Tribunals Service
Information Tribunal

Appeal Number: EA/2006/0065

Freedom of Information Act 2000 (FOIA)

Heard at Harp House, Farringdon Road, London, EC4
Decision Promulgated: 29 June 2007

BEFORE

INFORMATION TRIBUNAL DEPUTY CHAIRMAN
Mr David Marks
and
LAY MEMBERS
Paul Taylor
Roger Creedon

Between

Foreign and Commonwealth Office

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

Friends of the Earth

Additional Party

Representation:

For the Appellant: **Jonathan Swift of Counsel**
For the Commissioner: **Timothy Pitt-Payne of Counsel**
For the Additional Party: **Mr Philip Michaels, Solicitor**

Decision

The Tribunal allows the appeal of the Appellant and directs that the disputed information consisting of the following details with relation to discussions and correspondence between the Appellant and the US State Department between September and December 2003 inclusive at the levels of Secretary of State, Minister or Senior Civil Servants be not disclosed, namely the personnel involved on each side and the substance of such communication or communications.

Reasons for Decision

Introduction

1. This Appeal concerns the terms and operation of section 27 of the Freedom of Information Act 2000 (FOIA). That section deals with the exemption under FOIA which addresses international relations and provides in relevant part as follows, namely:

> "(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice –
>
> (a) relations between the United Kingdom and any other State,
>
> (b) relations between the United Kingdom and any international organisation or international court,
>
> (c) the interests of the United Kingdom abroad, or
>
> (d) the promotion or protection by the United Kingdom of its interest abroad.
>
> (2) Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.
>
> (3) For the purposes of this section, any information obtained from a State, organisation or court is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.
>
> (4) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) –

(a) would, or would be likely to prejudice, any of the matters mentioned in sub section (1), or

(b) would involve the disclosure of any information, whether or not already recorded, which is confidential information obtained from the State other than the United Kingdom or from an international organisation or international court.

2. This Appeal concerns primarily the provisions of section 27(1). Although some arguments were raised and observations were made about section 27(2) it is fair to say that the case has been argued for all intents and purposes with regard to the former section alone.

3. By way of preliminary comment, there has in this appeal been no reliance in the arguments regarding section 27(4) of FOIA: the principal issue between the parties given the prejudice-based test expressed in section 27(1) concerns whether or not the public interest in maintaining the exemption outweighs the public interest in disclosure.

4. During the appeal the Additional Party, namely Friends of the Earth (FOE), noted that it had not seen the information requested and set out a number of reasons why there was a real prospect that it could be environmental information which fell outside FOIA and fell within the Environmental Information Regulations 2004 (SI 2004 No. 3391) ("EIR"). FOE invited the Tribunal to rule on the issue. The Tribunal's decision on this issue will be dealt with below at paragraph 26 and following.

The request and its background

5. The appeal concerns events which occurred in late 2003 and the transportation to this country of what came to be called the "Ghost Ships", being various surplus US naval vessels, for the purposes of dismantling in this country. At that time and indeed since, public concern was expressed about not only the overall condition of the

vessels but also, and in particular, about the pollution and environmental risks which arose were the dismantling operations to be carried out. As matters stand, namely as at the date of the hearing of this Appeal, the vessels in question, being four in number, remain located in a port in the United Kingdom and have not yet been the subject of any dismantling operations.

6. A request was made by email dated 6 January 2005 by FOE to the FCO in the following terms, namely

"Please would you let us know whether the issue of the importation of the US Naval Vessels (Ghost Ships) was referred to in any discussions or correspondence between the FCO and the US State Department between September and December 2003 (inclusive) at the levels of Secretary of State, Minister or Senior Civil Servants and provide details of any such discussions or correspondence including:

- Date of such communication.
- Form of communication.
- Personnel involved on each side.
- Substance of communication".

7. Initially this request was treated as a combined FOIA/EIR request: indeed FOE itself in due course claimed that the information it was seeking constituted "environmental information" as that term is defined within the EIR as constituting "information on measures … such as policies, legislation, plans, programmes, environmental agreements …" and initially the Appellant, namely the Foreign and Commonwealth Office ("FCO") relied on the applicable exception in the EIR as set out in paragraph 12(5)(a) of the EIR as well as section 39 of FOIA both of which provisions deal with environmental information.

8. In initially rejecting the request outright and despite reliance on those provisions, the FCO briefly characterised its contentions in favour of

withholding the information as also constituting "prejudice to the effective conduct of international relations" and the fact that the free and frank exchange of information in the context of such relations depended on the maintenance of trust and confidence between States. As will be seen, these considerations lie at the heart of the FCO's case.

