IN THE FIRST-TIER TRIBUNAL GENERAL REGULATORY CHAMBER (INFORMATION RIGHTS)

AND

IN THE MATTER OF AN APPEAL UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

Appeal No. EA/2012/0036
&
EA/2012/0037

BETWEEN:

ANTHONY NEWBERY

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

THE DEPARTMENT OF ENERGY AND CLIMATE CHANGE

Second Respondent

BEFORE

DAVID MARKS QC (Tribunal Judge)
ANDREW WHETNALL
SUZANNE COSGRAVE

Representation:

The Appellant in person
For the First Respondent: Rachel Kamm (Counsel)
The Second Respondent did not appear and was not represented

Subject Matter and Statutory Authorities Cited:

Freedom of Information Act 2000, sections 17, 21, 35 & 39; Environmental Information Regulations 2004, Regulations 6 & 12.

Cases Cited:

Rhondda Cynon Taff County Borough Council v IC (EA/2007/0065), *Birkett v DEFRA* [2011] EWCA Civ 1606, [2012] 1 Info LR1 and *Oates v IC and Architects Registration Board* (EA/2011/0138).

Decision

The Tribunal upholds the Decision Notices of the Information Commissioner (the Commissioner) being the Decision Notice dated 16 January 2012, reference no. FER0377841 and the Decision Notice dated 6 February 2012, reference no. FER0369838 and dismisses the Appellant's appeals in respect of both the said Notices.

Reasons for Decision

Introduction

1. The Appellant is concerned to obtain information relating to certain proceedings that took place before the House of Commons Science and Technology Select Committee (HoC Committee) in the autumn of 2010. In particular, in his request of 8 September 2010 he seeks disclosure of information relating to a letter referred to in the course of those proceedings, the said letter being sent by Chris Huhne, the then Secretary of State for Energy and Climate Change to George Osborne, the Chancellor of the Exchequer. As will be seen, the request which forms the basis of the Decision Notice of the Commissioner dated 6 February 2012 (the February Notice) is for disclosure of the said letter "either electronically or on paper".

2. In relation to the Decision Notice which is also relevant in this appeal, namely that of 16 January 2012 (the January Notice), the Appellant requested on 7 October 2010 a copy of "George Osborne's reply to Chris Huhne's letter". He also asked for "a list of all individuals, or any other entities, that [sic] had received copies of Chris Huhne's letter either at the time that it was written, or since then".

3. With regard to the February Notice, the relevant public authority, namely the Department of Energy and Climate Chance (DECC) initially responded by refusing to disclose the information sought, relying on an exception in the applicable Environmental Information Regulations (EIR). Curiously, as will be seen, and unknown to the public authority in question, the information which had been requested, or at least part of it, had in fact been published on the appropriate Parliamentary website, in particular, that part of the request which related to the original letter sent by Chris Huhne and the list of recipients. It was then removed in circumstances which will be explained in more detail below only to reappear

elsewhere on the web in a fashion which again will be set out in further detail below. The reappearance of the letter took place on an unrelated website which is not in any way the responsibility of the public authority but which is generally available to the public. In due course, the DECC confirmed, or more accurately, reconfirmed the fact that the letter was available on the said website. As will also be seen, both the EIR as well as the relevant provisions of the Freedom of Information Act 2000 (FOIA) provide that a public authority in effect is deemed to have complied with any request for information if the information sought is otherwise readily available to a complainant.

4. With regard to the letter, the subject matter of the February Notice, after initially refusing to supply the information requested by the Appellant, the DECC subsequently confirmed to the Appellant that the available information was the requested information, doing so during the course of the Commissioner's investigations.

5. Despite the above events, the Appellant maintains that reliance on the relevant provisions of the EIR and FOIA which relate to public accessibility is erroneous and that the DECC should, as he sets out in his skeleton argument, "be required to provide me with a copy of a letter from Chris Huhne to George Osborne that they hold." Insofar as the related request for the circulation list for the Chris Huhne letter covered by the January Notice was concerned, he remains dissatisfied with the information that has been given to him. In particular, he seeks a direction that the DECC be required, in his words: "to search backup services for information concerning [the relevant letter's] circulation to" the appropriate Select Committee and "anyone else". Various other specific orders and directions are sought by the Appellant relating to these principal heads of complaint.

