IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

EA/2019/0040 &38

Ministry of Defence (EA.2019.0038)
Peter Burt (EA.2019.0041)
Appellants

and
Information Commissioner
First Respondent

and
Peter Burt (EA.2019.0038)
Ministry of Defence (EA.2019.0041)
Second Respondents

OPEN WITNESS STATEMENT OF VANESSA NICHOLLS
ON BEHALF OF THE MINISTRY OF DEFENCE

I, **Vanessa Nicholls**, of the Defence Nuclear Organisation, Ministry of Defence ('MOD'), Whitehall, London, **WILL SAY AS FOLLOWS:**

1. I am the Director General for Nuclear and lead the Defence Nuclear Organisation, having taken up the role in May 2019. I have spent 20 years in the Civil Service, mostly focusing on security and law enforcement matters. My previous posts include Director of Crime and Drugs Strategy in the Home Office, a secondment to the Metropolitan Police as Strategy Director, and, as part of what was Department for Energy & Climate Change (DECC), Director for Civil Nuclear Security, Emergency Planning and Non-proliferation, as well as nuclear decommissioning, including Sellafield.

2. I make this witness statement to explain the process by which the MOD considered the information that was requested by the appellant relating to the two 2015-16 annual nuclear safety assurance reports produced by the Department's independent safety regulators and the balance of public interest considerations that resulted in the decision to withhold them from release. I have sought to provide my statement with Open Material to the maximum extent possible, however, some of my evidence will be presented as Closed Material - this is marked accordingly and shown in red.

3. The facts and matters set out in this statement within my own direct knowledge are true. Facts and matters derived from other sources and information supplied to me by others are true to the best of my knowledge and belief. There is now produced and shown to

me a paginated bundle of true copy documents marked "VN1". All references to documents in this statement are to Exhibit VN1 unless otherwise stated.

Information in Scope of the Request

4. The original requests were handled under the Freedom of Information Act 2000 ('the FOIA'). The first for the Defence Nuclear Safety Regulator's ('DNSR') Annual Assurance Report was received on 25 September 2017 and substantively responded to on 20 October 2017, advising that the information was held but that it fell entirely within the scope of qualified exemptions provided at ss.24, 26 and 36 of the FOIA. The second for the nuclear content of the Defence Safety Authority's ('DSA') Annual Assurance Report was received on 23 October 2017 and substantively responded to on 23 November 2017, advising that the information was held but that it fell entirely within the scope of qualified exemptions provided at ss.24, 26, 27 and 36 of the FOIA. The use of s.27 was not explained, in accordance with s.17, as to do so would likely disclose the information being withheld. The two reports relate to the requirement for the DSA and DNSR to provide an assurance on defence nuclear safety to the Secretary of State for Defence ('the Secretary of State').

Oversight and regulation of defence nuclear safety

5. There are various exemptions, derogations or disapplications from United Kingdom ('UK') legislation on Health, Safety and Environmental Protection in respect of the Crown and of specific defence activities. The Secretary of State's policy, however, requires the Department to maintain arrangements that produce outcomes that are, so far as reasonably practicable, at least as good as those required by the legislation. These principles are laid out in the Secretary of State's policy statement on Health, Safety and Environmental Protection in Defence: **[VN1, document 1]**. MOD policy is to have organisational separation between those who conduct defence activities and those who provide safety regulation, to ensure the independence of the latter.

6. The DSA draws its authority from a charter issued by the Secretary of State and provides independent assurance to him that the policy is being promoted and implemented in the conduct of Defence activities. It has three roles:

   a. Regulating safety across defence (including in relation to nuclear activities);

   b. Responsibility for investigating defence accidents; and

   c. Acting as the Defence Authority for safety.

7. Specifically, in respect of defence nuclear activities, the Crown has a number of exemptions from relevant nuclear and radiological safety and environmental protection legislation in relation to nuclear weapons and nuclear reactors. Regulation of the Defence Nuclear Programme is carried out therefore through a combination of the work of DNSR and the statutory regulator, the Office for Nuclear Regulation ('ONR'). The relationship between the work carried out by these two entities is set out in the MOD/ONR General Agreement and supporting Letter of Understanding **[VN1, documents 2 & 3]**.

