IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL (INFORMATION RIGHTS) UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

BETWEEN

(1) MINISTRY OF DEFENCE (EA/2019/0038)
(2) PETER BURT (EA/2019/0041)

Appellants

-and-

(1) THE INFORMATION COMMISSIONER (both appeals)
(2) PETER BURT (EA/2019/0038)
(3) MINISTRY OF DEFENCE (EA/2019/0041)

Respondents

SKELETON ARGUMENT ON BEHALF OF THE INFORMATION COMMISSIONER

References to pages in the Open Bundle are in the form: [OB/tab/page].
References to documents in the Closed Bundle are in the form: [CB/tab].
References to witness evidence are in the form: W/S Name, §x.
References to the Freedom of Information Act 2000 are in the form: "FOIA".

A. Introduction

1. This skeleton argument is served in accordance with the Directions of the Registrar dated 1 November 2019 [OB/2/152], on behalf of the First Respondent ("the Commissioner").

2. The Tribunal is considering two joined appeals filed against Decision Notice FS50754705 ("the DN") [OB/1/1-18]. In summary:

   (1) Appeal EA/2019/0038 is brought by the Ministry of Defence ("the MoD") against the requirement of the DN that all passages in the requested information for which section 24 had not been claimed be disclosed.

Reliance is (now) placed upon sections 24, 26 and 27 FOIA. The MoD no longer maintains its appeal in respect of a small amount of information released on 11 October 2019 [OB/4/226-229]. In its skeleton argument, the MoD has withdrawn (without explanation, but plainly correctly) reliance on section 21. Mr Burt opposes the MoD's appeal.

The Tribunal will find the two relevant reports with the MoD's redactions sought in its appeal indicated through coloured highlighting at [CB/3] and [CB/5].

(2) Appeal EA/2019/0041 is brought by Mr Burt against the conclusion of the DN upholding the application of section 24 to the passages over which it had been claimed by the MoD at that time. The MoD opposes that appeal.

3. Having reviewed the open and CLOSED evidence, the Commissioner submits that both appeals against the DN should be dismissed. The Commissioner correctly struck the balance in the redactions accepted in the DN.

4. Significant parts of the MoD's case are advanced in CLOSED evidence. The Commissioner by no means accepts significant aspects of that CLOSED evidence as served and will, on her own and Mr Burt's behalves, seek to test that evidence at the Tribunal. In the light of the handling difficulties, including the late provision of the MoD's CLOSED skeleton, the Commissioner is not in a position to provide CLOSED written submissions. She will supplement her OPEN position orally as appropriate.

B. The Context to the Information: Defence Nuclear Regulation

5. As explained in the MoD's skeleton argument, health and safety legislation in its various forms is not generally extended to Crown-operated defence activities and facilities. Rather, the standards set in the defence context are those

of MoD policy, which is to "*produce outcomes that are, so far as reasonably practicable, at least as good as those required by UK legislation*": 'Defence Policy Statement on Health Safety and Environmental Protection' (July 2018) ("the Policy Statement") [OB/6/449-450]. The Policy Statement provides that the Secretary of State for Defence is "*answerable to Parliament for such matters*" (at §1), and that the Defence Safety Authority ("the DSA") is directed by "*Charter to provide me with independent assurance that my policy is being promoted and implemented in the conduct of Defence activities*", including by the provision of an annual report (at §4).

6. The DSA produces its annual assurance report concerning the full range of defence activities it inspects, and summarises the safety assurance it is able to give across each area. Its 2015/16 report is publicly available, save for the part of the content which concerns nuclear safety, which has been redacted in accordance with the MoD's position in this appeal ("the DSA Report"). The version in the public domain may be seen at [OB/3/180-201].

7. The Defence Nuclear Safety Regulator ("the DNSR") is, since the creation of the DSA, the part of the DSA responsible for regulating the nuclear hazards of the Defence Nuclear Enterprise, or Defence Nuclear Programme, consisting of the Naval Nuclear Propulsion Programme and the Nuclear Weapon Programme, where the MoD has specific exemptions from statute. Neither it, nor the DSA, was created by statute.

