

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 December 2018

Public Authority: The Ministry of Defence
Address: Whitehall
London
SW1A 2HB

Decision (including any steps ordered)

1. The complainant submitted a request to the Ministry of Defence (MOD) seeking a copy of the Defence Nuclear Safety Regulator annual report for 2015/16 and a further request for an unredacted version of the Defence Safety Authority's 2015-16 annual assurance report. The MOD sought to withhold the requested information on the basis of the following sections of FOIA: 36(2)(b)(i) and 36(2)(c) (effective conduct of public affairs), 24(1) (national security), 26(1) (defence) and 27(1) (international relations). The Commissioner has concluded that sections 36(2)(b)(i) and 36(2)(c) are not engaged; that section 24(1) is engaged and the public interest favours maintaining this exemption; and that for a small portion of information which the MOD has only sought to withhold on the basis of section 36 and 27(1), section 27(1) is not engaged.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Provide the complainant with a copy of the Defence Nuclear Safety Regulator's 2015-16 Annual Report. In providing this report to the complainant the MOD can only redact the parts of the report to which it has identified to the Commissioner as attracting section 24(1) of FOIA.
 - Provide the complainant with Defence Safety Authority's 2015-16 annual assurance report. Again, in providing this report to the complainant the MOD can only redact the parts of the report to which it has identified to the Commissioner as attracting section 24(1) of FOIA.

3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

4. The Defence Safety Authority (DSA) is an independent organisation, empowered by charter from the Secretary of State for Defence. Its mission is 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.
5. The Defence Nuclear Safety Regulator (DNSR) is part of the DSA. The DNSR is responsible for regulating the nuclear hazards of the defence nuclear enterprise consisting of the naval nuclear propulsion programme and the nuclear weapon programme, where the MOD has specific exemptions from statute: these concern the through-life safety of the nuclear reactor plant and nuclear weapon activities and is responsible for the regulation of nuclear safety across the defence nuclear enterprise.

Request and response

Request FOI2017/09189

6. The complainant submitted the following request to the MOD on 23 September 2017:

'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.¹

¹ The MOD subsequently gave his request reference number FOI2017/09189.

7. The MOD contacted the complainant on 23 October 2017 and explained that the information was held but it fell within the scope of the following exemptions of FOIA and it needed additional time to consider the balance of the public interest: section 24 (national security), section 26 (defence), and section 36 (prejudice to the effective conduct of public affairs).
8. The MOD provided the complainant with a substantive response on 10 November 2017. It confirmed that it held a copy of the Defence Nuclear Safety Regulator's (DNSR) 2015-16 Annual Report but it did not intend to publish it. The MOD also explained that it considered this document to be exempt from disclosure on the basis of sections 24, section 26, section 27 (international relations) and section 36 of FOIA and that the public interest favoured maintaining the exemptions.
9. The complainant contacted the MOD on 13 November 2017 and asked it to conduct an internal review of this decision.
10. The MOD informed him of the outcome of the review on 1 May 2018 (the review also covered his later request, FOI2017/10382.) The review upheld the application of the various exemptions. The only exception to this being in relation to the titles of the individual sections within the DNSR report which the MOD provided to the complainant.

Request FOI2017/10382

11. The complainant also submitted the following request to the MOD on 22 October 2017:

'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 2015-16.²

12. The MOD responded on 23 November 2017 and explained that the redacted parts of the Defence Safety Authority's (DSA's) 2015-16 annual assurance report were considered to be exempt from disclosure on the basis of sections 24, 26, 27 and 36 of FOIA.

² The MOD subsequently gave this request reference number FOI2017/10382.

13. The complainant contacted the MOD on 24 November 2017 and asked it to conduct an internal review of his request. The complainant suggested that this internal review was undertaken jointly with the internal review concerning request FOI2017/09189.
14. As noted above, the MOD issued its internal review on 1 May 2018 which also concluded that the various exemptions cited in the refusal notice for request FOI2017/10382 had been correctly applied.

