



**IN THE FIRST-TIER TRIBUNAL**  
**0041**

**Appeal No: EA/2019/0038 &**

**GENERAL REGULATORY CHAMBER**  
**(INFORMATION RIGHTS)**

**ON APPEAL FROM:**

**Information Commissioner's Decision Notice No: FS50754705**

**Dated: 20 December 2018**

**Ministry of Defence (0038)**  
**Peter Burt (0041)**

**and**

**Information Commissioner**

**Appellants**

**First Respondent**

**Peter Burt (0038)  
Ministry of Defence (0041)**

**Second Respondents**

**Heard at: Field House, Breams Buildings EC4**

**Date of Hearing: 2-3 December 2019**

**Consideration: 22 September 2020**

**Before**

**Chris Hughes  
Judge**

**And**

**Anne Chafer  
and  
Paul Taylor**

**Tribunal Members**

**Date of Decision: 22 September 2020**

**Date of Promulgation: [completed by tribunal office]**

**Attendances:**

For the First Appellant: Rory Dunlop QC, Daniel Isenberg (instructed by Mairi Pollock and Ruth O’Sullivan)

For the Second Appellant: in person

For the Respondent: Christopher Knight (instructed by Sapna Gangani)

**Subject matter:**

The Freedom of Information Act 2000

**DECISION**

**REASONS**

**Introduction**

1. In the UK the main agency responsible for the safety of industrial and similar sites is the Health and Safety Executive (“HSE”). This was created by s.10 of the Health and Safety at Work Act 1974 (“the HSWA”) with the responsibility to secure the health safety and welfare of persons at work, to protect the public from risks to health and safety arising from work and to control the keeping and use of dangerous substances (s.1 HSWA). In recognition of the unusual and specific risks associated with unstable nuclear isotopes the Energy Act 2013 placed with the newly created Office of Nuclear Regulation (“ONR”) responsibility for nuclear site safety, safeguards and security and transport of nuclear material rather than with the HSE. However where sites have a military function two other bodies are involved.
2. The Defence Safety Agency (“the DSA”) under a Charter charging it with responsibility *“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.”*
3. The Defence Nuclear Safety Regulator (“DNSR”) was formed by the MOD before the ONR was created and is responsible for certain matters exempt from regulation by ONR. It is responsible for providing assurance of compliance with the Secretary of State’s Policy Statement on Health Safety and Environmental Protection on the safety of the defence nuclear programme including both nuclear weapons and nuclear propulsion in naval vessels.
4. For some years DNSR published (subject to redaction) its annual report. The DSA annual report, which included information from DNSR, was also published. However after the publication of the reports in 2015 the MOD’s approach to publication changed.

### **The request for information**

5. The Appellant in these proceedings, Dr Burt, made two requests for information, the first on 23 September and the second on 22 October 2017:-

1

*“Does the Ministry of Defence intend to publish the 2015-2016 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 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 document”*

2

*“For what reasons has information on defence nuclear safety been redacted from the Defence Safety Authority’s 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 2015-2016)*

6. The Ministry of Defence resisted disclosure of both documents and on internal review it relied on various exemptions contained in FOIA including:-
- For the whole of the DNSR and the redacted parts of the DSA reports s36(2)(b)(i) and (c) for which a qualified persons’ opinion was obtained;
  - For specified parts of both reports s24(1) which permits the withholding of information *“for the purpose of safeguarding national security”* and for the same parts of the reports s26(1) *“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-(a) the defence of the British Isles or of any colony, or (b) the capability, effectiveness or security of any relevant forces”*
  - s27(1)(a) *“Information is exempt information if the disclosure under this Act would, or would be likely to, prejudice- relations between the UK and any other State”*

### **The complaint to the Information Commissioner**

7. Dr Burt complained to the Information Commissioner (“the IC”). During the course of the investigation the MOD on 6 August 2018 sent to her the material, an evaluation of the

public interest tests applying to the various exemptions and a “*Section 36 submission which includes SECRET discussion of the public interest factors dated 25 September 2017 and Ministerial authorisation of the use of s36 dated 9 October 2017*”

8. In her decision notice she largely accepted the arguments of Dr Burt that s36 was inappropriate (decision notice 33):-

*“The Commissioner recognises that circumstances may change, and she notes the MOD’s reference in the internal review to the current security. However in the light of the fact that previous versions of the reports have been disclosed casts, in her view, very considerable doubt on the likelihood that disclosure would prejudice the free and frank provision of advice”*