9. FOE sought a review of the FCO's decision on 15 February 2005. By a letter dated 14 March 2005 and following an internal review conducted by the FCO, the FCO subsequently accepted that the information regarding the date and form of the communication or communications sought would be provided. The FCO confirmed in answer to the first two questions set out in paragraph 6 above, that the subject matter came up during a meeting on 13 November and during subsequent telephone calls on 14 and 15 November 2003. On 23 March 2005 FOE wrote to the Information Commissioner ("the Commissioner") seeking release of the information not disclosed by the FCO.

Events leading up to Decision Notice

10. In mid-January 2006, FOE contacted the office of the Commissioner. FOE informed the Commissioner that it had also made a request via a related organisation under the United States Freedom of Information Act to the US Secretary of State which had resulted in the provision of what were called briefings, being in fact exchanges between the United States' Embassy in London and the US Secretary of State. Those briefings reflected in turn communications provided to the Embassy from the British Government, in particular from officials from the Department of the Environment and Rural Affairs (DEFRA) relating to the vessels. It is enough at this stage to say that these briefings related to the fact that the first two vessels which were the subject of importation were in all probability not subject to proper official authorisation or licences in respect of the proposed dismantling in this country. The briefings also reflected the growing concern felt in late 2003, particularly in late October and early November as to whether

the United Kingdom had properly complied with all appropriate international agreements and regulations.

11. The Commissioner issued a Decision Notice dated 26 July 2006. In it he noted that following upon the FCO's internal review the FCO obtained a statement from the US State Department "that it would prefer the information to be withheld on the grounds of its sensitivity" which prompted the FCO to offer its "opinion that access to the information would be refused under the US Freedom of Information Act". The Commissioner added that he had taken "seriously the expertise of the FCO in judging when prejudice is likely to occur" as well as taking into account the views of the FCO and the US Secretary of State. On balance he regarded the section 27 exemption as being engaged. He also found that the information requested did not constitute "environmental information" under the EIR.

12. In his Decision Notice, the Commissioner stated that he did not consider that the relationship between the UK Government and other States gave rise to any general obligation of confidence similar to that which existed between a doctor and his patient. At paragraph 5.14 and following the Commissioner added:

"It may be that particular sensitivities arise in relation to the personnel involved in discussions between the UK and US Governments. For instance it may be felt that information as to the seniority of the participants in the discussion may reveal information about the importance attached to the issue under discussion. In this particular instance, however, it is clear that the issue of the import of the redundant ships to the UK already enjoyed a high profile and it is difficult to see how information as to the seniority of the participants could give rise to any particular prejudice. Indeed, if decisions as to disclosure were routinely to become focused upon the seniority of individuals involved in discussions and decision making, there is a considerable risk that the public authorities would choose never to

disclose such information because of the inferences that could be drawn from disclosure in one case and refusal in another.

5.15 In the Commissioner's view, just as the FCO has failed to provide any specific public interest arguments in favour of support of the maintenance of the exemption, it has failed to properly consider any specific public interest favouring disclosure over and above a general acknowledgment of the value of the transparency and the fact that the issue giving rise to the request was relatively high profile.

5.16 The background to the request has been described briefly above. As indicated, as a result of the controversy around the import of the ships, two enquiries were carried out by Defra and the Environment Agency and reports issued setting out the chronology of events and analysis of how particular decisions came to be taken and an account of the relevant regulatory framework including the various international instruments dealing with environmental protection. In the Commissioner's view, the FCO assessment of the public interest in this case should have taken into account not only the general public debate but also the importance of the issue recognised by the lead players. In particular it should have considered the extent to which the information which it holds would have borne out the conclusions of these reports and, conversely, the extent to which the information which it holds may suggest that the enquiries leading to the reports were defective. He should also consider the extent to which the refusal of the request may give the impression that the account provided by Defra and the Environment Agency tells any part of the story.

5.17 Having reviewed these matters, the Commissioner is satisfied that there is a substantial public interest in the release of the requested information. While accepting the FCO view that there is likely to be some prejudice to relations with the US, the Commissioner, considers that such prejudice would be slight and that there is a much stronger public interest in forming a wider public debate about this issue".

The Commissioner duly directed that the FCO communicate to FOE the remainder of the information requested.