Scope of the case

15. The complainant contacted the Commissioner on 12 June 2018 in order to complain about the MOD's decision to withhold information falling within the scope of both of his requests.
16. The Commissioner has therefore considered whether the withheld information is exempt from disclosure on the basis of the exemptions cited by the MOD.
17. For clarity, in response to request FOI2017/09189, the MOD withheld the DNSR's annual report 2015/16 in its entirety. The MOD has applied section 36(2)(b)(i) and 36(2)(c) of FOIA to all of this report. It has also argued that parts of the report are exempt from disclosure on the basis of sections 24(1), 26(1) and 27(1)(a) of FOIA.
18. With regard to request FOI2017/10382, a redacted version of the DSA's 2015-16 annual assurance report has been published online. However, the complainant's request sought an unredacted version of this. The MOD's view is that the redacted parts of the report are all exempt from disclosure on the basis of sections 36(2)(b)(i) and 36(2)(c) with certain parts of the redacted information also attracting the exemptions contained at sections 24(1), 26(1) and 27(1)(a) of FOIA.

Reasons for decision

Section 36 – effective conduct of public affairs

19. Sections 36(2)(b)(i) and (c) of FOIA state that:

'(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act...

(b) would, or would be likely to, inhibit-...

(i) the free and frank provision of advice...

...(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.'

20. In determining whether these exemptions are engaged the Commissioner must determine whether the qualified person's opinion was a reasonable one. In doing so the Commissioner has considered all of the relevant factors including:

- Whether the prejudice relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection the opinion is unlikely to be reasonable.
- The nature of the information and the timing of the request, for example, whether the request concerns an important ongoing issue on which there needs to be a free and frank exchange of views or provision of advice.
- The qualified person's knowledge of, or involvement in, the issue.

21. Further, in determining whether the opinion is a reasonable one, the Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only not reasonable if it is an opinion that no reasonable person in the qualified person's position could hold. The qualified person's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.

22. With regard to the process of seeking this opinion the MOD sought the opinion of the qualified person, in this case the then Secretary of State the Rt Hon Sir Michael Fallon MP, on 25 September 2017. The qualified person was provided with access to a copy of the withheld information, a briefing on the relevant background to the request, including arguments for the engagement of the exemptions contained at sections 36(2)(b)(i) and (c), and a preliminary public interest test. The qualified person confirmed that the exemptions should apply on 9 October 2017 via an email from his Deputy Private Secretary which read: *'SoS was satisfied that section 36 should apply as release would in his opinion inhibit the free and frank provision of advice, and would prejudice the effective conduct of public affairs'*.
23. The complainant argued that this response gave no information about the grounds on which the qualified person came to this decision, the evidence he used to come to this decision, or the briefing he received from civil servants in making this decision. The complainant also argued that the 'record of decision' on this matter is extremely brief and vague and does not comply with the standards recommended by the Commissioner's guidance which states that *'as a minimum we would accept a signed statement from the qualified person recording their opinion'* (emphasis in original).³ The complainant noted that a signed statement of this nature does not appear to exist and there is no evidence to indicate that the decision to withhold information was made by the qualified person in any meaningful way with any proper consideration, or whether it was to all intents and purposes delegated to civil servants and merely 'rubber stamped' without consideration of the circumstances of the particular case. In such a situation, the complainant argued that section 36 exemption cannot lawfully be applied.
24. With regard to the process which the MOD followed to determine whether the exemption was engaged, the Commissioner acknowledges that it did not result in the qualified person issuing a signed statement recording his opinion. Nevertheless, and despite the comments in her guidance, the Commissioner is satisfied that the MOD followed an appropriate process in seeking his opinion. It is not uncommon in cases involving central government departments for the qualified person, ie a minister of the department, to simply confirm their agreement that the section 36 exemption is engaged via an email from a member of their private office. In the Commissioner's opinion such an approach reflects the practical realities of a seeking, and securing, the opinion of a

³ <https://ico.org.uk/media/2259713/prejudice-to-the-effective-conduct-of-public-affairs-section-36.docx> - see paragraph 82.

qualified person when that individual is a minister. The Commissioner acknowledges that the opinion itself, ie the email quoted above, does not give any details of the thought processes or rationale of the qualified person himself. However, the Commissioner has seen a copy of submission to the qualified person and she is satisfied that it contains a detailed assessment as to why sections 36(2)(b)(i) and (c) were considered to apply in relation to these two particular requests. She is therefore satisfied that the approach the MOD adopted in seeking the qualified person's opinion, whilst not directly in-line with her guidance, is an appropriate process to follow.