9. In considering the application of s24(1) to certain material she noted the arguments of the MOD that disclosure could contribute to a mosaic effect (whereby information about the UK deterrent could be revealed to potential adversaries) and the key role that nuclear deterrence played in UK national security strategy. She noted Dr Burt’s argument that (decision notice 42-45) the UK was not facing an imminent threat from any aggressor. He stated that the evaluation of whether the UK deterrence was credible would be made by any potential aggressor. He submitted that Russia undoubtedly had the capability to make its own assessment of the credibility of the deterrence regardless of any information published in the reports. The IC concluded, despite Dr Burt’s arguments, that the exemption was engaged.
10. In weighing the balance of public interest (dn paragraphs 44-58) she noted Dr Burt’s arguments that information related to the safety of the nuclear weapons programme was a matter of public concern and that inferences might be drawn from the non-disclosure of the current reports when previous reports had been disclosed. However on balance she accepted the MOD’s argument in favour of non-disclosure to prevent the possibility of undermining the capability, credibility and deterrent effect (which the nuclear programme was intended to provide) since she considered that the potential harm caused by such undermining was arguably a very serious one. She noted that the s26 exemption was engaged by the same material and did not consider that exemption further.
11. With respect to two paragraphs in the DNSR report where MOD relied on the s27 exemption, she concluded that the harm claimed by the MOD related to and was in a causal relationship with interest protected by the exemption. She considered the arguments of Dr Burt that the UK had long-lasting, deep and robust co-operation arrangements with the USA and France on military nuclear matters and in the light of these arguments concluded that the threshold for engagement of the exemption, that prejudice “would be likely” to result if the material was disclosed, was not met.
12. In the light of these findings she ordered the disclosure of the withheld information to the extent that the MOD had not identified it as protected by s24.

### **The appeal to the Tribunal**

13. Both Dr Burt and the MOD appealed against the decision notice, Dr Burt arguing for the release of all the information and the MOD for the withholding of all the information. The MOD ceased to rely on s36; initially MOD relied in part on s21 (material already in the public domain) but later abandoned that reliance. The MOD also changed its stance between the representations it made to the IC and to the tribunal with respect to ss24 and 26, before the tribunal it argued that all the withheld material engaged these sections rather than some of it. The MOD continued to rely on s27. The MOD also released some material from the DNSR report which related to DNSR and how it discharged its functions.
14. In its appeal the MOD set out its interpretation of the context of the requests. The MOD argued that Parliament had created a separate regime for defence nuclear safety which was separate from public accountability under HSWA. This provided assurance to senior officials and to the Secretary of State who in turn was answerable to Parliament. The tribunal should therefore recognise that DSA and DNSR were not regulators whose work should be carried out in public but internal bodies assisting the Secretary of State whose reports should be kept within the MOD. The MOD had published a policy on health safety and environmental protection which aimed to maintain arrangements which were as far as practicable at least as good as those under HSWA. In 2015 there had been a Strategic Defence and Security Review (SDSR) which set out the UK defence strategy for the next 10 years. A review of information security in the light of the perceived threat from hostile state actors changed the MOD approach to publication. After May 2016 the MOD ceased publication of DNSR and redacted DSA reports where they dealt with nuclear matters. The IC had erred in her understanding of why the disputed material engaged s24 (national security) and s26 (prejudice to the defence of the British Isles, or the the capability, effectiveness or security of the armed forces of the Crown or any forces co-operating with them), why s27 was engaged and where the balance of public interest lay. The MOD emphasised that the substantive issues going to the exemptions could only be developed in closed witness evidence.
15. In his appeal Dr Burt argued that there had been no apparent change in the security position. He stated that the MOD did release some information about the safety of nuclear weapons and that demonstrating the safety of nuclear weapons would assist rather than harm deterrence. With respect to s24 (national security) he argued that if the MOD was unable to manage its nuclear enterprise safely this would raise substantial issues concerning UK defence and foreign policy which it was in the public interest to know. There was no evidence that defence personnel would be placed at risk by publication and previous reports had not contained information which compromised military security. Dr Burt argued that late reliance on exemptions should not be accepted.
16. In resisting both appeals the IC noted the difficulty of dealing with the MOD appeal without knowledge of its substance. She disagreed with the argument of Dr Burt that reliance on new exemptions was impermissible but noted that the delay could be seen to weaken arguments in their favour. She submitted that while Dr Burt was entitled to rely on the previous publication of reports but that the MOD was entitled to change its

position on disclosure when its assessment was that the national security risks with respect to the nuclear deterrent had altered and there was no duty to perpetuate an error *“the release of information about the nature and functioning of the UK’s defence nuclear facilities and the safety aspects of those facilities had the clear potential to form part of a mosaic of valuable information to be pieced together by hostile state actors.”*

17. In replying to the MOD and IC Dr Burt submitted that publication of equivalent reports between 2005 and 2015 was not an error but a decision which had correctly balanced safety and national security. The reports were unlikely to contain “detailed and specific information”. He resisted the widening of material to which the exemptions applied.

