IN THE FIRST-TIER TRIBUNAL **Case No. EA/2015/0022**
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FS50537163
Dated: 3 December 2014

Appellant:	**North Bristol NHS Trust**
First Respondent:	**The Information Commissioner**
Second Respondent:	**Carillion Plc**
Third Respondent:	**The Hospital Company Southmead Ltd**
Fourth Respondent:	**Mr Sid Ryan**
Date of oral hearing:	**7 & 8 September 2015 at Field House, and 23 & 24 November 2015 at Gee Street Court**
Date of decision:	**26 June 2016**
Date of Promulgation	**6 July 2016**

Before

Ms Anisa Dhanji
Judge

and

Mr Andrew Whetnall
Mr David Wilkinson
Panel Members

Representation:

For the Appellant: Ms Lorraine Woodward
For the Second Respondent and Third Respondents: Mr Robin Hopkins, Counsel
For the First Respondent: Ms Laura John, Counsel
For the Fourth Respondent: in person

Subject matter

FOIA section 43(2) - whether disclosure would or would be likely to prejudice the commercial interests of any party; section 2(2)(b) whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.

Case Law

APPGER v IC & FCO [2013] UKUT 0560 (AAC)

Bank Mellat v Her Majesty's Treasury [2013] UKSC 38

Browning v Information Commissioner and the Department for Business, Innovation and Skills [2014] EWCA Civ 1050

Department for Work and Pensions v Information Commissioner and FZ [2014] UKUT 0334 (AAC)

Department of Health v Information Commissioner and Lewis [2015] UKUT 0159 (AAC)

FCO v LC and Plowden [2013] UKUT 275 (AAC)

Home Office v Information Commissioner and Bingham Centre for Rule of Law [2015] UKUT 0308 (AAC)

LB Southwark v Information Commissioner, Lend Lease and Glasspool (EA/2013/0162)

Newham LBC v Information Commissioner EA/2011/0288

Nick Innes v Information Commissioner & Buckinghamshire CC [2014] EWCA Civ 1086

R (Lord) v Secretary of State for the Home Department [2003] EWHC 2073 (Admin)

Staffordshire CC v Information Commissioner & Silbelco (EA/2010/0015)

Veolla v Nottinghamshire CC [2010] EWCA Civ 1214

DECISION

The appeal is allowed in part.

As identified in our decision, the Public Authority is not required to disclose certain items of the Disputed Information to Mr Sid Ryan.

Except as set out above, the Commissioner's Decision Notice is upheld.

The Disputed Information required to be disclosed to Mr Ryan must be disclosed to him within 35 working days of this decision being promulgated.

Signed

Anisa Dhanji

Judge

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REASONS FOR DECISION

Introduction

1. This is an appeal by North Bristol NHS Trust (the "Trust"), against a Decision Notice issued by the Information Commissioner (the "Commissioner"), on 3 December 2014.

2. It concerns a request made by Mr Sid Ryan, a journalist, under the Freedom of Information Act 2000 ("FOIA"), for information in relation to a Private Finance Initiative ("PFI") contract between the Trust and the Hospital Company Southmead Ltd (the "Project Company").

3. PFI is a means of using private finance to fund the design, construction, and sometimes, the operation, of substantial public projects. PFI projects are awarded to organisations in the private sector following a competitive tender. There are various stages in the process leading to a final successful bid. Following a review of PFI in 2012, the Treasury relaunched PFI as PF2.

4. Carillion Plc ("Carillion"), is an international construction and facilities management company listed on the London Stock Exchange.

5. Following a tender exercise in 2007, Carillion, along with other parties, was invited to participate in a competitive dialogue in relation to a PFI project for the design and construction of a new building, the Brunel Building (the "Project"), to form part of Southmead Hospital in Westbury–on-Trym, North Bristol (the "Hospital"). An interim submission was made in December 2007. After clarification of bids in July 2008, the competitive dialogue closed in February 2009. Carillion and one other company were invited to submit final bids. Carillion was announced as the preferred bidder in March 2009. There followed a preferred bidder debt funding competition to test and set the allowed cost of debt and to finalise the financial details. The contract was signed on 26 February 2010 (the "Project Agreement"). The Brunel Building was opened in April 2014.

6. The Project Company was set up as a special purpose vehicle ("SPV") for the purpose of delivering the Project. Until recently, the Project Company was 50% owned by Carillion Private Finance (Health) Ltd, a wholly owned subsidiary of Carillion.

The Request for Information

7. On 13 December 2013, Mr Ryan made a request in the following terms:

> *"Could I please be provided with:*
>
> *The full PFI contract for North Bristol Hospital between North Bristol Trust and the Hospital Company (Southmead) Ltd.*
>
> *And all associated documents. I would expect this to include, but not be limited to, any schedules, annexes, appendices or other documents attached".*

8. The Trust responded on 5 January 2014, stating that to answer the request would exceed the appropriate cost limit under section 12 of FOIA.

9. On 31 January Mr Ryan requested an internal review of the decision. In response, on 26 February 2014, the Trust disclosed much of the requested information, but withheld certain information, citing the exemption in section 43(2) of FOIA (prejudice to commercial interests), and section 40(2) (personal data of third parties).

10. Mr Ryan complained to the Information Commissioner (the "Commissioner"). The Commissioner found that section 43(2) of FOIA was engaged, but that the public interest balance under section 2(2)(b) of FOIA favoured disclosure of the information. The Commissioner noted that majority of the information withheld consisted of details of negotiation points with contractors, methodologies, payment mechanisms and other detailed aspects of the Project Agreement. The Commissioner accepted that information of that kind related to the Trust's ability to participate competitively in a commercial activity. He therefore accepted that section 43(2) was engaged.

11. The Commissioner noted the arguments that disclosure would give rise to a commercial disadvantage for the Trust in respect of future procurements, and would make it difficult for the Trust to obtain the best deal and value in future similar exercises. Disclosure would undermine future negotiation processes as other parties may feel they cannot openly negotiate with the Trust without the information coming into the public domain. The Project Company would also be placed at a disadvantage because its competitors would know what it was willing to accept, and they would be able to use this information in their bids in other tendering exercises. The Commissioner considered that while the arguments as to the commercial prejudice that would arise were not particularly detailed, there was a real risk, in respect of some of the information, that disclosure would give rise to commercial disadvantage as had been claimed.

12. The Commissioner noted that the Trust considered that the disclosures already made were sufficient to meet the public interest in transparency as to how public monies are spent. The Trust also pointed out that it had specifically agreed, in its negotiations with the Project Company, that some of the Disputed Information would be treated as confidential.

13. As regards Mr Ryan's position, the Commissioner noted his argument that there was a substantial public interest in disclosure of the information. PFI has been widely criticised as poor value for money and has been associated with proposals to close popular hospitals. The lack of transparency over PFI contracts has been highlighted by the Public Accounts Committee as a factor resulting in poor value for money. Mr Ryan also argued that value for money could not be assessed without a full breakdown of the services provided and performance targets. Mr Ryan acknowledged that headline figures for PFI unitary charges are published on the Treasury's website, but argued that these do not allow the public to judge value for money, for example, of the multimillion pound contracts for cleaning and maintenance that make up a proportion of the total. Mr Ryan further argued that disclosure of the financial model which comprises Schedule 19 of the Project Agreement (the "Financial Model") would enable the public to track planned expenditure against actual income, allowing it to form a view as to whether this Project was providing value for money.