8. The functions of the DNSR sit alongside the civilian nuclear regulator: the Office for Nuclear Regulation ("ONR"), created under the Energy Act 2013. A detailed 'General Agreement between the MoD and ONR for Regulation of the Defence Nuclear Programme' (28 January 2015) is at [OB/6/451-477]. That helpfully delineates the respective competences of the ONR and the DNSR. The ONR does have competence, for example, over nuclear installation site which is operated by a commercial organisation under contract with the MoD; see,

e.g. the tables at [OB/6/455-456] for the divisions of responsibility. ONR itself is required to report annually to the DNSR on its work, so that the MoD can consider both reports together [OB/6/459]. Any redactions proposed by the DNSR must be justified by reference to FOIA [OB/6/461]. There is also a Letter of Understanding between the ONR and DNSR (April 2015) appended to the General Agreement [OB/6/469-477] to support "*coherent, complete and seamless regulation of the Defence Nuclear Programme*". The DNSR and ONR agree to further openness and transparency [OB/6/473].

9. The DNSR is, like the DSA, obliged to issue an annual assurance report in relation to both Naval Nuclear Propulsion Programme and the Nuclear Weapon Programme. This obligation is set out in the two governing Joint Services Publications: JSP 518 on Regulation of the Naval Nuclear Propulsion Programme (July 2014) – see §61 [OB/6/564] – and JSP 538 on Regulation of the Nuclear Weapon Programme (July 2014) – see §60 [OB/6/864]. Both paragraphs use the term "*publish*", but also state that it is provided to the Permanent Under-Secretary, the Defence Nuclear Executive Board and the Defence Nuclear Safety Committee.

10. The content of the DSA Report in relation to nuclear safety is materially derived from or relates to the specialist report produced annually by the DNSR. The entirety of the annual assurance report for 2015/16 from the DNSR has been withheld ("the DNSR Report"), save for a limited amount of text released in the course of this appeal on 11 October 2019 [OB/4/226-229]. A clean version of the full DNSR Report is at [CB/1].

11. Mr Burt's evidence – W/S Burt 6 at §§12-14 [OB/5/282] – gives examples of similar regulatory bodies in other nuclear states, and the publication of their reports. For example, in the USA, the Defense Nuclear Safety Facilities Board provides and publishes an annual report to Congress on the safety of US

nuclear weapons sites under section 2286E of the Atomic Energy Act 1954 (as amended), 42 USC.

12. Mr Burt correctly emphasises that past annual reports from both the DNSR and DSA have been published in full: W/S Burt 1 at §12 [OB/5/239]. The former Defence Minister, Sir Nick Harvey, has provided a short supporting statement indicating his experience of approving such reports for publication [OB/5/299-300].

13. The DNSR Annual Report 2012/2013 [OB/5/301-324] and the DNSR Annual Report 2014/15 [OB/5/325-340] are before the Tribunal. The Commissioner notes the following from those two reports:

(a) A common theme of both Reports (and it appears prior Reports too) is that the most significant issue identified is the ability of the MoD to sustain a sufficient number of Nuclear Suitably Qualified and Experienced Personnel ("NSQEP"): e.g. [OB/5/306-307] and [OB/5/331-332]. It is described as the "*principal threat to the delivery of nuclear safety*" [OB/5/326].

(b) The other core issue in both Reports is 'Strategic Organisational Change' or 'Organisational Capability', which appears to involve a number of detailed and technical aspects across the defence nuclear programme, and which the DNSR considers requires continued vigilance; [OB/5/307-309] and [OB/5/332].

(c) The Reports inter-relate and are clearly reference back to the strategic issues highlighted previously; they provide, as one would expect, a picture of how safety performance across core issues is developing and which strategic issues need particular focus in the forthcoming year.

