



# Ministry of Defence

Our Ref: FOI2018/02269

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E-mail: [DNO-SecretariatTeam@mod.gov.uk](mailto:DNO-SecretariatTeam@mod.gov.uk)

Via email: [REDACTED]

30 January 2023

Dear [REDACTED],

We should like to apologise for any inconvenience caused by the long delay in responding to your request for:

*“a copy of the section 36 submission, the supporting documents and the full text of the email that recorded the qualified person's decision.”*

which related to the application of the section 36 exemption to your requests for the Defence Safety Authority and Defence Nuclear Safety Regulator annual assurance reports for 2015-16.

We have treated your correspondence as a request for information under the Freedom of Information Act 2000 (the Act).

We previously confirmed that the Ministry of Defence holds information in scope of your request, but that we were considering the application of exemptions under sections 26 (Defence) and 36 (Prejudice to the Effective Conduct of Public Affairs) of the Act. That work was placed on hold while your requests for the annual assurance reports and our decision to withhold them were considered by the Information Commissioner and Information Rights Tribunal. We are now in a position to respond to your request.

Information which is able to be publicly released is available at Annexes A, B and C.

However, much of the information has been found to fall within the scope of the qualified exemptions provided for under sections 24 (Safeguarding National Security), 26 (Defence), 27 (International Relations), 28 (Relations within the UK) and 35 (Government Policy) of the Act and has been withheld.

As qualified exemptions, these are subject to a public interest test which means that information requested can only be withheld if the public interest in doing so outweighs the public interest in disclosure. We can confirm that a public interest test has been completed for each exemption; the arguments and outcomes are summarised below.

Section 24(1) provides that information is exempt from disclosure if exemption is required for the purposes of safeguarding national security. It has been applied to some of the information in scope which relates to the credibility and effectiveness of the UK's nuclear deterrent, and to threat assessment. The nuclear deterrent exists to deter the most extreme threats to our national security and the public has a natural interest in the measures and capabilities which are in place to deter such threats. However, any misinterpretation of the information, due to an incomplete picture, could harm the deterrent's credibility and reduce the deterrent effect. Further, release of the information would disclose some content from the annual assurance reports, which the Information

Rights tribunal agreed should be withheld under section 24. The balance of public interest was found to be in favour of withholding information which falls in scope of section 24 for the purpose of safeguarding national security.

Section 26(1) provides that information is exempt if its disclosure would, or would be likely to, prejudice (a) the defence of the British Isles or any colony or (b) the capability, security or effectiveness of the Armed Forces. They have been applied to some of the information in scope which relates to the operation of the nuclear deterrent by the Royal Navy to defend the UK. Due to its role in deterring the most extreme threats, the nuclear deterrent plays a key role in defending the UK. The public has a natural interest in the measures and capabilities which are in place to defend the UK from the range of threats it faces. However, any misinterpretation of the information, due to an incomplete picture, which could reduce the deterrence effect would negatively impact our ability to operate the deterrent and defend the UK. Further, release of the information would disclose some content from the annual assurance reports, which the Information Rights tribunal agreed should be withheld under section 26. The balance of public interest was found to be in favour of withholding the information which falls in scope of section 26 as its release would prejudice the defence of the UK and the capability and effectiveness of the Armed Forces.

Section 27(1)(a) provides that information is exempt if its disclosure would, or would be likely to, prejudice relations between the UK and any other state. It has been applied to some information in scope which discusses parallels between UK and US programmes. The public has some interest in understanding the relationships between the UK and US nuclear deterrence programmes. However, any misinterpretation of the information, due to an incomplete picture, leading to conclusions about the UK nuclear deterrent could lead to the same conclusions being extrapolated to apply to the US nuclear deterrent. Further, release of the information would disclose some content from the annual assurance reports, which the Information Rights tribunal agreed should be withheld under section 27. The balance of public interest was found to be in favour of withholding the information which falls in scope of section 27 as its release would prejudice the relationship between the UK and US.