6. There has been an oral hearing in this appeal in which the public authority has neither appeared nor been represented. In effect, the contest has been between the Appellant and the Commissioner. The DECC has however lodged brief written submissions, largely echoing those submitted and proposed by the Commissioner.

Background

7. On 8 September 2010, Lord Oxburgh gave evidence to a public session of the HoC Committee. There was, it seems, a live webcast of this event on the official Parliamentary website. The HoC Committee was reviewing matters relating to the release on the internet of emails held at the University of East Anglia relating to that University's Climatic Exchange Unit., Lord Oxburgh had recently completed a review relating to the same matter. The Committee Chair was Andrew Miller MP. Mr Miller asked Lord Oxburgh at the end of the session whether he had seen the letter from

the Secretary of State for Climate Change, i.e. Mr Huhne to Mr Osborne. Lord Oxburgh said he had not. Mr Miller then said that he did not think the letter was regarded as being "public". The exchange can be seen at http://www.parliamentlive.tv/main/player.aspz?meetingid=6581. It seems that the relevant passage began at about 11.26am.

8. That same afternoon the Appellant requested from the DECC a copy of the letter that Mr Miller had referred to. The request was made under the terms of both FOIA and the EIR. Initially, the DECC withheld the letter and did so again on a request being made for a review. In brief terms, the public authority stated that they considered the exchange to be "an internal communication" and cited EIR Regulation 12(4)(e) and section 35 (1)(b) FOIA. These sections provide as to the former that there is an exception to disclosure if disclosure involves the disclosure of internal communications relating to environmental matters. The latter section deals with that exemption under FOIA which, put in general terms, relates to "Ministerial communications".

9. The Appellant has at all times contended that the Chairman of the Committee clearly received a copy of the letter. The Appellant maintains that since the individual was a Labour MP, it necessarily follows that the exemption under FOIA at least could not be relied on. As the Appellant put it in his Grounds of Appeal, the DECC's grounds for withholding the information seemed "highly questionable".

10. The Tribunal pauses here to state that much depends on whether the letter was formally sent or copied to the Chairman of the Science and Technology Committee by the Secretary of State or his department. The DECC states that it has no record that it was so sent. If it had been sent the Appellant would have been right to question the application of the EIR exemption for "internal communications" EIR 12(4)(e. If the letter had reached Mr Miller by another unintended route the engagement of an exemption relation to internal communications (EIR) or Ministerial correspondence (s35(1)(b)) would not be undermined. The Tribunal's view is that the incidental receipt by a third party of what otherwise would fall properly to be exempted information under FOIA and EIR does not of itself necessarily lead to the conclusion that the exemption cannot apply.

11. Of far more importance however is the fact that following upon the relevant Parliamentary hearing, the letter appeared on the related Parliamentary website. As will be explained later, no clear explanation has since emerged as to how this occurred. The same, however, is not strictly speaking as will also be seen, relevant to the determination of the issues on this appeal.

12. The above events were followed by a written request made on 7 October 2010 for the distribution list pertaining to the letter. The Appellant claimed that this further request was made with the intention of establishing that the letter had been far more widely circulated than the DECC sought to claim, thereby casting doubt on the grounds advanced by the public authority for withholding the information at all.

13. In January 2011, the Appellant complained to the Commissioner about the way in which both requests had been refused, including and following upon an internal review in each case. On 16 August 2011, on the Commissioner's request, the DECC provided the Appellant with what it claimed was information sought regarding the distribution list. However, in the view of the Appellant, the DECC still failed to provide "any documentary evidence to back this up".

14. On 18 September 2011, some 12 months following the Appellant's initial request for the undisclosed letter, an acquaintance of the Appellant, an Andrew Montford, informed the Appellant that he, Mr Montford, had recalled the letter from Chris Huhne being available on the parliamentary website and had now located on an archive website on the internet a document that appeared to be the letter in question.

15. The Tribunal was provided for purposes of the appeal with a written statement from Mr Montford dated 30 July 2012. He is a science writer and editor stating that he "focuses" on issues of climate change. He refers to the fact that the document in question had originally been on the Parliament website which is www.publications.parliament.uk. The evidence from Mr Montford was that he had seen the letter from Chris Huhne on the www.publications.parliament.uk site at some time and incorporated a link ("URL") in his blog. He did not provide information as to when that occurred. However, he was able to trace a copy of what seemed to be the same document on a website which he refers to, and which will be referred to in this judgment, as the Wayback Machine. In his words, the Wayback Machine is not searchable but since Mr Montford had the original URL on his own blog, he was able to find what he called the archived copy. It was his evidence that the copy from the parliament publications website was made on the Wayback Machine on 20 September 2010 and his statement provided support of that fact: which was shortly after the first evidence session relating to the hearings conducted by the HoC Committee. He says that he has a "vague recollection" of having archived the document himself, but he can find no record of having done so. He did however find that this document was no longer available on the parliament publications website by 18 September 2011 but using his knowledge of the archiving on the Wayback Machine located the same information there - and notified Mr Newbery of this fact. He said that the link for the missing document was "functional" and in effect provided the

necessary link to what he called the archived text. In short, the information was no longer available on the Parliament website by 18 September 2011.

16. The Tribunal does not regard it as necessary to set out the entirety of the letter in the body of this judgment. The text of the letter indicates that its objective is to notify those on the circulation list of the intended publication of a response to a report of the Science and Technology Committee of the House of Commons. The letter included a summary of the proposed response and was being sent to The Chairman of the relevant Cabinet Committee (in this case the Economic Affairs Committee chaired by the Chancellor of the Exchequer) with a copy to the members of the Committee, other interested Ministers, the Prime Minister and the Cabinet Secretary. For the full text, it is however sufficient to refer to the link which Mr Montford claimed took him to the letter. The link showed a page on the aforementioned Parliamentary website, headed in relevant part with reference to the HoC Committee and continuing with the phrase, description and heading "Contents: Reviews into the Climatic Research Unit's E-mails at the University of East Anglia". Beneath that there is a series of subheadings, each bearing a numerical reference, the first sub-reference being "00 University East Anglia", there being two others bearing the numeric references 01 and 02 and the fourth being "03 Department of Energy and Climate Change". It is this last link which led Mr Montford to a copy of the letter on the Wayback Machine.

17. The matters set out in the preceding paragraph again caused the Appellant to entertain doubts as to the veracity of the DECC's response to both his requests. He alleged both in his Grounds of Appeal and in argument during the appeal that he had initially requested the Commissioner to treat the information and relevant facts and matters he had learnt about these matters in confidence, not to pass these matters on to the DECC without at least informing him. He asserted that the fact that the ICO advised the DECC of the existence of the letter on the Wayback Machine was evidence of an inappropriate relationship as between the ICO and the DECC officials dealing with his requests.

18. Again, the Tribunal pauses here to say that although it can understand the basis of the Appellant's concern in that respect, the fact remains that the Commissioner is charged as a matter of law with the statutory responsibility of investigating a request and that any ensuing response by a public authority, coupled with any exchanges with the Commissioner, cannot in general allow the Commissioner to be bound by confidence with any party including a complainant in the light of, and given, those statutory responsibilities.

19. It is appropriate to revisit the basic chronology and to retrace the course of events relating to these appeals. On 26 October 2010 the DECC advised the Appellant that there was no George Osborne response to the Chris Huhne letter and hence in

relation to the first part of his October 2010 request the information was not held. On 16 August 2011, as indicated above, the DECC disclosed some information to the Appellant relevant to the second part of his October 2010 request. The DECC confirmed that the Chris Huhne letter had been sent not only to Mr Osborne, as Chair of the Economics Affairs Committee, but also copied to various members of that Committee and others as listed on the Parliamentary website: the relevant website address was provided to the Appellant. The recipients also included the Prime Minister, the Deputy Prime Minister, Sir Gus O'Donnell, the Secretary of State for the Environment Food and Rural Affairs, the Minister of State for Justice, the last two Ministers being those charged with the relevant policy areas, with a copy being sent to the DECC Secretary of State's office, the DECC Special Advisors, the Economic Affairs Secretariat in the Cabinet Office and "the relevant policy official" in the DECC.

20. As the Appellant pointed out, that was the circulation list of the letter as set out in the last paragraph of the document found on the Wayback Machine.

21. In due course, on or by mid-September 2011, the DECC confirmed that it had not provided copies of the letter to any of a number of individuals named by the Appellant himself in confidence. The DECC confirmed that Mr Miller as Chairman of the Committee had received the letter but added that he did not have any information as to how Mr Miller had received the letter. Later, the DECC provided information relating to the distribution of the letter by way of a list of the recipients' positions held and in some cases, names, which the DECC considered complied with the terms of the request which was for a "list of all individuals or other entities, that have received copies of Chris Huhne's letter..". The DECC did this rather than provide the details of the email addresses used as in many cases "the letter would have been directed to a private office or other departmental e-mail addresses for the Ministers concerned." .