The relevant chronology

13. By early 2000 the US Maritime Administration (MARAD) had embarked upon a programme to dispose of obsolete vessels in the national defence reserve fleet. A report in March of that year stated that 110 vessels had been designated for disposal and that the vessels were "literally rotting and disintegrating as they await disposal". It was also noted that the vessels' structures contained hazardous substances such as asbestos and solid and liquid polychlorinated biphenyls (PCBs). By May 2003 MARAD sought to export 13 vessels to a facility on Teesside in England held and operated by a company known as AbleUK for dismantling and recycling. The dismantling unit was known by the acronym TERRC. This appeal concerns the first four vessels out of the original group of 13. The first two ships left for the United Kingdom on 6 October 2003 and the remaining two on 17 October 2003.

14. In order to operate a dismantling operation AbleUK obtained a waste management licence which was issued by the UK Environment Agency. That Agency originally issued such a licence on 31 October 1997. That licence was modified on 30 September 2003 principally in order to allow ships and vessels to be scrapped at the site: in addition the volume of waste which was to be processed annually was substantially increased. The Environment Agency also granted a trans-frontier shipment (TFS) authorisation.

15. However, the Environment Agency apparently issued the modified waste management licence on the assumption that the ships were to be dismantled in dry dock. On 7 October 2003 the responsible local authority, namely the Hartlepool Borough Council, issued a press release which stated that it had notified AbleUK that there was no valid planning permission for the construction of a dry dock facility at the

TERRC site. It followed from this that the Environment Agency had issued its modified licence on a false assumption: in addition it had not assessed the impact of the effect of the dismantling operations in the local area and upon the environment by taking into account the possibility of the works being carried out in a wet dock. Consequently, on 30 October 2003 the Environment Agency informed AbleUK that the authorisations that had previously been granted to permit the dismantling of ships at the TERRC site were invalid. Both MARAD and AbleUK were forced to reconsider their position. By that stage the four ships in question were already under tow across the Atlantic having been certified as being safe to be moved from the United States.

16. DEFRA issued a press release on 6 November 2003 which contained a statement by the then Environment Secretary, Mrs Margaret Beckett. The release showed that the Environment Agency had made it clear to the parties and to the UK authorities that the proposed transport of the vessels to Hartlepool could not be completed consistently with international rules and community law and that the UK Government agreed that the law required the return of the vessels to the United States. However, equally the Government recognised that the immediate return of the first two vessels would be "impracticable" on the basis of a number of difficulties to which attention had been drawn by the US authorities. In the circumstances the UK Government was exploring how best to store the ships on a temporary basis. Another statement of the following day issued by Mrs Beckett contained the following passage:

"We continue to work closely with the United States authorities to examine the safety and liability concerns they have raised to proposals that the second pair of ships return to the US. We take those concerns seriously, and are looking for rapid resolution of that question".

17. On 12 November 2003 the Environment Agency issued an emergency modification of AbleUK's waste management licence to allow the first two ships to dock. The second pair of ships arrived on 27 November

2003 or 2 December 2003. The modification prohibited the dismantling of any of the four vessels. All four vessels remained in Hartlepool without any authorisation having been granted to allow for them to be dismantled. As indicated above the same appears to remain the situation today.

18. There then followed the meeting and telephone calls of 13, 14 and 15 November as referred to in the information requested of the FCO. On 15 November 2003 the US Department of Transportation issued a statement in which it said that it appreciated the decision made by DEFRA to "permit the second pair of ships to dock at the AbleUK facility in Teesside, England for safekeeping over the winter" and such action "offers a responsible solution that fully addresses the safety and environmental concerns associated with an Atlantic tow at this time of year". DEFRA issued a similar statement on the same date to the effect that following what it called the "exploration of alternative options", the UK Government had agreed with the US authorities that the second pair of vessels should continue their passage to Hartlepool where they would be "securely stored pending a decision on their future". The press release noted that as with the first two ships, "the Environment Agency will place requirements on them to ensure the environment is fully protected and the ships remain ready for return to the United States". The statement added that both Governments were working closely to "examine the practicability of the return of the third and fourth ships to the United States".

19. On 19 November 2003 the Environment Food and Rural Affairs Committee of the House of Commons heard extensive oral evidence about the relevant issues surrounding the importation of the vessels and the decisions made by the UK Government and the appropriate regulators. The same events also led to two High Court decisions involving applications for judicial review. In the first, namely *R(ota FOE Ltd) v The Environment Agency and others* [2003] EWHC 3193 (Admin) Sullivan J held by way of a preliminary point that the Agency

was correct in conceding that the decision to modify the waste management licence could not stand. In the second decision, namely *R (ota Gregan & Others) v Hartlepool Borough Council and AbleUK Limited* [2003] EWHC 3278 (Admin) Sullivan J granted a declaration that the planning permission granted to Able UK in 1997 by the Hartlepool Borough Council did not allow for the dismantling of ships. The judge remarked that given the absence of suitable authorisation, the position remained "highly unsatisfactory" from the point of view of all those involved and he urged the carrying out of a "thorough investigation into the decision making processes that have so conspicuously failed to prevent the most unsatisfactory situation from arising …" (see para 92 of the latter judgment).

