



[Neutral Citation Number]

**IN THE FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
INFORMATION RIGHTS**

**Case No. EA/2011/0286 & 0287**

**ON APPEAL FROM:**

**The Information Commissioner's  
Decision Notices: FS5032064 and FS50390786  
Dated: 1 and 2 November 2011**

Appellant: **Department of Health**  
Respondent: **Information Commissioner**  
Second Respondent: **Rt Hon John Healey MP**  
Third Respondent: **Nicholas Cecil**

Heard at: Victoria House London

Date of hearing: 5 and 6 March 2012

Date of decision: 5 April 2012

**Before**

John Angel  
(Judge)

and

Richard Enderby  
Darryl Stephenson

**Attendances:**

For the Appellant: James Eadie QC and Ivan Hare  
For the Respondent: Timothy Pitt-Payne QC  
For the Second Respondent: Holly Stout  
For the Third Respondent: no appearance

**Subject matter: s.35(1)(a) FOIA formulation and development of government policy; s.40(2) personal information.**

**Cases:** *Department for Education and Skills v IC & Evening Standard* EA/2006/0096  
*Department for Work and Pensions v IC* EA/2006/0040  
*OGC v Information Commissioner (AG intervening)* [2008] EWHC 774  
(Admin)  
*Guardian Newspapers & Brooke v IC & BBC* EA/2006/0011 and  
EA/2006/0013  
*Dun v Information Commissioner & National Audit Office* EA/2010/0060

## **DECISION OF THE FIRST-TIER TRIBUNAL**

The Tribunal allows the appeal relating to the Decision Notice dated 1 November 2011 and dismisses the appeal relating to the Decision Notice dated 2 November 2011.

The Appellant is required to disclose the Transitional Risk Register to the Second Respondent, with the name of the author of the document redacted, within 30 days of the date of this decision.

## **REASONS FOR DECISION**

### **Background**

1. The requests in these appeals were made in 2010 and 2011 for two risk registers relating to the introduction of the Government's proposals for NHS reforms. The Health and Social Care Bill ("HSC Bill") implementing these reforms was before Parliament at the time of these proceedings. The reforms are far-reaching and highly controversial.
2. NHS reorganisation was not part of the Conservative election manifesto prior to the 2010 General Election. The Coalition Agreement of May 2010 stated  
  
*" We will stop the top-down reorganisations of the NHS that have got in the way of patient care..."*
3. However on 12 July 2010 the Department of Health ("DOH") published a White Paper, *Equity and excellence: Liberating the NHS*, which proposed extensive reform of the NHS. There was no prior Green Paper. Its main proposals included:
  - Consortia of GPs would be given budgetary responsibility for commissioning the majority of healthcare services, with all GP practices required to join a consortium: White Paper, §§4.2-4.9;
  - An NHS Commissioning Board would be established, to hold GP commissioners to account for delivering outcomes and financial performance: White Paper, §§4.10-4.11;
  - Primary Care Trusts (PCTs) would be abolished: White Paper, §4.16;
  - Strategic Health Authorities would also be abolished: White Paper, § 4.13;
  - GP commissioning consortia would be able to purchase care from "any willing provider" (so long as the provider was licensed by Monitor to provide NHS services)<sup>1</sup>: White Paper, §5.14;
  - All NHS trusts (apart from PCTs) would become foundation trusts: White Paper, §4.23;
  - Monitor, the existing regulator for foundation trusts, would be given a new role as the economic regulator of health and social care, with wide-ranging powers to prevent anti-competitive behaviour - see e.g. White Paper, §§4.27-4.30;
  - NHS management costs would be cut by more than 45% over four years: White Paper, §5.3.
4. The Government proposed to reform the whole of the NHS rather than take a piece meal approach as in the past. The annual cost of the NHS is estimated at £80bn. The proposals for reform coincided with a period of significant financial

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<sup>1</sup>Because of the requirement for NHS providers to be licensed, the policy is often referred to as "Any Qualified Provider" (AQP).

challenge for the NHS, with up to £20 billion of efficiency savings having to be found by 2014-15 in addition to the cuts in management costs.

5. The proposed timetable for reform as set out in the White Paper was (subject to Parliamentary approval) for a large part of the reforms to be implemented during 2011/12.

### **The requests for information**

6. On 29 November 2010 Mr Healey asked the DOH for  
*“ the full details and copies of any Departmental risk assessment or risk register which officials or advisers in the DoH have created or are maintaining which contains assessments of the risk associated with the implementation of the GP Commissioning Consortia or the White Paper or measures to be contained in the forthcoming Health Bill” (“the Healey Request”).*
7. The request was interpreted by the DOH as being a request for what is called the Transition Risk Register dated 1 November 2010 (“TRR”). All parties accept that this is the disputed information in relation to the Healey Request.
8. On 28 February 2011 Mr Cecil asked the DOH for the Strategic Risk Register (“SRR”) which was published on the same day (“the Cecil Request”).
9. The Healey Request was refused initially claiming the s.36(2) FOIA exemption, but by the time of the internal review for the Healey Request the DOH relied on s.35(1)(a) FOIA. The DOH only relied on s.35(1)(a) for the Cecil Request.

