

Freedom of Information Act request for copies of correspondence / reports between NDA and DECC regarding NDA's recent work on management of UK plutonium.

Original Request

Dear Sir/Madam

Under the FoI Act, I would like to request copies of the correspondence/reports between the Nuclear Decommissioning Authority and the Department for Energy and Climate Change regarding the conclusions of the work the NDA has recently undertaken into the management of the UK's separated plutonium stocks. Details of this work and conclusions have been briefly mentioned on the NDA website:

<http://www.nda.gov.uk/news/pu-stocks.cfm>

I look forward hearing from you in the near future.

Regards

Response

REQUEST UNDER THE FREEDOM OF INFORMATION ACT 2000/ ENVIRONMENTAL INFORMATION REGULATIONS 2004

I am writing in response to your request of 22 August for "copies of the correspondence/reports between the Nuclear Decommissioning Authority and the Department for Energy and Climate Change regarding the conclusions of the work the NDA has recently undertaken into the management of the UK's separated plutonium stocks".

I can confirm that the Department holds the information referred to. The information comprises a covering letter from NDA to DECC, an appendix to that letter, a draft public position statement and a main report. Your request has been considered under the terms of the Freedom of Information (FOI) Act 2000 and to the extent that the information in question constitutes "environmental information" then under the Environmental Information Regulations 2004 (EIRs).

In line with your request a copy of the covering letter, but not the appendix, from NDA to DECC is enclosed with this response. It has been redacted only to prevent disclosure of the names of junior officials, in line with Government policy to protect personal information.

With this exception, we are withholding the information you have sought. This letter explains the grounds on which we have based this decision.

The main report and the appendix to the letter were not intended for release into the public domain as they were prepared specifically for DECC's consideration as part of our policy development process. Instead the public position statement was drafted to

ensure that relevant information was available for publishing in the public domain. Our intention is that when DECC has had an opportunity to consider the NDA advice, the NDA will publish a final version of the public position statement.

There are a number of exemptions under the FOI Act and exceptions under the EIRs which we consider apply to this information.

(i) Section 35 of the FOI Act and regulation 12(4) (e) of the EIRs

The current draft public position statement, the main report and the appendix to the letter comprise information for our consideration, which is intended to aid our development of policy on plutonium management. We consider that the information, therefore relates to the formulation or development of government policy in the field of plutonium management and that section 35(1) (a) of the FOI Act applies.

To the extent that the information constitutes environmental information we consider that regulation 12(4) (e) of the EIRs “internal communications” applies. Regulation 12(4) (e) provides that a public authority may withhold information where the request involves the disclosure of internal communications. On this particular issue DECC is developing its policy on plutonium management and has asked the NDA to directly assist it in providing technical input into the policy process. In this regard given the NDA’s role in directly participating in DECC’s policy formulation process we consider that the information in question constitutes internal communications.

In any event you should note that regulation 12(8) of the EIRs goes on to say that internal communications includes communications between government departments. It does not limit the scope of the exception to communications between government departments. Further Article 2(2) of the Directive on which the regulations are based suggests the scope of the exception to be communications internal to the whole area of the state covered by the definition of public authority.

Both Section 35 of the FOI Act and regulation 12(4) (e) of the EIRs are subject to the public interest test and similar public interest arguments will apply to both provisions. There is a public interest in transparent decision making as this increases trust and engagement between citizens and the general public. Furthermore open policy making can result in better policy formulation as a wider range of views and opinions may be canvassed.

However officials need a free space in which to develop their thinking and, in this case, to explore options through discussions with the NDA freely and frankly and the NDA needs to be able to provide private and frank advice to DECC. Officials also need to be able to think through the implications of particular options and to be able to undertake rigorous and candid assessments of the benefits and risks of particular options without the undue influence that disclosure in this case might bring.

For these reasons we consider that the public interest, in respect of this exemption and exception, lies in withholding the information from disclosure.

(ii) Section 22 of the FOI Act and regulation 12(4) (d) of the EIRs

When we have concluded our internal deliberations the intention is for the public position statement to be published by the NDA. For that reason this public position

statement is also being withheld under Section 22 of FOI Act, which relates to the disclosure of information intended for future publication.

Section 22 of the FOI Act is also subject to the public interest balancing test. In taking this decision we recognise the public interest in disclosure of the information and acknowledge that there may be some interest in the information being available sooner. However, there is a high public interest in permitting public authorities to publish information in a manner and form and at a time of their own choosing. It is part of the effective conduct of public affairs that the publication of information is conveniently planned and managed and within the reasonable control of public authorities. This is particularly the case where the information in question covers a complex issue as is the position here.

Additionally it is also important that the publication of the material in question does not undermine any relevant pre-publication procedures. In this regard DECC, as the sponsoring Department for the NDA, and the Department which sets the policy for plutonium management in the UK, needs to be able to provide its input in a timely and considered way into any public position statement that is ultimately published. Premature publication of the information in response to an FOI request is likely to impact on this process.

We also consider to the extent that this piece of information constitutes environmental information then the exception in regulation 12(4) (d) of the EIRs would apply in that the request so far as the draft public position statement is concerned relates to material which is still in the course of completion.

Regulation 12(4) (d) is also subject to the public interest test. There is a general public interest in the disclosure of environmental information. However the public position statement is being drafted in the context of DECC and the NDA deliberating the options put forward and in formulating further policy on plutonium management. A safe space, away from public scrutiny, is required in order to carry out these deliberations effectively which disclosure of the draft position paper (which will refer to those options) before it is finalised would jeopardise.