14. In undertaking the public interest balancing exercise under section 2(2)(b), the Commissioner noted that PFI contracts have been criticised for over-spending and under-delivering. He also accepted that because of the public's reliance on NHS

services, spending on hospitals is likely to be of high public interest. He considered that those NHS Trusts which have PFI contracts for delivering services should be as open and transparent as possible in order to demonstrate that they are receiving the best service, at the best cost. The Commissioner noted that arguably, the public interest in transparency and accountability had been met by disclosure of large portions of the Project Agreement. He also noted that some of the information that had been withheld had been identified by the Project Company and the Trust as being commercially sensitive. He acknowledged that it was not in the public interest to commercially disadvantage private companies, and further, that disclosure could impact future negotiations.

15. However, the Commissioner considered that there was a strong argument for full disclosure to show the exact services being bought and the specifications which had to be met. Disclosure of financial information, and even commercially sensitive information, would allow the public to form an opinion as to whether the services being provided were adequate and flexible enough to prevent the Trust from being subject to very high charges.

16. The Commissioner took into account that the provision of NHS services affects almost every person in the United Kingdom. He considered that there was a strong overall public interest in disclosure of information which provides further insights into PFI contracts. Where, as here, the information relates to a specific NHS Trust, full disclosure could affect a significant numbers of people in the local area because if the deal did not represent value for money, it could lead to closures of departments and job losses, whereas if it did represent value for money, disclosure would enhance the public's confidence in the Trust's ability to provide for people in its local area.

17. For all these reasons, the Commissioner reached the view that in this case, the public interest favoured disclosure. He ordered that there should be disclosure of the Disputed Information in full, subject only to redactions of the names of certain individuals which he considered were exempt under section 40(2).

Appeal to the Tribunal

18. The Trust has appealed against the Commissioner's Decision Notice under section 50 of FOIA. The appeal is only in relation to section 43(2). There is no appeal in relation to section 40(2), and no other exemptions have been relied upon.

19. The scope of the Tribunal's jurisdiction in dealing with an appeal from a Decision Notice is set out in section 58(1) of FOIA. If the Tribunal considers that the Decision Notice is not in accordance with the law, or to the extent that it involved an exercise of discretion by the Commissioner, he ought to have exercised the discretion differently, the Tribunal must allow the appeal or substitute such other notice as could have been served by the Commissioner. Otherwise, the Tribunal must dismiss the appeal.

20. Section 58(2) confirms that on an appeal, the Tribunal may review any finding of fact on which the Decision Notice is based. In other words, the Tribunal may make different findings of fact from those made by the Commissioner, and indeed, as in this case, the Tribunal will often receive evidence that was not before the Commissioner.

21. Carillion and the Project Company were joined as the Second and Third Respondents in this appeal.

22. The hearing was listed for 2 days in September 2015. It became clear, by the second day, that the evidence was considerably more complex than may have been anticipated. Also, the parties wished to lodge additional evidence to address some of the issues that had arisen. The hearing was adjourned part heard, and listed for a further two days at the end of November 2015. The panel reconvened to deliberate further in January, February and June 2016. The delay in the interim has been for personal reasons, and I regret any inconvenience this has caused.

23. The parties lodged both open and closed bundles as well as a substantial quantity of other documentary material. Part of the Disputed Information has been provided to us on a CD Rom, because some items were simply too voluminous to have been dealt with sensibly in any other way. In addition, we have had a number of witness statements, written submissions, and skeleton arguments. Mr Ryan has been provided with the index to the closed bundles and the cover sheet at the front of each tab which explains what lies behind each tab.

24. We allowed brief further submissions after the November hearing to assist us with the task of trying to identify headline information within the Financial Model which might lend itself to disclosure. Mr Ryan submitted a note on 3 December, and Carillion submitted one on 1 December. Ms Woodward submitted short comments on Mr Ryan's submissions. The Commissioner objected to some of the material in Carillion's note on the grounds that permission had, in his view, only been granted to set out where the categories of information in respect of which Mr Ryan expressed particular interest, could be found in the Financial Model, and not to make further substantive submissions on whether such information should be disclosed. The Commissioner asked that such submissions be disregarded. In the event, we did not find it necessary to rule on this point because we did not find anything materially new in the submissions. They simply provided a summary of otherwise voluminous evidence.

25. Following the November hearing, Ms Woodward also submitted three sets of the business case representing different stages of the procurement process (see further at para 40 below), in redacted form. The same documents (the "Business Cases") had been provided to Mr Ryan. They were referred to by the parties in evidence and submissions, but the panel had not received copies.

26. We have considered all the material before us, and all the oral evidence we heard, and will refer to it as needed, but will not attempt to refer to all of it, nor to every turn of argument.

27. Some parts of the hearing took place in closed sessions. These were strictly limited to the details of and arguments about the Disputed Information. Only Mr Ryan was excluded. Detailed gists of each closed session were produced by Mr Hopkins, reviewed by the panel, and provided to Mr Ryan during the hearing. In describing the Disputed Information in this decision, we have gone no further than what Mr Ryan is already aware of. For this reason, we have not needed a confidential annex. In line with the Supreme Court's decision in Bank Mellat v Her Majesty's Treasury [2013] UKSC 38, we have said as much as we reasonably can in this open decision, about the closed material we have relied upon. We have also kept in mind the Court of Appeal's guidance in Browning v Information Commissioner and the Department for Business, Innovation and Skills [2014] EWCA Civ 1050, and the Upper Tribunal's decision in Department of Health v Information Commissioner and Lewis [2015] UKUT 0159 (AAC), as regards closed material and closed sessions, generally.

The Disputed Information

28. As already noted, the request was for the full Project Agreement and all associated documents. Most of the information requested has been disclosed. The disclosure took place at the time of the request and to some extent, subsequently, on 15 June, and at the hearings.

29. What has not been disclosed are some parts of the Project Agreement and some of the schedules. In some cases, the information that has been withheld consists of limited redactions from documents that have otherwise been disclosed. We will use the term "Disputed Information" to describe the information currently in dispute.

Witness Evidence

30. The hearing began on the basis that there would be evidence from just one witness, Mr Owen Travis, on behalf of Carillion, supported by a presentation by Mr Gordon Howard, Carillion's Senior Finance Manager, in relation to the Financial Model which forms a key part of the Disputed Information. There was no witness statement from Mr Howard on the basis that he was not going to be submitting any positive evidence as to why disclosure of the Financial Model would cause commercial harm, but rather, he would be helping the Tribunal to understand how the various items of data and formulae contained in the Financial Model were interlinked. Carillion was of the view that such assistance could not usefully be set out in a witness statement. However, on the panel's suggestion, it was agreed, during the first two days of the hearing, that Mr Howard's explanation would be supported by a witness statement on which he could then be cross-examined.

31. It was also agreed that it would be helpful to hear evidence from the Trust. Ms Woodward who was representing the Trust at the hearing said she was the best person to give evidence on its behalf. Having regard to the overriding objective in The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended), and given the Trust's by now relatively limited position on the substantive issues in this appeal, we gave leave for her to do so. No objection was raised by any party to this dual role, and no difficulties arose from it.

32. We expressed concern early in the hearing that we did not have any direct evidence about the interests of the general public in this major PFI project. Mr Ryan said, during the September hearings, that he was hoping to identify an appropriate witness to give such evidence. Various communications took place between September and November to explore whether the intended witness would be able to give evidence via video link. In the event, the witness was not available and Mr Ryan gave evidence himself.

33. Eventually, therefore, there were four live witnesses, each of whom produced a witness statement. We heard evidence first from Mr Travis, then from Mr Howard, then Ms Woodward and finally from Mr Ryan. The two witnesses representing Carillion and the Project Company gave their evidence partly in open and partly in closed sessions.

34. We have summarised below the evidence given by each of the witnesses beginning, however, with Ms Woodward's evidence because her evidence provides a helpful context for the evidence of the other witnesses. We are grateful to all the witnesses for their assistance to improve our understanding of PFI in general, and the Project in particular.

