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

Appeal No: EA/2013/0103

BETWEEN

LUCAS AMIN

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

DEPARTMENT OF ENERGY AND CLIMATE CHANGE

Second Respondent

Before

Brian Kennedy QC
Alison Lowton
Dave Sivers

Representation:

For the Appellant:	**Julianne Stevenson of counsel**
For the Respondent:	**Chris Knight of counsel**
For the Second Respondent:	**Justine Thornton of counsel**

DECISION

The Tribunal refuses the Appeal.

We direct that the requested information should not be disclosed and the Closed Bundle should remain confidential.

Introduction:

[1] The appeal is brought under section 57 of the Freedom of information Act 2000 ("FOIA") as modified by regulation 18 of the Environmental Information Regulations 2004 ("the EIR"). The Tribunal and the parties worked from an open Trial Bundle ("TB") indexed and paginated and from a smaller Closed Bundle ("CB") also indexed and paginated. We have also been provided with an indexed Authorities Bundle ("AB").

[2] The impugned decision under appeal is the Decision Notice ("DN") from the Respondent dated the 26th March 2013: Reference FER0468055.

Background to the Appeal:

The background to the appeal is helpfully summarised by counsel on behalf of the Respondent in his Response to the Notice of Appeal dated 12th June 2013, thus;

> 1. The background to the Appellant's request relates to the development by the Department for Energy and Climate Change ("DECC") of a policy concerning Emissions Performance Standards ("EPS") for fossil fuel power stations which is currently contained in the Energy Bill.
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> 2. The Appellant made three information requests to the Department on 5 April 2012. The detail of those requests is set out at: DN §4. In short, the Appellant sought correspondence between officials of DECC and seven energy companies in relation to the proposal for new EPS from 1 January 2012 ("Request 1"); correspondence between officials of DECC and the Environment Agency ("EA") in relation to the proposal for new EPS from 1 October 2011 ("Request 2"); and correspondence between officials of DECC and other government departments in relation to the proposal for new EPS from 1 October 2011 ("Request 3").
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> 3. DECC responded to Request 3 on 2 July 2012. It informed the Appellant that it held information within the scope of the request, but that it was withholding the information under EIR regulations 12(4)(e) (internal communications) and 12(4)(d) (incomplete information).
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> 4. DECC responded to Request 2 on 6 July 2012. It informed the Appellant that it was releasing some information, and withholding other information under regulation 12(4)(e) EIR (internal communications) and that it had redacted the names of some junior officials in the released information under regulations 12(3) and 13 EIR (personal data).
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> 5. DECC responded to Request 1 on 12 July 2012. It informed the Appellant it was re-leasing the only document held within scope of the request, but with the names and contact details redacted under regulations 12(3) and 13 EIR (personal data).

6. The Appellant replied on 19 July 2012 requesting an internal review of the decision. He queried the application of the specified exemptions and the limited nature of the material held under Request 1, and argued that the public interest favoured disclosure.

7. DECC provided the outcome of the internal review on 5 October 2012. This confirmed the application of the exemptions and that the public interest favoured the maintenance of those exemptions. It also confirmed that a full search had been undertaken in relation to Request 1, including "individual email accounts of relevant officials".

8. The Appellant complained to the Commissioner on 10 October 2012 to complain about the non-disclosure of the requested information, asking the Commissioner to consider whether the information had been correctly withheld. The Commissioner communicated with both parties seeking their views on the application of the exemption. In the course of correspondence, the Department provided the requested information to the Commissioner.

