

**IN THE FIRST TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

ON APPEAL FROM A DECISION OF THE INFORMATION COMMISSIONER

BETWEEN:

THE MINISTRY OF DEFENCE

Appellant

-and-

**(1) THE INFORMATION COMMISSIONER
(2) PETER BURT**

Respondent

and

PETER BURT

Appellant

-and-

**(1) THE INFORMATION COMMISSIONER
(2) THE MINISTRY OF DEFENCE**

Respondents

**SKELETON ARGUMENT OF THE MINISTRY OF DEFENCE
FOR A HEARING ON 2-3 DECEMBER 2019**

INTRODUCTION

1. This is the skeleton argument of the Ministry of Defence (“MOD”) in relation to two joined appeals against a decision of the Information Commissioner (“the ICO”) contained in a Decision Notice dated 20 December 2018, reference FS50754705 (“the Decision Notice”). The Decision Notice considered whether to release the 2015-2016 annual report of the Defence Nuclear Safety Regulator (“DNSR”) and the redacted elements of the 2015/6 annual assurance report by the Defence Safety Authority (“DSA”). The Decision Notice ordered the release of some but not all of the 2015/6 reports by the DNSR and DSA.

2. On 11 October 2019 the MOD released some of the information within the 2015/2016 DNSR report. It is, therefore, academic whether this information, now released, should have been released at the time of the request. The First-tier Tribunal (“FTT”) should focus instead on the elements of the 2015/6 DNSR and DSA reports which have still not been released (“the withheld information”).
3. In its appeal the MOD argues that none of the withheld information should be released. All of the withheld information is exempt under at least one, if not more of, ss.24, 26 and 27 of the Freedom of Information Act 2000 (“FOIA”) and in each case the public interest in maintaining the exemption outweighs the public interest in disclosure.
4. In his appeal, Mr Burt argues that all of the withheld information should be released.
5. It is not yet clear whether the ICO will change from the position taken in the Decision Notice now that it has seen the evidence from the parties. No doubt it will become clearer when they file their skeleton argument.

FACTUAL BACKGROUND

Nuclear safety authorities and their reports

6. There are four authorities with different responsibilities for health and safety: the Health and Safety Executive (“HSE”); the Office for Nuclear Regulation (“ONR”); the Defence Safety Authority (“DSA”); the Defence Nuclear Safety Regulator (“DNSR”).
7. The HSE is a body created by s.10 of the Health and Safety at Work Act 1974 (“the HSWA”). Its function is to secure the health, safety and welfare of persons at work, protect the public against risks to health and safety arising from work and control the keeping and use of dangerous substances (see s.1 of the HSWA). It operates under Regulations made under the HSWA. There is, however, a ‘carve out’ for nuclear safety, nuclear site health and safety, nuclear security, nuclear safeguards and radioactive material transport purposes which are not the subject of those Regulations (see s.15(1A) of the HSWA).

8. The ONR is a body created by s.77 of the Energy Act 2013 (“the EA”). Its purposes are defined by ss.67-73 of the EA and include nuclear safety, nuclear site health and safety, nuclear security, nuclear safeguards and transport of nuclear material. Those purposes are further delineated so that, in certain areas, the ONR only has responsibility for ‘civil nuclear premises’ and ‘civil nuclear sites’ (see s.70 of the EA). The security of sites and premises which are ‘controlled or operated wholly or mainly for defence purposes’ are ‘carved out’ of the ONR’s responsibilities, reflecting pre-existing arrangements. In other words, the ONR takes on many of the nuclear responsibilities ‘carved out’ from the HSE. However, there is a ‘carve out’ to the ‘carve out’ when it comes to certain nuclear defence matters. The boundary between the roles of the ONR and the DNSR is discussed further below.
9. The Crown cannot be prosecuted under the HSWA or made subject to the usual enforcement notices (see s.48 of the HSWA). However, the Secretary of State for Defence is answerable to Parliament for all health, safety and environmental protection matters in Defence and has published a policy statement on his aims.¹ The MOD’s policy is to maintain arrangements that produce outcomes that are, so far as practicable, at least as good as those required by HSWA.
10. The DSA is responsible for assuring safety in defence. It draws its authority from a Charter, which came into force on 1 April 2015, and which defined the DSA’s purpose as being ‘*to provide independent assurance to the Secretary of State that his policy on safety (including Health and Environmental Protection) in Defence is being promoted and implemented in the conduct of Defence activities*’.² The DSA is led by a military officer of 3 star rank, currently Air Marshal Susan Gray CB OBE FREng, who reports directly to the Secretary of State.
11. The DNSR works under the delegated authority of the DSA, although its functions pre-date the DSA (and the ONR). It is responsible for providing assurance on the safety of the defence nuclear programme, in particular the naval nuclear propulsion programme