Ms Lorraine Woodward

35. Ms Woodward is the Commercial and Legal Services Manager of the Hospital, and gave evidence on behalf of the Trust. She was not personally involved in this PFI

procurement. Her witness statement, lodged after the September hearing, summarises the structure of a PFI arrangement, and gives an overview of the procurement process, and also responds to some specific issues that arose in the September hearing.

36. The Project Agreement is between the Trust and the Project Company, an SPV with an issued share capital of 1000 shares. Originally, half the shares were owned by Aberdeen Asset Management Limited, and the rest by Carillion Private Finance (Health) Limited. The latter was a wholly owned subsidiary of Carillion Private Finance Limited until it was sold in 2015. Following that sale, Carillion Private Finance Limited ceased to have any equity in the SPV. However, the rights, obligations and liabilities of Carillion Construction Ltd, and Carillion Services Ltd, continued in accordance with the Project Agreement.

37. The Project Agreement will continue until 30 September 2045. It is a very lengthy document with 140 pages in the main body and 38 schedules. It is based on the Department of Health's standard form. Any departures from that form are subject to the approval by the Department of Health's Private Finance Unit.

38. The Project Agreement is essentially the contract through which the Project Company is obliged to deliver the Project "operations" for the duration of the Project Agreement, in return for a monthly service payment. The operations comprise (a) the works and (b) the services. The works are carried out during the construction phase and are subcontracted by the Project Company to Carillion Construction Ltd. The services are the hard facilities management services that must be provided when the Hospital becomes operational and have been subcontracted by the Project Company to Carillion Services Ltd. The services include grounds and maintenance, pest control, energy and utilities management and helpdesk services. Unlike other PFI arrangements, the Trust did not contract with the Project Company to deliver soft facilities management such as portering, cleaning, security, etc.

39. The Project Company does not own the Hospital. It belongs to the Trust. The Project Company has no rights over the land or the Hospital at the end of the Project term.

40. Ms Woodward's witness statement helpfully explains the procurement process from the Outline Bidding Case ("OBC") (for which there were three bidders), through to the Appointment Business Case ("ABC") (provisional preferred bidder), to the Confirming Business Case ("CBC") (competition concluded). The CBC received approval from the Trust's Board, the Strategic Health Authority, the Department of Health and the Treasury, and this marked the achievement of financial close. During the procurement process, the Trust's financial adviser was the Royal Bank of Canada, which was responsible for the scrutiny of the Financial Model, as part of the assurance process.

41. On the issue of confidentiality, she said that the overarching principle is that all aspects of the Project Agreement, save that specifically designated as commercially sensitive, should be freely disclosable. This appeal was brought by the Trust, not because it fears harm to itself from disclosure of financial information, but because the Trust considers that Carillion's concerns about the commercial prejudice that would arise from disclosure are genuine. The Trust supports Carillion's right to protect its commercial interests.

42. Ms Woodward said she had checked with her colleagues as to whether, through the Trust's financial and other reporting or accounting processes, any of the Disputed Information had been put by them into the public domain. It had not.

43. In response to Mr Ryan's claim that the Commissioner had ordered disclosure of 4 previous PFI contracts, Ms Woodward said that that none of those 4 decisions were relevant to the current appeal. She strongly resisted any suggestion that the Commissioner had set a precedent for disclosure.

44. When asked about the relatively small number of staff who work on enforcing compliance of the Project Agreement, she maintained that the Trust was very much on top of the contract, and enforced its rights under it.

45. As to whether the public would benefit from some simplified reporting of the central basic figures on the financing of the Project, she said she favoured transparency, but this should be done by some overarching body reporting on all hospital PFI projects. She did not think it would be right to give full disclosure of the figures on this Project, in isolation.

46. She agrees with Carillion's arguments that when one sees another party's approach to dealing with a problem or challenge, it is very difficult to get it out of your head. So, instead of working with a blank piece of paper, the tendency is to then follow what you know, leading to a stifling of new ideas and innovation.

47. She thought that she was not sufficiently senior and privy to all the key material to be able to say whether the Trust had got a good deal. However, she had not heard anyone say that it was a poor deal. The Trust now had a new hospital, built to its specification, at a price it had expected.

Owen Travis

48. Mr Travis gave evidence for the Second and Third Respondents. He explained that the Project Company was incorporated for the delivery of the Project. Therefore, while the Project Agreement is between the Trust and the Project Company, Carillion is, for all intents and purposes, the private party whose commercial interests are at stake.

49. Mr Travis joined the Project as Concession Manager, just prior to financial close i.e., the completion of contracts, in 2010, and remained with the Project, through construction and the commissioning of the Brunel Building. He retired in 2014, but continues to be retained as a consultant and undertakes advisory work across Carillion's PFI portfolio.

50. He explained that the role of a Concession Manager entails administering or implementing a project agreement that has already been negotiated, agreed and signed. He had not been involved in the bidding phase for the Project which had been headed up by the Transactions Director of Carillion Private Finance whose role was to seek to win the competition for the contract. Mr Travis also acknowledged that he was not expert on the financial aspects of the Project.

51. The Project has been Carillion's largest contract by value for a major acute hospital. In broad terms, the tender process for the Project proceeded as follows: In May 2007, the Official Journal of the European Union ("OJEU") notice was published. In July 2007, Carillion was invited to participate in a competitive dialogue. In December 2007, interim submissions were made. In July 2008, clarification bids were issued. In February 2009, competitive dialogue closed, with Carillion and its competitor, Skanska, being invited to submit final bids. Carillion was announced as the preferred bidder in March 2009. Financial close took place in February 2010.

52. Mr Travis explained that throughout these stages, the bidders' designs are developed, refined to the point that final detailing can take place subsequent to financial close, and in preparation for delivery. This process involves the investment

of considerable resources across a number of companies, consultants and advisers. Bidders will typically have spent a few million pounds by the time they reach financial close.

53. There are a limited number of competitors in this market. Mr Travis estimated that there were five or six serious players, of whom three entered in the "competitive dialogue" phase from which Carillion emerged as the "preferred bidder" for the Project.

54. Asked whether this small number of competitors makes very similar offerings in 'headline' terms (overall budget and timescales), Mr Travis said that although firms did not later learn exactly what others had bid in PFI tender exercises, they did get some feedback, and using their experience, they were able to make well informed judgements on these "headline" terms. He said that Carillion would have had a firm idea that they were working with the right sort of figure, and that Carillion "knows when we were not competitive".

55. By contrast, the details of a bid (for example, department configurations, aspects of site design, energy consumption and sustainability of design and materials), can be critical in the selection of the winning bidder. Hence, bidders put forward unique proposals and protect such details with great care because they constitute critical competitive aspects of the bids. Carillion's competitors did not know enough about the details of these aspect of Carillion's bid to replicate or nullify the advantage by incorporating them into their own offerings. Mr Travis identified this as the essence of a competitive market. If the bidders could all reliably anticipate their rivals' details, bids would be much more closely aligned to one another. This is why the Disputed Information should be withheld. Not only does it embody what he described as "Carillion's winning formula", but also, withholding it upholds the competitive market and thereby stimulates innovation and progress. Asked whether in a field of endeavour such as the construction of hospitals, there was not a natural and general rapidity in the assimilation of innovation, Mr Travis maintained that this did not undermine his general point.