### **The complaint to the IC**

10. Mr Cecil and Mr Healey both complained to the IC. The Commissioner issued two separate Decision Notices (“DNs”):
  - The first DN dated 1 November 2011 (FS50392064), arising out of Mr. Cecil’s request, relating to the SRR (“DN1”); and
  - The second DN dated 2 November 2011 (FS50390786), arising out of Mr. Healey’s request, relating to the TRR (“DN2”).
11. The reasoning in both notices is very similar. The IC accepted that s.35(1)(a) FOIA was engaged in relation to the TRR and SRR and that the public interest balance favoured disclosing the registers.
12. The IC did not discuss the application of s.36 FOIA. He did not need to do so, given that s.35(1)(a) and s.36 are mutually exclusive.
13. The IC referred to ss 21 and 22 FOIA in relation to the Healey Request, which had been relied on by the DOH at internal review, and explained why he did not consider that he needed to make a decision about their application (DN2, §40). The DOH has not advanced any argument based on ss 21 or 22 in this appeal.

14. The IC also referred to s. 40(2) FOIA (DN2, §41). The DOH had relied on this as a basis for redacting some of the names of officials set out in the TRR. The IC considered that s. 40(2) did not provide an exemption from disclosure, given the seniority of the individuals involved.
15. Finally the IC found that there was a procedural breach of the Act, in that the DOH failed to inform the requester within the statutory time limit that it was relying on s.35(1)(a) (DN2, §42). The DOH has not appealed against this finding.
16. The IC made similar findings in relation to DN1 where applicable.

### **Appeal to the Tribunal**

17. The DOH appealed to the First-tier Tribunal (“FTT”) against both DN’s. The Tribunal consolidated the appeals so that they could be heard together. Mr Healey and Mr Cecil were joined as parties. On the request of one of the parties and others the appeals were fast tracked. Mr Cecil did not attend the hearing.
18. The case was heard over two very full days. Ms Stout, for Mr Healey, asked us to announce our decision at the end of the second day with reasons following. We were unable to do this but were able to meet soon after and our decision was announced on 9 March 2012 and these reasons have followed.
19. There are two principal questions for the Tribunal to decide in these appeals:
  - a) On the basis we accept that s.35(1)(a) is engaged, has the IC applied the public interest test properly?
  - b) If he has, should the names of certain civil servants referred to in the TRR be redacted?

### **The legal framework**

20. The relevant legal provisions of FOIA in this case are as follows:

*s. 1(1) Any person making a request for information to a public authority is entitled—*

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- (b) if that is the case, to have that information communicated to him.*

*s. 2(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—*

- ...
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.*

s. 35(1) *Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to—*

(a) *the formulation or development of government policy*

s. 40(2) *Any information to which a request for information relates is also exempt information if –*

(a) *it constitutes personal data which do not fall within subsection (1), and*

(b) *either the first or the second condition below is satisfied.*

21. All parties agree that s.35(1)(a) is engaged in this case. It is a class based exemption so there is no need to show prejudice or harm. We have considered the evidence in this case and reviewed the disputed information and we accept that the exemption is engaged.
22. The only matter for the Tribunal to consider therefore is whether the IC was correct to find that the public interest balance favoured disclosure of both risk registers.
23. In order to do that the Tribunal has various powers under s.58 FOIA including under s.58(2)

*The Tribunal may review any finding of fact on which the notice in question was based.*

24. The Tribunal has considered s.35(1)(a) on many occasions. In *Department for Education and Skills v IC and Evening Standard EA/2006/0096* (“DfES”) it was first established that the exemption had a broad construction and that government is entitled to a ‘safe space’ in order to consider policy options. During this period it would be very unlikely to be in the public interest to disclose information, unless there was evidence of wrongdoing.

In *DfES* the Tribunal stated at §75(v) that

*“ a parliamentary statement announcing the policy...will normally mark the end of the process of formulation.”*

25. In other cases<sup>2</sup> the Tribunal has found that the formulation and development of government policy has come to an end by the time a Bill receives the Royal Assent. The Tribunal has tried to distinguish between the formulation and development stages of policy and the implementation of policy. It has also established that the need for a safe space is at its highest during policy formulation and that once the policy has been announced that need diminishes over time depending on the amount of development still taking place, but that the same safe space is not needed by the time the policy is being implemented.
26. In this case both the DOH and the IC say the Tribunal has taken too narrow a view of policy formulation in the past. Since the *DfES* case, the IC’s Office has

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<sup>2</sup> *Department for Work and Pensions v IC EA/2006/0040*; *OGC v Information Commissioner (AG intervening)* [2008] EWHC 774 (Admin); *Guardian Newspapers & Brooke v IC & BBC EA/2006/0011* and *EA/2006/0013*.

commissioned specific research on policy formulation from the Constitution Unit at University College London. The UCL report<sup>3</sup> notes that:

“ a strong trend in recent years has been to regard attention to delivery issues as an integral part of policy making and not something to be managed separately.