25. With regard to the substance of the qualified person's opinion, as the above suggests this is essentially reflected in the section 36 submissions themselves. These submissions are detailed in nature and refer directly to the withheld information and also contain further information which the MOD considers to be sensitive. Therefore, the Commissioner has not, and indeed cannot, set out in detail the rationale behind the qualified person's rationale for engaging sections 36(2)(b)(i) and (c). However, in relation to section 36(2)(b)(i) it can be summarised as follows:
26. Disclosure of the withheld information would - as opposed to simply being likely to - inhibit the ability of the DNSR and DSA to provide impartial, unimpeded advice on the defence nuclear programme. Rather, producing material for public consumption could impact on the credibility of the regulators and may also result in less candid advice that holds ministers and defence nuclear programme duty holders to account. The qualified person also argued that sensitive information must be protected in the current security context.
27. The complainant argued that the qualified person's argument that disclosure of withheld information would inhibit the frank assessment of nuclear regulators was not credible given that in past years the publication of the DNSR's annual assurances reports had not inhibited the provision of such advice. Moreover, the complainant argued that it is the job of regulators to provide frank feedback, and sometimes exercise sanctions, to those they regulate, and a regulator which is not prepared to do this is not an effective regulator. Furthermore, he argued that robust regulation enjoys the support of the public, and allowing the public to learn of cases where a regulator has taken a tough approach can enable the regulator to face down opposition from operators who would prefer a softer regulatory approach.
28. Furthermore, the complainant argued that there was no evidence or argument provided by the MOD as to how release of such advice could compromise the credibility of the regulator or inhibit its ability to provide candid advice, and in fact such a view was contrary to both government

policy, the positions taken by other regulators in the UK, and international experts.

29. Rather, the complainant argued that a commitment to transparency and a demonstration that defence nuclear safety regulators are willing to provide candid advice would actually enhance their independence and credibility. He also noted that other regulators in the nuclear sector have not hesitated to publish documents which are critical of MOD and its contractors in response to FOI requests and there has been no suggestion that this might create a 'chilling effect' to inhibit the provision of candid and critical advice.⁴
30. The complainant also noted that the government has published a regulatory code to set out how regulators should engage with those they regulate.⁵ In the Foreword to the code Sir Michael Fallon, at the time Minister of State for Business and Enterprise (and thus also the qualified person following his move to be Secretary of State for the MOD), states that the code seeks to promote regulation *'through the development of transparent and effective dialogue'* (page 2). The code itself states that *'Regulators should ensure that their approach to their regulatory activities is transparent'* (Paragraph 6, page 5) and as an illustration of transparency, goes on to say *'Regulators should publish, on a regular basis, details of their performance against their service standards'* (paragraph 6.5). The complainant argued that this is exactly what DNSR's annual assurance report does.
31. The complainant also argued that the MOD's assertion that regulators would not be able to exercise their role effectively if the requested

⁴ For example:

Office for Nuclear Regulation: BAE Systems Wet Dock Quay at Barrow-in-Furness:

<http://www.onr.org.uk/foi/2013/2013080280.htm>

Office for Nuclear Degredation: Structural degradation of buildings at the Atomic Weapons Establishment :

<http://www.onr.org.uk/foi/2013/2013010019.htm>

Office for Nuclear Regulation: Assessment report, Devonport Dockyard:

<http://www.onr.org.uk/foi/2016/201602180.htm>

Health and Safety Executive: Prosecution of the Atomic Weapons Establishment following a fire:

<https://nuclearinfo.org/article/awe-aldermaston/investigation-safety-watchdog-concluded-awe-fire-could-have-resulted-%E2%80%9Cmany>

[E2%80%9Cmany](https://nuclearinfo.org/article/awe-aldermaston/investigation-safety-watchdog-concluded-awe-fire-could-have-resulted-%E2%80%9Cmany)

Environment Agency: Waste Management at the Atomic Weapons Establishment.