22. For the sake of completeness, the Tribunal should again refer to a copy of the letter which appeared on the Wayback Machine. That copy concluded with a specific reference to the fact that its contents were copied to a number of individuals with the specific titles and descriptions which have already been referred to and listed above.

23. Reference has already been made to the Appellant's wish that a far more intensive search or series of searches be undertaken as to some of the requested information, in particular, the list of names. As to this, the Tribunal is firmly of the view that it is more than enough to refer to paragraphs 11-17 inclusive of the January Notice. There is here set out a detailed account and description of the searches undertaken by the DECC of the whereabouts, if any, of the distribution list of the letter. The Tribunal does not propose to go into any detail as to what these paragraphs contain since they can be read separately. There is there a detailed account and narrative of the searches which the DECC in fact carried out and of the way in which it maintains

its records in accordance with its management policy. The Tribunal accepts that the DECC, whilst aware that the Chair of the House of Commons Science and Technology Select Committee made a reference to the letter on 8 September 2010, has no recorded information on how Mr Miller received the letter. The DECC's evidence was that this did not mean that Mr Miller's access was unauthorised but that the DECC does not hold any record of having authorised its release by any other party. When pressed and after considerable internal searches the DECC considered there was no obligation arising under FOIA or EIR to investigate further how the letter came to the Committee Chairman. The Tribunal, having reviewed the information supplied by the DECC to the Commissioner concerning the nature and scope of its searches, is satisfied that on the balance of probabilities there is no further information held by the DECC relevant to the scope of the request concerning the recipients of the letter.

24. At one point during the hearing of the appeal, the Appellant expressed his surprise at the fact that there appeared to be a process of deletion within the systems maintained by the DECC. Whatever view might be taken of the DECC's policy, the simple fact remains that no evidence was put before the Tribunal to question this assertion or in any way cogently to suggest that any such policy was in some way inappropriate. In particular, as indicated above and despite the Commissioner's investigation into the matters concerning these requests, the Commissioner noted not only that he had been shown evidence to show that the letter was available on the Parliamentary website at the time of the request was being dealt with by the DECC, but also that it had been confirmed to him by the DECC that it held no recorded information which would explain how the letter was received by the HoC Committee. The DECC's explanation was that the letter had been published on the Parliamentary website "in error".

25. We do not know when the DECC first became aware that the letter had appeared on the Parliamentary website. We do know when it became aware it requested its removal and says it would not have approved publication if it had been asked. As mentioned above, the information in the form of the letter was no longer available on the Parliamentary website on 18 September 2011. On 7 December 2011, the Commissioner informed the DECC of this fact. On 9 December 2011, the DECC wrote to the Appellant stating that it had discovered that a copy of the letter had been placed on the publications. Parliament website and copied and archived at another website. Of crucial importance however was the additional fact that the DECC then formally provided the Appellant with the website address, i.e. the Wayback Machine whereabouts referred to above, where the letter could be viewed and confirmation that the document held on that archive was the information he had requested. In notifying the Appellant of the website address, unaware that the information passed

to the DECC by the ICO had in fact come from the Appellant, the DECC nevertheless put itself in the position, as it judged, to claim exemption from disclosure of the document directly by reason of s21 of FOIA.

26. As at the date of the hearing of this appeal, the letter remains available on the Wayback Machine website. What is shown is that the record of the letter's contents was created on 13 September 2010 on the www.publications.parliament.uk website and thereafter was "captured" on 20 September 2010 from the Parliamentary website.

The Relevant Law

27. Section 21 of FOIA provides in relevant part as follows, namely:

> "(1) Information which is reasonably accessible to the applicant otherwise and under section 1 is exempt information."

28. Regulation 6 of the EIR provides in relevant part as follows, namely:

> "(1) Where an applicant requests that the information be made available in a particular form or format, a public authority shall make it so available, unless -
>
> (a) it is reasonable for it to make the information available in another form or format; or
>
> (b) the information is already publicly available and easily accessible to the applicant in another form or format."
>
> (2) If the information is not made available in the form or format requested, the public authority shall –
>
> (a) explain the reason for its decision as soon as possible and no later than 20 working days after the date of receipt of the request for the information;
>
> (b) provide the explanation in writing if the applicant so requests; and
>
> (c) inform the applicant of the provisions of regulation 11 and of the enforcement and appeal provisions of the Act applied by regulation 18."

29. Section 39 of FOIA deals with environmental information. It provides in relevant part that:

> "(1) Information is exempt information if the public authority holding it –

(a) is obliged by environmental information regulations to make the information available to the public in accordance with the regulations, or

(b) would be so obliged but for any exemption contained in the regulation."

30. However, the list of absolute exemptions for the purpose of section 2(2) of FOIA includes section 21 but not section 39.

31. Section 17 of FOIA requires a public authority to provide specified information when it refuses the requested information.

The Grounds of Appeal

32. In his grounds of appeal the Appellant sets out various grounds. Matters have not been entirely helped by the fact that despite the extensive number of grounds dealing with the two appeals, the apparently lengthy written skeleton argument in connection with the appeal did not, in all material respects, entirely follow the ways in which the grounds of appeal had been set out.

33. The Tribunal, however, is content initially to adopt the characterisations afforded to the Appellant's grounds of appeal in relation to the February Notice (relating to the earlier request for the Chris Huhne letter) as set out in the Commissioner's written response. The Appellant alleges first that the Commissioner did not take into account the full impact of the new information about the availability of the requested information on the Wayback Machine website. Second, the letter, or more accurately, the information contained in the letter, was not reasonably or easily accessible to him at any time on account of the inability to search properly or at all the Wayback Machine website. Thirdly, there was no reason to think that the letter or the information therein was publicly available given the content of the HoC Committee discussion and the fact that the DECC had relied on Regulation 12(4)(e) of the EIR, and section 35(1)(B) of FOIA in refusing the Appellant's request. Fourth, it is claimed that the letter on the Wayback Machine website "may not be the complete or authentic requested information" and finally and fifthly, it is claimed that the DECC never "held" the "web page" on the Wayback Machine website, coupled with the denial uttered by the DECC that it provided the requested information to the HoC Committee.

34. In fairness to the Appellant, a number of other issues were raised by him in his original grounds of appeal. However, none of them in the Tribunal's judgment properly fall within the Tribunal's jurisdiction. The first of these supplementary

grounds is that the Commissioner did not engage in proper discussions with the Appellant. This has been touched on above. The manner in which the Commissioner addressed his investigation, and the extent to which he engaged as requested in discussion with the Appellant, are not matters for the Tribunal, although we have seen nothing to suggest that he acted otherwise than in accordance with his normal practice, obligations and duties. The second concerns the relaying of information claimed to be confidential as provided to the Commissioner by the Appellant to the public authority. This also has been dealt with above. Again, the Tribunal is of the firm view that this provides no basis for impugning the way in which the Commissioner fulfilled his obligations and duties in relation to these requests and these appeals. The third relates to the alleged failure on the part of the Commissioner to confirm to the Appellant that the document available on the Wayback Machine was the requested information. This too has been addressed above. In any event, the public confirmation was in due course unequivocally provided by the public authority itself. The final head of complaint in this regard is the alleged failure to establish whether a criminal offence has been committed. The short answer to that particular contention is that the Tribunal has no jurisdiction to entertain that form of complaint and if it did, there is certainly no material in the present case to justify any such complaint.

35. The Tribunal therefore returns to the five remaining grounds of appeal articulated above. As to the first, the relevant chronology needs to be revisited. The Commissioner described the letter and the information contained in it as constituting environmental information within the meaning and scope of the EIR. This was because the letter included information or material likely to affect the state of the elements within the environment and/or information on measures designed to protect elements within the environment and/or measures that were likely to affect material specific facts, all of which find expression and reflections in the EIR.

36. As also related above, and for reasons which are not entirely clear though not finally relevant, the letter was initially published and publically available on the Parliamentary website, namely www.publications.parliament.uk from 13 September 2010 until at least 20 September 2010. It then became publically available on the Wayback Machine, the brief reference to which is web.archive.org. The request was made on 8 September 2010. The public authority reached its decision on 6 October 2010 and conducted its review on 9 November 2010.

37. The Appellant contends that he does not know whether the letter on the Wayback Machine website is in fact a true and accurate reflection of the requested information. This matter was re-examined carefully during the appeal. First, the DECC provided the Commissioner with a copy of the signed letter. Second, the Commissioner in due

course confirmed that the text of the body of the letter was identical to the requested information with the exception of two minor, and the Tribunal finds totally immaterial, typographical errors. First, in that regard, the heading reads and contains the term "CLIMIATIC" instead of what should clearly be "CLIMATIC". Second, the final bullet point states "We know that Norfolk police at still investigating" whereas the original letter says as one would expect "We know that Norfolk police are still investigating". The Tribunal is therefore entirely satisfied that having seen the original letter, there is no material difference whatsoever between the form and content of the copy of the signed letter provided by the public authority for the Commissioner and the form and content of the letter available on the Wayback Machine.

38. The Appellant also claims both in his written grounds and in oral argument that the DECC does not hold what can be called the Wayback Machine version of the letter and so cannot by provision of a link to a third party archive discharge its obligation to meet his request for a copy of the original letter. During the oral hearing the Appellant accepted that he had a misunderstanding of the regime created by FOIA and invoked in these appeals by the Appellant. The Appellant's rights both under the EIR and under FOIA relate to information and not to specific documents or letters. There can be no doubt in the Tribunal's judgment that the DECC held the requested information at the time of the request. Equally, there can be no doubt that in due course the same public authority confirmed to the Appellant where the said information could be found: see generally *Rhondda Cynon Taff County Borough Council v IC* (EA/2007/0065), in particular paragraph 26. Put shortly, the critical principle is that the basic obligation under both the EIR and under FOIA is to provide access to information to an applicant as distinct from being obliged to communicate the information directly to the applicant if it is otherwise accessible. So, to quote the example given in the *Rhondda* decision the requisite obligation in question under the EIR can be met by allowing inspection of the information held by the pubic authority. If the applicant does not like the way in which it has been made available, then he can thereafter request the information in a particular form or format so as to bring into play Regulation 6 in the way quoted above.

39. In the Tribunal's view, the DECC fully complied with its obligations under FOIA, in particular, under Regulation 5(1) to make the environmental information it held available on being requested to do so. In its response on 6 October 2010 the DECC chose to rely on the exception set out in regulation 12(4)(e) whether or not the DECC was entitled to rely on a specific exception has not needed to be determined by the Tribunal. Such reliance is now completely superseded by the fact that the DECC fully complied with its obligations under Regulation 5 by providing the information in question and confirming the same to the Appellant in the way referred to.

40. It could of course be said to some extent the said confirmation was in a sense superfluous since the Appellant in fact had already accessed the information in question. In the Tribunal's judgment, it necessarily follows that there is no need on the facts of the present case to consider whether and, if so to what extent, the letter and the information it contained was not or could not have been reasonably or easily accessible to him at any prior time. There is simply no need for the Tribunal on the facts of this case to do that, given the course of events that transpired.

41. It has already been seen earlier in this judgment that the Appellant requested the information in a particular format, namely and in accordance with his original request of 8 September 2010 in the form of a copy of the letter, either electronically or on paper. In the Tribunal's judgment it is a complete answer to that request for the DECC now to rely on Regulation 6(1)(b): the information was already publicly available and is now easily accessible. For what it is worth, however, the Tribunal agrees with the Commissioner that the DECC failed nonetheless formally to comply with its obligations to provide the Appellant with the information requested by Regulation 6(2) in failing to explain the reasons for its decision within the relevant 20 day time limit prescribed.

42. The Tribunal is also firmly of the view that the ultimate resolution of both the present appeals remains the same, irrespective of whether the relevant principles or exemptions or exceptions in the EIR or FOIA are in play. With regard to FOIA, the Tribunal is not in fact required to determine whether the qualified exemption set out in section 35 was engaged at the relevant time although the DECC evidence was strongly that this was Ministerial communication. This was Cabinet Committee correspondence and part of the machinery for ensuring collective responsibility for Government decisions and for circulating information about them. The Commissioner submitted, and the Tribunal duly accepts, that with regard to the competing public interests, namely those militating in favour of maintaining the exemption as against those in favour of disclosure, on balance, the issue would in the Tribunal's view have been resolved in favour of maintaining the exemption. The latter, however, is not a material issue in these appeals as the facts have finally unfolded. In any event, as the Tribunal has concluded, the DECC could rely, and can rely, on the absolute exemptions as set out at section 21 of FOIA.

43. Nor does the matter stop there. In the present cases, insofar as the requested information did not constitute environmental information or indeed may have constituted environmental information not otherwise exempt from disclosure by virtue of section 39, the absolute exemption set out in section 21 still applies. The Tribunal is of the view that as at the material time i.e. the time when his request was received and being considered by the DECC, the information was reasonably accessible to the

Appellant on the Parliamentary website and in the location directly relevant to the Select Committee concerned. The Appellant stated that he had no reason to assume that the information was readily accessible in that way. As indicated above, and whilst clearly not what the DECC had expected when it placed its initial reliance for refusal upon s35 FOIA and Reg 12 (4) EIR, although ultimately irrelevant, the information sought later became available on the Wayback Machine website and that the DECC for a while at least was unaware of that fact. The only failure on the part of the public authority was the failure to comply with its obligations or obligation under section 17(1) of FOIA to notify the Appellant of its reliance on section 21.

44. Finally, the Tribunal endorses the particular submission of the Commissioner, but in the light of a binding authority on the Tribunal, it is well established that a public authority is entitled to rely as a matter of right on the exemption in section 21 or the exceptions in Regulation 6(2)(b) of the EIR at any stage: see generally *Birkett v DEFRA* [2011] EWCA Civ 1606, [2012] 1 Info LR1.

45. For all the above reasons, the Tribunal rejects the five principal heads of complaint as set out above constituting the grounds of appeal in relation to the February Decision.

46. The Tribunal now turns to the appeal against the January Notice (which related to the later request for the George Osborne letter in response and the circulation list.). The Commissioner identified 14 separate heads of complaint constituting the Appellant's original grounds of appeal. The first claims that the DECC did not provide any documentary evidence to back up the information provided to the Appellant on 16 April 2011. There is no merit in this submission. As the Tribunal has already determined the public authority in the event provided the information which was requested. Second, it is claimed that the list of names provided by the DECC did not include Mr Miller or the HoC Committee. This contention too has no merit. Indeed, whilst there may well be a query as to how Mr Miller obtained the letter the same is not material. In any event the Commissioner was satisfied that having conducted an investigation into the request on the balance of probabilities, the DECC did provide the Appellant with all the information it held. It does not follow that the DECC held information about Mr Miller at the relevant time. As has been pointed out, the Commissioner, as well as this Tribunal, were and remain content with the searches that have been made.

47. Third, it is claimed that the Commissioner did not take into account the full impact of the full information about the availability of the letter and in particular the information being online elsewhere, e.g. with the Wayback Machine. With respect, this is simply not the real issue before the Tribunal. The main question is and remains whether the DECC provided the Appellant with all the information it had about the original recipients of the letter. The Commissioner determined that the full list of the original

recipients was communicated to the Appellant by letter dated 16 August 2011. This constituted not only compliance with FOIA, in particular section 1(1), but also with Regulation 5 of the EIR. That list included all the recipients listed in that letter as appearing on the Wayback Machine website. The Appellant has contended that although a Lord McNally is included by name in the text of the letter, the DECC did not name him as a recipient. Lord McNally, however, was the Minister of State for Justice at the material time and as such, was therefore named in the text of the letter. Mention has also been made of the inclusion of a reference to a "relevant policy official" at or with the DECC.

48. The Appellant however made a specific request for a list of "all individuals or any other entities". He did not request actual names. The Tribunal agrees with the Commissioner that in those circumstances, the DECC was not required to communicate or provide access to all actual names whether of a policy official or otherwise.

49. It follows that it is not material to consider whether, and if so to what extent, the Commissioner failed to take into account the impact of the new information he later was aware of.

50. Fourth, it is said that on the balance of probabilities, the DECC did not provide the Appellant with all the information it held about the letter being provided to the HoC Committee for reasons just stated. While we note the care with which Counsel for the ICO said that the DECC had no recorded information about other recipients, as opposed to no knowledge, on a balance of probabilities we think it is unlikely that the DECC has suppressed or deliberately failed to find recorded information. As the DECC did not attend the hearing we were unable to clarify what the DECC might know, as opposed to what it recorded, this argument too is rejected.

51. Fifth, reference is made to the apparent discrepancy regarding Lord McNally. This has been addressed above.

52. Sixth, it is said if one name was omitted, it follows that there is reason to believe that other names might also have been omitted. This too has been addressed above. The Tribunal has not been shown nor provided with evidence which in any way suggests as such.

53. Seventh, reference is made to the omission to name the "relevant policy official". This too has been addressed above.

54. Eighth, it is contended that it is not correct to say in the relevant Decision Notice that the final paragraph of the letter in question allowed the Appellant to verify the list

provided by the public authority. The Commissioner and the Tribunal have both concluded that the DECC provided the Appellant with all the information it held. The matter referred to in the relevant paragraph in the relevant Notice which is referred to by the Appellant deals with in part the story regarding the on-going investigation conducted by the Commissioner. That investigation resulted in the final conclusion reached by the Commissioner and endorsed by the Tribunal. The fact that the Appellant may have had concerns and that no reference or some inadequate reference is made to this, is wholly immaterial.

55. Ninth, it is claimed that the January Notice fails to mention that the Appellant also had concerns and has asked the DECC for documentary evidence of the list of recipients. The answer to this contention is the same as that given with regard to the last mentioned contention and is again rejected by the Tribunal.

56. Tenth, it is claimed that having failed to provide documentary evidence confirming the list of recipients, the DECC was in breach of certain, though unspecified, statutory obligations. This contention is not fully understood. In any event, if the complaint is levelled at the quality of the overall enquiry conducted by the Commissioner already referred to, the allegation is again firmly rejected.

57. Eleventh, it is denied that the January Notice did not mention that the Appellant had concerns about how Mr Miller and his committee had been provided with a copy of the letter. This too has been dealt with above. In any event, the Tribunal is firmly of the view that the Commissioner was under no obligation, legal or otherwise, to refer to any such matter.

58. Twelfth, similar and related contentions are made with regard to the manner in which Mr Miller obtained a copy. This too has been addressed above.

59. Thirteenth, it is claimed that there is no evidence in the January Notice for the finding that the DECC did not delete any records. This too has been addressed above on more than one occasion in this judgment.

60. Fourteenth and finally, it is claimed that the actual distribution list was in a covering email which was not available on the internet but the Appellant contends was part of the letter. The Tribunal has already found that the Commissioner conducted a proper enquiry and investigation. The DECC had provided separately clarification concerning the information regarding recipients contained in that email. The Commissioner took into account the evidence regarding the manner in which information had been made available, both initially on the Parliamentary website and thereafter on the website found by Mr Montford. It is well established that there is a limit to the extent of an investigation required of the Commissioner in such

circumstances. See generally *Oates v IC and Architects Registration Board* (EA/2011/0138), particularly at paragraph 11. In any event, the fourteenth head of complaint is not fully understood but insofar as it is claimed that the document was not accessible on the internet, such a contention is misconceived since the request is for information and this information has already been disclosed by the DECC..

61. As in the case of the Appellant's grounds of appeal regarding the February Notice, there were a number of other grounds of complaint which do not form part of the fourteen grounds dealt with above. They can be mentioned briefly, if only for the sake of completeness. First, it is contended that the Commissioner failed to seek the views of all relevant parties before reaching a decision with regard to either Decision Notice, the said contention is rejected. In any event, as the Commissioner points out, the jurisdiction of this Tribunal does not encompass such a matter. Second, there are contentions about the alleged confidence that was said to obtain between the Appellant and the Commissioner, as mentioned earlier in this judgment. This has been dealt with above. Third, issue is taken with the finding that the Decision Notice informed the Appellant that the DECC has confirmed that the letter which could be accessed on the Wayback Machine was the withheld information as outlined several times earlier in this judgment. Finally, insofar as the same is suggested, it is entirely rejected by the Tribunal, even if the Tribunal had jurisdiction to consider the same, that the Commissioner was under any obligation to comply with the Appellant's request and thereby contact the HoC Committee to establish how it received the letter. Insofar as those grounds have persisted and insofar as the same is relevant to the determination of this appeal, the Tribunal accedes to the Commissioner's request that these grounds, finding expression in paragraphs 11, 12, 16 and 26 in the grounds of appeal, should be struck out.

Conclusion

62. For all the above reasons, the Tribunal dismisses the appeals made by the Appellant with regard to both the Decision Notices here in question and upholds the Decision Notices of the Commissioner in both appeals.

Signed On the original
(David Marks QC)
Judge

Dated: 3 September 2012