20. In April 2004 the Environment Agency published a review to identify the lessons to be learned from the incident and DEFRA published in its own right a similar report. The Tribunal has read these reports. The two reviews consider the regulations and practices relating to the dismantling and recycling of vessels that might contain hazardous materials. The DEFRA report considered general issues of policy whilst the Environment Agency report had regard to the lessons that needed to be learnt by those responsible for applying the relevant regulations based on the events in question. In November 2004 the House of Commons Committee referred to above published its own report which considered a wide range of issues concerning the dismantling of vessels in the United Kingdom as well as the international regulatory framework which applied to such activities.

The evidence

21. The Tribunal has had the benefit of hearing evidence from two witnesses. Both provided statements on so called open and closed bases. In the case of the closed statements the evidence was considered in the absence of the Additional Party. However, as matters have emerged and developed, save with regard to the contents

of paragraph 25 below, it is fair to say that nothing that transpired in the closed sessions in any way bore upon the true issues in the appeal.

22. Ms Anne Pringle who gave evidence on behalf of the FCO is a highly experienced diplomat. She is currently Director of Strategy and Information at the FCO. She reports to the Permanent Secretary and is a member of the FCO board. She has had numerous foreign posts, most recently as Ambassador to the Czech Republic. It is fair to say, however, that her experience was not (save perhaps in those latter capacities) one which had dealt directly with the diplomatic relationship with the United States, either by her having served there or in any office or function specifically connected with that relationship: however, the Tribunal entirely accepts that she was a competent witness as regards international relations generally. In her view the release of the information requested was capable of prejudicing the UK's relations not simply with the United States but also more widely within the international community as a whole. The gist of her evidence is reflected in the following passage from her open witness statement, namely what she called "the ability to talk freely and frankly on the controversial issues of the day, particularly at the levels at which policy decisions are taken." She went on to add:

"This freedom and frankness would be seriously compromised if either or both of the parties to an exchange they considered to have occurred on a confidential basis believed that the content of the discussion would be made public".

23. Both in her open statement as well as in evidence she stressed the importance regarding good and effective administration with regard to the maintenance of the records of any such discussions. She also discussed the levels of protection required for documents which were generated as a result of such discussions, e.g. Top Secret, Secret, Confidential and Restricted. She claimed that a "weighty public interest" was required to justify disclosure under section 27 and again both in her oral and her written evidence pointed to three factors which

militated in favour of non-disclosure, namely the age of the information (albeit likely to diminish in importance over time), the political and other sensitivity of the subject-matter involved and the level at which the exchange or exchanges took place. She also contended that "considerable weight" should be given to judgements made by "experts in the field". She also relied on the fact that the United States had in this case voiced "strong objection" to disclosure, quoting a response received from the US State Department in November 2005 which had stated that release of the documents in question:

"… could be detrimental to the climate of confidence that contributes to the effectiveness of the UK-US diplomatic relationship and we would not release them".

24. The second witness was Andrew Howarth, currently head of the Hazardous Waste Unit in the Waste Management Division at Defra. He commented upon the assertion made by the Commissioner in the Commissioner's Decision Notice to the effect that the FCO in assessing the public interest should have considered the extent to which the disputed information would have borne out the conclusions of the reports published in the wake of the events of 2003 as well as, conversely, the extent to which the same information might suggest that the enquiries leading to the reports were defective. However, the true importance of Mr Howarth's evidence emerged in cross-examination in open session. First, he accepted in answer to questions from the Commissioner's Counsel, Mr Pitt-Payne, that there were what Mr Pitt-Payne called three "themes" in the public debate insofar as that debate concerned the trans-shipment of the "ghost ships" from mid 2003 onwards, namely first the question of whether environmental damage would arise from any dismantling work that might be carried out in the United Kingdom, secondly the fact that the ships were being transported over the Atlantic without the necessary authorisations in place and thirdly, that once it was clear that the first two ships were

destined to come to the United Kingdom what should happen to them once they did arrive in this country.