Report IDs I/130907/QB3535DR/V001 and I/140722/QB3535DR

⁵ <https://www.gov.uk/government/publications/regulators-code>

information was released does not hold water when examined in detail because:

- a) Staff working for the regulator will know that very little of the advice they provide will be the subject of a request under the FOIA, and thus the great likelihood is that advice will remain private.
 - b) Making critical comment is an integral part of the regulatory function, and a good regulator will not hold back on providing criticism when it is needed.
 - c) There is inevitably a considerable delay between authorship of a report and its release under FOIA (often years rather than months). During this time the situation will almost certainly have changed, and hopefully the problems will have been acknowledged and rectified. (Indeed, if they have not been, the complainant argued that this would add to the public interest in releasing the information).
32. Finally, the complainant noted that MOD had argued that its reliance on section 36 that sensitive information must be protected particularly in the current security context. However, he argued that the current security context was irrelevant to the use of the section 36 exemption, which relates to the effective conduct of public affairs; issues relating to security should be considered under the section 24 exemption.
33. With regard to the engagement of section 36(2)(b)(i), in the Commissioner's view the complainant has advanced a compelling case why it is not reasonable for the qualified person to argue that disclosure of the withheld information would result in the DNSR and/or DSA being less frank or candid in future assessments of the defence nuclear programme. In reaching this view the Commissioner has placed considerable weight on the fact that previous versions of the DNSR annual report have been disclosed, with unredacted or with very minimal redactions, and there does not appear to have been any resultant loss of candour in the regulator's future reports. The Commissioner recognises that circumstances may change, and she notes the MOD's reference in the internal review to the current security context. However, in light of the fact that the 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.
34. The Commissioner also considers that the fact that other regulators have disclosed, under FOIA, documents that are critical of the MOD provides an additional basis to question the rationale that disclosure of withheld information would lead to some sort of chilling effect. The Commissioner also accepts that the credibility of the DNSR and DSA as regulators would arguably be open to criticism if the disclosure of the requested information led to future versions of their reports being less candid. Finally, should the DNSR and DSA have genuine concerns about

comments in their annual reports being sensitive to the extent that their disclosure could harm the defence nuclear programme itself, then they would be aware that there other exemptions within FOIA to protect such information. Therefore, having taken all of these factors into account the Commissioner is not persuaded it is reasonable for the qualified person to have concluded that disclosure of the withheld information would – or for that matter – would be likely to – prejudice the free and frank provision of advice by the DNSR and DSA. Section 36(2)(b)(i) is therefore not engaged.

35. With regard to the engagement of the section 36(2)(c) exemption, the MOD's responses to the complainant do not appear to explain why section 36(2)(c) was considered to be engaged. The qualified person's opinion does go into detail about the basis of this but in doing so makes some reference to the content and context of the information. Therefore, although the Commissioner has also concluded that the qualified person's opinion that section 36(2)(c) is engaged is not a reasonable one, her rationale for reaching this finding is set out in a confidential annex, a copy of which will be provided to the MOD only. For reasons explained in this annex, the Commissioner has concluded that section 36(2)(c) is not engaged.

Section 24 – national security

36. The MOD argued that the disclosure of parts of the DNSR's annual report and that parts of the DSA's annual assurance report were exempt on the basis of section 24(1) of FOIA.