9. The Commissioner issued his DN (reference FER0468055) on 26 March 2013. He reached the following conclusions:

> (1) The information concerned the introduction of a new emissions policy for fossil fuel power stations that would affect the state of elements of the environment such as the air and atmosphere, and as such was information within the scope of the EIR by virtue of regulation 2(1)(c): DN §14.
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> (2) The information consisted of emails within DECC or between DECC and other government departments, including attachments, which clearly constituted internal communications. The regulation 12(4)(e) was therefore engaged: DN §18.
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> (3) There was a strong public interest in the disclosure of the information based upon the cumulative effect of the policy arguments around the controversy surrounding energy policy and the EPS, as well as the very significant weight to be accorded to the most fundamental public interest in the subject matter of climate change: DN §§19-23.
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> (4) There was 'live' policy making taking place at the time of the Requests, be-cause the Energy Bill was only published after the Requests, and the arguments about harm to policy-making here applied to a specific ongoing process. Just as the importance of the subject matters adds weight in favour of disclosure, it also adds weight to the importance of avoiding harm to policy making. Officials had contributed to the process in a free and frank manner, harm to the policy making process could result and this should be given very significant weight: DN §§24-29.
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> (5) Even taking account of the very strong public interest in disclosure, and the presumption in favour of disclosure in regulation 12(2), the public interest factors were finely balanced but the close relation of the harm arguments to the policy making process meant that the public interest favoured maintaining the exemption and regulation 12(4)(e) applied: DN §30.
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> (6) Disclosure of the names and contact details, and what projects they had been working on, was personal information the disclosure of which would be unfair in that it would add nothing to add public understanding of the decision

making process either in the context of disclosed information or in isolation from the withheld information. Disclosure would contravene the first data protection principle: DN §§32-45.

(7) Having considered the response of DECC to his queries, the Commissioner considered that sufficient and adequate searches had, on the balance of probabilities, been undertaken: DN §§46-48."

The Legal Framework:

[3] It is agreed by all parties that Regulation 12(4)(d) & (e) of the EIR is engaged and is the contentious aspect of this appeal.

a) Under Regulation 12(4)(e) a public authority may refuse to disclose information to the extent that the request involves disclosure of internal communications. This is not an absolute exemption and any applications to refuse disclosure under this exemption will be subject to the public interest test. It is the balancing of the weight given to the factors that affect the public interest in disclosure or non disclosure that is at issue in this case.

b) Regulation 12(4)(d) is engaged in so far as it relates to a draft impact assessment which contains material still in the course of completion and which formed part of the internal communications. Again it is a qualified exemption and when engaged is subject to the public interest test.

c) The public interest in maintaining the exemption from disclosure under Regulations 12(4)(d) & (e) can be considered cumulatively in the circumstances pertaining in this case where there is a common content as to the public interests being considered.

The Issues:

[4] The appellants' Notice of Appeal dated the 14th May 2013, at the outset states:

I do not dispute the exceptions 12(4) (d) and (e) apply but believe the public interest in disclosing the information far outweighs any harm that might also arise".

The Appeal Notice further states:

"DECC also claim to have identified one document in scope as regards communications between itself and the big six energy companies. I am not satisfied that a proper search of its records was conducted by the department and believe the ICO has neglected to investigate this fully."

[5] The focus of the appellants' appeal is against the Commissioner's application of the public interest balancing test to the information requested in Requests 2 & 3 and the issues relating to Regulation 13 and the disclosure of personal data and the adequacy of searches were not pursued. For the avoidance of doubt the Tribunal agree with the reasoning on these latter two issues dealt with at DN §§32-45 and DN §§46-48.

[6] The requests were made on 5 April 2012. The EPS, whilst announced in March 2012, formed only part of the draft energy bill which was published on 22 May 2012. The energy bill was introduced into Parliament on 29 November 2012. It completed its Committee Stage

on 7 February 2013. The Report Stage and the Third Reading of the bill in the House of Commons took place over 3 - 4 June 2013.

[7] The withheld or "disputed information" arises from the request for correspondence between the DECC and the Department for Business Innovation and Skills and the Treasury in relation *to "proposals for the introduction of new emission performance standards for fossil fuel power stations' from 1 October 2011 to 5 April 2012."*. The second Respondent resists disclosure of this information which is in the closed bundle, on the grounds that:

a) Regulation 12(4)(e) EIR is engaged - the request involves disclosure of internal communications within the DECC or between the DECC and other government departments, including e-mails and attachments and the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

b) Regulation 12(4)(d) EIR is engaged - in so far as it relates to a draft impact assessment which contains material still in the course of completion which formed part of the internal communications. Again the second respondent argues that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

c) The public interest in maintaining the exemption from disclosure under Regulations 12(4)(d) and (e) can be considered cumulatively.