Finally we can see no overwhelming public interest arguments for the premature disclosure of this information and for these reasons we consider that the public interest as far as section 22 of the FOI Act and regulation 12(4)(d) lies in withholding the information.

(iii) Section 43(2) of the FOI Act and regulation 12(5) (e) of the EIRs

The main report and the appendix to the letter contain NDA's views on the commercial viability of the various technical options being considered and their assessment of the potential markets able to offer a solution for management of plutonium, including estimated costs of implementing the options and to release this information would prejudice its commercial interests under section 43(2) of the FOI Act.

Further, the costs and approaches developed by each of the technology providers along with the individual's party's figures are contained in the information which has been requested. If this information was released, it again would be likely to prejudice their commercial interests and that of the NDA in any potential competitive process.

Some of the advice also relates to aspects of NDA commercial business regarding management of third party owned material. Again, the disclosure of this information would prejudice the commercial interests of the NDA and section 43(2) of the FOI Act would apply.

To the extent that the information constitutes environmental information we consider that regulation 12 (5) (e) of the EIRs would apply in that its disclosure would adversely affect the “confidentiality of commercial or industrial information, where such confidentiality is provided by law to protect a legitimate economic interest”. The costs and approaches developed by each of the technology providers are covered by bilateral non-disclosure agreements which establish clearly the confidential nature of this information. In any event given the nature of the information concerned we consider that it would also be covered by the common law duty of confidence. Finally the previous paragraphs above (in relation to section 43) have already set out the nature of the commercial sensitivity of this information and this indicates that there is a legitimate economic interest to be protected in this case.

Section 43 (2) of the FOI Act and regulation 12(5) (e) are subject to the public interest test and similar public interest arguments will apply to both provisions. There is a public interest in the disclosure of commercial information in order to ensure that there is transparency in the accountability of public funds and that public money is being used effectively.

However there is a very high public interest for withholding this information. If the information were released it is less likely that that the individual companies concerned and others would provide the NDA or this Department with commercially sensitive information in the future. This would impede the NDA’s ability in carrying out its role effectively to consider properly the commercial viability of the technical options. Further as procurement is a likely part of securing a future plutonium disposition route, release of this information could threaten the NDA’s ability to secure value for money for UK taxpayers. This would be highly contrary to the public interest.

For the above reasons we consider that the balance of the public interest in respect of section 43(2) of the FOI Act and regulation 12(5) (e) of the EIRs lies in withholding the information.

(iv) Section 40(2) of the FOI Act and regulation 13(1) of the EIRs

As mentioned above we have redacted the names of junior officials, which constitute personal data, from the correspondence that we intend to disclose to you. Section 40(2) of the FOI Act and regulation 13(1) of the EIRs provide an absolute exemption for personal data which then falls to be dealt with under the Data Protection Act. Personal data of third parties can only be disclosed in accordance with the data protection principles. In particular, the first data protection principle requires that disclosure must be fair and lawful and must comply with one of the conditions in Schedule 2 of the Data Protection Act. We do not think that it is fair to release the names of junior members of staff and do not think that any of the relevant conditions apply.

In conclusion we consider that the above information is subject to exemptions under the FOI Act and exceptions under the EIRs and that the public interest in respect of

those exemptions and exceptions (where the public interest balancing test applies) lies in withholding the information in question.

Finally we should add that we consider that the publication of the public position statement will satisfy the public interest for the disclosure of information in this area.

Appeals procedure

If you are unhappy with the result of your request for information, you may request an internal review within two months of the date of this letter. If you wish to request an internal review, please contact: The Information Rights Team (DECC Shared Service), Department of Business, Innovation & Skills, Victoria 3, 5th Floor, 1 Victoria Street, London, SW1H 0ET. Email: foi@decc.gsi.gov.uk

Please remember to quote the reference number above in any future communications.

If you are not content with the outcome of the internal review, you have the right to apply directly to the Information Commissioner for a decision. The Information Commissioner can be contacted at: Information Commissioner's Office, Wycliffe House, Water Lane, Cheshire, SK9 5AF.

Yours sincerely,

Copy of redacted covering letter

Our Ref: ST/STY(13)0032

27 June 2013

Mr Mark Higson
Chief Executive, Nuclear Unit
Office for Nuclear Development
Department of Energy and Climate Change
55 Whitehall
London SW1A 2EY

Dear Mark

NDA advice to DECC regarding Management of Plutonium

As you are aware, over the last year NDA have been delivering a programme of work relating to the management of plutonium in the UK, in support of DECO as it develops its policy.

We committed to provide updated "Advice to DECC", and it is my pleasure to attach this deliverable, along with a proposed short public position statement which NDA intend to publish with your agreement. I believe the latter does not over commit us, but we believe it is important to continue working with potential technology providers to maintain the momentum and retain the confidence and trust we have built up with third parties in the event that a procurement exercise takes place. We intend to continue to scope out work with AREVA, Candu and GEH to support the compilation of a Justification application.

The main paper is by necessity relatively long and for your convenience, I attach the actual advice as appendix one of this letter.

I think it crucial that, after you have had time to consider the advice, and ideally ahead of any submissions being sent up to ministers, you and I get together for a comprehensive discussion on the way forward and how we can best support promulgation of our findings through Government and to this end I will ask my P.A. to arrange a two hour meeting in the next 3 weeks or so.

I trust this is satisfactory, and in addition would like to take the opportunity to thank DECC/ShEX staff, notably [REDACTED], [REDACTED], [REDACTED] and [REDACTED], for supporting us in delivering this important work.

Yours sincerely

Dr Adrian Simper
Director Strategy & Technology