37. Section 24(1) states 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'.

38. FOIA does not define the term national security. However in *Norman Baker v the Information Commissioner and the Cabinet Office* (EA/2006/0045 4 April 2007) the Information Tribunal was guided by a House of Lords case, *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, concerning whether the risk posed by a foreign national provided grounds for his deportation. The Information Tribunal summarised the Lords' observations as follows:

- "national security" means the security of the United Kingdom and its people;
- the interests of national security are not limited to actions by an individual which are targeted at the UK, its system of government or its people;

- the protection of democracy and the legal and constitutional systems of the state are part of national security as well as military defence;
 - action against a foreign state may be capable indirectly of affecting the security of the UK; and
 - reciprocal co-operation between the UK and other states in combating international terrorism is capable of promoting the United Kingdom's national security.
39. Furthermore, in this context the Commissioner interprets 'required for the purposes of' to mean reasonably necessary. Although there has to be a real possibility that the disclosure of requested information would undermine national security, the impact does not need to be direct or immediate.
40. In its responses to the complainant the MOD argued that this exemption had been applied to information which if disclosed would be likely to provide or contribute to a 'mosaic effect' revealing information on the nuclear deterrent that would be of benefit to potential adversaries, damaging the effectiveness of the deterrent and thus prejudicing national security. The MOD expanded on this position in submissions to the Commissioner which made reference to the content of the withheld information itself. For obvious reasons, the Commissioner cannot set out the content of these submissions in this notice.
41. In his submissions to the Commissioner the complainant argued that in its internal review response the MOD had noted that *'it has long been established that the United Kingdom's nuclear deterrent is a key component of the nation's national security strategy. I therefore consider that the information is within the scope of this exemption'*. However, the complainant argued that it is clearly not the case that all information relating to nuclear weapons is covered by a blanket exemption from release on national security grounds. He noted that the MOD has released information on matters relating to nuclear weapons on its own volition and in response to numerous FOI requests.
42. The complainant argued that the MOD was overstating the case to argue that the UK's national security could be harmed if the withheld information was released. In support of this he noted the UK is not currently facing an imminent threat from any aggressor, and on the basis of information provided in the previously published DNSR annual reports, the information provided in the report is unlikely to be sufficiently detailed or specific to run any risk of compromising the nuclear weapons programme.
43. He also argued that the MOD had not provided any evidence or argument to support its claim that that release of the information might undermine the capability, credibility or the deterrent effect of the UK's nuclear weapons and thus compromise national security. Furthermore

he suggested that whether the UK's nuclear deterrent is credible is a judgement to be made by any potential aggressor against the UK, notably Russia, and the UK's allies. The complainant argued that these nations undoubtedly have the capability to make their own assessment of the credibility of the UK's nuclear weapons regardless of any information published in the two annual assurance reports.

44. The complainant did acknowledge that disclosure of the withheld information might only undermine the credibility of the UK's nuclear weapons if the reports indicate that the MOD is unable to operate its nuclear enterprise safely and reliably. But in such a scenario, the complainant argued that this would raise very significant issues relating to the UK's defence and foreign policy and thus there would be a compelling case to argue that the public interest favoured disclosure of the withheld information.
45. The Commissioner appreciates that the complainant is at a disadvantage in being able to understand the MOD's basis of relying on section 24(1) given that he has not seen its full submissions to support the reliance on this exemption. However, having done so herself, and taking these into account along with a close consideration of the information itself, the Commissioner is persuaded that disclosure of this information would result in the disclosure of information which, via the mosaic effect described by the MOD, could plausibly undermine the effectiveness of the nuclear deterrent. The Commissioner accepts that in turn this could harm national security. Section 24(1) is therefore engaged. The Commissioner has elaborated on her basis for reaching this decision in the confidential annex.

Public interest test

46. Section 24 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
47. In his submissions to the Commissioner the complainant set out the following general arguments which in his view meant that the public interest favoured disclosing the withheld information:
48. The complainant explained that the requested information related to the safety of the UK's nuclear weapons programme. He noted that as reports from arms-length regulatory organisations, they provide credible evidence regarding the safety of the programme. He argued that a recurring long-term theme among public opinion regarding nuclear programmes is that such programmes may not always be safe and that an accident could pose significant risks.