[8] For all the reasons canvassed by the Appellant (and not disputed by the Respondents), the Tribunal agrees that the public interest in disclosure of the information sought has very significant weight.

[9] DECC supplied to the Commissioner arguments which relied upon the harm which would be caused to policy-making were the disputed information to be disclosed. The Commissioner has accepted the principle that a safe space is needed with which officials and government departments can discuss and develop policy. The Commissioner does not accept that in all cases disclosure leads to a negative impact upon the policy making process but in this case, the risk of harm to the policy making process, is sufficiently high to be a public interest factor which outweighs those in favour of disclosure.

[10] DECC argues that the Appellant's requests are directed at the heart of the policy making process for EPS. They argue his requests are express in that regard: *"Please provide correspondence - - - - in relation to proposals for the introduction of new emissions standards for fossil fuel power stations".* The Tribunal note on reading the relevant papers, the White Paper and Chapter 8 of Part 2 of the Energy Act 2013 and in particular sections 57 - 62 of the Act, the subject matter concerned is very wide and complex and the "grandfathering period" is but a part of the issues dealt with therein. DECC argues the chronology demonstrates the Appellants request and the information sought are directed at a critical juncture of policy making. DECC further argues that in the circumstances specific to policy development in this area, the convention of collective Cabinet responsibility supports non disclosure of relevant ministerial correspondence, particularly given the Government is in Coalition. DECC argue the need for "safe space" continues to apply given the Bill is at Committee stage; given the ongoing level of interest; given the recent speculation about the position of individual Government departments and given the need for secondary legislation once the Bill is enacted.

[11] The Commissioner argues that the timing of the request is crucial. He argues that it occurred when the policy-making process was "live". He makes a number of important observations on the facts of this particular case, inter-alia;

a) The subject requests for information relating to the EPS came at a time when the finalised details of the policy had not been published as part of the Energy Bill and therefore for the purpose of this case was "live" or ongoing at the time of the request.

b) The importance of the policy area supports the need for transparency in relation to it, but it also supports the likelihood that in a controversial and highly-sensitive area officials are less likely to express their views candidly and imaginatively.

c) The Commissioner, having seen the disputed information accepts the contributions were made in a free and frank manner and is also of the view that the information is not of the nature which would render the public debate about EPS policy choices stifled or misconceived by its non disclosure.

d) The passage of the Energy Bill through Parliament, and the EPS within it, means that it will be subject of detailed and informed debate. Non dis-closure of the disputed information will not stifle that debate.

e) The Commissioner further argues that where there are two or more exceptions engaged under EIR, the Tribunal may aggregate the public interest, providing there is a *"sensible or logical link between the content of the two exceptions in issue" such that there is "common content as to public interest or interests".* The exceptions must not involve "apples and pears". The Tribunal accept that in the circumstances of this case the public interests under regulations 12(4)(d) and (e) are of the same ilk and that this is an appropriate case for aggregation.

The Evidence:

[12] The Tribunal had the benefit of evidence from three witnesses who were all subjected to comprehensive cross examination. We heard evidence on behalf of the Appellant from Joss Garman of Greenpeace (TB pages 239 -254), and on behalf of the Second Respondents from John Spurgeon, Assistant Director in the office of Carbon and Storage in the DECC (TB pages 440 =453) who is responsible for providing advice to Ministers on coal generation issues and the Emissions Performance Standards (EPS). We also considered and heard the evidence of Ashley Ibbett, a Director in the same office, responsible for fossil fuel policy. (TB pages 454 -456). Inter-alia the Tribunal noted the following points in the evidence presented on behalf of the parties.

[13] The evidence of Joss Garman that EPS has implications on levels of emissions and the cost of energy and environmental footprint, are of great public interest and supported the case for disclosure. It was uncontroversial in that regard. The Respondents and the Tribunal accept there is a very high interest in disclosure on the facts pertaining to this case. Under cross examination he did not challenge the proposition put by Ms. Thornton, counsel for the second respondent that inter-alia, Greenpeace had been invited to informal consultation and grandfathering had been discussed.