(d) Although the Reports are at a relatively high-level, they nonetheless summarise in detail the position of the Naval Nuclear Propulsion

Programme and the Nuclear Weapons Programme, including the status of future replacements and the work done on individual vessels and bases: e.g. [OB/5/329-330]. The 2012/13 Report highlights technical issues arising from ageing plant and infrastructure [OB/5/309-310].

(e) So far as the Commissioner can see, neither Report contains any comment concerning the armed forces or nuclear technology of any other State.

(f) The 2012/13 Report specifically notes that the DNSR is "*seeking to develop its approach to openness and transparency, recognising the appeal being taken by external regulators (e.g. ONR)*", bearing in mind the careful balance needed in the defence context [OB/5/317].

14. The Commissioner further notes that at least some of the DSA and DNSR Reports were initially released, with some redactions, pursuant to a FOIA request and, during the course of an appeal, the MoD released most of the redacted information such that the appeal was rendered academic: *Edwards v Information Commissioner & Ministry of Defence* (EA/2010/0056, decision of 2 December 2010). The application and importance of FOIA in gaining access to these Reports forms part of the context.

C. The Requests

15. On 23 September 2017 Mr Burt made a request to the MoD for the "*2015-16 annual assurance report from the Defence Nuclear Safety Regulator*" [OB/4/206-207]. On 22 October 2017, Mr Burt made a further request for the "*unredacted copy of the Defence Safety Authority's annual assurance report for 2015-16*" [OB/4/208-209] ("the Requests").

16. Substantive responses were provided by the MoD on 10 November 2017 [OB/4/210-211] in relation to the DNSR Report and 23 November 2017 in

relation to the DSA Report [OB/4/212-213]. Both Reports were withheld in materially identical letters, in reliance on sections 24, 26, 27 and 36.

17. On 13 [OB/4/211a] and 24 November 2017 [OB/4/214] Mr Burt requested internal reviews. On 1 May 2018 [OB/4/215-222], the MoD provided the outcome of that joint internal review, which upheld the original decisions. The MoD explained that it was relying on section 36 generally (and as its primary case). The internal review indicated that section 24 applied generally to the Reports and that section 26 covered materially the same ground as section 24. Section 27 was applied only to some of the information in the Reports, with no detail being provided in reliance on section 17(4) FOIA.

18. Mr Burt complained to the Commissioner on 12 June 2018 [OB/3/153-154]. His representations were in identical form to the Grounds of Appeal filed by Mr Burt in his appeal [OB/1/81-91]. In the ordinary way, the Commissioner sought and received a copy of the DSA and DNSR Reports from the MoD, along with representations from both parties as to their positions. The MoD made clear in its representations that although it relied upon section 36 to withhold the Reports generally, only certain passages in both Reports were said to be exempt on the basis of section 24 (and section 26), and two paragraphs in the DNSR Report were said to be exempt on the basis of section 27 [OB/3/179]; [CB/6; CB/7; CB/8].

19. The Tribunal will find a copy of the DNSR Report with the redactions sought by the MoD at the time of the DN at [CB/2], and the equivalent DSA Report at [CB/4]. These versions provide the most helpful indication of how the DN struck the balance (save for the two paragraphs for which section 27 was claimed).

D. The DN and the Appeals

20. On 20 December 2018 the Commissioner issued her DN (reference FS50754705) [OB/1/1-18]. The reasoning of the DN may be summarised as follows:

(1) The MoD's reliance on section 36 was rejected: §§19-35 [OB/1/5-10]. Section 36 is not relied on in this appeal and so it is unnecessary to set out the reasoning.

(2) Having considered the Reports, disclosure would result in release of information which, via the mosaic effect, could plausibly undermine the effectiveness of the nuclear deterrent. This could harm national security. Section 24(1) was therefore engaged in respect of the passages over which section 24(1) was claimed by the MoD: §45 [OB/1/12].