Section 28(1) provides that information is exempt if its disclosure would, or would be likely to, prejudice relations between two or more administrations in the UK. It has been applied to some of the information in scope which relates to the basing of the nuclear deterrent in Scotland. There is a strong public interest in reassuring the public, especially in Scotland, that the nuclear deterrent is maintained and operated safely. However, any misinterpretation of the information, due to an incomplete picture, could lead to further anti-nuclear arguments from the Scottish Government, which is already strongly in favour of removing the nuclear deterrent from Scotland. The balance of public interest was found to be in favour of withholding the information which falls in scope of section 28 as its release would prejudice relations between the UK and Scottish governments.

Section 35(1)(a) provides that information is exempt if it relates to the formulation or development of government policy. It has been applied to some of the information in scope which relates to the arguments for and against the application of section 36 to the request for the release of the 2015-16 annual assurance reports, and to some of the information in scope which relates to the drafting and publication options for subsequent annual assurance reports. Releasing the information would further public understanding of how Ministers make decisions based on advice from officials. However, the nuclear deterrent is a contentious subject which requires careful consideration of decisions unfettered by public comment. This safe space is essential for the consideration of policy options and the internal debate of live issues for protecting the credibility and effectiveness of the deterrent away from interference and disruption. Withholding the information relating to the drafting and handling options for subsequent reports would preserve space to modify plans in light of changing circumstances, based on free and frank advice. Further, there is limited public interest in the arguments for and against section 36 being applied specifically to the 2015-16 annual assurance reports as, in the appeal to the tribunal, the Department ceased to rely on section 36. The balance of public interest was found to be in favour of withholding the information to preserve a safe space in which officials can provide detailed advice to ministers.

If you are not satisfied with this response or you wish to complain about any aspect of the handling of your request, then you should contact us in the first instance at the address above. If informal resolution is not possible and you are still dissatisfied then you may apply for an independent internal review by contacting the Information Rights Compliance team, Ground Floor, MOD Main Building, Whitehall, SW1A 2HB (e-mail [CIO-FOI-IR@mod.gov.uk](mailto:CIO-FOI-IR@mod.gov.uk)). Please note that any request for an internal review must be made within 40 working days of the date on which the attempt to reach informal resolution has come to an end.

If you remain dissatisfied following an internal review, you may take your complaint to the Information Commissioner under the provisions of Section 50 of the Act. Please note that the Information Commissioner will not normally investigate your case until the MOD internal review process has been completed. The Information Commissioner can be contacted at: Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF. Further details of the role and powers of the Information Commissioner can be found on their website, <http://www.ico.org.uk>.

Yours sincerely,

Defence Nuclear Organisation Secretariat

To: [REDACTED], DPS/SofS

From: Julian Kelly, DG Nuclear

25 September 2017

[REDACTED]

**THE 2015-16 ANNUAL REPORTS ON NUCLEAR SAFETY AND ASSURANCE**

**Issue**

1. Withholding from public release the nuclear elements of the Defence Safety Authority's (DSA) 2015-16 Annual Assurance Report and the full Defence Nuclear Safety Regulator (DNSR) 2015-16 Annual Report.

**Recommendation**

2. That Secretary of State **notes** that:
- a. Both reports highlight a range of national security matters that relate to defence capability and international relations, and so their release should take account of Departmental direction on security-related considerations with respect to information disclosure;
  - b. The current threat to the UK deterrent from Hostile State Actors, including Hostile Foreign Intelligence Services, means we need to tighten up our practice on release of information: even information which is arguably unclassified in isolation could help a potential adversary put together a more highly classified picture;
  - c. The Department must ensure the independent nature and reporting of DSA and DNSR assessments is preserved, but managed within security-related considerations. Actions taken on the 2015-16 reports as a result of this submission will be emulated with the 2016-17 reports due to the current security context and to reduce any prominence associated to their publication being delayed.

And is invited to **decide** that

- d. In addition to the defence capability and international relations concerns surrounding disclosure of the information, whether in his reasonable opinion release would, or would be likely to inhibit the free and frank provision of advice, and / or otherwise prejudice the effective conduct of public affairs within the terms of the exemption at Section 36 of the FOI Act.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**Timing**

3. Priority. The intention is to publish the 2016-17 DSA report in October – DG DSA will write separately on this point.

**Background**

4. [REDACTED]

The Department received a request under the FOI Act to release the DSA report in February 2017 and, more recently, the DNSR report on 25 September 2017.