[14] In his evidence John Spurgeon sets out the detail of the background to UK Energy Policy, the Emissions Performance Standard, the policy Rationale, EPS Design and Grandfathering. He described how as part of the EMR programme, a consultation document on EPS was published in December 2010. This he described as a twelve week consultation on the EPS, which included the question of grandfathering and the approach to grandfathering. Responses to the EMR consultation were published on the DECC website. The Government's broad conclusions on this issue were set out in a White Paper; "*Planning our Electric Future",* published in July 2011. He says that the joint statement of the Secretary of State for Energy and the Chancellor of the Exchequer issued on 17 March 2012 indicated

the Governments intent to set the EPS at 450g/KWh and to grandfather the EPS for all plans consented to at that level until 2045. His evidence is unequivocal and is that whilst the Government had announced its "*policy intention",* the final EPS was, at the time of the appellant's request, still subject to the Parliamentary process. He indicates that the Parliamentary process provides the ultimate "*public consultation*" giving the capacity to make amendments before the Bill becomes Law. He states that the EPS provisions in the Bill are still subject to any further amendments and therefore the EPS policy making process cannot be considered to be finalised or complete on the 17th March 2012.

His evidence was that the "live nature" of the policy making was also illustrated by the fact that the EPS has been amended in response to recommendations made by the Energy and Climate Change Select Committee (ECCC) contained in its report on pre-legislative scrutiny of the Energy Bill. He confirmed that in response to the recommendations made by the ECCC, the Government introduced into legislation a requirement that that the Secretary of State lay before Parliament a copy of any direction to suspend the EPS together with a statement of their reasons for making the direction. He described how this brings greater transparency and accountability to the decision making process in respect of suspension of the EPS. He added that provisions that would have allowed carbon capture and storage projects to be envisaged from the EPS were also removed before the introduction of the Bill in response to ECCC concerns around the approach applied.

In relation to the public interest in respect to the Disputed Information, while recognising the importance of the public interest in understanding of the development of Government Policy and all of the points the Appellant makes in that regard, he is of the opinion that there are two countervailing considerations which outweigh the factors in favour of disclosure of Cabinet correspondence and other internal communications *in the particular circumstances of this case; (our emphasis*); namely a) the importance of protecting collective cabinet responsibility; and b) ensuring a "safe space for policy making" for Ministers and civil servants. His opinion is that in this case the live Parliamentary consideration of a controversial aspect of the EPS and ongoing policy consideration in response to the ongoing policy debate mean that the release of the disputed information could undermine and result in harm to the policy making process and Parliamentary handling of the Energy Bill.

Mr. Spurgeon while recognising the importance of transparency and accountability in disclosure of information including between Ministers and civil servants describes in detail the risks that can occur and the need for recognition of the public interest in non disclosure in certain circumstances. He described at length the importance of the safe space and Cabinet Responsibility and how in weighing up the public interest balancing test, the DECC had come to the view that disclosure of the disputed information in this case would not lead to greater understanding of the EPS policy given the information already in the public domain.

As stated he was subject to a comprehensive cross examination but remained adamant that at the time of the joint statement issued on 17 March 2012, *"My experience was that a lot of the policy is formed after that period".* He stated that it was not a case of *"the shutter coming down*" and *"Policy was certainly being formulated during that time"..*

In relation to the draft Impact assessment he said that release of it; *" - - would create confusion and would not really help inform the public interest one way or another"* and he confirmed *"I say this having read the documents".*

Describing himself as a policy maker he disagreed with the Appellant's counsel that there had not really been ongoing or *"live"* issues in the policy decision after 17 March 2012. On the contrary he stated that he came into the role in June 2012 and *"We were constantly dealing with ongoing changes".*

[15] Mr. Ashley Ibbett gave evidence and he was also subjected to a comprehensive cross examination. He has overall responsibility for fossil fuel policy and was therefore best placed to update the Tribunal on the passage of the Energy Bill through Parliament and the EPS. He described how the Bill had gone through a process commonly known as "Ping Pong" as the Bill goes back and forth between the two houses in Parliament. He confirms that this Ping Pong effect inevitably involves intense policy discussion within Government, both in the relevant Department and cross-Whitehall, in respect of likely outcomes and potential concession strategies: any change in policy resulting from such discussions would of course, he describes, require collective agreement. Describing the detail of the Ping Pong in this case and the resulting amendments, he indicated the Bill completed its Parliamentary passage on 11 December 2013 and received Royal as-sent on 18 December 2013.