(3) The case was unusual because of previous disclosures of reports. There was a very strong public interest in disclosing information which revealed safety concerns with the defence nuclear programme, and a strong public interest in disclosing information which revealed that there were no such safety concerns. The public would be entitled to understand the views of the regulators. However, there was a very significant public interest in ensuring that national security was not undermined and the potential harm was very serious. The nuclear deterrent is the apex of the national security strategy, and the consequences were broad-ranging and fundamental. By a relatively narrow margin, the public interest balance favoured maintaining the exemption: §§57-58 [OB/1/14-15].

(4) Section 27 was not engaged because disclosure of the two paragraphs would not be likely to prejudice the UK's relations with any other State or States: §65 [OB/1/17].

(5) It was not necessary to consider section 26 as those passages were already exempt by reason of section 24: §66 [OB/1/17].

(6) The DN included a Confidential Annex addressing some of the reasoning advanced by the MoD by reference to the Reports [CB/11].

21. The MoD's Amended Grounds of Appeal against the DN are at [OB/1/32-38]. The Grounds of Appeal of Mr Burt against the DN are at [OB/1/78, 81-91].

22. Mr Burt's Response to the MoD is at [OB/1/39-61]. The MoD's Response to Mr Burt is at [OB/1/92-99]. The Commissioner's Response to both appeals is at [OB/1/100-112]. Mr Burt's Reply is at [OB/1/113-125].

E. The Provisions of FOIA and the Law

(1) Section 24

23. Section 24(1) provides that "*Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security.*"

24. Section 24 is not a prejudice-based exemption. It is engaged where the exemption is "*required for the purpose of safeguarding national security*". The term "*required*" means 'reasonably necessary': *Kalman v ICO & Department for Transport* [2011] 1 Info LR 664 at §33.

25. A threat to national security may be direct or indirect: *Quayum v ICO & Foreign and Commonwealth Office* [2012] 1 Info LR 332 at §42; *McIntyre v ICO & Home Office* (EA/2013/0093) at §23.

26. National security is a matter of vital national importance. For this reason the Tribunal should pause and reflect very carefully before second-guessing the

sincerely held views of relevant public authorities: *Quayum* at §43; *McIntyre* at §25, applying *R (Binyam Mohammed) v Secretary of State for Foreign Affairs* [2010] EWCA Civ 25; [2011] QB 218 at §131 per Lord Neuberger MR.

27. It is a qualified exemption subject to a public interest balance: section 2(2). However, "*the reality is that the public interest in maintaining the qualified national security exemption in section 24(1) is likely to be substantial to require a compelling competing public interest to equal or outweigh it*": *Keane v Information Commissioner, Home Office and Metropolitan Police Service* [2016] UKUT 461 (AAC) at §58.

(2) Section 26

28. Section 26 FOIA provides a qualified exemption from disclosure in the following terms:

> "*(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice –*
> *(a) the defence of the British Islands or of any colony, or*
> *(b) the capability, effectiveness or security of any relevant forces.*
>
> *(2) In subsection (1)(b) "relevant forces" means –*
> *(a) the armed forces of the Crown, and*
> *(b) any forces co-operating with those forces,*
> *or any part of those forces.*"

29. The usual well-known analysis in this jurisdiction for determining whether prejudice is relevantly likely applies.

30. Although there is little by way of appellate authority considering section 26, the Commissioner accepts that the principles derived from the section 24 and 27 cases concerning respect for the relevant public authorities apply equally to section 26 and matters of defence, and particularly in this context. At least in this appeal, the Commissioner agrees with the MoD that sections 24 and 26 cover the same ground and apply either together or not at all.