25. Mr Howarth gave evidence that when it became clear that the second pair of ships were on their way across the Atlantic, as indicated above, other options suggested themselves apart from the second pair of ships at that time being allowed to dock in the United Kingdom. One option was that the vessels be kept in the Azores pending resolution of the overall position concerning authorisation and the second option involved directing them to an alternate point outside the United Kingdom. He made it clear that the United States was reluctant to accept, if not directly opposed to, the return mid-passage to the United States of the second pair of vessels, in part on account of an inability to obtain suitable reinsurance coupled with other considerations. He added that in connection with the press release referred to above, namely the one issued on 15 November, a "final decision" to allow the vessels to dock in the United Kingdom "would have been made around 14th, 15th November …". However, in closed session, Mr Howarth confirmed that the decision to allow the second pair of vessels to dock had effectively been made by DEFRA prior to 13 and 14 November. The decision he said reflected the fact that as evidenced by DEFRA's own press release on 7 November, the United States despite having received proposals that the second pair of ships should turn back, retained deep concerns about the feasibility of such a proposal and by 13 November had concluded that the alternatives reflected in the various options mentioned above were not feasible, thereby causing Defra to come to the view prior to 13 November that the ships should dock in the United Kingdom.

The Environment Information Regulations 2004 (EIR)

26. As explained above at paragraph 11, the Decision Notice determined that the disputed information was not "environmental information" and therefore fell to be considered under FOIA. The EIR provide that the public authority shall make "environmental information" available on

request. The term "environmental information" is defined by Regulation 2 in relevant part as follows, namely:

""environmental information" has the same meaning as in Article 2(1) of the Directive [i.e. Council Directive 2003/4/EC on public access to environmental information], namely any information written, visual, aural, electronic or another material form 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 inter action 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;"

27. Regulation 12 of the EIR contains a list of so called exceptions to the duty to disclose environmental information in particular by Regulation 12(5) by providing that:

"A public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

(a) international relations, defence, national security or public safety;"

28. As indicated above, the Tribunal was invited by FOE to rule on whether the disputed information constituted "environmental information" within

the meaning of the EIR. The principal difference between the EIR and section 27 of FOIA is that, as Mr Michaels for FOE pointed out, the threshold is arguably less easy to satisfy under Regulation 12(5)(a) of the EIR than under section 27 which requires that information is to be exempt if its disclosure "would or would be likely to prejudice" relations between the United Kingdom and another State.

29. Whilst fully accepting, as he was clearly bound to do, that he could not examine the disputed information, Mr Michaels raised a number of points which the Tribunal feels it is appropriate to deal with.

30. First, the phrase "information relating to the environment" found in the appropriate Council Directive referred to above and in effect re-enacted in Regulation 2 of the EIR has been held to include a statement of views advanced by a public authority made in connection with planning approval for the construction of a proposed ring road. See *Mecklenburg v Pinneberg – Der Landrat ECJ C-321/96* (17 June 1998) and that in the circumstances a broad interpretation had to be afforded to the concept of "environmental information" under the EIR: see also *R v Secretary of State for the Environment ex p Alliance Against the Birmingham North Relief Road* [1999] Env LR 447 per Sullivan J especially at 470.

31. Secondly, Mr Michaels contended that since the vessels in question in this case constituted waste, the definition in Regulation 2(1)(b) was directly engaged and moreover Regulation 2(1)(a) was engaged on the basis that there here existed information which could be said to relate to the way in which the importation of the ships would or might affect the state of any of the elements of the environments listed in that sub paragraph.

32. Both the Commissioner and the FCO were agreed that the EIR did not apply. The Tribunal heard argument to this effect from both those parties, of necessity in closed session. It informed the parties during the appeal that it was of the view that the EIR did not apply. It

undertook to give such reasons but again since the reasons will relate to the content of the disputed information they will be given in a separate judgment to be made available solely to the Appellant and to the Commissioner.

The issues in the Appeal

33. Apart from the question of whether the requested information fell within the EIR, the two issues on the appeal are:

(1) whether the exemptions in section 27 of FOIA are engaged and if so which, and to what extent,

(2) whether the public interest in maintaining the applicable exemption or exemptions outweighs the public interest in disclosure; the Commissioner considered that the applicable exemption was section 27(1); paragraph 5.9 of his Decision Notice shows that his conclusion was based on the FCO's judgment that prejudice was likely to occur.