56. As to whether disclosure of relatively anodyne parts of the Disputed Information would cause any real prejudice to Carillion, Mr Travis maintained that seemingly anodyne information could be aggregated into a composite picture which would be very damaging to Carillion. He relied heavily, throughout his evidence, on this "jigsaw effect" in responding to questions put to him about the competitive value of various specific parts of the Disputed Information. In particular, in his opinion, the "jigsaw effect" meant that disclosure of the Disputed Information with certain parts redacted was not an acceptable option. Even limited disclosure through redacted material would allow competitors a useful insight into Carillion's "winning formula" in the management and delivery of complex PFI projects in general, and the Project in particular.

57. His witness statement notes that Carillion's commercial interest lay in securing contracts that deliver an attractive internal rate of return ("IRR"), while at the same time being attractive to its public sector partners such as the Trust. Disclosure of the IRR would equip competitors with valuable information; they would obtain a useful insight into what IRR Carillion would be aiming for on the next comparable project. They would then tailor their bids so as to try and "beat" Carillion, for example, by pitching their bids based on IRRs only marginally lower than Carillion's.

58. He confirmed that there was no provision in the Project Agreement for any re-financing after completion; the funding arrangements were non-variable.

59. Mr Travis was not aware whether the IRR for the Project had ever been made publicly available. He said that the residents of North Bristol, and the public in general, did not have access to information that would allow them to make their own judgement on the IRR, even if they knew the figure, nor were they able to get answers to any questions that they put to the Trust on such matters because the Trust was bound by the commercial confidentiality clauses of the Project Agreement.

60. As part of the tender process, Carillion and other bidders would have provided the Trust with detailed financial and strategic information. This would include the bidders' detailed financial model which would have been provided under terms of confidentiality.

61. Mr. Travis acknowledged that each PFI project is, to a material extent, a "one-off". The project requirement and the clients' needs differ from project to project. However, he says that this "uniqueness" factor is irrelevant in terms of how Carillion does business and organises its projects. These "unique selling points" are not known to Carillion's competitors, but are a part of Carillion's bids from one project to another. Some of the Disputed Information will be used in Carillion's future bids for comparable PFI projects. Disclosure would mean that competitors would come to learn about these "unique selling points", and this will be very harmful to Carillion's competitive position.

62. Although some information will vary from project to project, this does not mean that disclosure of information about the Project is of no value to competitors in drawing inferences about Carillion's bids for other projects. Competitors are industry experts, and insiders will be well placed to understand the Project in detail, particularly if they themselves submitted bids, and will be able to read across from the Project to others. The same applies to public authorities who may go out to tender on comparable projects in the future.

63. The PFI documentation for the Project, including the Disputed Information, formed the basis for Carillion's successful tender for the Royal Liverpool Hospital project. This had progressed from initial submissions of interest in May 2010 through to the preferred bidder nomination in May 2013. It reached financial close in December 2013.

64. He says that the same material also formed the basis for Carillion's bid for a hospital project with Sandwell and West Birmingham NHS Trust. The tender process for that project entered the preferred bidder stage in August 2015. The underlying commercial strategy, including Carillion's distinctive approach to delivery of a project, runs through these projects and will be substantially revealed by disclosure of the Disputed Information.

65. Not only would disclosure of the Disputed Information have been highly likely to cause actual and substantial harm to Carillion's position in the then current tenders, but it is likely to do so also in respect of any future bids. It will be used by its rivals to obtain an unfair advantage over Carillion. Also, once competitors, as well as equipment and service suppliers, know the prices at which Carillion had been working in 2009/2010, they would use these to calculate the level at which they would need to compete. It would be fairly certain that the information would feed into their bids. Referring again to the "jigsaw effect", he stressed that a series of figures, relatively insignificant in and of themselves, could build up into a significant cumulative picture. There would have been a real risk of Carillion losing out on tenders it would otherwise have won, or securing less attractive terms from suppliers or public authorities. Ultimately, this would distort the competitive market.

66. When asked about the effect of the passage of time on the commercial prejudice that would arise from disclosure, Mr Travis said that the Disputed Information was commercially sensitive at the time of the FOIA request in December 2013, and remains so. Also, more generally, beyond a particular tender exercise, it would have provided an insight into Carillion's business methods, particularly its quality planning that is a key aspect of its "winning formula".

67. Mr Travis confirmed that after the Project Agreement was entered into in 2010, just two further PFI contracts for major acute hospitals had been finalised, namely, Royal Liverpool, and Sandwell & West Birmingham. Although on a smaller scale than the Project, these two projects would have had much in common in terms of the hospitals' functionality and departments, and that each project had an SPV to deliver the construction, facilities management and a financing partner. Asked whether other companies operating in this field might be Carillion's finance partners, Mr Travis said that Carillion always chose their partner from the financial sector.

68. As to whether the Disputed Information or key aspects of it would have become known to its competitors as a result of staff movement, Mr Travis says that Carillion is a very stable organisation in staffing terms, with such movement of staff as occurs taking place primarily through acquisitions. Consequently, he was confident that there was little seepage of commercially sensitive information.

69. In taking Mr Travis through the Disputed Information, Ms John, on behalf of the Commissioner, asked whether any attempt had been made to assess whether a redacted version of the Disputed Information could be disclosed. She asked in this regard about the Financial Model, in particular. Mr Travis maintained that there are real risks in releasing even headings and categories of information as these could allow competitors to develop insights into the shape and nature of the Financial Model. He accepted that individual elements might not have a material effect, but maintained that taken together, they would help a competitor to understand how one puts together a successful bid for a major acute hospital. From Carillion's perspective, no particular part of the Disputed Information constituted the "crown jewels" for Carillion; it was all commercially sensitive.

70. In reply to questions from Mr Ryan, Mr Travis said that Carillion is no longer an equity holder in the Project Company, having sold off its original share. Asked whether the Trust, and through it, the general public, had got a "good deal", Mr Travis said that the value of this competitive tendering was shown by the fact that the Royal Liverpool Hospital was the "cheapest hospital PFI deal ever".

71. Asked by Mr Ryan whether recent changes in Carillion's business methods and partners as reported in Carillion's annual reports meant that the Disputed Information had lost at least some of its commercial sensitivity, Mr Travis maintained that it would still be of commercial value to Carillion's competitors and suppliers. He expected that that would remain the position until at least 2045.

72. Throughout his oral evidence, Mr Travis held to his position as set out in his witness statement that the balance of public interest rests with withholding the Disputed Information. His one concession was to agree that the index pages of Part 4 of Schedule 8 of the Project Agreement could be disclosed, without giving rise to commercial prejudice. These were given to Mr Ryan in the course of the hearing.

Mr Gordon Howard

73. Mr Howard is a qualified Chartered Accountant and has been a Senior Finance Manager at Carillion since 2009. He is the current Finance Manager of the Project

Company. In oral evidence, Mr Howard confirmed that he was not directly involved in the negotiations for the Project.

74. In his witness statement, he explains that the Financial Model is a projection of the revenues and costs, profit and loss, and assets and liabilities of the Project over the full 45-year term of the Project Agreement. It analyses how the Project is to be financed, and how it is expected to produce a return on investment. The Financial Model shows all the key financial aspects of the Project, and allows all the different users of the Financial Model (Carillion, the Trust, sponsors, investors, and lenders), to extract commercial information as required through the tender, financial close and contract delivery phases.

75. The Financial Model was constructed by a financial adviser, in this case HSBC, which has been retained by Carillion as its financial adviser on all subsequent health PFI bids. HSBC has its own template model that it amends and populates for each project. Mr Howard did not know whether HSBC made its model available to other PFI contractors. He was not personally aware, however, of any previous release into the public domain.

76. Mr. Howard explained that PFI projects are financed by a combination of "senior debt", raised from banks or other financial institutions, and shareholder investments from the project sponsors (here, Carillion). Typically, about 90% of the total financing is met through senior debt, and about 10% through shareholder investment.