(3) Section 27

31. Section 27(1) FOIA provides a qualified exemption from disclosure in the following terms:

> "*(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*"

32. The application of the prejudice test in the context of both sections will often occur in the context of a risk of a detrimental effect, rather than quantifiable damage. The Tribunal held, applying section 27(1) in *Gilby v Information Commissioner & the Foreign and Commonwealth Office* (EA/2007/0071) at §23, that a risk of this type was sufficient:

> "*prejudice can be real and of substance if it makes relations more difficult or calls for particular diplomatic response to contain or limit damage which would not otherwise have been necessary. We do not consider that prejudice necessarily requires demonstration of actual harm to the relevant interests in terms of quantifiable loss or damage. For example, in our view there would or could be prejudice to the interests of the UK abroad or the promotion of those interests if the consequence of disclosure was to expose those interests to the risk of an adverse reaction from the [Kingdom of Saudi Arabia] or to make them vulnerable to such a reaction, notwithstanding that the precise reaction of the KSA would not be predictable either as a matter of probability or certainty. The prejudice would lie in the exposure and vulnerability to that risk. Similar considerations would apply to the effect on relations between the UK and the KSA*".

33. Risks to matters such as national security, defence and international relations are invariably areas about which the public authority will have much greater expertise than the Commissioner or the Tribunal, and weight should be given to the considered view of the public authority: *APPGER v Information Commissioner & Ministry of Defence* [2011] UKUT 153 (AAC); [2011] 2 Info LR 75 at §56:

> "*There are essentially two issues:*
>
> *i) would disclosure of the information be likely to prejudice international relations;*

ii) if so, does the public interest in maintaining the exemption outweigh the public interest in disclosing it.

Both matters are for the Tribunal to determine for itself in the light of the evidence. Appropriate weight needs to be attached to evidence from the executive branch of government about the prejudice likely to be caused to particular relations by disclosure of particular information: see Secretary of State for the Home Department v Rehman *[2001] UKHL 47; [2003] 1 AC 153, [50]-[53] and see also* R (on the application of Mohamed) v Secretary of State for Foreign and Commonwealth Affairs *[2010] EWCA Civ 65 at [131] per Master of the Rolls:*

> *'In practical terms, the Foreign Secretary has unrestricted access to full and open advice from his experienced advisers, both in the Foreign Office and the intelligence services. He is accordingly far better informed, as well as having far more relevant experience, than any judge, for the purpose of assessing the likely attitude and actions of foreign intelligence services as a result of the publication of the redacted paragraphs, and the consequences of any such actions so far as the prevention of terrorism in this country is concerned.'"*

34. See too *Savic v Information Commissioner, Attorney General's Office and Cabinet Office* [2016] UKUT 535 (AAC) at §116, reiterating and approving that analysis, and *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] UKSC 60; [2015] AC 945, where Lord Neuberger observed at §75 that: "*the Foreign Office is the best equipped organ of the state to assess the likely reactions of a volatile foreign government and people, and while it would be an overstatement to say that a domestic court is the worst, it is something of an understatement to say that it is less well-equipped to make such an assessment than the Foreign Office.*" (See also §46 and §§70-71).

35. The Upper Tribunal in *Savic* also noted that it "*must be remembered that what is relevant is an assessment of those reactions rather than the validity of the reasons for them looked at through 'English or any other eyes'*": at §116.

(4) The MoD's Exemptions

36. The Commissioner does not accept the argument made by Mr Burt that reliance on new exemptions – or relying on exemptions to a wider range of information – is abusive or impermissible. It is well-established as a matter of authority that

late reliance is permissible, for the reasons set out by the MoD in its skeleton argument, and all parties have had clear notice of which exemptions are relied upon. Mr Burt is fully entitled to explore with the witnesses, and make the submission, that the reason why the MoD did not rely on the exemptions more broadly before the Commissioner was because the experienced officials who considered the requests did not consider that they could apply.

37. The Commissioner welcomes the withdrawal of the MoD's reliance in its appeal, for the first time, on section 21. That reliance was never explained and was, so far as the Commissioner could see, inexplicable.

F. The Application of Section 27

38. The Commissioner recognises that the existence of the UK's nuclear deterrent has an international relations aspect. She accepts the point made in W/S Nicholls at §13 [OB/6/442-443] that the deterrent is relied upon by the UK's allies in NATO, along with that of the two other nuclear nations in NATO: France and the USA: W/S Beckett at §7 [OB/6/437].