8. ONR's regulatory focus is primarily on the nuclear safety, and more recently conventional Health and Safety, at UK nuclear sites and their facilities in accordance with the Energy Act 2013. DNSR, as a constituent part of the DSA, is tasked with regulating activities that are exempt from legislation and in maintaining an appropriate regulatory regime. Its regulatory activity is directed primarily by two Joint Service Publications: JSP 518 – Regulation of the Naval Nuclear Propulsion Programme **[VN1, document 4]** and JSP 538 – Regulation of the Nuclear Weapon Programme **[VN1, document 5]**. Those JSPs also lay out the objectives of regulation at JSP 518 §19 *et seq.* **[VN1 document 4, p3]** and JSP 538 §7 *et seq.* **[VN1 document 5, p2]**.

9. The Director General of the DSA is required to produce an Annual Assurance Report for the Secretary of State. That report covers safety across the entire defence enterprise (aviation, maritime, land, ordnance and explosives, medical and fire, etc.) – including nuclear. In respect of nuclear activities, the DSA's Annual Assurance Report draws upon the analysis and conclusions of the DNSR's own annual assurance report – see JSP 518, §61 **[VN1 document 4, p83]** and JSP 538 §60 **[VN1 document 5, p112]**. The purpose of these two assurance reports is to articulate the safety performance of defence nuclear activities against the Secretary of State's policy, present a picture of compliance with defence regulations, and highlight areas which, in the view of the DNSR and DSA, require improvement. The reports are a key mechanism for communicating a consolidated view to the regulated community within MOD and for identifying and monitoring strategic issues and trends.

The Defence Nuclear Organisation

10. Through my organisation, I provide a single point of oversight for defence nuclear matters. My organisation was created to provide overarching supervision and management of the complex network of organisations, programmes and people that sustains the UK's nuclear deterrent. Taken as a whole, this is referred to as the Defence

Nuclear Enterprise ('the Enterprise') and its work includes designing, producing, and maintaining nuclear-powered submarines and nuclear warheads, as well as providing the necessary estate, people, and support to operate those systems. My organisation operates through working with other parts of MOD, other Government Departments, and our industry and international partners.

11. I report to, and am held to account by, the Defence Nuclear Executive Board through which I am responsible for providing the Secretary of State with a coherent and comprehensive view of the Enterprise, including its performance and associated risks. My organisation was set up in April 2016 and my predecessor, Mr Julian Kelly, who was the Director General between May 2016 and March 2019, led much of the transition to establish accountability and governance for the organisation and the wider Enterprise.

Security and transparency

12. One of my primary responsibilities is to sustain and protect the credibility of the UK's deterrence posture. This involves judging when to withhold information that may damage that credibility (see further below). I do, however, recognise the public interest in being as well-informed as possible about MOD's nuclear activities and reassured that these are safe. These competing principles present a challenge, however, and so to keep our nuclear technology safe, capable and credible, my first course must always be to protect information to safeguard our position from exploitation and to maintain our obligations with our international allies. These reports fall within such a challenge.

Nature of the nuclear deterrent

13. As set out in the National Security Strategy and Strategic Defence and Security Review 2015, 'Defence and protection start with deterrence, which has long been, and remains, at the heart of the UK's national security policy'. UK government policy is to operate a nuclear deterrent to deter the most extreme threats to our national security and way of life. For that to be effective I have to ensure the continued viability of the UK's nuclear deterrent. Effective nuclear deterrence is based on three distinct principles: capability, credibility, and communication. Our adversaries need to know that the UK has the capability to deliver a nuclear strike at a scale sufficient to outweigh any perceived benefits of attack; that, in extreme circumstances of self-defence, the UK would be willing to use that capability if there were no other alternatives; and for that to work, we have to communicate effectively our capability and credibility to our adversaries. Perceptions of our credibility and capability do not just extend to our adversaries; our

allies in NATO, who rely on a UK nuclear deterrent, and the British public must also be equally assured.