49. More specifically, the complainant argued that if the information in the two annual assurance reports relating to the defence nuclear programme indicated that there were indeed concerns within MOD over safety standards, this would be highly important in informing public debate on nuclear weapons. He suggested that if the public felt that the MOD's nuclear programme posed unacceptable safety risks they might reasonably wish to rethink or renegotiate the terms under which the UK operates its nuclear deterrent. In particular, he argued that communities in the vicinity of defence nuclear sites have the right to be informed of, and to understand, any risks they may face from such sites. The complainant argued that parliamentarians should also be aware of such concerns in order to press the government to take corrective action.
50. Conversely, the complainant argued that if the withheld information showed that the defence nuclear programme complies with acceptable safety standards then its disclosure would help in reinforcing the status quo, helping to allay any public concerns, and demonstrating the virtue of current defence policy.
51. The complainant argued that if the statements made by the MOD on the safety of its nuclear programme are to be considered credible, they needed to be backed by impartial evidence such as regulatory reports. In his view such an argument is sufficiently strong, in terms of accountability to the public and provision of information to Parliament, to support the case that it is in the public interest to release the withheld information, regardless of the case to the contrary which has been made by MOD.
52. Furthermore, the complainant argued that given the unusual circumstances under which the requests had been refused, ie with previous versions of the reports being disclosed, he suggested that it was difficult not to draw the conclusion that the MOD is attempting to conceal something – quite possibly that its nuclear programme has not achieved acceptable safety standards to the satisfaction of regulators. The complainant argued that this undermines confidence in the competence of both the MOD, as managers of the programme, and the DNSR as its regulator, and weighs in the public interest of releasing the information.
53. In the context of section 24(1), as noted above the complainant argued that should it be the case that the withheld information indicates that the MOD is unable to operate its nuclear enterprise safely and reliably then this would raise extremely significant issues relating to the UK's defence and foreign policy. The complainant argued that given the MOD's claim that the nuclear deterrent is a 'key component' of our national security strategy, the inability to operate it to the necessary standard would raise doubts as to whether nuclear weapons were indeed able to guarantee national security as intended.

54. The complainant argued that this was a key issue in public policy and the public and Parliament have a clear right to know whether the UK's nuclear weapons programme is able to deliver the benefits claimed for it, especially given the very large costs of the programme and the existence of alternative strategies for ensuring national security.
55. The complainant argued that under such circumstances, paradoxically, withholding publication of the DNSR report might be interpreted as undermining the credibility of the UK's nuclear weapons if it is interpreted by an enemy as an indication that the UK is experiencing problems in managing its nuclear programme safely and reliably.
56. In its responses to the complainant the MOD acknowledged that there is a legitimate public interest in the defence nuclear programme. Furthermore, disclosure of the withheld information would allow a level of public awareness of the concerns and scrutiny of the steps taken by the MOD to address them and that this information would demonstrate the rigour with which DSA and DNSR discharge their roles and illustrate the independent nature of the roles. However, the MOD argued in its view there was a more compelling argument for concluding that the public interest favoured non-disclosure of the withheld information, primarily because it is not in the public interest to disclose information that could undermine the capability, credibility or the deterrent effect the nuclear deterrent is designed to provide.
57. Clearly the Commissioner cannot comment on what the content of the withheld information actually is. However, she accepts that the complainant's point that this is somewhat unusual case in that earlier versions of the reports have been disclosed by the MOD whereas the decision has been made to withhold the latest version of the DNSR annual report and redact the corresponding parts of in the DSA assurance report. In this context, the Commissioner agrees with the complainant that there is a very strong case for disclosing the withheld information should it reveal that there are safety concerns with the defence nuclear programme; equally, given this context there is a very strong case for disclosing the withheld information should it reveal that there are no safety concerns. In particular, the Commissioner finds that the complainant's view that in order for the public to be able to trust and have confidence in the MOD's statements on the safety of the defence nuclear safety programme, and indeed confidence in the DSA and DNSR, then the public need to have access to be able to understand the regulator's reports and findings a particularly strong line of argument.
58. Nevertheless, in finding the exemption is engaged the Commissioner has concluded that withholding the withheld information is necessary in order to safeguard national security. Moreover, she accepts that there is a clearly a very significant public interest in ensuring the UK's national security is not undermined. In the circumstances of this case the

Commissioner acknowledges that the potential harm is arguably a very serious one, namely to the UK's nuclear deterrent, which in the MOD's description represents the 'apex of our force capabilities and national security strategy'. The consequences of disclosure are therefore broad ranging and fundamental ones. Therefore, despite the strong case advanced by the complainant, the Commissioner has concluded that by a relatively narrow margin, the public interest favours maintaining the exemption contained at section 24(1).