39. As Mr Burt has pointed out [OB/1/84], nuclear co-operation between the UK and France and the USA is of very long-standing. He notes that the Mutual Defence Agreement 1958 (strictly, the Agreement for Co-operation on the Uses of Atomic Energy for Mutual Defence Purposes) has been effect for over 60 years. Article 3 sets out that the USA will sell to the UK a naval nuclear propulsion system for its submarines. Various provisions of the Agreement reiterate the need to protect classified information received from the other State: see Articles 6(C), 7, and 8. The Commissioner considers that Mr Burt is right to emphasise that the long-established relationships in this sphere are robust, and likely to withstand the continued publication of DNSR and DSA Reports.

40. The MoD's case on section 27 is set out entirely and only in the CLOSED evidence of Rear Admiral Beckett: W/S Beckett [CB/14]. The Commissioner has carefully considered what that evidence says, and what it does not say. She does not accept that section 27 is engaged in respect of any part of the Reports. There is no sufficiently evidenced basis set out in that statement upon which she or the Tribunal can conclude that any relevant prejudice would or would be likely to occur.

G. The Application of Sections 24 and 26

41. The Commissioner respects the national security and defence expertise of the MoD and its witnesses. So should the Tribunal. But that does not mean that the either should uncritically accept the assertions of harm to national security and defence. That is all the more important where:

(1) Parliament has not provided for an absolute exemption in FOIA in connection with the Defence Nuclear Programme, still less the DNSR.

(2) Materially the same information has been repeatedly published by the MoD in successive DSA and DSNR Reports. The MoD is entitled to say that the context has changed, and that its position should change too. But where it does so, it is incumbent on the MoD to explain with some precision what harm has been caused by past publication and what has changed. This is particularly so where Ms Nicholls specifically accepts that the DNSR Report contains "*equivalent or similar information*" to the previous disclosed reports: W/S Nicholls at §20 [OB/6/444].

(3) The mosaic effect is undoubtedly real; as the Pozen article relied on by Mr Burt notes, all intelligence agencies collect seemingly disparate pieces of information in the hope of discovering a coherent whole [OB/5/389]. Ms Nicholls is clearly right to say that hostile States actively seek information

about the UK and the deterrent: W/S Nicholls at §17 [OB/6/443-444]. But it is surprising that the MoD, with all the resources available to it, cannot do more than the generalised concern at W/S Nicholls, §19 [OB/6/444].

(4) Similarly, any alternation in the nature or extent of threats to national security – and their specific connection to the withheld information – need to be clearly identified.

(5) The nuclear deterrent may be at the 'apex' of the national security strategy, in the sense that it is self-evidently the most devastating weapon in the UK's arsenal, but it is not the sum total of the national security strategy and it is something of a *non sequitur* for the MoD to assert that the "*consequences of undermining the UK's nuclear deterrent are potentially devastating*" (skeleton at §28). If the MoD means to imply by that language that any disclosure ordered by the Tribunal will cause the UK to be the subject of nuclear attack, that is patently implausible.

(6) The theme of the MoD's Policy Statement and the Letter of Understanding with the ONR is alignment with civil nuclear regulation. An effective blanket non-disclosure policy is not aligned and is inconsistent with the repeated recognition by the DNSR itself of the need for openness and transparency. It is also inconsistent with the reality that the ONR has significant functions in nuclear safety even in the defence context (where the MoD has chosen to contract out site management).

42. The Commissioner accepts that there is a significant difference in principle between an assessment made upon the assumptions of a hostile State and information of dubious or unclear authority, and an assessment based upon, or informed by, official information released by the UK itself about its own deterrent. Moreover, Ms Nicholls is right to make the point that there is a difference between information on long-established aspects of the deterrent,

with which hostile States will have had many years to become familiar, and content on the new Dreadnought replacement about which there will be much less information available: W/S Nicholls at §§21-22 [OB/6/444-445]. The mosaic concern is more plausible in that context. But that cannot justify the MoD's blanket withholding of the near entirety of the DNSR Report.

43. In the context of the safety (as opposed to the technical details) of the Defence Nuclear Programme there are unusually strong public interest factors in favour of disclosure in this national security context. That is the case whatever degree of safety assurance is revealed by the Reports. Mr Burt is right to say that whatever the regulatory bodies find will be of importance to the public and, just as importantly, to service personnel who work directly with the deterrent, for whom the safety of the nuclear activities of the State is of considerable importance. Nuclear safety is of colossal public interest, given the devastating potential consequences of accidents, as the DNSR Report for 2012/13 itself recognised in its analysis of how the MoD was addressing lessons from the Fukushima disaster [OB/5/314-315].

44. It is also to be noted that:

(1) The non-disclosure of the Reports has been the subject of press coverage, particularly (for understandable reasons given the location of submarine bases) in Scotland [OB/3/170-178]. The editorial of The Sunday Herald described the position as "*fundamentally undemocratic – and dangerous*".

(2) The MoD appear to have provided a statement to The Herald which did comment on the level of safety assurance, being quoted as having said that the nuclear programme "*continues to meet all the required standards*" [OB/3/173].

(3) A number of Parliamentary questions have been asked about why the DNSR Report has not been published: W/S Burt 4 [OB/5/260-265]. The

existence, location and safety of the nuclear deterrent is a high-profile, well-known issue of serious political debate.

(4) The MoD emphasises that the Secretary of State is accountable to Parliament for the safety of the Defence Nuclear Programme; clearly he is. But it is hard to see how Parliament can effectively hold the Secretary of State to account if it has no idea what the view of the regulatory body is, what issues that body is raising, or what the MoD is doing in response. Accountability is not provided by Parliament only being able to ask questions after something has gone wrong.

(5) The public interest is only met to a limited extent by the knowledge of the mere existence of the DNSR and the DSA.

(6) The distinction between the legislative roles of the ONR (and Health and Safety Executive) and the legislative exemptions for Crown nuclear installations does not have quite the force the MoD asserts. The critical point is that Parliament did not, in creating a divide between civil and defence nuclear regulation, provide any greater indication that the DNSR, DSA or the MoD should be exempt from the application of FOIA than the ONR. The separate regulation of the Defence Nuclear Programme may justify asking whether sections 24 and 26 might apply to particular information, but it cannot provide the answer as to whether or not they do in any given case.

45. In these circumstances, the Commissioner cannot accept the MoD's wider assertions on appeal that it would harm national security, and be contrary to the public interest, to withhold the entirety (or near entirety) of the DNSR Report and the equivalent summary in the DSA Report. She does not consider that the OPEN or CLOSED evidence justifies such an outcome.

46. However, nor does the Commissioner accept Mr Burt's conclusion that there should be disclosure of the whole of the DNSR Report, albeit she appreciates

his measured request that the MoD's position be carefully scrutinised. There is a balance to be struck to reduce the level of risk to the deterrent by ensuring technical details are not disclosed (especially for new aspects of the Programme), whilst maintaining a satisfactory level of public accountability and insight into safety assurance. In accepting the targeted redactions made by the MoD during the investigation, the Commissioner sought to strike that balance. She maintains that those redactions continue to better balance the competing interests of the MoD and of Mr Burt than either of the extreme positions advanced in the respective appeals. It will be for the Tribunal to assess whether any of those individual redactions fall to be reconsidered in the light of the greater material before it.

H. Conclusion

47. For the reasons set out in the DN and in this skeleton argument, the Commissioner submits that both of the appeals should be dismissed.

CHRISTOPHER KNIGHT

11KBW

25 November 2019

11KBW
11 King's Bench Walk
Temple
London
EC4Y 7EQ