77. The Financial Model shows the financing terms in detail, including the fees and margins payable to the senior lenders, the interest rates payable, the gearing, and the investment returns to shareholders. It analyses how the Project is to be financed and how it is expected to bear financial fruit. It does not contain figures for all operational matters, nor the granular details of the construction or operation costs for the Project, such as pricing or margins for all the various items and services which go into building and running a hospital.

78. The Financial Model comprises three parts; inputs, calculations and outputs. The inputs comprise the cost of delivering the Project over the full term, dates and timings, the terms on which the lenders are willing to provide financing, and the tax and accounting assumptions. The calculations comprise the amount of finance that is required for the Project and the cost of repaying that finance, and any profit and loss and tax payable. The last category is a range of outputs that are important for the customer, sponsors and the lenders.

79. Mr Howard emphasised very strongly in his witness statement, how competitive PFI tender exercises were, with a fraction of one per cent in the evaluation scores sometimes proving crucial. As to how tenders are evaluated, he says that price is a key factor. Bidders work hard to find even marginal improvements in their bids and would be very interested in gaining any insights into their rivals' exact approach and techniques for financing the project. If released, the Financial Model would be analysed by competitors to improve their understanding of their rival's pricing for the construction, operations and life cycle, the financing structure and terms that it had secured, its approach to recovering bid costs and the level of its shareholder investment returns. Disclosure of the Financial Model would, in his view, have been of substantial benefit to Carillion's competitors during the Royal Liverpool and Sandwell & West Birmingham tendering exercises. There are two upcoming PFI tenders in the UK over the next year and access to the Financial Model would be of substantial benefit to Carillion's competitors in that regard as well. Carillion has a good track record of winning these competitive tenders, and its competitors would

want to understand how it went about financing such a major project with a view to emulating its “winning formula”.

80. Mr. Howard stresses that the Financial Model is held and used subject to clearly understood duties of confidentiality. A new financial model is prepared for each PFI project, and is always treated very securely by sponsors/bidders. He is not aware of any previous releases into the public domain of a financial model of the type in issue here.

81. He stressed that Carillion is concerned not only about the items of data in the Financial Model, but also about its overall structure. He says it is important to note that HSBC, who built this model, have been retained as Carillion’s financial advisers on all subsequent health bids and have used a similar template on subsequent bids, because it works and has been successful for Carillion. He says that Carillion is extremely concerned that release in part or whole of this Financial Model would enable an astute financial mind to extract commercial information that would prove detrimental to future bids by Carillion. He says that Carillion’s primary concern is that disclosure of this information would create a real risk of losing out on contracts it would otherwise have been likely to win. He stresses that bidding for PFI projects is very expensive. If disclosure of the Financial Model caused Carillion to lose out on a contract, it would suffer substantial financial loss in the form of its bid costs.

82. The provision of the health service is highly political. He commented that there was a risk of political pressure being brought to bear on future negotiations if the Financial Model were to be released. He was unable or unwilling to elaborate further on this comment.

83. Asked whether openness would not produce a more competitive set of bids, with lower prices, to the benefit of the taxpayer, he said that he thought that disclosure would lead to a convergence of proposals around a false costing floor and would stifle innovation.

84. The key financial data was “locked in” for the 45-year life of the Project and was set at the point of completing the Project Agreement. Asked whether this constituted a good deal for the public, Mr Howard said he was not qualified as a witness to offer broad value judgements of such matters.

85. Mr Howard did not think that any of the figures that were drawn to his attention, at the hearing, as being in the public domain (for example those at page 231 of Mr Ryan’s witness statement taken from the March 2015 National Audit Office’s Report “The Choice of Finance for Capital Investment”, Appendix 2, Figure 33), were comparable in nature to the commercially sensitive material brought together in the Financial Model. Carillion’s published accounts would not show the figures that actually won the tender.

86. As to whether he regarded the Financial Model as being confidential in perpetuity, he conceded that improvements in financial modelling meant that the commercial sensitivity of the Financial Model might be somewhat diminished over time, but he maintained that this particular Financial Model would retain its sensitivity for the foreseeable future.

87. When asked to explain the commercial sensitivity of certain apparently insignificant elements of the Financial Model, Mr Howard made the same arguments as Mr Travis to explain why he thought that redactions did not offer a way forward in terms of a limited release of information.

88. As to how a taxpayer could ever have confidence that he has got a fair deal if the Financial Model is withheld in perpetuity, Mr Howard said that as he understood it, both the Treasury and the Department of Health signed off on these projects. He did not know whether other regulators, such as the National Audit Office, the Audit Commission or the Strategic Health Authority, had access to the Financial Model. He suggested that it was for them to assess the value to the taxpayer.

89. When asked about Standard and Poor's 2013 diagram of construction difficulty score (at page 198 of the annexes to Mr Ryan's witness statement, which reproduces page 22 of the National Audit Office's October 2013 report), Mr Howard did not accept the score of between 1 and 2 for hospital construction on a spectrum of complexity rising to 5 at the most complex end. Mr Howard thought there were considerable risks in stalled projects or overruns, downturns and other unfavourable changes in the health sector.

90. Towards the end of his oral evidence, Mr Howard was asked to consider what Carillion might be willing to release, in the form of a layman's guide to the Financial Model, to meet Mr Ryan's request (given in answer to questions from the Commissioner and from the panel to specify what he regarded as the key information he wanted from the Financial Model). Mr Howard was not able to give an immediate answer. This was not taken forward in evidence, but was addressed subsequent to the November hearing (see para 24 above).

Mr Sid Ryan

91. Mr Ryan submitted a 23-page witness statement supported by 12 annexes. We have considered this in addition to his original submission and skeleton and the corresponding 11 annexes. If our summary below is considerably briefer, it is only because some of what Mr Ryan says is more in the nature of submissions than evidence. This is not a criticism. Without having sight of the Disputed Information, he is not, of course, in a position to do more.

92. Mr Ryan explained that his background is as an investigative journalist. He is a founder member of the People versus PFI campaign. He believes that the PFI sector was rotten from its inception. It has been a way for central government to obtain public infrastructure without its cost appearing on the national debt figures. Ideally, he would have liked to have made a FOI class request covering the more than 100 PFI contracts in the NHS. However, this was impracticable and this is why he requested information about a single project.

93. In Mr Ryan's view, PFI was created out of political convenience rather than public interest, making too much money for vested interests within a system designed to resist oversight, with procurement corrupted by what has already been decided rather than fair appraisal, and government wilfully blind to its problems and ignoring or resistant to its own regulators. Based on these premises, he says (at paras 28 to 30 of his witness statement):

> "31. In these circumstances, the only route to proper accountability, oversight and ultimately, better policymaking, is to allow the public to access the key information about the sector.
>
> 32. It is exactly the arcane complexity of these contracts, lack of proactive transparency, persecution of whistleblowers, the legal and financial resources of the contractors and the fact that it takes two years to even get a hope at accessing a financial model that has prevented this analysis from taking place so far.

33. …disclosure is a necessary first step towards fixing a sector which is entirely broken by obtaining information which has been purposefully kept from the public eye."

94. He says he is struck by the lack of collated and comparable information on PFI projects and says that this information is not even available to the National Audit Office. He draws attention to the Foreword of the October 2013 National Audit Office Report, Review of the Value for Money Process for PFI, which emphasised "one overarching point" - "that the VFM quantitative tool did not answer what we believe is the key question, namely whether the benefits of private finance outweigh the additional cost of private finance above government borrowing". Mr Ryan maintained that in his view, this remained the very question that the public wanted answered – the cost of PFI versus public procurement. He says that the lack of transparency is the core reason why PFIs remain so contentious. He says that PFI contractors like Carillion who received money from taxpayers for providing public services should meet higher standards of transparency than if they operated only in the private sector. Transparency is not just about knowing how public money has been spent, but it is also about protecting the public from risk that the plans, policies and programmes implemented by government are not working as intended.