¹

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/727413/2018_Policy_statement_by_SoS_HSandEP_with_MOD_Logo.pdf

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/517493/20150325-DSA_Charter.pdf

and the nuclear weapon programme. It is responsible, inter alia, for nuclear defence matters ‘carved out’ of the ONR’s responsibilities – e.g. the nuclear safety of the submarine nuclear reactor, nuclear weapon and defence nuclear sites and premises. It has in place an administrative agreement with the ONR that *‘outlines the relationship between MOD and ONR in discharging their respective roles and responsibilities for nuclear, radiological and conventional health and safety in respect of the defence nuclear programme’*³. There are, as Mr Burt points out, some nuclear sites where both the ONR and the DNSR have roles. This relates to two situations: ONR licensed sites, operated by private contractors undertaking defence activities; and Crown sites, operated directly by the MOD. Broadly speaking, the ONR has responsibility for anything that might affect the safety of the public living around those sites, or the staff working at those sites; whereas, the DNSR has responsibility for matters that are more closely connected to defence functions. Thus, the ONR regulates both radiation and conventional safety at nuclear sites – e.g. the safety of the buildings on those sites and the safety from radiation of the areas around them; whereas, the DNSR regulates the safety of the nuclear weapon, once it is assembled, and the nuclear propulsion system on the submarines that are carrying nuclear weapons.

12. On 1 December 2015 the DSA published its annual report for 2014-2015 with some elements redacted. The DNSR has, on 4 occasions in the past, published its annual reports (for 2011, 2012-13, 2013-14, and 2014-2015).
13. Following a review of information security in light of the changing global security context (including the developing threat from hostile state actors), the MOD changed its policy/practice on the publication of DSA and DNSR reports.⁴ Since May 2016 the MOD has not published any of the annual DNSR reports and it has redacted the nuclear content of each annual DSA report – see e.g. the DSA report of 2015/6 [3.181-201].

The history of requests

³ <http://www.onr.org.uk/documents/2015/onr-dnsr-letter-of-understanding.pdf>

⁴ See Vanessa Nicholls’ OPEN statement at §§20-25.

14. On 23 September 2017 [4.206-207] the requester asked the MOD for the following information:

'Does the Ministry of Defence intend to publish the 2015-16 annual assurance report from the Defence Nuclear Safety Regulator, and if not, what are the reasons why not? If the Ministry of Defence does intend to publish this report, when is it intended for it to be published? If the Ministry of Defence does not intend to publish this report, please provide me with a copy of it, or the nearest equivalent replacement document.'

15. On 22 October 2017 [4.208-9] the requester asked for the following further information:

'For what reasons has information on defence nuclear safety been redacted from the Defence Safety Authority's 2015-16 annual assurance report? Who authorised redaction of the relevant section of the report? Please provide me with an unredacted copy of the Defence Safety Authority's annual assurance report for 2015-16.'