Section 27 – international relations

59. There are two paragraphs of information within the DNSR report which the MOD has only sought to withhold on the basis of the section 27(1)(a) and section 36 of FOIA.⁶ Having already concluded that section 36 does not apply to this information, the Commissioner has gone to consider whether section 27(1)(a) provides a basis to withhold this information. Section 27(1)(a) states that:

'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

relations between the United Kingdom and any other State'

60. In order for a prejudice based exemption, such as section 27(1) to be engaged the Commissioner considers that three criteria must be met:

- Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner

⁶ It should be noted that the MOD also argued that additional parts of the withheld information were exempt from disclosure on the basis of section 27(1)(a). However, as she has already concluded that such information is exempt on the basis of section 24(1) she has not considered whether the same information is also exempt from disclosure on the basis of section 27(1)(a) of FOIA.

considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.

61. Furthermore, the Commissioner has been guided by the comments of the Information Tribunal which suggested that, in the context of section 27(1), prejudice can be real and of substance *'if it makes relations more difficult or calls for a particular damage limitation response to contain or limit damage which would not have otherwise have been necessary'*.
62. In its internal review the MOD explained that in relation to this exemption it was relying on the provision contained at section 17(4) of FOIA.⁷ It could not therefore explain why it considered section 27(1)(a) to apply as to do so would result in the disclosure of withheld information. However, the MOD has provided the Commissioner with submissions to explain its reliance on this exemption.
63. With regard to the MOD's reliance on section 27 of FOIA, the complainant noted that the UK cooperates with both the United States and France on military nuclear matters. He also noted that 2018 marks the 60th anniversary of the signing of the US-UK Mutual Defence Agreement, which enables cooperation on military matters between the two nations. The complainant argued that the longevity of this relationship indicates that it is a particularly robust and enduring relationship, suggesting that it would require the release of particularly damaging information to realistically prejudice relations between the two nations. Likewise, the complainant explained that the UK-France nuclear relationship commenced in 1992 – more than 25 years ago – and in 2010 was consolidated by the agreement of a 50 year treaty on nuclear co-operation between the two nations, again suggesting that in his view the relationship is robust.
64. The complainant also noted that the Commissioner's guidance on this exemption will only apply if the disclosure of information would prejudice the international relations or interests of the UK itself, not of a part of the UK, or a sector or group in the UK, or the interests of the public authority itself. Therefore the complainant encouraged the Commissioner to ensure that in assessing whether the section 27(1)(a) applies to this case, she is clear whether any prejudice would indeed

⁷ Section 17(4) provides that a public authority does not have to explain to a requester why an exemption has been applied if to do so would result in the disclosure of information which would itself be exempt from disclosure.

apply to the nation as a whole, rather than merely the interests of MOD or personnel within MOD.

65. The Commissioner has considered the position of both parties carefully, along with the particular paragraphs of information to which section 27(1)(a) has been applied. Having done so the Commissioner is satisfied that whilst the first two limbs of the test above are met, the third is not. Therefore, she has concluded that disclosure of the two paragraphs in question would not be likely to prejudice the UK's international relations with another state or states. Such information is therefore not exempt from disclosure on the basis of section 27(1)(a) of FOIA. Clearly, given the MOD's reliance on section 17(4), the Commissioner cannot set out why she has reached this position in this decision notice. However, she has explained her findings in the confidential annex.

Section 26 - defence

66. The MOD has applied to section 26(1) of FOIA to the same parts of the information which the Commissioner has already concluded are exempt from disclosure on the basis of section 24(1). Therefore, she has not considered the MOD's reliance on section 26(1) in this notice.

Right of appeal

67. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504
Fax: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

68. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
69. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Gerrard Tracey
Principal Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF