submitted by the University. The MOD argued that it may be the case that the scheme which is ultimately submitted is different from the proposed scheme set out in the report. It would not be in the public interest to disclose the withheld information as this may not be determinative in the process of deciding whether the MOD would recommend to the planning authority that the radar condition could be discharged.
43. More broadly, the MOD argued that withholding the requested information would contribute to preserving the principle of confidentiality; this was inherently in the public interest.
44. More specifically, the MOD explained that it was always willing to work with developers – even if it objects to a planning application – to try and mitigate the effects of the development on military operations and assets. Such discussions rely on developers providing the MOD with commercially sensitive information on the understanding that it will be kept confidential and this level of trust is vital for this process to work. Disclosure of the withheld information would begin to undermine third parties' confidence in the MOD's willingness and ability to protect their commercially sensitive information.

### **Public interest in favour of disclosing the withheld information**

45. The MOD acknowledged that there is a public interest in the disclosure of the withheld information as part of the wider transparency which already exists to provide public confidence in the propriety and regularity of the planning consent process in respect of approvals for wind farms. Disclosure would inform public debate on wind farm development issues and provide transparency in relation to the types of mitigation solutions required to ensure that military and civilian air traffic radar is not degraded by the construction of wind farms. Disclosure would also provide assurance on the related public safety and security issues concerning such arrangements. Finally, disclosure could provide future wind farm developers with information which could assist their understanding of the nature of mitigation solutions potentially acceptable to the MOD. This could improve the quality and efficiency of their own submissions in future planning processes.
46. The complainant argued that the use of a radar mitigation scheme to remove the MOD's previous objection to this development is an issue

that is very much in the public interest given that the scheme sits at the heart of the protection and safety of members of the public which the condition is designed to serve. He also argued that if the scheme is to be deployed, then presumably the MOD is of the view that it works. If it works the public must be entitled to know and see how it works to remove, lessen or obviate the known detriments to air defence and air traffic radar.

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

47. The Commissioner believes that the various public interest arguments in favour of disclosure identified by both the MOD and the complainant should not be dismissed lightly. Disclosure of the withheld information could – as the complainant emphasises – provide local residents with a greater understanding as to why the MOD removed its previous objection to the wind farm development (subject of course to the requirements of the relevant planning condition being met). Given the public safety considerations involved in the Commissioner's view this line of argument attracts significant weight. More broadly, the Commissioner agrees that there is a wider public interest in the disclosure of the information as it would not only assist other wind farm developers who may be considering locations near MOD assets, but arguably more importantly, it could also help increase public awareness and potentially inform public debate surrounding the development of wind farms and their impact on aviation activities.
48. However, the Commissioner believes that the extent to which disclosure of the withheld information could serve this first interest – ie informing residents as to why the MOD withdrew its objection – is, to some extent, limited by the fact that some parts of the report which explain how the mitigation proposal will actually work are technical in nature. More broadly, the Commissioner believes that the public interest in disclosure of the withheld information is also, limited to some degree given that as the MOD has explained the withheld information only constitutes information provided to it for the purpose of agreeing to the radar condition. The actual radar mitigation scheme to be submitted by the University may be different from that contained in the radar mitigation report. As discussions regarding the radar mitigation scheme remain ongoing it is not simply the case that disclosure of the withheld information will provide the public with details of the radar mitigation scheme, and it is that scheme which is necessary for planning condition 18 to be met.
49. With regard to the public interest arguments in favour of maintaining the exception, the Commissioner does not consider that it is in the public interest that third parties (such as the consultant) have their commercial interests harmed simply because they have entered into

contracts with a public body (in this case the University). The Commissioner believes that this argument should be given significant weight. Moreover, the Commissioner considers that there will always be some inherent public interest in maintaining the principle of confidentiality and the relationship of trust. In the particular circumstances of this case the Commissioner considers that this argument should be given additional weight given that the MOD has demonstrated how disclosure of the withheld information would undermine not only its ongoing relationship with the University in relation to this particular development but also with other developers in the future.

50. In conclusion, the Commissioner accepts that there are strong public interest arguments in favour of disclosure of this information. However, he considers these to be outweighed by cumulative negative impact of disclosure on the commercial interests of the consultant, the potential impact on the nature of the negotiations between the MOD and the University in relation to this planning application and the wider impact on how other developers engage with the MOD in the future.
51. In light of the Commissioner's findings in relation to regulation 12(5)(e) he has not gone on to consider the MOD's reliance on regulation 12(5)(a).

### **Regulation 11 – representations and reconsiderations**

52. Regulation 11(4) requires a public authority to inform a requestor of the outcome of an internal review within 40 working days. In this case the complainant requested an internal review on 10 December 2013. However, the MOD did not inform him of the outcome of the internal review until 2 May 2014. The Commissioner therefore finds that the MOD breached 11(4) by failing to complete the internal review within 40 working days.

## Right of appeal

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53. 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)

54. 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.
55. 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 .....**

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