### **The question for the Tribunal**

18. The question for the tribunal is whether the exemptions claimed by the MOD are engaged by some or all of the material and if so how the balance of public interest should be struck.

### **Open Evidence**

19. In support of his case Dr Burt submitted a number of witness statements. Commander Robert Forsyth RN (retired) (who was 2inC of a nuclear armed submarine from 1972-74 and on the Naval Staff of the MOD until early retirement in 1981) gave evidence as to the contents of previously published reports which in his view gave a general commentary which would not be of material assistance to an adversary seeking to obstruct the UK’s programme. The reports identified key issues, were sometimes critical and indicated remedial measures the MOD was taking. Such reports were valuable in ensuring trust and publication of an independent assessment was important both for the public and also for the crew of the submarines. Withholding the reports was disproportionate to security risks and the MOD should revert to good practice by routinely publishing.
20. Sir Nick Harvey an MP from 1992 -2015 and Minister for the Armed Forces between 2010-2012 gave a statement supporting publication. He argued that the publication of the reports showed the commitment of the MOD to taking regulation of nuclear safety seriously and enabled public and Parliamentary scrutiny of the MOD nuclear programme. The information from this independent source was more convincing than statements by Ministers and the cessation of publication was a backward step.
21. Dr Burt is a member of the Independent Advisory Panel to ONR’s Chief Nuclear Inspector. In seven witness statement he presented his reasoning why he did not accept that the exemptions were made out. He emphasised what he considered to be procedural irregularities in the late use of exemptions by the MOD and argued that it had not acted in good faith. He emphasised the need for transparency around nuclear safety. He explored the public interest in the work of DNSR and highlighted news coverage of nuclear defence related issues and argued that the public was entitled to know what action had been taken. He highlighted malicious narratives about the UK military originating from Russia and Russia’s use of information warfare. He described systematic activities by

Russian state agencies RT and Sputnik to spread misinformation to undermine the UK nuclear defence programme. He argued that the provision of information by an arms-length regulator would counteract this. In addressing potential harm to national security he argued withholding the report might undermine credibility of the deterrent more than disclosing it. He noted that the UK was committed to disarmament and had emphasised the quality of DNSR's work in its report to the Non Proliferation Treaty (NPT) Preparatory Committee and the MOD had reported to the Public accounts Committee that it was "*committed to transparency on the nuclear enterprise*". He argued that publication of the DNSR report would be a clear example of its commitment to the NPT.

22. Vanessa Nicholls leads the Defence Nuclear Organisation which is responsible for oversight of defence nuclear matters, providing overarching management of the organisations, programmes and people which sustain the UK nuclear deterrent and is responsible for its continuing viability. She set out the principles of deterrence, capability credibility and communication. In that context she explained that:-

*"our desire for our adversaries to understand our capability and credibility of the UK nuclear deterrence does not preclude the essential need to withhold information about its specific design and performance... 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 and vulnerabilities,*
- (iv) acquire these technologies for their own use."*

23. In support of this aim she emphasised the importance of maintaining uncertainty as to the detail of systems and confirmed that "*Hostile states regularly pursue active operations to gather information in order to reduce uncertainty*". Through systematically gathering small pieces of information it was possible to reduce uncertainty to the point where a potential adversary was in a position to make an informed assessment of capacity.
24. Two fundamental shifts occurred which drove the change in approach to publication of the reports. The 2015-6 DNSR report was the first to address not only existing nuclear systems but the replacement Dreadnought-class submarines which meant that the construction programme and the associated safety assurance process were underway, these were reflected in the 2015-6 report. While a potential adversary would be likely to have some information about the existing vessels they would have much less about the future vessels. Therefore any information provided would be of greater value to such a potential adversary and accordingly it was essential to maintain that ignorance for as long as possible. The more challenging global security context had prompted a wider review of the MOD approach to releasing nuclear related information.
25. The witness provided a significant number of documents in the public domain which set out the regulatory processes and controls in place. In balancing the public interest of the disclosure of the withheld information she stressed that existing disclosure provided significant information on nuclear safety and oversight and stressed the importance of



DNSR being an independent regulator with the power to authorise or refuse to authorise activities. The withheld information was only one small part of the defence nuclear safety regulation and oversight and the public interest in nuclear safety was met by the regulatory framework, the interest in disclosure of the withheld material was counterbalanced by the interest in protecting the information. She did not want to withhold information unnecessarily and had considered each paragraph in order to determine whether it could be disclosed, in the light of this a disclosure had been made.