5. [REDACTED]

6. [REDACTED]

7. [REDACTED]

[REDACTED]

8. [REDACTED]

9. [REDACTED]

10. In addition, and more significantly, DSA and DNSR must be able to report their views to fulfil their function as independent regulators. The engagement of Section 36 for these and future reports provides reassurance to both that in presenting their impartial advice and conclusions they should not feel constrained due to a need to take account of public consumption. Thus maintaining the imperative that they can be candid with ministers and the Department to ensure that the sponsor and duty holders of the DNP are held to account on safety matters.

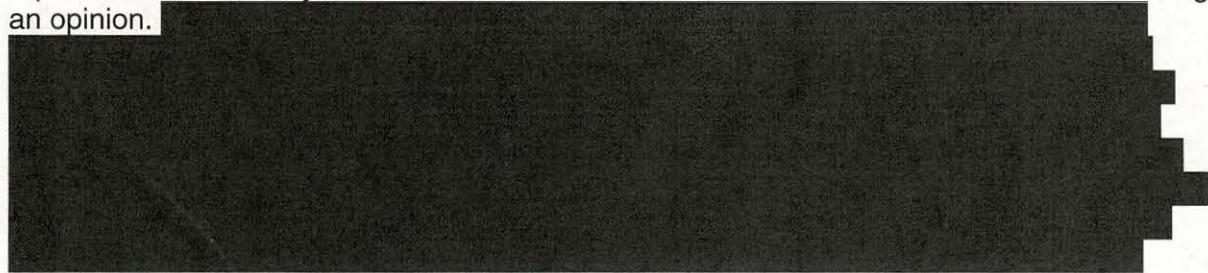
11. [REDACTED]

Engagement of Section 36

12. Section 36 requires that a 'qualified person' decides upon the application of the exemption; under the Act a Minister of the Crown is a suitably qualified person and the

responsibility cannot be delegated. Therefore the Secretary of State is invited to decide whether the Section 36 exemption should be engaged. The Secretary of State is also required to make a decision on the level of the prejudice that would apply: i.e. whether the release of the information 'would' or 'would be likely' to inhibit the free and frank provision of advice and / or 'would', or 'would be likely' to otherwise prejudice, the effective conduct of public affairs. A prejudice level of 'would' implies that the harm is more probable (a more than 50% chance) than not, while 'would be likely to' implies that there would be a lesser, but not negligible, risk. The latter option represents a lower threshold of risk, but one that still needs to be significant and weighty. As the FOI process entitles the requestor of the information to complain about the decision to withhold information, should this occur the Information Commissioner's Office will expect to see a record of the opinion as part of the investigation.

13. To be clear exemption is about the processes that may be inhibited and/or the impact to conduct public affairs - in this case the ability of the regulator and DG DSA to provide impartial, unimpeded advice on the DNP - rather than the information contained in the two reports. Also, Secretary of State must consider the circumstances of the case before forming an opinion.



#### Public Interest

14. As qualified exemptions, the application of Sections 26, 27 and 36 must be subjected to a public interest test to determine whether 'in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. While there are strong arguments for withholding the information as discussed above, it is recognised that there are also strong arguments for releasing the information. These include the public interest in nuclear safety and the public confidence inspired by the impartial positions of DG DSA and the DNSR, and them being open and transparent in their activities.

15. In legal terms, Secretary of State is not required to assess where the balance of public interest lies, only whether in his reasonable opinion the exemption should be engaged. The public interest test will not be finalised until the opinion is known, but a draft outlining the primary arguments on both sides is provided for information at Annex A.

#### **Financial Aspects**

16. There are no financial implications to the decision sought.

#### **Presentational Aspects**

17. A large black rectangular redaction block covering approximately five lines of text in paragraph 17.

- The safety of the public, our submarine crews, the defence workforce and the protection of the environment remain the Department's priority. When managing safety, our aim is to maximise transparency while balancing the need to maintain national security.
- Withholding these assessments will not prevent effective management of the Defence Nuclear Programme.
- Overall, the Defence Nuclear Programme achieves the required high standards of nuclear and radiological safety. Nuclear safety has not been compromised.