16. On 10 November 2017 the MOD confirmed that it held an unredacted version of the 2015-2016 DSA report and a 2015-2016 DNSR report but refused to provide either, relying on ss. 24, 26, 27 and 36 of FOIA [4.210-211]. That refusal was maintained at internal review [4.212-222] and the requester complained to the ICO [3.153-4]. The MOD provided the withheld information to the ICO with colour coding to identify passages that were exempt by reason of ss.24, 26 and 27. For the residue the MOD relied on s.36.

17. In the Decision Notice [1.1-18], the ICO found that:

- (1) The information identified, at that stage, by the MOD was indeed exempt by reason of s.24. The public interest in maintaining the exemption in s.24 outweighed the public interest in disclosure of this information.
- (2) The exemptions in ss.36(2)(b)(i) and (c) did not apply.
- (3) The exemption in s.27 did not apply to the two specified paragraphs of one report, as the information in those paragraphs would not be likely to prejudice the UK's international relations.

18. On 13 February 2019 the MOD filed a notice of appeal against the Decision Notice [1.19-31]. The grounds of appeal were later amended [1.32-38].
19. On 14 February 2019 Mr Burt filed a notice of appeal against the Decision Notice [1.75-91]. On 28 March 2019 the MOD filed a response to Mr Burt's appeal [1.92-99]
20. On 29 March 2019 Mr Burt filed a response to the MOD's appeal [1.39-61].
21. The ICO filed responses to the two appeals on 9 May 2019 [1.100-112]. Mr Burt responded on 30 May 2019 [1.113-125].
22. Mr Burt has filed seven witness statements from himself and statements from Mr Forsyth and Sir Nick Harvey [5.230-300]. The MOD has filed statements from RAdm Keith Beckett [6.436-8] and Vanessa Nicholls [6.439-447].
23. On 11 October 2019 the MOD released some elements of the information Mr Burt had requested, in particular information concerning the DNSR itself and how it carried out its functions [4.226-229].
24. On 25 October 2019 Mr Burt filed a response to the MOD's evidence [1.62-74].

SUBMISSIONS

Introduction

25. The FTT will be looking at matters afresh, with the benefit of evidence that was not before the ICO at the time of the Decision Notice. As a result, these submissions look in turn at each of the exemptions now relied on by the MOD, in light of the current evidence, and then at the public interest balance.
26. In any event, the MOD no longer intends to rely on s.21 of FOIA for any of the withheld material. The only exemptions relied on are ss.24 and 26 (where the public interests overlap) and s.27. Thus, the MOD does not rely on any new exemptions but it does argue that those exemptions cover more of the material than it first identified.

27. As the ICO rightly recognises⁵, the MOD is not restricted to the exemptions or arguments it relied on in the initial response to Mr Burt's request. The caselaw relied on in para. 8 of Mr Burt's response to the MOD's appeal, and para. 4 of Mr Burt's second statement, is out of date. It is now well-established that public authorities can argue, in an appeal to the FTT, that information is exempt by reason of an exemption they did not raise before the ICO (see *Birkett v DEFRA* [2011] EWCA Civ 1606; [2012] 2 CMLR 5 and *McInerney v ICO & DFE* [2015] UKUT 0047 (AAC)).

Sections 24 and 26 of FOIA

28. As the Decision Notice rightly recognised, the nuclear deterrent is the 'apex' of the UK's national security strategy. The consequences of undermining the UK's nuclear deterrent are potentially devastating. There is, therefore, an extremely strong public interest in maintaining an effective nuclear deterrent.
29. As Ms Nicholls explains in para. 17 of her statement, a central part of effective nuclear deterrence is ensuring that adversaries are uncertain as to the details of the UK's nuclear defence programme. Even seemingly insignificant information could be the missing piece in the jigsaw/mosaic which adversaries need to complete their picture of the defence nuclear programme (see para.s 18-19 of Ms Nicholls' statement). Such a picture could be used by adversaries to develop counter-measures, exploit possible limitations or perceived vulnerabilities and acquire technologies for their own use.
30. Mr Burt speculates that the UK's adversaries already have information and intelligence about the UK's nuclear programme. The FTT is not in a position to determine whether that speculation is true. Even if it were true, it would be nothing to the point - it would still be damaging to national security and defence to provide official MOD information that could corroborate, complement or correct the unofficial intelligence adversaries may already have. (This point is rightly accepted in para. 41 of the ICO's response [110]).