When asked at the conclusion of that cross examination what was his sense about grandfathering entering the parliamentary process after 5 April 2012, he replied *"It would undergo scrutiny in the parliamentary process itself".*

The Tribunal also heard closed evidence from the two witnesses on behalf of the Second respondent and have the benefit of studying the closed bundle containing the disputed information.

Reasons:

[16] The Tribunal agree with the Commissioner in his analysis of the Public Interest Test in that we too recognise a very significant public interest in favour of disclosure of the disputed information based on its subject matter and the public interest factors in this case are finely balanced (see DN and above). In fact the Tribunal are divided and we will set out the majority view and then record the minority view.

[17] The Tribunal accepts the Disputed Information consists of exchanges between Government departments, including Ministers, including a draft Impact Assessment. The Tribunal agrees that the two exemptions, where applicable, in this case, aggregation of the public interests (if necessary) is appropriate. The appellant has not argued to the contrary.

[18] The Majority View

The Tribunal has deliberated on the issues we believe to be pertinent to this appeal before us. They are;

a) Was the EPS Policy "live", (See [22] below).
b) Was the convention of collective Cabinet Responsibility engaged (See 23 below); and
c) Whether or not the disputed information would materially increase public understanding.

Some helpful observations on Factual background and context by the Commissioner assist before we address each of the above issues

[19] The request is for correspondence between DECC and two other Government departments; *"in relation to proposals for the introduction of new emissions performance standards for fossil fuel power stations".* It was neither requests limited to how the EPS level of 450g/KWh was reached nor limited to the 2045 grandfathering date. The request is wide and related to the EPS policy generally. It is accepted that this means that it may capture more information and extend beyond the information in the 17 March 2012 joint statement which referred only to a limited part of the overall policy. There were more aspects to the relevant policy and there are questions about whether all this was settled. The breadth and

complexity of the issue pertaining to the developing policy can be understood in the course of reading Chapter 8 of Part 2 of the Energy Act 2013 and are apparent therein.

[20] The date of the policy statement on 17 March 2012 pre dated the request at 5 April 2012 and the initial refusal by DECC on 12 July 2012. However between the request and the refusal the draft Bill was published, as was the Impact Assessment and the Commons Select Committee was preparing its' report.

[21] The EPS policy had been subjected to various changes during the drafting and passage of the Bill. Mr. Spurgeon and Mr. Ibbett gave detailed evidence of the ongoing and often controversial changes that demonstrate that the policy was, on balance *"live"*

[22] There is no dispute that there was much information about the EPS in the public domain. Again there was detailed evidence about this, and it included a White Paper (TB323-371), following a public consultation exercise, detailed Impact Assessments (TB109-151) and a review of the draft Bill by the relevant Select Committee with a lengthy report (TB 405 - 422). The informal consultation responses on the Grandfathering period (and other issues including CCS exclusion) were released under the EIR (TB 152 - 242). Most of these were also dealt with in evidence by the DECC witnesses. The Environment Agency's stance on appropriate grandfathering period was released under the EIR to the appellant in this case (TB 98 -99). Government policy announcements have been publicly made. Further and importantly, because the EPS policy was to be contained in primary legislation, it has been the subject of repeated debate and Ministerial explanation in Parliament during the passage of the Bill. There has been ample opportunity for an informed public debate without the disputed information.

[23] a) Was the EPS Policy "live"?