18.

[REDACTED]

19.

[REDACTED]

Copied to:

COS/Secretary of State  
APS/Minister (DP)  
PSO/CDS  
PPS/Perm Sec  
PS/VCDS  
MA/1SL  
PS/DG Security Policy  
MA/DG DSA  
MA/CSSE  
Hd DNSR  
DDC



**DRAFT PUBLIC INTEREST TEST – NUCLEAR INFORMATION IN THE 2015-16 DSA ANNUAL ASSURANCE AND DNSR REPORTS**

Section 26 – Defence Capability

- Arguments For Release:

- There is legitimate public interest in the safety of nuclear reactors and submarine activities.

[REDACTED]

- The information would demonstrate the rigor with which DSA and DNSR discharge their roles and illustrate the independent nature of their roles.

- Arguments Against Release:

[REDACTED]

- Any misinterpretation of the information by members of the public or Parliament, due to an inevitable incomplete picture, could harm the credibility of the deterrence.

Section 27 – International Relations

- Arguments For Release:

- There is legitimate public interest in the safety of nuclear reactors and submarine activities.

[REDACTED]

- The information would demonstrate the rigor with which DSA and DNSR discharge their roles and illustrate that the independent nature of their roles.

- Arguments Against Release:

[REDACTED]

[REDACTED]

Section 362b and c – Prejudice to Effective Conduct of Public Affairs

- Arguments For Release:

- There is legitimate public interest in the safety of nuclear reactors and submarine activities.

[REDACTED]

- The information would demonstrate the rigor with which DSA and DNSR discharge their roles and illustrate that the independent nature of their roles.
- Knowledge that officials' analysis and advice will be subject to disclosure, and thus public scrutiny, may help improve the quality of the advice.

- Arguments Against Release:

- Any change to the ability for the DNSR and DG DSA to provide advice uninhibited would severely undermine their credibility.
- Any change may also result in less candid advice that holds to account Ministers and DNP duty holders.
- Their advice is essential to the good governance of the DNP, but where it is classified or sensitive it must be protected particularly in the current security context.

[REDACTED]

DNo / 886 / BK64

Nuclear-Secretariat AH ( [REDACTED] )

DNO SECRETARIAT  
DNO SEC 1 / 004

From: SofS-DPS ( [REDACTED] )  
 Sent: 09 October 2017 11:02  
 To: DGNuc-SecretariatAH ( [REDACTED] )  
 Cc: SofS-COS (Parmenter, Damian SCS); Min(DP)-APS2 ( [REDACTED] ); CDS-PSO (Mortimer, Ian Brig); PUS-PPS ( [REDACTED] ); VCDS-MA ( [REDACTED] ); NAVY-1SLCNS GROUP (MULTIUSER); DG Sec Pol-Private Office (MULTIUSER); DSA-DG-MA ( [REDACTED] ); DES SM CSSE-MA-Desig (S-TRIBUNE); DSA-DNSR-Hd (Langbridge, David SCS); DDC-Director (VACANT); DGNuc-DG-Desig (Kelly, Julian SCS); DGNuc-ResPol-Director (Kett, Nicole SCS); DGNuc-Pol-Hd (Franklin, James SCS); DefenceSecretary-Group (MULTIUSER)  
 Subject: RE: 20170925-Handling The 2015-16 DSA and DNSR Annual Assurance Reports ~~-SUKEO-~~  
~~-LIMDIS-~~

PLEASE TREAT AS OFFICIAL RESPONSE

~~SECRET UK EYES ONLY LIMITED DISTRIBUTION~~

4-2-4-4

4-5-1-7

Thank you for your submission dated 25 Sep 17 regarding the 15-16 DSA and DNSR Annual Assurance Reports. Please note the direction in underline at the bottom of this email.