95. He says that there have been many difficulties with specific PFI projects, and in his written submissions dated 27 August 2015 he lists what he says are failures in a number of other projects in which Carillion has been involved.

96. In relation to this Project, he says that the PFI consumes over 10% of the Trust's income, far higher than when the Project Agreement was signed. He says that as a result, the Trust could no longer afford the capacity (i.e. the number of beds) it needed. He also says that Carillion knew perfectly well that the Trust was tied to signing a PFI contract and used that to secure itself a far more favourable deal that it could otherwise have done.

97. Taken through the individual items of Disputed Information at the hearing, and asked what specific public interest would be served by their release, Mr Ryan said that his non-expert role was to find out and understand enough so that he could go and ask others, more expert than himself, whether what was contained in the information was reasonable.

98. Asked whether what he really wanted was a systematic central source for the key financial data like IRRs for each NHS PFI project, thereby putting all contractors on the same footing, Mr Ryan said that it was strange that there was not such a central PFI data bank, but there was not. Noting how difficult it had proved for bodies like the National Audit Office to obtain the same information he was seeking, he had pursued the fall back option of trying to obtain full transparency on at least one project.

99. He says that although the Second and Third Respondents argue that the Disputed Information will be valuable to their competitors, they have not drawn a distinction between information that is bespoke to the Project, and information which is common across PFI projects, generally. The point is pertinent because the way PFI projects are procured, starting out with a Treasury-produced template contract, and modifying it according to the needs of a particular project, information begins as "common" and is then made "bespoke". If information is common across projects, then it would be reasonable to assume that it is already known to competitors. If information is bespoke to the Project, then it would provide little value to competitors tendering on different projects. For this reason, he maintains that any commercial advantage to be gained from either type of information would be slight, if it provided an advantage at all.

100. He also says that the PFI industry does not have "competitors" as such and this further reduces the risk of prejudice to Carillion's commercial affairs as a result of any disclosure. He goes on to explain that the PFI industry contains so many consortia, and is comprised of so many companies, that he would venture that Carillion could not name a single major construction company that they have not been partnered with on a PFI project, or otherwise, that their competitors have not "bought out" a PFI contract which Carillion originally signed. The fact that there are very few companies on the construction side of the PFI industry also means that there would be very little incremental value to competitors if the details of this Project were disclosed.

101. He further says that if Carillion's competitors did not already have a detailed knowledge of Carillion's business affairs through collaboration, then that is information they would have obtained through market intelligence.

102. In short, he says that whatever Carillion's "winning formula" is, it will already be known to competitors, either through collaboration or other similar projects or through normal business practices.

103. In addition, Mr Ryan says that a contract signed in 2010 is significantly aged, even if looked at in the circumstances as at late 2013/beginning 2014. He says that the passage of time renders a significant amount of the financial information of little benefit to competitors. For example, key elements of pricing, such as the PFI loan interest rates, change daily. Also, Carillion's own operations will be constantly evolving to improve quality and reduce their own costs, and for that reason too, information will quickly become out of date. He says that the Tribunal has not been given evidence that Carillion's approach to PFI projects in 2010 is at all similar to how they would go about tendering for and running a PFI project in 2013 or later. They have not presented a 2013 PFI contract for direct comparison, for example.

104. In response to Carillion's argument that members of the public would not have the expertise to understand much of the information in issue, he urges the Tribunal to consider the best of the public's abilities, rather than the average. He says it is not the role of the man in the street to understand this information itself; it is the role of civil society to interpret it on the public's behalf.

Findings and Reasons

Statutory Framework

105. Under section 1 of FOIA, any person who makes a request for information to a public authority is entitled to be informed if the public authority holds that information, and if it does, to be provided with that information.

106. The duty on a public authority to provide the information requested does not arise if the information is exempt under Part II of FOIA. The exemptions under Part II are either qualified exemptions or absolute exemptions. Section 43(2) is a qualified exemption. Pursuant to section 2(2)(b), information that is subject to a qualified exemption is only exempt from disclosure if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. This balancing exercise must take place as at the date of the refusal, in this case, February 2014.

Issues

107. The only issue in this appeal is in relation to section 43(2) of FOIA. Section 43(2) states that information is exempt if disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it.

108. The first question is whether section 43(2) is engaged at all. This has to be considered in respect of each item of information. If it is not engaged, we need go no further. If it is engaged, then we must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information.

The Parties' Positions

109. During the course of this appeal, the parties have clarified their positions. It is probably fair to say that before the hearing, the Second and Third Respondents had framed their arguments against full disclosure in fairly broad terms. More specific arguments as to why the public interest favours withholding the Disputed Information were only put forward at the hearing. This in turn led to the Commissioner having to revisit his position on certain items of the Disputed Information.

110. Although it would have been better, of course, for the parties' positions to have been clear from the outset, we make no criticism about this. We recognise that it is often the process of preparing for a hearing and the hearing itself, that helps to clarify certain matters. We are grateful to the parties and their witnesses, for the assistance they have given to the Tribunal.

111. It may be helpful at this juncture to briefly summarise the parties' positions, although we will revert to their more specific arguments when we consider the individual items comprising the Disputed Information.

112. The Trust has appealed primarily in order to create a right of appeal for the Second and Third Respondents who are effectively the appellants in this case. Although when lodging its appeal, the Trust contended that disclosure would or would be likely to prejudice any future negotiations it may have with third parties, this is not a point it pursued with any vigour at the hearing. Its real argument is that the Commissioner underestimated the prejudice to the commercial interests of Carillion that would arise from disclosure of the Disputed Information, and failed to take into account the extent of the commercial harm that would result, not only to one private company on a one-off basis, but to future transactions as well, which would be contrary to the wider public interest. It also claims that the Commissioner overestimated the public interest in disclosure and relied too heavily on generalised arguments about transparency as regards PFI contracts, including the negative attention such contracts have received in recent years, rather than properly addressing the specific information in dispute, and how disclosure of that information would further the public interest. The Trust further says that the Commissioner relied on speculation as to potential job losses and departmental closure.

113. The Second and Third Respondents speak with one voice. They do not invite the Tribunal to overturn the Commissioner's Decision Notice in its entirety. While they maintain that all of the information was correctly withheld at the time the Trust dealt with Mr Ryan's request, they seek to withhold only the information which they consider is still (as at the date of the hearing), of substantial commercial sensitivity. They argue that disclosure of the information would prejudice their position in respect of future contracts. They say this would not be in the public interest because successful commercial partnerships between the public and private sectors depend in large measure on there being an effective competitive market

for the provision of private sector services. Disclosure of the Disputed Information would give their competitors an unfair commercial advantages over them and this would distort the fairness of the relevant market sector. They say this is not a factor to which the Commissioner gave proper consideration. Instead, the Commissioner overestimated the public interest in disclosure by relying too heavily on generalised assertions about the public interest in relation to PFI projects generically, rather than focusing on the public interest in relation to this particular Project. They say that there is very little public interest in the disclosure of the Disputed Information.

114. The Second and Third Respondents further say that at the time of the request, Carillion was actively preparing bids for other hospitals, comparable to the Project. The documentation and information in issue in this appeal formed the basis for Carillion's successful tender for the Royal Liverpool Hospital project which is now under construction. The same material also formed the basis for Carillion's bid for a project with Sandwell and West Birmingham NHS Trust, the tender process for which had yet to be completed at the time of Trust's response to Mr Ryan in February 2014. The information was therefore not out of date then. Disclosure would have likely caused actual and substantial harm to Carillion's position in respect of those tenders. They accept that each project is, to an extent, bespoke, but say that many features of a tender for a hospital building will be replicated in subsequent tenders. They stress that these types of tenders are highly competitive. Negotiations are intense and detailed, and success can hinge on small but important features of a bidder's offering.