26. Rear Admiral Keith Beckett Director of Submarine Support has 30 years experience as a nuclear engineer overseeing nuclear submarine propulsion systems. He emphasised the highly sensitive nature of the operations and systems which required much of his evidence to be in closed session. In open he emphasised the importance of the nuclear deterrent and the role of nuclear powered and armed submarines since the UK's Continuous at Sea Deterrent patrol was started in April 1969. He emphasised the role of DNSR and its access to all sensitive and classified details of nuclear engine design in ensuring safety. He explained that DNSR provided assurance to regulators in other countries in support of UK submarines in foreign ports through the provision of a Standard Statement giving high level assurances without disclosing details of technology. The UK, US and France shared a common approach in this matter.
27. In a witness statement in reply Dr Burt noted the 11 October disclosure of material from the DNSR 2015-6 report but criticised the MOD for what he considered the blanket non-release policy. In replying to Admiral Beckett he argued that his closed evidence would need to demonstrate tangibly how disclosure would harm national security and international relations. Dr Burt adopted Ms Nicholls' four fold categorisation and argued that if the DNSR report did not discuss critical technologies or enable a potential adversary to take any of those four steps then the case for withholding the information was weakened. He cautioned against the MOD attempting to use s24 and the mosaic argument to protect all information. He emphasised that not all information about the Dreadnought-class programme was sensitive and that comments the regulator might make would be unlikely to compromise national security. If the regulator had exposed fundamental design or safety issues then the public was entitled to know these. ONR had responsibilities for regulating sites involved in the UK nuclear weapons programme and detailed information on safety performance and management on these sites had been published. The MOD was out of step. With respect to the global security context Dr Burt argued that the SDSR did not contain material to justify the approach taken by MOD.
28. A late witness statement recorded that Dr Burt had been present at a ONR meeting with its non-governmental stakeholders (which had now been reported on a news website) where its Chief Inspector had stated that he had informed the MOD that he considered the withholding of the DNSR report was unhelpful, and that further work had been commenced to define the respective responsibilities between ONR and MOD agencies. Dr Burt did not accept that the MOD was properly excluded from regulation by ONR.

**Closed evidence – gist**

29. Vanessa Nicholls was questioned in closed sessions on matters raised by Dr Burt in open to which she had been unable to give open replies including with respect to the MOD engagement with DNSR and the DNSR's views in relation to the publication of its 2015/6 Annual Report, how the withheld information was stored in MOD IT, the handling restrictions applied to it, and concerning the original decision to apply the s36 exemption. In further questioning the 2015/6 report was compared with previous years, the geopolitical context surrounding the review of publication practices after 2015, including in relation to the DNSR report and how disclosure of the withheld information could be used to create a mosaic of information.
30. Rear Admiral Beckett was similarly questioned. The questions covered how elements of international relationships on nuclear co-operation have waxed and waned over time, whether the previous publication of reports had compromised national security and his opinion on the disclosure of the 2014/5 DNSR report. He was further questioned as to the potential consequences of the disclosure of the withheld information and the likelihood of such consequences materialising (including whether it mattered if the disclosure was voluntary or ordered by the tribunal) and as to his own views as to the appropriate extent of publication of the DNSR Annual Reports.

#### **Legal submissions and analysis**

31. Dr Burt's overall position was that where it was justified he accepted that information should be withheld on the grounds of the protection of national security, he was concerned that rather than considering the actual information in the documents the MOD was adopting a blanket approach and seeking to withhold all information without a proper consideration.
32. Mr Knight for the IC advanced the arguments which would have been available to Dr Burt. For the IC he acknowledged that arguments as to public interest were finely balanced. He submitted that there was a lack of evidence of harm proceeding from the disclosures made in previous years and accordingly it was speculative to assert that harm would flow from disclosure of the disputed material. From the open evidence of the MOD he accepted that s27 was engaged however this acceptance was at the low end of the scale when weighed in the balance of against the public interest in disclosure, there had been publication of similar material since 2005. He confirmed that the issues raised by s24 and s26