Secretary of State **noted** that:

- a. Both reports highlight a range of national security matters that relate to defence capability and international relations, and so their release should take account of Departmental direction on security-related considerations with respect to information disclosure;
- b. The current threat to the UK deterrent from Hostile State Actors, including Hostile Foreign Intelligence Services [REDACTED] means we need to tighten up our practice on release of information: even information which is arguably unclassified in isolation could help a potential adversary put together a more highly classified picture;
- c. The Department must ensure the independent nature and reporting of DSA and DNSR assessments is preserved, but managed within security-related considerations. Actions taken on the 2015-16 reports as a result of this submission will be emulated with the 2016-17 reports due to the current security context and to reduce any prominence associated to their publication being delayed.

And **decided** that

- d. In addition to the defence capability and international relations concerns surrounding disclosure of the information, in his reasonable opinion release would, or would be likely to inhibit the free and frank provision of advice, and / or otherwise prejudice the effective conduct of public affairs within the terms of the exemption at Section 36 of the FOI Act.

[REDACTED]

SofS 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.

[REDACTED]

Regards

[REDACTED]  
Deputy Private Secretary to the Secretary of State for Defence  
[REDACTED]

---

**From:** DGNuc-SecretariatAH ([REDACTED])  
**Sent:** 25 September 2017 18:37  
**To:** SofS-DPS ([REDACTED])  
**Cc:** SofS-COS (Parmenter, Damian SCS); Min(DP)-APS2 ([REDACTED]); CDS-PSO (Mortimer, Ian Brig); PUS-PPS ([REDACTED]); VCDS-MA ([REDACTED]); NAVY-1SLCNS GROUP (MULTIUSER); DG Sec Pol-Private Office (MULTIUSER); DSA-DG-MA ([REDACTED]); DES SM CSSE-MA-Desig (S-TRIBUNE); DSA-DNSR-Hd (Langbridge, David SCS); DDC-Director (VACANT); DGNuc-DG-Desig (Kelly, Julian SCS); DGNuc-ResPol-Director (Kett, Nicole SCS); DGNuc-Pol-Hd (Franklin, James SCS)  
**Subject:** 20170925-Handling The 2015-16 DSA and DNSR Annual Assurance Reports -~~SUKEO LINDIS~~

[REDACTED]  
As notified at O-S level, please find attached a submission on the above.

[REDACTED]  
AH Secretariat, DG Nuclear  
MB6-H-18 [REDACTED]

**From:** DGNuc-Secretariat-Parliamentary (MULTIUSER)

**Sent:** 25 September 2017 18:36

**To:** [REDACTED] (SofS-DPS)

**Cc:** Parmenter, Damian SCS (SofS-COS); [REDACTED] (Min(DP)-APS2); Mortimer, Ian Brig (CDS-PSO); [REDACTED] (PUS-PPS); [REDACTED] (VCDS-MA); NAVY-1SLCNS OUTER OFFICE (MULTIUSER); Watkins, Peter SCS (DG Sec Pol-DG Sec Pol); [REDACTED] (DG Sec Pol-PS); [REDACTED] (DSA-DG MA); [REDACTED] (DES SM CSSE-MA); Langbridge, David SCS (DSA-DNSR-Hd NNPI); Newns, Carl MR (DDC-Director); Kelly, Julian SCS (DGNuc-DG); Kett, Nicole SCS (DGNuc-ResPol-Director); Franklin, James SCS (DGNuc-Pol-Hd); DGNuc-Secretariat-Parliamentary (MULTIUSER)

**Subject:** Handling the 2015-16 DSA and DNSR Annual Assurance Reports-ØS

[REDACTED]

I have sent at SECRET level a submission to SofS to address publication of the 2015-16 DSA and DNSR reports. [REDACTED]

[REDACTED] The submission seeks from SofS an opinion (as he is determined a 'qualified person' to do so under provision of s36 of the FOI Act) on whether the release of this information would be likely to inhibit the provision of free and frank advice from his regulator.

[REDACTED]

Happy to come and discuss the argument.

Yours,

[REDACTED]

[REDACTED] | Assistant Head Secretariat, DG Nuclear  
Ministry of Defence | 6-H-18 Main Building, Whitehall, London SW1A 2HB |  
Direct Dial: [REDACTED] | Military: [REDACTED]

**\*\* Please send all official mail to our group mailbox: [DGNuc-Secretariat-Parliamentary@mod.gov.uk](mailto:DGNuc-Secretariat-Parliamentary@mod.gov.uk) \*\***