115. The Commissioner welcomed the further information that had been disclosed since his Decision Notice. He did not seek to have the Decision Notice upheld in full, but sought more detailed arguments as to what information was still in dispute, and why the specific items of information in issue should not be disclosed. The Commissioner emphasised that his primary interest in defending an appeal against one of his decision notices is not to win the appeal, but rather to ensure that the legislation which he is responsible for regulating, is correctly applied.

116. Mr Ryan acknowledged the difficulty in disaggregating the general and specific public interests in this case. He says that demonstrating the public interest in the Project, requires a certain baseline of information. The key issues are quality and cost. Value for money can be assessed from these two criteria. Disclosure of the full information is necessary as a first step in considering the merits of the Project. The public interest in disclosure is greatest, however, in respect of financial information rather than other information such as technical drawings.

117. Mr Ryan also says that to insist on arguments specific to the Hospital pre-supposes that enough is known in order to demonstrate which particular information may be of greatest public interest. He says, for example, that where the information concerns fees charged for small works, without sight of the charges themselves, only general arguments can be made by reference to where this has been an issue in other PFI contracts. He also points out that the nature of the contract's size, length, and complexity, poses further difficulty because a figure which may appear to be uncontroversial, might appear less so when compounded over several decades or when it intersects with another area of the contract.

118. He argues that a request of this nature is not the same as a request for minutes of a controversial meeting or the results of an enquiry into some specific wrongdoing whose ramifications can be demonstrated, and the public interest in disclosure assessed more or less immediately. He argues that being so costly, so long-running, and so complex, a PFI project such as this lends itself far better to an assessment of the merits for full disclosure and full public understanding, than

specific arguments for disclosure of particular figures. He points out that this Project Agreement relates to a hospital worth £430 million which will cost more than £2 billion over the life of the Project Agreement. Each year, it will cost approximately £50 million. He invites the Tribunal to consider "settling" the issue of disclosure of PFI contracts, bearing in mind that there are 728 such contracts in the UK. He says that a decision favouring disclosure would save individuals the considerable expense of appeals to different public authorities, the Commissioner, and the Tribunal.

Is section 43(2) engaged?

119. The first issue we must decide is whether section 43(2) is engaged at all. Mr Ryan's position is that the exemption is not engaged, and that if it is, the public interest favours disclosure. Although Mr Ryan did not cross-appeal the Commissioner's finding that section 43(2) is engaged, no issue on this point was taken by the other parties. Bearing in mind that he was unrepresented, we allowed the point to be argued. However, it is probably fair to say that he did not make this argument with any real conviction.

120. The relevant test as to whether section 43(2) is engaged is whether disclosing the Disputed Information would have "a very significant and weighty chance" of causing prejudice that is "real, actual or of substance": Department for Work and Pensions v the Information Commissioner and FZ [2014] UKUT 0334 (AAC) and R (Lord) v Secretary of State for the Home Department [2003] EWHC 2073 (Admin). While the chance of prejudice must be significant and weighty, the extent of the prejudice need not be (though it will be relevant to the public interest balance). It is sufficient that "some commercial disadvantage" is likely to be suffered: Newham LBC v Information Commissioner EA/2011/0288. Whilst other First-tier Tribunal decisions are not binding on us, we find no reason not to adopt this interpretation.

121. A substantial quantity of the information requested by Mr Ryan has already been disclosed. What remains is information the disclosure of which has been resisted because of concerns about commercial prejudice. While there are legitimate arguments to be made about whether the balance of public interest favors disclosure of the information, we do not consider that there are serious arguments to be made that section 43(2) is not engaged. Carillion operates in a competitive landscape. There were other parties who bid for the Project, and who have bid for other projects that Carillon has since been interested in. The amounts in issue are considerable. The information clearly has commercial value. As we have already noted, the extent of the likely prejudice need not be great in order for the exemption to be engaged. We accept that risk of harm to commercial interests arising from disclosure has been demonstrated such that section 43(2) is engaged in respect of all the Disputed Information.

122. The only proviso to this is that of course, section 43(2) cannot be engaged in relation to any information that is already in the public domain. There is evidence to suggest that some aspects of the Financial Model may not be as secret as Carillion suggests. Some figures have been disclosed, for example, via the National Audit Office or through the Hospital Company's published annual accounts. We will address this further when we deal with the Financial Model, below.

The Public Interest Balance - the Principles

123. We turn now to what is the key issue in this appeal, namely, whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure. In reaching our findings, we have been mindful that the task before us concerns this particular Project only. We seek to

express no views about PFI generally except where this is incidental to our findings about this Project. While we have had regard to the wider issues raised, we have done so only in order to consider them in their application to the issues properly before us in this appeal. We are also conscious that some of the issues raised are within the domain of elected representatives and not the Tribunal. Furthermore, it is not for us to decide how far our findings might be relevant to the facts of another PFI project, so despite Mr Ryan's urging that we should "settle" issues on disclosure of PFI contracts, we cannot and do not seek to do so.

124. In considering the correct approach to the application of the public interest balancing exercise under section 2(2)(b) of FOIA, we have been guided by the Upper Tribunal's decisions in APPGER v ICO and FCO [2013] UKUT 0560, Department of Health v Information Commissioner and Lewis [2015] UKUT 0159 (AAC) and Home Office v IC and Bingham Centre for the Rule of Law [2015] UKUT 0308 (AAC). Under FOIA, there is of course no presumption in favor of disclosure. The burden lies on the parties asserting it, to establish that the harm that would or would be likely to be caused by disclosure of the information is such that it outweighs the considerations in favor of disclosure.

125. Before we embark on the public interest balancing exercise, it may be helpful to first address certain submissions the parties have made as to how we should undertake that exercise.

126. We have been referred, by the Second and Third Respondents, to the Court of Appeal's decision in Veolia v Nottinghamshire County Council [2010] EWCA Civ 1214. They say that information such as that in dispute in this case, engages the rights of the owner of that information under Article 1 of Protocol 1 to and/or Article 8 of the European Convention on Human Rights ("ECHR"), and that disclosure should only be ordered, therefore, where it is justified in ECHR terms. They say that this means that disclosure of the information in dispute here must further a pressing social need, and that disclosure must be proportionate. We acknowledge the application of the principles set out in Veolia. However, as the Second and Third Respondents themselves accept, these principles do not transform the usual public interest balancing test to something different. In other words, the public interest balance already accommodates the proportionality analysis required to ensure compliance with the ECHR. The specific and pressing social interests that would be served by disclosure of this particular information are essentially encompassed within the factors relied on in the arguments that have been made in favor of disclosure. We disagree with the Second and Third Respondents, when they say that what Mr. Ryan is seeking is full disclosure of thousands of pages of information in order that somebody might go through it to see if there is anything there to criticise, and that this makes his request disproportionate. We do not consider this to be Mr. Ryan's position. What he seeks is transparency, and an opportunity for greater understanding, and he accepts that such disclosure may show this PFI contract in a positive light. He is not able to specify the details he wishes to be disclosed more exactly where he has no information about contents or even headings of the Disputed Information.