34. Section 27(1) involves a prejudice-based exemption. Such exemptions have been considered in a number of the Tribunal's decisions most recently in *Office of Government Commerce v Information Commissioner* (2 May 2007) EA/2006/0068 and 0080). At paragraphs 40 and 41 of the Tribunal's judgment the following passages appear, namely:

"40. The Tribunal has considered the meaning and application of the prejudice test, which is common to a number of qualified exemptions under FOIA, in several decisions e.g. *Hogan and Oxford City Council v Information Commissioner* and *John Connor Press Associates Limited v Information Commissioner.* These cases found the term "would prejudice" means that it is "more probable than not" there is prejudice to the specified interests set out in the exemption. The other part of the prejudice test, "would be likely to", has been found by the Tribunal to mean something less than more probable than not but where "there is

a real and significant risk of prejudice" (Hogan at paragraph 35). This finding has drawn support from a decision in *R (on the application of Lord) v Secretary of State for the Home Office* [2003] EWHC 2073 (Admin).

41. In other words the Tribunal has found that the occurrence of the prejudice to the specified interest in the exemption has to be more probable than not or that there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not. The probability of prejudice expressed by these two limbs of the test are not too far apart."

In the *Office of Government Commerce v Information Commissioner* decision it was argued unsuccessfully that the basis on which the second limb set out above was set far too high. The Tribunal rejected that argument. This Tribunal is not minded to disagree with that finding which reflects an approach which is now, it seems, well entrenched in its jurisprudence.

35. If a prejudice-based exemption is engaged two distinct issues need to be addressed: first what is the risk of the prejudice and secondly what is the likelihood of the occurrence of the prejudice. These elements may differ from case to case and much will turn on the particular subject matter of the exemption.

36. In the present case, a number of general observations can be made with regard to section 27(1):

(1) section 27(5) defines the term "State" as including the "government of any state and any organ of its government": thus in most cases the question will be whether there may be prejudice to relations as between the UK Government and the Government of another State: whether an entity is an "organ" of a foreign state's government will be a question of fact and degree and consideration will need to be given at least to the

degree of autonomy attributed to the "organ" in question: the latter question, however, does not arise in the present appeal;

(2) the sole question raised by section 27(1) is whether prejudice may "occur to the relations" between the United Kingdom and another State: although the natural inference is that such relations would normally reflect exchanges between the Governments and their organs, i.e. diplomatic exchanges, there seems no reason to confine the meaning of section 27(1) to such exchanges: indeed there may be little, if any, diplomatic tie or ties in a given case between the UK Government and a foreign State, and such circumstances would not prevent the disclosure of sensitive information risking prejudice or further prejudice to the relationship in question: again, however, the latter scenario is not in play in the present appeal;

(3) the FCO urged the Tribunal to have regard to the FCO's own relevant expertise with regard to the predictable degree of possible prejudice in the sense that the same reflected a proper evaluation of the likely prejudice: the Tribunal is loathe to sanction unqualified recourse in such a way in all cases where section 27(1) is engaged: this issue will be referred to below in connection with the contention that the question of foreign relations and any decisions relating thereto are in some way non-justiciable and that in this regard courts and tribunals should not make orders that would require the Government in any way directly or indirectly to conduct foreign policy in a particular way;

(4) there is clearly a degree of overlap between the subject matter of each of sub-paragraphs (a) to (d) of section 27(1): however, as between sections 27(1) and 27(2) there is only an overlap insofar as the information requested of the public authority includes or refers to confidential information obtained inter alia from a foreign State in accordance with the expanded definition of confidentiality contained in section 27(3);

(5) it follows from (4) above that if information is provided by a foreign State in circumstances where confidentiality in the extended sense referred to (including that relating to the identity of the persons imparting the information) did not apply, disclosure of that information should nonetheless not operate if the likely effect of disclosure is to prejudice the international relations of the United Kingdom generally, having regard to the information itself: this is subject to the further observation that the term "information" is not as such defined in FOIA and can, therefore, connote knowledge of any fact or event, e.g. as here the identity or identities of the persons who are involved in a particular exchange or series of exchanges: information will remain information even if it is not directly informative to the recipient.

Prejudice and the balancing of the respective public interests

37. In his Decision Notice at paragraph 5.17 which is quoted above the Commissioner stated that he accepted that there was likely to be "some prejudice" to US/UK relations but nonetheless considered that such prejudice would be "slight". In the circumstances although the Commissioner gave weight to the judgment of the FCO he formed his own assessment as to the degree of prejudice and the likelihood of its occurrence.