⁵ See para. 37 of the ICO's response [1.109]

31. Further, there is a public interest in the DNSR being able to regulate the defence nuclear programme in confidence, so that safety concerns can be acknowledged and discussed candidly without any risk that those concerns may be used against the UK's defence and national security interests.
32. There is a balance to be struck when regulating defence nuclear safety. The way that the legislature has struck that balance is as follows.
33. The ONR regulates aspects of the defence nuclear programme that are broadly analogous to its responsibilities for the civil nuclear industry. It licenses the sites operated by contractors. It ensures that hazards from those sites are safely controlled. It ensures that the people working at and living near those sites are safe.
34. The DNSR, by contrast, focuses on the elements of the defence nuclear programme which are most directly concerned with the military and its operational capabilities. It regulates nuclear activities and facilities at sites which are Crown-owned and operated by the MOD. It regulates the safety of the warheads themselves and the propulsion systems on submarines, throughout their respective life-cycles.
35. It is, therefore, unsurprising that the ONR publishes more information than the DNSR. As the ONR is more concerned with civil safety and less intimately concerned with defence and national security than the DNSR, there is less harm and a greater public interest in disclosing at least some aspects of ONR reports.
36. The DNSR, by contrast, was deliberately created to deal with those aspects of nuclear regulation that relate directly to military capabilities and the associated military operations. Parliament deliberately created a 'carve out' for the regulation of the defence nuclear programme. It is no coincidence that the purpose of the DSA (and hence its agency, the DNSR) is expressly stated in the Charter to be to provide assurance to the Secretary of State and senior defence officials, not directly to the public. The DNSR understands the unique circumstances of both the defence nuclear programme and nuclear submarine operations; and has access to relevant security protected information which enables it to ensure that defence outputs are delivered safely.

37. One obvious reason why certain defence matters are ‘carved out’, and reserved for the DNSR, was to ensure that the regulation of safety within the defence nuclear programme should not be carried out under public scrutiny. The First-tier Tribunal should respect Parliament’s intentions and recognise that the DSA and DNSR are not public regulators. They are, in effect, primarily internal bodies to provide reassurance to the Secretary of State. The Secretary of State is entitled to decide that their reports should be kept within the MOD.
38. That is not to say that no information may ever be given about the safety of the defence nuclear programme. On the contrary, the public and foreign allies receive other information by which they can be reassured that the UK’s defence nuclear programme is safe:
- (1) As Ms Nicholls explains in para. 31 of her statement, the DNSR does not just write reports. It also authorises nuclear operations. The public (and foreign allies) can be assured that a nuclear activity would not be taking place if it had not been authorised by the DNSR as sufficiently safe.
 - (2) The public has received, and continues to receive, information about the DNSR’s activities – e.g. the number of inspections it has carried out etc. Such information can reassure the public that the DNSR is a thorough regulator.
 - (3) As RAdm Beckett explains in para. 7 of his statement, the UK provides a standard statement to the regulators of other ports when a UK submarine docks in their port, providing high-level reassurance as to the safety of those submarines: for example, that no effluent or waste will be discharged from the ship which would cause a radioactive hazard (“the Standard Statement”) [6.438xx].
39. However, there is a difference between the amount of information about nuclear safety that can be put in the public domain or shared with foreign states, without undermining the UK’s national security and defence interests, and the amount of information about nuclear safety that a regulator like the DNSR would need to discuss in its reports in order to conduct its function robustly. For example, when DNSR assesses safety risks associated with the nuclear programme in one of its reports, it goes into far more detail than would be required for the Standard Statement. There is good reason why those details safety assessments should be kept confidential whatever they may say. That can be demonstrated by looking at the three hypothetical possibilities.