14. There is clearly a balance to strike on communications; our desire for our adversaries to understand our capability and credibility of the UK nuclear deterrent does not preclude the essential need to withhold information about its specific design and performance, to ensure the system's effectiveness. This is generally done to protect the critical technologies involved, so that potential adversaries are not able to: (i) assess accurately a system's potential performance; (ii) develop effective counter-measures to it; (iii) exploit possible limitations or vulnerabilities; or (iv) acquire those technologies for their own use. For the nuclear deterrent, and the underpinning weapon and propulsion technologies, this protection needs to be of the highest order. They are of fundamental importance to our national security; we need to avoid proliferation and ensure we meet our obligations in the UN Non-Proliferation Treaty; and potential adversaries particularly want to obtain information about them. As such, nuclear-related information is generally held at high levels of security classification.

15. Assuring the safety of nuclear systems, both weaponry and propulsion plants, requires a deep, technical knowledge of how they are constructed, and of the way they are operated. Hence information about the safety of a nuclear system is intrinsically linked to information about its design and performance.

16. As noted above, there is a tension between reassuring the public that the UK's nuclear systems are being operated safely and protecting information about the nature of those systems. The MOD recognises that there is a public interest in transparency in such an important arena of public safety. However, the public can be reassured, by information about the DNSR, that there is a body regulating defence nuclear safety. Furthermore, the public interest in maintaining a credible and effective nuclear deterrent is greater than the public interest in transparency about the DNSR's conclusions.

Uncertainty and the 'mosaic effect'

17. A central part of effective nuclear deterrence is ensuring that potential adversaries remain in a position of uncertainty as to the detailed nature of the UK's nuclear systems, as well as of the UK's overall nuclear capabilities. It is axiomatic that the greater the amount of potentially relevant information available to potential adversaries, the lesser their degree of uncertainty. Hostile states regularly pursue active operations to gather

information in order to reduce their uncertainties; and the UK does not wish to assist that process.

18. The collection of small, individual pieces of information over time from a variety of sources can be used to build up a more complete picture of a subject being investigated. This is commonly known as the 'mosaic effect'. Used effectively, this approach can reduce uncertainty to the point where a potential adversary is in a position to make an informed assessment as to UK capability. Accordingly, the UK takes steps to defeat its use.

19. This is not a simple task, however, as it is difficult, if not impossible, to identify which pieces of information may be a missing 'piece in the puzzle' for a particular adversary. The UK will not know what other pieces of information a hostile state has already acquired or has failed to discover; and a reviewer cannot presently assess what information may become relevant to an adversary in the future. This problem is more acute in an age where adversaries are able to scour electronically the internet and other digital sources in a manner difficult for a human analyst to comprehend or replicate. The impossibility of effectively future-proofing the disclosure of any information means that all such disclosures, however small, carry a certain degree of risk.

Regulator reports

20. Prior to 2016, proactive publications of the DNSR annual report and the DSA Annual Assurance Report were made with only minimal information withheld. The content in the two disputed reports (i.e. those for the year ending in 2016) reflects that contained in previous years' reports. That is to say, they address the same types of topic and issues. However, by the time that the reports in issue were compiled, the context had changed significantly. Two fundamental shifts had occurred, such that, at the time of the review, disclosure of the disputed material was no longer appropriate (even though equivalent or similar information in previous years' reports had been disclosed).

21. First, the DNSR report for 2015-16 was the first which substantively addressed not only the existing nuclear systems, but also their proposed future replacement (then known as the Successor programme and now as the Dreadnought-class submarine programme). The Dreadnought fleet will enter service in the early 2030s, but the construction programme is already underway and so is the associated safety assurance process, which formed part of the material in the 2015-16 report.

22. There is a greater concern about releasing information in respect of systems that have yet to be brought into operation than in respect of existing systems. In practice, the UK recognises that potential adversaries are already likely to possess a certain amount of information about nuclear systems that have been in operation for a substantial period of time. Conversely, adversaries are more likely to be operating with a 'blank slate' in respect of future systems, such that any information provided is likely to be of greater value to them. It is essential to deprive them of useful information for as long as possible.

23. Secondly, the global security context had also significantly changed by the time of the 2015-16 report. There had been a marked increase in the activities of hostile states directed against UK interests, as part of a wider trend of an increased willingness of some states to reject previous norms in international relations and to interfere in other states. As the then-Secretary of State stated in a keynote speech at the Royal United Services Institute (RUSI) on 11 February 2019: "*the very character of warfare itself is changing. The boundaries between peace and war are becoming blurred. Our adversaries are increasingly using cyber-attacks, subversion and information operations to challenge us and the rules-based international order*" **[VN1, document 6]**.

24. As such, even putting the same type of information into the public domain as that which had been published in previous years carried with it significantly greater risks to UK national security and defence capability by the time of the 2015-16 report. On that basis, my predecessor sought the then Secretary of State's reasonable opinion to engage s.36. Whilst MOD accepted the Information Commissioner's finding for not engaging the exemption, the arguments on the harm from release as originally made remain valid for withholding the disputed information.

25. In parallel, the more challenging global security context also prompted a wider review of the MOD's approach to releasing information about nuclear matters and contributed to the Government's decision to make changes to the way that nuclear-related business was organised, as announced in the Strategic Defence and Security Review ('SDSR') White Paper in November 2015. These included the creation of my post, which was a clear marker of increased concern at that time about nuclear matters in general and about ensuring the transition to the future deterrent in particular.

26. As noted by the Information Commissioner, I acknowledge our case is unusual, owing to the previous releases of reports of this kind or other defence nuclear-related information. As explained above, however, the context for release had changed, which necessarily resulted in a new approach to the disclosure of information relating to

nuclear matters, as well as in a re-organisation of the MOD's nuclear business. As part of this, the more information that is in the public domain in relation to safety, the greater the potential for potential adversaries to build up a picture of the nature and capability of the UK's nuclear systems.

27. The MOD has, nevertheless, reviewed the full DNSR 2015-16 report again and now identified specific information from it that potentially can be disclosed without compromising the information security considerations set out above. This material will be extracted and placed in a new document, which will be released shortly, once final checks have been completed.

28. Where the MOD relies on section 21 that is because the information is already in the public domain, namely in the equivalent annual report for 2014-15, which is publicly available.

Public Interest

29. I have already acknowledged, and do not shy away from, the strong public interest in disclosure of information relating to nuclear safety in general. That is why the UK has a robust system of civil nuclear oversight and governance; and why the MOD seeks to produce safety outcomes that are, so far as reasonably practicable, at least as good as those required by UK legislation. Recognising that public interest, however, it is nevertheless outweighed in favour of withholding the disputed information for the weighty reasons I have explained.

30. Relevant to that assessment is the fact that the public interest in disclosure of this particular information is already met through other means. First, the disclosure of the remainder of the reports which is not covered by the statutory exemptions provides the public with a significant degree of information in relation to nuclear safety and oversight. Moreover, the existence of the DNSR as an <u>independent</u> regulator (as I have explained above) acts to ensure that the public can be confident in proper oversight of the Defence Nuclear Enterprise. That independence is established by the DSA's charter.

31. Further, the DNSR is not simply a regulator that provides intermittent written reports. Rather, it is also responsible for the <u>authorisation</u> of nuclear operations. If the regulator took the view that – for example – the assembly process of a warhead was unsafe, it would simply withdraw authorisation for that process.

32. As such, the disputed information constitutes only one small element of one strand of the edifice of defence nuclear safety regulation and oversight. There is a substantial public interest in defence nuclear safety, which is met by that regulatory framework as a whole. However, in respect of the specific information in dispute, the public interest lies in withholding it for the reasons that I have given.

Statement of Truth

I believe that the facts stated in this witness statement are true.

Signed: ..... Dated: 7 October 2019

Vanessa Nicholls

Director General for Nuclear, Defence Nuclear Organisation, Ministry of Defence