38. The Tribunal is fully entitled on the hearing of an appeal to make its own assessment both as to the seriousness of any possible prejudice and as to the likelihood of its occurrence: see *Guardian Newspapers and Brooke v Information Commission and the BBC* (EA/2006/0011 and 0013 especially at paragraph 14. In particular the Tribunal can review findings of fact in the light of all the evidence before it. In *DfES v Information Commissioner and Evening Standard* (EA/2006/0006) at para 20 the Tribunal confirmed that the competing public interests must be assessed by reference to the date of the relevant request. Although it was rightly pointed out in the Tribunal's view, that account should be

taken of the time that has passed, the Tribunal would add that the overall effect of the passage of time since the time of the request may well not militate in favour of disclosure in a case where the disclosure of the disputed information could never have been regarded as being in the public interest: see and compare *DTI v Information Commissioner* (EA/2006/007) particularly at paragraph 44 and 46.

39. In the circumstances of this case and in considering the possible level of prejudice as well as the likelihood of such prejudice the Tribunal respectfully disagrees with the Commissioner's assessment in his Decision Notice. It does so for the reasons set out below.

(1) Even though Ms Pringle both in her written statement and in her oral evidence contended that only the FCO had the experience to judge whether the release of the disputed information would harm relations between the United Kingdom and the United States, as indicated above, the Tribunal does not accept that this matter was or is for the FCO's judgment either in the sense contended for or at all and rejects any contention as submitted by the FCO that the judgment of a public authority in such a case must be accepted unless otherwise perverse or in some other way as to be so unreasonable that no tribunal could accept it.

(2) On the other hand the Tribunal accepts that the view of the FCO as the relevant public authority is one that can properly be taken into account with the question of weight to be decided dependent upon the circumstances of the case.

(3) The Tribunal has indicated above that it does not regard Ms Pringle as perhaps the ideal witness to have spoken in particular as to the possible prejudice to the relationship between the United Kingdom and the United States; however, despite the lack of her direct experience of those particular diplomatic ties, the Tribunal is prepared to accept the gist of her evidence

particularly when measured against the similar expressions emanating from the United States both in March 2005 and in the later exchange of November 2005 quoted above.

(4) Even though the Tribunal is not persuaded by the contention on the facts of this case that the content of the exchanges constituting the disputed information were necessarily of that degree of sensitivity contended for by Ms Pringle, the Tribunal nonetheless remains satisfied that the exchanges within the scope of the request were at a sufficiently high level as to have attracted a shared assumption that they were made in confidence.

40. As is clear from the earlier part of this judgment, there were at least four principal subjects relating to the facts which form the subject matter of this Appeal and which it can be justifiably be said were of public concern at the relevant time, namely;

(1) the fact that the vessels were being imported in order to be dismantled in the United Kingdom;

(2) the fact that authorisations previously given to AbleUK were then withdrawn;

(3) the fact that the United Kingdom Environment Agency had given its consent to the transhipment of the vessels prior to the necessary consents being finalised; and

(4) the lack of coordination among the United Kingdom regulators.

It is against that background that the Tribunal has to assess the respective arguments for and against disclosure.

41. The arguments in favour of disclosure can be summarised as follows, namely:

(1) the four matters as set out in the preceding paragraph were of public concern;

(2) in particular, as demonstrated by the two reports issued by both DEFRA and the Environment Agency which were issued in the wake of the events in question, it was in the public interest to understand how the entire situation surrounding the transportation of the Ghost Ships to this country came about;

(3) the disputed information had at least the potential to add to the sum total of the public's interests and concerns as to the matters referred to in (1) and (2); and

(4) moreover, the public had a right to know the extent to which Ministers and senior officials were involved in the decision making process.

42. The arguments in favour of maintaining the exemption can be summarised as follows, namely:

(1) the exchanges in question were being conducted on the basis of a shared assumption that they were held in confidence;

(2) the prosecution of a successful foreign policy depends in a large part, if not wholly, upon mutual trust and confidence;

(3) proper records might not be kept if there were a perceived view of disclosure;

(4) the United States had explained its own view in a formal manner that it would have resisted disclosure being made of the information in question under its own freedom of information regime;

(5) particular damage would be caused to the special relationship which obtained between the United States and the United Kingdom, in particular with regard to the way in which the United

States might treat information that the United Kingdom intended to share in confidence with the United States;

(6) disclosure in the way sought might have implications with regard to the United Kingdom's dealings with other members of the international community;

(7) the information in question was marked "Restricted" to reflect many, if not all, of the above considerations;

(8) it was not for the Commissioner, let alone the Tribunal, to second-guess the FCO in relation to the making of foreign policy.