The Tribunal agree the issues here are finely divided. On the face of it one can entirely understand the argument the Appellant makes that the joint statement was a declaration of a decided policy. This arguably was subsequently reflected in the draft Bill. The passage of a Bill through Parliament can be characterised as the process by which Government begins its policy implementation. The Government may agree amendments but this is in order to achieve its main policy objectives. To this extent, therefore, amendments may be regarded as tactical rather than policy making. Even if they can be characterised as policy making, they are concerned with secondary or supplementary aspects or details of the main policy and may therefore have less weight when balanced against the public interest in favour of dis-closure.

However the counter argument in the particular circumstances of this case is described on behalf of the Commissioner thus;

"The EPS policy remained live throughout the Parliamentary process. It was no longer an intensive formulation situation, but the period was one during which the EPS, in all its aspects, was being altered in some respects and kept under close review for contingencies in others."

The Tribunal deliberated on this question of fact at length and find in the circumstances of this particular case, as outlined above, the EPS policy on balance in our opinion was "live". However there was not agreement on the weight which should be given to the "live" nature of the policy discussion. The majority view within the Tribunal was that the "live" nature of the policy making carries significant weight in favour of non disclosure.

That is not the end of the matter. The argument for safe space is engaged.

[24] b) Was the convention of collective Cabinet Responsibility engaged?

The Tribunal acknowledges that the arguments pertaining to safe space and collective Cabinet Responsibility are also finely balanced in the particular circumstances of this case. It is clear that the presumption is in favour of disclosure and it is true that the subject matter is such that the public interest requirement for full and frank disclosure is very significant. However the Tribunal has heard the evidence of the civil servants advising Ministers on these issues and the clear opinion held by them is that in the particular circumstances of this case the Public Interest in non disclosure of the disputed information outweighs disclosure.

The Tribunal accepts that in many cases such as non controversial or low profile pieces of legislation a Government with a majority is unlikely to be adversely affected by disclosure of argument or sensitive compromise by ministers or the like. However in the circumstances of this particular case, which is a high profile, controversial and contentious piece of unfinished legislation (at the time of the request), there is a much greater risk of damage to the public interest by disclosure of detail of possible compromise and consensus. The evidence of Mr. Ibbett confirmed this assertion and indicated that the Energy Bill and the EPS provisions within it were more likely to lead to rebellions against whips. He suggested this is particularly so in a coalition Government and in the House of Lords. The Tribunal are not entirely convinced that a coalition government is any more susceptible than a majority government would be so affected but accept the need for room for climb down, compromise and make concessions is all the more real in the context pertaining in the circumstances in this case. Regardless of the makeup of the Cabinet, Ministers need to be able to state their position on a policy issue but be prepared ultimately to accept and support the majority view if and when it differs from his or her own view. These discussions would be much less robust and effective if they were conducted with one eye to the response of the opposition, the media and the public to what a particular minister or civil servant may have said or what he or she may have eventually been prepared to accept. There could be a temptation, rather than risk finding themselves in an untenable position, to not argue on put on record an unpopular view or a reservation. The Tribunal accept the need for safe space and the application of the convention of collective Cabinet Responsibility but were not all convinced by the evidence that that the public interest in disclosure was outweighed in this case. Accordingly, the Tribunal held a majority view that in this case, the need for safe space outweighed the need for disclosure. The Tribunal emphasises that this is not an absolute consideration but applies on the particular facts of this case in light of the evidence considered herein.

[25] c) Whether or not the disputed information would materially increase public understanding?

The Tribunal notes the arguments made on this issue and has considered carefully the disputed information and the closed hearing and submissions. On balance the Tribunal, by a majority decision, considers that in relation to the public interest balance, there is less weight in favour of disclosure of the disputed information than in non disclosure. As outlined earlier the DECC has disclosed a significant amount of material to enable public understanding of the decision making process in relation to EPS policy inter-alia;

a) The December 2010 consultation on EPS and the responses to that consultation.
b) The July 2011 White Paper on reform of the electricity market.
c) An informal consultation on detailed design of the EPS. (September - October 2011) and responses to the consultation.
d) The draft Energy Bill published in May 2012 and the revised version introduced into the House of Commons in November 2012.

e) The Select Committee Report on the draft Energy Bill.
f) An impact assessment of the EPS.
g) Parliamentary debates on the Bill and tabled amendments in Hansard.