. . .

more attention is now paid in policy formulation to delivery issues and the managerial issues associated with policies are given far greater attention. Much modern theory of policy making also emphasises how far policy development is a continuous circle involving delivery and implementation as part of the process and not an afterthought.”

27. The IC has accepted in his recent guidance that “with the classic policy formulation process of turning a White Paper into actual legislation, the formulation of policy can be ongoing right up to the Bill receiving Royal Assent.”<sup>4</sup>
28. We are prepared to accept that there is no straight line between formulation and development and delivery and implementation. We consider that during the progress of a government introducing a new policy that the need for a safe space will change during the course of a Bill. For example while policy is being formulated at a time of intensive consultation during the initial period when policy is formed and finalised the need for a safe space will be at its highest. Once the policy is announced this need will diminish but while the policy is being debated in Parliament it may be necessary for the government to further develop the policy, and even undertake further public consultation, before the Bill reflects the government’s final position on the new policy as it receives the Royal Assent. Therefore there may be a need to, in effect, dip in and out of the safe space during this passage of time so government can continue to consider its options. There may also come a time in the life of an Act of Parliament when the policy is reconsidered and a safe space is again needed. Such a need for policy review and development may arise from implementation issues which in themselves require Ministers to make decisions giving rise to policy formulation and development. We therefore understand why the UCL report describes the process as a “continuous circle” certainly until a Bill receives the Royal Assent. However the need for safe spaces during this process depends on the facts and circumstances in each case. Critically the strength of the public interest for maintaining the exemption depends on the public interest balance at the time the safe space is being required.
29. We would also observe that where a Bill is a Framework Bill we can understand that even after it receives the Royal Assent there will be a need for safe spaces for policy formulation as secondary legislation is developed. We note in this case that the Bill, although suggested by DOH to be a Framework Bill, is prescriptive of economic regulation, and cannot be described purely in framework terms.

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<sup>3</sup> *Understanding the Formulation and Development of Government Policy in the context of FOI*, June 2009, paragraphs 3.28 and 4.35 (AB/X).

<sup>4</sup> *Completion of policy formulation and development in relation to the PIT*, LTT62, 26 March 2010 .

## Evidence

30. The Tribunal were fortunate to have evidence before it from two extremely senior civil servants, namely Una O'Brien the Permanent Secretary at the DOH and Lord Gus O'Donnell the former Secretary of the Cabinet and Head of the Home Civil Service between 2005 and 2011 and prior to that Permanent Secretary to HM Treasury. Professor Chris Ham Chief Executive of The King's Fund provided evidence on behalf of the IC which was not subject to questioning. Mr Healey also gave evidence. He has been an MP for 15 years and served as a Minister and on occasions member of the Cabinet in the previous government and at the time of his request was Labour's Shadow Health Secretary.
31. We wish to summarise the evidence under a number of headings.

## Progress of the reforms

32. It is helpful in this case to set out a chronology of progress of the reforms as they relate to the requests in these appeals:

<b>May 2010</b>	General Election
<b>12 July 2010</b>	White Paper: <i>Equity and excellence: Liberating the NHS</i> published setting out long term vision for the NHS
<b>11 October 2010</b>	Consultation on White Paper closes
<b>1 November 2010</b>	TRR compiled
<b>29 November 2010</b>	Mr Healey submits request to the DOH
<b>15 December 2010</b>	Government publishes response to consultation <i>Liberating the NHS: Legislative Framework and Next Steps</i>
<b>15 December 2010</b>	David Nicholson letter to the NHS re next steps
<b>20 December 2010</b>	DOH responds to Mr Healey's request and issues a refusal notice
<b>7 January 2011</b>	Mr Healey requests internal review
<b>18 January 2011</b>	Impact Assessment on proposed reforms published – date of assessment 30 November 2010
<b>January 2011</b>	HC Public Accounts Committee's Health Landscape Report published
<b>19 January 2011</b>	First Reading of the HSC Bill in the House of Commons
<b>8 February – 31 March 2011</b>	First Committee Stage of Bill in House of Commons
<b>28 February 2011</b>	SRR compiled
<b>28 February 2011</b>	Mr Cecil requests copy of the SRR
<b>2 March 2011</b>	DOH responds to Mr Healey's request for an internal review
<b>28 March 2011</b>	DOH responds to Mr Cecil's request and issues a refusal notice
<b>28 March 2011</b>	Mr Cecil requests an internal review
<b>6 April 2011</b>	Government halts progress of HSC Bill saying that it will engage in a listening exercise; NHS Future Forum established
<b>17 May 11</b>	DOH's response to Mr Cecil's internal review