This Tribunal notes that in the *DfES* case mentioned above the Tribunal quite properly suggested that in the context of section 35(1) of FOIA which deals with the formulation or development of Government policy (which attracts a qualified exemption), while the seniority of those participating in recorded discussions may increase the sensitivity of the matters minuted, no information under that section would be exempt simply on account of its status, its classification or the seniority of those whose actions are recorded. However, the present Tribunal is loath to regard that as a principle of general application. Mindful of the fact that the balancing of public interest with regard to any qualified exemption must reflect the subject matter of the exemption, the present Tribunal takes the view that the principles set out in the *DfES* case do not necessarily apply to other exemptions such as that presently being considered.

The Tribunal's findings

43. The Tribunal agrees with the Commissioner that section 27(1) is engaged. In answer to the questions raised in paragraph 35, the Tribunal finds that on the facts of this Appeal there is a significant risk of prejudice to UK/US relations and international relations as a whole were disclosure to be ordered and that equally the likelihood of such

prejudice is high on the basis of the evidence which the Tribunal has heard. The Tribunal is satisfied that the arguments in favour of maintaining the exemption are sufficiently made out in this case. The Tribunal lays some store upon the arguments put forward in favour of maintaining the exemption as reflected in sub paragraphs (1), (2), (4), (5) and (6) of paragraph 42 but given a different set of facts and in a different set of circumstances less weight may be accorded to each of those elements. On the other hand the Tribunal does feel that proper stress can be placed on the following matters, namely:

(1) there was nothing of substance in the disputed information which would have added in any material way to the public's understanding of the four areas of public concern outlined above at paragraph 40.

(2) there was an abundance of material in the public domain which addressed each of the four highlighted areas of public concern, principally in the forms of the DEFRA and Environment Agency Reports;

(3) in particular, the evidence before the Tribunal made it clear that the exchanges in question played no, or no meaningful, part in the decision made by Mrs Beckett to allow the second pair of vessels to dock in this country; Mr Howarth, in his evidence, made it clear in the Tribunal's mind that the relevant decision preceded the dates on which the exchanges took place and that such decision was in any event largely dictated by events over which the United Kingdom really had little, if any, control;

44. In the light of the elements set out in subparagraphs (1) to (3) above therefore, the Tribunal takes the view that disclosure of the disputed information would, in all the circumstances, have been and indeed remains unjustified. As Mr Swift, on behalf of the FCO put it in the course of argument, in all the circumstances, it is difficult to see how release of this information would actually inform any public debate on

the basis that there is a clear distinction between the information which simply added to the sum of human knowledge, and information that actually furthered a clear public interest.

45. However, having come to the determination referred to above, the Tribunal is not persuaded that the risk of disclosure would necessarily prejudice the need or perceived wish to keep proper or adequate records of any exchanges in respect of which an exception might otherwise be claimed.

Section 27(2)

46. As pointed out above, some reliance was placed on this exemption by the FCO during the Appeal. The Tribunal is not persuaded that section 27(2) is engaged on the facts of this case.

Further observations on section 27(1): non-justiciability

47. Mr Swift, on behalf of the FCO, addressed the Tribunal at length on an argument based on the principle that English courts have consistently refrained from requiring an executive to act on the basis of an assessment by the court as to the best means of effecting international relations, see e.g. *R v Secretary of State for the Home Department ex parte Lauder* [1997] 1 WLR 839 per Lord Hope at 857 C-D; *R v Secretary of State for Foreign and Commonwealth Office ex parte Pirbhai* (1985) 107 ILR 462 per Sir John Donaldson MR at 479. To be fair to Mr Swift, he placed reliance on these authorities and others of a similar nature in support of his contentions as it was put in his skeleton argument that: "any request for information under FOIA which falls for consideration must be approached with similar caution …". Without intending any disrespect to the careful and painstaking way in which Mr Swift developed this contention, the Tribunal does not find reliance on these authorities of any assistance since section 27 is not an absolute exemption nor should it be approached as such. The Commissioner's function, as well as that of the Tribunal, is to address on a case-by-case basis the competing interests within the ambit of the section:

indeed, it is not unfair to say that the carrying out of that exercise is recognised elsewhere in Mr Swift's written submissions. The Tribunal was referred in particular to an Australian decision, namely *Re Maher v Attorney General's Department* (1985) 9 ADL 731. The equivalent provisions of section 27 in the Australian Freedom of Information Act 1982 are cast in different terms and the Tribunal places no store upon this decision for that reason, save to say that the Australian Administrative Appeal Tribunal in its decision showed its reluctance to convert what is a prejudiced based exemption into a purely class based exemption, and to that extent, this Tribunal is fully in sympathy with that approach.

Conclusion

48. For all the above reasons the Tribunal allows this Appeal.

DAVID MARKS

Deputy Chairman Date 29 June 2007