40. First, at one extreme, it is theoretically possible that a DNSR report might identify serious safety risks that led to the DNSR refusing to authorise an operation. It would undermine the nuclear deterrent, and hence undermine national security and the effectiveness of defence, for such information to be disclosed.
41. Secondly, it is also theoretically possible for DNSR report to identify risks that are not so serious as to prevent an operation being authorised but which nonetheless require regulatory attention. Such risks would not have to be disclosed in the Standard Statement which is, as RAdm Beckett pointed out, 'high level' [6.437]. If information about such risks were disclosed, by way of FOIA requests, it could be used in a way that would be damaging to national security and the UK's defence. More detail can be given in CLOSED.
42. Thirdly, it is also theoretically possible that the DNSR reports might identify no serious regulatory concerns. If the DNSR's assessment is that the defence nuclear programme has satisfactorily achieved exceptionally high standards of safety, disclosure would not, that year, be particularly damaging to national security. However, disclosure of such a positive report could cause damage in future years, if the assessment was less positive and parts of the report had to be redacted. It would be prejudicial to national security if the MOD were to disclose DSA and DNSR reports when they did not identify safety concerns but to withhold or redact such reports when they did identify such concerns. Such a practice would likely lead to others to infer, from redactions, that there were concerns in relation to the safety of the UK's nuclear deterrent.
43. The only way to protect against these risks is to adopt the approach that the MOD has consistently applied from 2015/6 onwards – i.e. not to release any of the safety assessments in DNSR reports. This is equivalent to a 'neither confirm nor deny' ("NCND") policy and prevents any inferences being drawn from the redaction of DSA and DNSR reports.

Section 27 of FOIA

44. RAdm Beckett explains in his closed witness statement how disclosure of the withheld information would, at the material time, have been likely to prejudice international

relations. The point cannot be explained in OPEN. The MOD will file CLOSED submissions to address RAdm Beckett's CLOSED evidence.

Public Interest Balance

45. The public interest in maintaining the exemptions is extremely strong. Maintaining the exemptions helps protect the UK's nuclear defence programme. Undermining that programme would be potentially catastrophic to every person living in the United Kingdom. Undermining the defence nuclear programme would make it easier for an adversary to attack the UK. Even if the risks of such attack may not be high, the potential gravity of the harm is so great that there is an overwhelming public interest in not increasing that risk, even slightly.
46. Similarly, the public interest in not prejudicing the UK's international relations with other states is extremely important, for the reasons given by RAdm Beckett.
47. By contrast, the public interest in disclosure is not as strong. The MOD accepts that there is a public interest in the public being provided with information about the defence nuclear programme, particular information about whether that programme poses any risks to the safety of the public in the UK. However, that interest is already sufficiently met. The additional disclosure of the withheld information would add little. The incremental benefits of disclosure are vastly outweighed by the detriment it would cause. In particular, the public already receives information to reassure themselves that the defence nuclear programme is not creating any safety risks for them or for our allies:
 - (1) The public receives information from the ONR about the safety of nuclear sites to those that work in them or live near them.
 - (2) The public knows that defence nuclear operations will not be authorised by the DNSR if they are unsafe.
 - (3) The public knows how frequently the DNSR inspects nuclear safety.
 - (4) Foreign allies are given the Standard Statement to reassure them about the safety of submarines in their ports.

48. Disclosure would not tell the British public significantly more about the risks to their safety. By contrast, disclosure would actually increase the risk to their safety by imperilling the nuclear defence programme.
49. Put another way, the FTT is respectfully asked to respect the distinction drawn by the legislature and allow the DNSR to regulate defence nuclear safety in private, reporting only to the MOD and the Secretary of State for Defence.

CONCLUSION

50. For the reasons set out above, the ICO did not act in accordance with the law, and/or wrongly exercised her discretion, in ordering the disclosure of the disputed information.

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DANIEL ISENBERG

18 November 2019