<b>June 2011</b>	Coalition government announced revised plans for the reform of the NHS
<b>June/July 2011</b>	Revised Bill debated in Committee
<b>July 2011</b>	Regulatory Policy Committee publishes analysis of the Bill risk assessments
<b>6/7 September 2011</b>	Report and Third Reading in House of Commons
<b>8 September 2011</b>	First Reading, House of Lords
<b>11 October 2011</b>	Second Reading, House of Lords
<b>1 November 2011</b>	Decision Notice on the Cecil request (DN1)
<b>2 November 2011</b>	Decision Notice on the Healey request (DN2)
<b>24 November 2011</b>	NHS Operating Frameworks 2012/13 published

### **Position at time of hearing**

Bill at Report Stage in the House of Lords (6, 8, 13 March 2012). Remaining stages for the Bill are: Third Reading in the House of Lords (expected 19 March 2012), consideration of Lords' amendments in the House of Commons (20 March 2012, earliest) and Royal Assent.

33. The White Paper in July 2010 set out the new Coalition Government's strategy for comprehensive reform of the NHS. It was published within two months of coming to office. There was no apparent warning that such a radical approach would be taken. Ms O'Brien when asked whether the Department was ready for this at such short notice responded that many of the policies had already been under consideration by the previous government. However from the evidence in this case and the reaction to the White Paper it was clear to the Tribunal that it was published in a hurry and to much public concern.

34. It also seems to us from reading the White Paper that the policy decision had been reached at the White Paper stage. The subsequent consultation between July and October 2010 was largely directed at how best to implement the White Paper. This can be seen from the December 2010 publication that followed, *Liberating the NHS: Legislative framework and Next Steps* at §7.41

*"The Department specifically invited comments during the consultation period on how best to secure implementation as well as on the detailed design of the new arrangements."*

35. The response also states that it covers how policy proposals had been developed in the light of the consultation process and provides a comprehensive description of how the new system would operate. On reviewing the document the Command Paper does indicate that in some cases wholly unpopular proposals would not be proceeded with (§§5.34-5.35 – transfer of functions exercised by the health and overview scrutiny committee to the health and wellbeing board). In respect of the vast majority of proposals the Government adhered to the plans set out in the White Paper and set about implementing those proposals early where possible. The Command Paper summed up the Government's position:

*“ Some will oppose our plans, but the Government will maintain constancy of purpose in adhering to our vision and plans” (§7.59).*

36. The Command Paper identifies a number of relevant matters to this case:
- Respondents claimed that the Government’s reforms were the most radical changes to the health services since the NHS was founded and was too much too soon. The Government disagreed;
  - Despite the timetable for reform having been described as challenging the Government had decided to press ahead even more quickly with some of the reforms rather than wait for the Bill – for example with pathfinders of emerging GP consortia, encouraging local authorities to develop health and wellbeing boards and get NHS trusts to apply for foundations trust status. It would appear that legislation was already in place to facilitate some of these reforms;
  - A recognition that the most significant theme arising from the consultation was the need for effective management of the transition during what would be a challenging financial environment.
37. Mr Healey considered that the White Paper was firm government policy because the new strategy was referred to the L Committee (Legislation Committee which is a Cabinet sub-committee) soon after. The Committee’s consent is needed before Parliamentary Counsel could be instructed to draft a Bill. It would not have gained their approval unless he said *“policy decisions were already fixed and collectively agreed”*.
38. This would make sense because the White Paper envisaged the Bill being presented to Parliament in the autumn of 2010, although it was not in fact introduced until January 2011.
39. Even before the Bill was published Sir David Nicholson the NHS Chief Executive wrote to all senior managers in the NHS on 15 December 2010 which was the same day the consultation response was published with a letter headed *“Managing the Transition and the 2011/12 Operating Framework”*. In this letter he explains the Government’s strategy and policies and what the managers would have to do over the next four year transitional period to implement those policies, all before a Bill had been presented to Parliament. Sir David’s letter includes a summary timetable for the Government’s plans and a revised HR strategy to support implementation of the changes.
40. The HSC Bill received its first reading in the House of Commons on 19 January 2011.
41. At the same time Impact Assessments of aspects of the Bill were published. These deal with the risks associated with the Bill and Mr Healey informed us that the Regulatory Policy Committee in their July 2011 stated some were ‘not fit for purpose’ (in particular related to the GP Commissioning & NHS Commissioning Board, Provision-provider liberalisation, economic regulation and joint licensing and the Department of Health’s Public Bodies assessments).

42. As a result of mounting concern about the Bill, the Government paused its passage through Parliament at the beginning of April 2011 and established the NHS Future Forum to enable wider discussion about the proposals.
43. The Parliamentary process recommenced in June 2011 and was ongoing at the time of the hearing.

### **Risk registers**

44. Lord O'Donnell explained that risk management is used across all Government Departments who use PRINCE2 as a structured approach to project management. It provides a method for managing projects within a clearly defined framework. Risk registers are part of this methodology.
45. Ms O'Brien explained that at the DOH as high-level objectives of a proposed reform become clear, the next step is to identify the risks and compile a risk register. The identified risks are given a rating on a scale of 1 to 5 of the likelihood of the risk occurring (where 5 is the highest likelihood of the risk occurring) and the scale of the impact if that risk occurred, again on a scale of 1 to 5 (where 5 is the highest impact). By taking the scores for likelihood and impact together, a "RAG" rating is created. The RAG rating is a series of colours used to denote how serious a risk is: green, amber/green, amber. Amber/red and red in order of severity. The higher the likelihood and impact scores as judged at the time, the more serious the risk and the closer to "red" it is coloured.
46. Risk registers by their very nature do not provide detailed explanations of the risks involved only the possible headline risk and mitigation factors so that the impact of the risk can be seen relatively at a glance for ease of use at board or decision type meetings.
47. Lord O'Donnell says risk registers are the most important tool used across government to formulate and develop policy for risk management in advising Ministers.
48. Mr Healey as a former Minister and Cabinet member over 10 years who was responsible for the formulation and development of a number of new policies says he cannot recall seeing a risk register because as far as he was concerned they were used by a Department for managing the implementation of policy and therefore would not be seen by Ministers. He said  
*" they don't contain policy discussion or policy advice. They come in submissions, memos, requests for further data analyses, minutes of discussions with senior civil servants and advisers".*
49. In this case there are two different risk registers. We heard that the TRR was used at Executive Board level. The Board is comprised of civil servants in the DOH and is held monthly. The SRR was used at Departmental Board level. This Board is chaired by the Secretary of State and comprised of other Ministers, non-executive members and senior members of the Executive Board and sits approximately 5 times per annum.

50. We have examined the registers in detail. We find they are different. The TRR contains largely implementation/operational type risks which an executive board would be expected to be concerned with when faced with implementing the transition from an existing to a new regime. This is not surprising considering its title. The SRR on the other hand contains risks which need to be brought to the attention of Ministers so that if necessary policy decisions can be made. This is again not surprising considering the register's title. A risk on the TRR could be escalated to the SRR and therefore become potentially policy related.
51. Interestingly Mr Healey had not come across a strategic risk register in his time in government. Clearly the importance of the NHS reforms meant such a risk register was necessary.
52. Risk registers are updated regularly, usually for board meetings, to reflect the current likelihood of the risk occurring and the scale of the impact if that risk occurred with an updated RAG rating if appropriate.
53. References to concern about risk are recorded in the Command Paper, *Liberating the NHS: Legislative framework and next steps* (the Government's response to the consultation): for example §§1.16 (risk of privatisation and two-tier service), 1.19 (reforms 'a leap in the dark'), 1.22 ('challenging' timetable), 3.5 ('risk of unintended consequences'), 4.7 (concerns about GP commissioning), 6.45 ('risks of abolishing all of the current controls immediately'), 6.94 (risk with mergers). There were only limited references to risk mitigation and management: see §§4.49, 6.45, 6.95, 7.31, although at §7.3 more "*robust and transparent*" arrangements for financial control and risk management were promised.
54. Also evidence was provided that risk was a key theme considered by the House of Commons Health Committee in December 2010.
55. Although the White Paper had indicated that many of the changes proposed would require primary legislation (§6.7), the Command Paper setting out the Government's response to the consultation explained that the Government had decided to implement a number of the reforms proposed in advance of primary legislation.
56. GP pathfinder consortiums were now to be introduced early (§7.41), enthusiasts for the reforms were to be allowed to proceed early under existing legal and accountability arrangements (§7.42), "*shadow arrangements*" for an NHS Commissioning Board was to be introduced at a national level, "*early progress*" was to be made on Monitor and the Provider Development Authority was to be established, "*a parallel and connected programme of early implementer health and wellbeing boards*" (§7.43) was to be developed, as well as "*a programme of local HealthWatch pathfinders*". These programmes were to "*expand during 2011/12, prior to the establishment of comprehensive arrangements in 2012/13, where there will be a first dry run of the new commissioning arrangements nationally*" (§7.43).
57. We note that Ms O'Brien intends to publish on the DOH website shortly its scheme for the transition programme for health and social care, including the NHS reforms,

which will include its approach to risk management and how risk is managed in projects of this type. It is surprising to us this has not been done before.

### **Timing of requests**

58. The above evidence leads us to the following conclusions. The TRR was prepared at a time (1 November 2010) when government policy had been formulated and was aimed at identifying the risks involved to implement the legislation and reforms within the Government's proposed timetable for introducing them. The fact it is slightly earlier than the Command Paper is not surprising bearing in mind we would expect Government to be considering the risks as soon as the consultation process had been completed even if the response had not yet been published. We were told this was the first TRR for the NHS reforms and again this is not surprising considering the stage of development at this time.
59. The SRR is dated 28 February 2011. We were told that it was not the first such register. This is not surprising bearing in mind that it has a different purpose from the TRR and policy had been developing much before this time. However the date is significant. By 28th the Bill had been presented to Parliament (19 January) and according to Mr Healey there were over 100 divisions in the House of Commons in a short period thereafter. No doubt Ministers would have needed to be reappraised of any new risks and RAG ratings during and following this Parliamentary activity.

### **The public interest test**

60. We accept that a safe space is required for government to formulate and develop policy as discussed earlier in this decision. However we have also said that the strength of the public interest depends on how much that safe space is needed at the time of the request in the circumstances of the particular case. So timing is extremely important.
61. The case law has determined that we should consider the public interest at broadly the time of the request and in any case no later than the internal review, particularly where there has been a change in exemption claimed. With the Cecil Request it was made on 28 February 2011, the refusal notice is dated 28 March 2011 and the internal review was determined on 17 May 2011. With the Healey Request it was made on 29 November 2010, was refused on 20 December 2010 and the internal review was concluded on 2 March 2011. In this case we consider the critical time for us to consider the public interest test is around the time of the refusal notices as this would be when the DOH was applying the test in order to provide replies to Messrs Cecil and Healey under s.17 FOIA. We make this finding despite the fact that in the Healey Request the DOH later changed from claiming s.36 to s.35 as these are mutually exclusive exemptions and similar public interest factors would be applied to both, as appears to have been the case here.

### Factors in favour of maintaining the exemption

62. Lord O'Donnell was very concerned that if there was routine disclosure of risk registers at the stage they were requested in this case that ultimately they would lose their effectiveness as a vital management tool for government and this would have a profound and damaging effect on the public interest in sound policy-making for the following principal reasons:
- a) frankness and candour which are essential to the usefulness of risk registers would be fundamentally damaged;
  - b) the likelihood of the risks materialising would increase;
  - c) it would distract policy makers from their task at a crucial point in the process of formulation and development; and
  - d) there was a danger that disclosure of the risks in the form that they are set out in the risk registers could harm rather than assist public debate.
63. Ms O'Brien reinforces these reasons in her evidence. She says that risk registers allow the DOH to "think the unthinkable" in order to seek further advice from Ministers. If they were disclosable this process would be inhibited.
64. We have seen the registers and the risks identified and find it difficult to understand how they could be described in such a way, particularly for the TRR. It seems to us that the TRR identifies the sorts of risks one would expect to see in such a register from a competent Department.
65. The first reason given for having a profound and damaging effect on sound policy making is not unfamiliar to the Tribunal as it has been argued in other cases, particularly the ones already cited earlier in this decision. It is often described as the "chilling effect" that such disclosures will have on the future behaviour of civil servants. In *DfES* §75 the Tribunal found that in judging the likely consequences of disclosure on officials' future conduct Tribunals are entitled to expect courage and independence from such officials and information should not be withheld simply because of fear that it may reflect adversely and unfairly on a particular official.
66. Lord O'Donnell brought to our attention his own view of the likely chilling effect and the opinions of others. There was no actual evidence of such an effect.
67. We note that independent research carried out by the Constitution Unit at University College London has concluded that there is little evidence of FOIA leading to a chilling effect.<sup>5</sup> Also in a previous case, *OGC v IC* EA/2006/2068 & 80 ("OGC"), where the Information Tribunal ordered the disclosure of Gateway Reviews apparently there has been no evidence of a chilling effect since their release. Mr Healey was the Minister responsible for the Office of Government Commerce at the time and said that there was no evidence that a chilling effect developed as a result of the release of the reviews even after he moved to The

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<sup>5</sup> "The Impact of the Freedom of Information Act on Central Government in the UK – Does FOI work" 2010 at page 164.

Treasury. Although Gateway Reviews are different from risk registers there are strong similarities. They are both PRINCE2 project management tools using a RAG rating. In the OGC case the Gateway Zero Reviews were concerned with another highly controversial government policy relating to the introduction of identity cards. They were produced while the Bill was still being debated in Parliament. They were designed to identify risks and their mitigation.

68. Also we note that a risk register has already been released in relation to Heathrow's third runway in September 2008. Its release was not such a narrow matter as suggested in evidence provided by the DOH. Mr Healey was in the Cabinet at the time and said that it related to much wider policy issues such as environment, transport and economic policies and that policy had not been settled when the risk register was released. There was no evidence presented to us that the release of the Heathrow risk register had had a chilling effect on their use by Government. Ms O'Brien was aware that other risk registers had been made public by the Department's arm's length bodies such as the National Institute for Health and Clinical Excellence and the Care Quality Commission.
69. Lord O'Donnell said it was very difficult to prove one way or the other whether a chilling effect would take place.
70. Mr Healey expressed the view, that in his experience as a Minister, that the quality of submissions on policy had tended to improve since the above disclosures.
71. Lord O'Donnell provided limited evidence of the other reasons (§62(b) to (d) above) which would result in a damaging effect on the public interest in sound policy-making, although similar views had been expressed by others. We appreciate this would be difficult because of the limited disclosure of risk type registers to date. He did refer us to the views of Andrew Haldane the Executive Director for Financial Stability at the Bank of England who has written extensively on the failures of effective risk management within the banking system prior to the credit crunch. The reasons in relation to government, however, were mainly based on conjecture of what might happen if there was routine disclosure of risk registers.
72. However we do accept that there is a very strong public interest for the Government and the DOH in this case having a safe space to formulate and develop policies for the extensive reform of the NHS.
73. We would observe that the DOH's position expressed in evidence is tantamount to saying that there should be an absolute exemption for risk registers at the stages the registers were requested in this case. Parliament has not so provided. S.35 (and s.36) are qualified exemptions subject to a public interest test, which means that there is no absolute guarantee that information will not be disclosed, however strong the public interest in maintaining the exemption.

#### Factors in favour of disclosure

74. Ms O'Brien and Lord O'Donnell both accept that the NHS reforms are "*important and in part controversial*". However as Ms O'Brien again puts it to us in evidence:

*“ Those features are of course very common across Government; most, if not all, major reforms of public services and many other issues on which Government makes decisions are of considerable importance (almost by definition), and are often controversial.”*

Lord O'Donnell gave two such examples of Defence and Welfare reforms.

75. In other words they played down the significance of the NHS reforms in comparison to other important reforms.

76. Professor Ham disagrees. He says the NHS reforms involve radical changes at a time of unprecedented financial constraint. He quotes from the words of Sir David Nicholson the Chief Executive of the NHS that the changes are so big “you could probably see them from space”.

77. A recurring theme in responses to the Government's proposals was concern about the risks that reform on such a scale, in combination with acute financial restraint, might pose to the NHS as an organisation, to patients and to staff. The King's Fund response to the White Paper warned (extracts taken from the opening Summary):

*“ there are significant risks in making these changes when financial pressures on the NHS are increasing. The case for reorganising the NHS needs to be clear and convincing to justify taking these risks, and this case has not been made.*

*“ Large cuts in management costs and the abolition of primary care trusts and strategic health authorities will make it difficult to ensure there is effective change management in place to support implementation of these proposals.*

*“ There will be costs associated with these changes both directly, in the form of redundancy payments and related expenses, and indirectly, via the opportunity costs of taking management time away from the NHS's core business of improving patient care. The proposed changes could also result in less attention being paid to finding the cost-releasing efficiency savings needed to enable the NHS to meet increasing demands for care just at the time when this should be a top priority.”*

78. Mr Healey also disagrees. He considers that the NHS reforms are exceptional for three reasons. Firstly the scale of the reforms. Although the NHS has been reformed before, in his words

*“ those tended to be reorganisation and restructures that were about the provider side or the way the NHS was actually regulated. It was not and has not been simultaneously and entirely changing across the board.”*

79. Secondly he says the speed and element of surprise of the reforms is exceptional. They were announced without any prior consultation process which he considers would be the usual course for such major reforms as happened with the Darzi reorganisation in the previous government which was well prepared and expected. These elements were not present with the White Paper.

80. Finally Mr Healey says that the NHS as an institution is seen as the most important by UK's citizens. It directly affects every person living in the UK. In his words "it has a unique place in their hearts".
81. Mr Healey argues these reforms are exceptional. From the evidence we would agree with him.
82. We find in this case that there is a very strong public interest in transparency and accountability in relation to the risks involved in introducing the NHS reforms.

### The public interest balance

83. As we have already said we find there is a very strong public interest in the Government having safe space to formulate and develop its policy on NHS reforms in this case. However the strength of this public interest during the course of bringing such reforms into effect will vary depending on what is happening and when. So for example during the course of the Government formulating its policy leading up to the White Paper the need for the safe space would be at its highest but would diminish after the policy had been announced and when consultation had been completed.
84. In this case the policy process is unusual and complicated. There was no prior consultation to the White Paper. Consultation took place afterwards. The Government largely proceeded with its proposals for reform. The Bill was subject to unprecedented debate and public concern leading to a listening or further consultation exercise. This pause in Mr Healey's view was unprecedented. The Healey Request was refused at a time when consultation had ceased and policy seemed to be fixed. At this time the strength of the public interest in the need for a safe space had lessened. The Cecil Request was refused at a time when the reforms were being strongly questioned in Parliament and outside and the Government would have been re-evaluating its position which was why not long afterwards it went back into a consultation phase. During this period there would have been a very strong public interest again in the Government having a safe space to consider whether its policy needed to be reformulated.
85. From the evidence it is clear that the NHS reforms were introduced in an exceptional way. There was no indication prior to the White Paper that such wide-ranging reforms were being considered. The White Paper was published without prior consultation. It was published within a very short period after the Coalition Government came into power. It was unexpected. Consultation took place afterwards over what appears to us a very short period considering the extent of the proposed reforms. The consultation hardly changed policy but dealt largely with implementation. Even more significantly the Government decided to press ahead with some of the policies even before laying a Bill before Parliament. The whole process had to be paused because of the general alarm at what was happening.

86. The public interest in understanding the risks involved in such wide-ranging reforms of the NHS in the circumstances just described would have been very high, if not exceptional in this case.
87. Risk registers would have provided the public with a far better understanding of the risks to a national institution which millions depended on. Ms O'Brien's argument that the risks could be identified elsewhere such as Impact Assessments, National Audit Office publications etc is not helpful in this case because of their timing and difficulty in identification of the risks in these documents. In any case some of them had been described as 'not fit for purpose'.
88. The TRR largely covers operational and implementation risks being faced by the DOH to deal with the introduction of new policies, not in our view direct policy considerations. This register would have informed the public debate at a time of considerable public concern. It would have helped the public understand whether the government had understood the risks involved and what measures it was considering for dealing with them. Disclosure could have gone a long way to alleviating these concerns and reassuring the public that it was doable or it may have demonstrated the justification for the concerns so that public debate at a crucial time could have been better informed.
89. This is a difficult case. The public interest factors for and against disclosure are particularly strong. The timing of the request is very important. We find the weight we give to the need for transparency and accountability in the circumstances of this case to be very weighty indeed. We find that at the time the TRR was requested and the DOH dealt with the application of the public interest test, the public interest in maintaining the s.35(1)(a) exemption did not outweigh the public interest in disclosure.
90. In contrast we find that at the time the SRR was requested and the DOH dealt with the application of the public interest test, the public interest in maintaining the exemption did outweigh the public interest in disclosure.
91. By this time the government was again back into policy formulation and development mode. The SRR was provided for the Departmental Board who were requiring to consider risk at a largely policy rather than implementation level. This register was deserving of a protected safe space so that the Government could consider how to best deal with the unprecedented level of public debate following the publication of the Bill. This public interest was very weighty at this time. Despite the strength of public interest in transparency this was insufficient at this point in time, in our view, to provide a public interest balance in favour of disclosure.

### **Personal information**

92. The Tribunal having found that the TRR should be disclosed, must then consider the DOH's argument that four named individuals in the TRR should be redacted under s.40(2) FOIA on the basis they are junior officials, largely because they are on a Civil Service grade below a senior level.

93. The IC argues that the Tribunal ought not to follow a mechanistic approach, whereby the names of individuals below the level of the Senior Civil Service are automatically redacted. This, Mr Pitt-Payne contends, is wrong in principle, and each case needs to be considered on its own merits, and there is no level below which the names of individual public servants will be automatically redacted and he refers us to *Dun v Information Commissioner and Audit Office* EA/2010/0060, §40. The IC contends that, in the circumstances of the present case, there is no justification for the redaction of four individual names.
94. There is nothing in FOIA which requires us to interpret s.40(2) so as to differentiate between junior and senior officials, despite the fact that other tribunals have done so. Other tribunals have also said that where a junior official is the spokesperson for a government policy then that person would not have the same expectation of privacy as a junior official who had a non public facing role. In any event we are not bound by these decisions.
95. Having examined the TRR and heard evidence in closed session about the four named individuals we find that the names of three of those individuals should be disclosed because their role in relation to the TRR is similar to other individuals whose names the DOH does not object to disclosing. The only difference is their Civil Service grade.
96. In relation to the fourth named individual, who is junior in terms of Civil Service grade, this person only appears to have been responsible for compiling the register in an administrative capacity and is not responsible for identification and assessment of any risks. Therefore we find this person is deserving of protection under s.40(2).

### **Conclusion and remedy**

97. We conclude that the TRR should be disclosed for the reasons given above except for the redaction of the name of one individual.
98. We conclude that the SRR should not be disclosed for the reasons given above.
99. Our decision is unanimous

Signed

Professor John Angel

Principal Judge

Date 5 April 2012