#### **Consideration**

33. Almost all aspects of business, from the provision of legal advice, to the testing of new models of motor car to the construction and maintenance of nuclear propelled and armed submarines is subject to regulation and oversight in both the private and public interest. While the activities are different and what needs to be inspected and assessed may vary, many of the principles of regulation are similar. It is important to recognise that the risks to be guarded against and the risks arising from inspection vary from activity to activity

and also may vary over time. In all the activities listed while there is a requirement to give access to the regulator so that assurance can be given to the public as to the adequacy of legal services, the safety and fuel consumption of a car or the safety of a dockyard for its workers and local residents; weighing against that there will be some obligations on the regulator *in the public interest* to maintain the confidentiality of what has been inspected, in order to protect the confidentiality of a solicitor's clients, the intellectual property rights of the designer of a car and the national security and defence issues around the operation of the submarines. The force of these considerations will vary with the passage of time; the intellectual property issues around the safety assessment of a forty year old petrol powered car are likely to be less pressing than novel design issues in the latest all-electric vehicle. In both cases an inspection may result in a public statement that the vehicle is safe to drive, but the underlying processes and details of the specific technology involved which need to be understood are very different.

34. This case exemplifies these problems. The two regulators in these appeals are both specialist, one in nuclear safety and the other in a subset of nuclear safety as it applies to defence. The first is publicly accountable for safety, the second is accountable to the Secretary of State for Defence and has a wider view than the current safety of an installation. Matters inspected and considered go beyond the safety of the workforce and residents adjacent to the dockyard to wider questions going forward which will impact on the future nuclear defence posture. The extent to which these latter issues should be in the public domain raise issues of a different kind. The DNSR has access to relevant security protected information to enable it to ensure that the defence programme is delivered safely. Furthermore DNSR authorises nuclear operations. Its assurance means that these activities are sufficiently safe to be carried out. There is significant publicly available information provided about DNSRs activities such as the number of inspections carried out. There are local liaison arrangements through which information is provided to local authorities responsible for the areas where dockyards are located. A standard statement is provided to port authorities of other countries when a UK submarine visits giving assurance of safety.
35. While much is made in Dr Burt's appeal of the previous stance on the publication of these materials and the IC has supported some disclosure it is clear that two substantial changes have affected the extent to which disclosure could prejudice UK defence. The first is that while previous reports dealt with maintenance issues around the existing fleet, from 2015-6 the reports need to address the emerging understanding of the regulator in connection with future vessels. The previous information in the public domain will have been assessed by foreign states with potentially hostile intentions, however putting information relating to the new vessels into the public domain for the first time and which (it is hoped) they do not yet possess will clearly not be in the public interest. Furthermore as the tribunal observed in open session major events of the past decade show that the international situation must have changed by a consideration of the increasingly assertive risk taking by Russia including:-

- the seizing of the Crimea,

- the occupation of other parts of the Ukraine by covertly deploying regular soldiers,
- the shooting down of an airliner by these covert Russian forces using an advanced Russian weapons system
- the attempted murder of Mr Skripal (a former Russian intelligence agent) by two Russian intelligence officers and the actual murder of a British citizen (due to the reckless inhumanity of the assassins) in a cathedral city in England.

36. It is clear therefore that the actions of the Russian state indicate a more aggressive posture militarily as well as a more aggressive targeting of the UK by Russian intelligence. The tribunal is therefore satisfied that both the risk has increased and there are new nuggets of information about UK nuclear capability which may need protection. It may be noted that the material submitted to Ministers in relation to a s36 certificate covered the same issues explored in the hearing thus providing a clear understanding of the significance of those exemptions to the Minister and to the IC who received this explanation of the issues in conducting her investigation.
37. The tribunal accepted that it had not been presented with any evidence of the current state of knowledge of the UK nuclear deterrence and its capabilities possessed by potentially hostile powers or evidence that such powers had used information published in these reports in previous years. It is clear however that publicly available sources will be examined and each increment of information will be used to assemble a more complete picture. While the tribunal accepted the force of Sir Nick Harvey's argument in favour of public and Parliamentary scrutiny, it noted that while a Defence Minister he had not been responsible for the decision to release previous (redacted) versions of the reports and conditions were now different.
38. The tribunal was satisfied that the mosaic effect significantly enhanced the value of the withheld material. The tribunal was further satisfied that s24(1), s26(1) and s27(1) were all engaged and that a significant prejudice would arise from disclosure which substantially outweighed the value of disclosure of the information to the public. The significance of the closed evidence for this is more fully considered in a closed section. The fourfold classification put forward by Ms Nicholls that disclosure could contribute to understanding of the potential performance, limitations and vulnerabilities as well as assisting a potential adversary in the development of the technologies and countermeasures to them was justified by the evidence.
39. The tribunal upheld the appeal by the MOD and dismissed Dr Burt's appeal.

**Judge Hughes**

Date: 22 September 2020