Inter-alia the DECC argue that the information in the public domain provides detail on the rationale, considerations and supporting analysis for the development of EPS policy. We agree that the draft Impact assessment does not add any further information than already provided and was only a draft at a very rough stage of working. Finally, it is on balance, the majority view of this Tribunal that the disputed information would not significantly or materially add to the public interest.

[26] The Minority View

The Minority view held by Panel member Alison Lowton were as follows: The key points at issue in this case arise from the need to balance the public interest in favour of disclosure of information with the public interest in maintaining the exemptions. There was no dispute that the exemptions applied or that the public interests in respect of each can be aggregated. Therefore, this minority view focuses on the public interest issue and does not deal in any detail with the exemptions themselves.

The DN concluded that the decision in relation to where the public interest lay was finely balanced and appeared to depend (at least in part) on the policy discussion within government at the time of the request being live. If it was live, then the need to ensure safe space for the development and discussion of policy was likely to be significant.

Evidence was given by two civil servants, neither of whom were involved at the time of the request but who had relevant experience. One of the witnesses became involved in the Energy Bill at a later stage. Neither of them could, however, provide direct evidence about what was actually live at the dime of the request. Their evidence, in essence, was that policy development continued throughout the passage of the Bill through Parliament. The Bill was contentious and there was a possibility of amendments being proposed on which the Government might have to compromise.

The Appellant's view was that the policy issues had been determined prior to the Bill being presented to parliament, in several documents including a press release and a White Paper. The Appellant submitted 'all of the evidence in the public domain firmly points to the fact that by the date of the information requests, the Government's EPS policy was fixed.' and that the request predated the passage of the Bill through Parliament and therefore, at the date of the request it was only, in the Appellants' submission, supposition that the Government might have to revisit its policy.

Whilst accepting that policy development may not always be a linear process, it is at least arguable that a Bill is the mechanism to implement Government policy which the Government then promotes through the Bill's parliamentary passage. Decisions on amendments may be strategic rather than policy decisions. At the very most, it is likely to be the case that any policy development comes and goes during the parliamentary process and any policy issues may be of higher or lower significance. The second Respondent's witness described the policy position as 'fluid'. This does not go very far in providing evidence that subsequent events may demonstrate that a policy was 'live' at an earlier time. The evidence of the need for safe space at the time of the request was in the minority view, therefore unconvincing.

The second element relied on by both Respondents was the need to preserve the convention of collective Cabinet responsibility. The Appellant submitted that both

Respondents appear to treat the application of the convention as automatically amounting to a significant or weighty public interest in preserving the exemption. Previous Tribunals have not agreed with this (e.g. Scotland Office). The fact that information may be covered by the convention does not inevitably mean that there is a strong public interest against disclosure. It depends on the facts of each case. Only one of the two witnesses addressed this point and in essence the evidence (given in closed session) did not strongly focus on the convention. Again, the evidence, in the minority view, was unconvincing and did not support the need, in this instance, to give significant weight to the convention.

The third element in support of non disclosure was the utility (or lack of utility) of the requested information. Given the minority view conclusions above that the first two elements did not carry as much weight as the Respondents contended, the third element would have had to be substantial to weigh against the presumption of disclosure. DECC's argument was that there was already sufficient information in the public domain for Greenpeace and others to understand why the Government has proposed the policy it had. In addition, disclosure of the draft impact assessment would have been a significant distraction and evidence was given that an explanation of the surrounding context would have had to be given. This, in the minority view, was unpersuasive.

In conclusion, the minority view of this panel was that neither the evidence or the submissions from the Respondents were strong enough to tip the scales against disclosure. In those circumstances, it is the minority view that the balance of the public interest lay in favour of release.

[27] In the factual circumstances outlined above and for the reasons given the Tribunal (by a majority) refuses this appeal

Signed:

Brian Kennedy QC 12th June 2014.