127. In undertaking the public interest balance, we have carefully considered the evidence of the witnesses. What we have not done, though urged to do so by the Second and Third Respondents citing FCO v Information Commissioner and Plowden [2013] UKUT 275 (AAC), is to defer to the evidence of Mr. Travis and Mr. Howard where they address matters on which the Tribunal does not have expertise. We do not read Plowden as saying that the Tribunal should defer to the evidence of partisan witnesses, called by and employed by one or other of the parties. Clearly, they know more about PFI and the competitive environment for PFI contracts than we do, and that is, in part, why they have been called to give evidence. The fact that

they know more does not, however, dilute the proper opportunity the other parties must have to test their evidence, nor indeed does it absolve the Tribunal of the responsibility to consider the evidence carefully and objectively. It is also relevant to note here, that neither Mr. Travis, nor Mr. Howard had any involvement in the bidding stage of the Project, nor as we understand it, in the arrangements for settling the cost of capital after the preferred bidder had been selected, nor indeed at similar stages of the Sandwell hospital project. As Mr. Travis himself acknowledged, he is not an expert on the financial aspects of the Project. Their evidence must be considered in light of these limitations.

128. The Disputed Information comprises a number of specific items of information. It is necessary to look at all the information in issue, both individually, and as a package. However, it was common ground between the parties that while certain public interest considerations apply to all the information, certain different or specific considerations arise in respect of the different items of information.

129. In considering how to approach the public interest balance, we have followed the Upper Tribunal's guidance in APPGER v IC & FCO and Department of Health v Information Commissioner and Lewis. We note that the public interest balance must be undertaken by reference to specific public interest factors relating to the content of the Disputed Information. This does not mean that generic factors are not relevant. Mr Ryan has argued, and we accept, that public interest considerations will often have a wider scope than the specific arguments that may be made as to commercial harm. Indeed, not having had sight of the Disputed Information or knowing its details, a requester is often unable to make specific arguments relating to the content of the individual items of information. However, we accept the argument made by the Second and Third Respondents that the generic factors must be borne out by the particular information in issue.

The Public Interest Balance – the Generic Factors

130. We will begin by setting out the more generic factors as to the harm and benefit of disclosure, and we will then turn to the individual items comprising the Disputed Information, and the specific factors relating to their content.

131. The generic considerations in favor of disclosing the information include the following:

- The construction of major public infrastructure, such as the Brunel Building, entails a substantial expenditure of public money. Mr. Ryan has said that the Brunel Building is worth £430 million and it will cost over £2 billion over the lifetime of the Project Agreement. There is clearly a significant public interest in transparency about this level of expenditure, and in the public having confidence that the money is spent properly, and that costs are not greater than an efficient company making a reasonable return on its capital would need, in order to deliver the contract requirements.

- There is also a genuine public concern, widely recognised (for example, by the House of Commons Select Committee on Public Accounts and the National Audit Office), that PFI contracts do not always deliver value for money. This has led to concerns about wider consequences, including, for example, miscalculation of the number of beds required, the risk of hospital closures, and reductions in other areas of service.

- Disclosure would assist the public to assess whether the Project represents value for money. They can consider and understand, for example, whether the Project could have been delivered more cost effectively without a PFI

arrangement, and whether specific aspects of the Project Agreement are poor value for money.

- Disclosure is necessary in order that lessons can be learned, regardless of whether the Project is good value for money or poor value for money. If it is poor value for money, there is a public interest in understanding that, in holding the Trust to account, and to inform such arrangements in the future, to the overall benefit of the public.

- The lessons learned would contribute to a better understanding by the public and by public authorities as to how such arrangements should be constructed in the future, in order to deliver a public infrastructure and public services of better quality, and at a better price, to the overall benefit of the public as a whole.

132. Factors favoring withholding the information include the following:

- It is in the public interest to preserve the integrity of the commercial bargaining process, and in particular, the public procurement process, and to ensure that private parties are not able to access information about their competitors, or their customers, that would enable them to change their prices, tailor their offerings, or otherwise give them an unfair advantage over their competitors or their customers. Disclosure would lead to bids becoming homogenous, and public authorities' ability to secure the best outcomes would thereby be impeded. This would ultimately be to the prejudice of public authorities and the taxpayer.

- Carillion would suffer substantial commercial prejudice, not only because its rivals would derive very significant commercial earnings, but also because the particular information in dispute would have been used to prejudice Carillion's position in any contracts it was seeking to secure at the time of Mr Ryan's request. The information is not too old nor too project specific not to cause harm to Carillion's competitive position. It is important, for both public and private interests, that the integrity of the competitive process is preserved. It is in the public interest to have an effective competitive marketplace.

- Carillion invests millions of pounds over a period of years in putting together various iterations of competitive bids. If, because of disclosure of the Disputed Information, Carillion lost out on tenders that it would otherwise have won or secured them on less attractive terms, then given the size and scale of these projects, it could have caused a very weighty commercial harm. It is not in the public interest that a private company should suffer such a significant financial detriment or be deterred from participating in competitive bids.

- To the extent that the parties had agreed to treat any of the Disputed Information as confidential (for example in schedule 35 of the Project Agreement), there is a public interest in upholding contracts, and giving effect to what parties to a contract have agreed.

133. Before moving on to the specific items of Disputed Information, it may be helpful if we address certain matters relating to the generic public interest factors.

134. First, we have not taken into account, as a relevant factor, any potential job losses or departmental closures. This was a factor the Commissioner considered in his Decision Notice, but there was no real evidence before us, as to such risks.

135. Second, Carillion has stressed that there were two similar PFI projects for hospitals out to competition after the Project Agreement was finalised in 2010. However, we note that the Royal Liverpool Hospital reached financial close at December 2013. This was before Mr Ryan's request. The Sandwell & West Birmingham Hospital project reached financial close at December 2015, and procurement began with a procurement notice in the OJEU in March 2014, so if there was a risk of harm to Carillion's commercial position arising from disclosure in February 2014, it related to this project.

136. Third, a more general argument that disclosure could prejudice Carillion's position in any future PFI or PF2 procurement was made, in the witness evidence, with particular reference to prisons. We did not find this persuasive. The evidence is that the number of PFI projects in the pipeline has fallen significantly in recent years. If there are to be future hospital projects, we are satisfied, in respect of financial information and the cost of capital in particular, that information relating to the Project which closed in 2010, will be of limited use to competitors. There would be separate processes for finalising financial details in light of current market information, potentially relating to both debt and equity. The risk that competition for projects such as prisons, with different construction and risk profiles, could be prejudiced by older information relating to hospitals, has not been made in sufficient detail for us to attach any great weight to it.

137. Fourth, it might have been expected that the Second and Third Respondents would have put forward more specific arguments and evidence than they did. The Commissioner had previously raised the same concern. In his Response dated 15 April 2015, he highlighted the lack of detailed arguments, beyond high level and general arguments, as to exactly why it is said that the public interest favors maintaining the exemption in respect of each element of the Disputed Information. Although, they did provide further evidence, through Mr. Travis and Mr. Howard, and although they have acknowledged (see for example, their submissions dated 21 May 2015), that they must establish the harm that they say would be likely to arise from disclosure by reference to the specific information they seek to withhold, there has been a tendency to make generalised statements without seeking to demonstrate their veracity. We refer, for example, to their assertions that all or most of the Disputed Information is part of Carillion's "winning formula", without actually demonstrating how that was so, and the statements about the "jigsaw effect" of disclosure, again without showing how that effect would actually arise. There was also a reluctance, it seemed, to distinguish between the aspects of the Disputed Information that were bespoke to the Project, and aspects that might properly be said to be common to similar projects, or anodyne, or likely to be known to competitors. We observe that of some 100 acute hospital PFI schemes, as at 2015, in the Treasury database, only 3 are ascribed to Carillion as equity holder. They may have since won further schemes, and may have had earlier involvement in others. Nevertheless, there are clearly many other providers who have their own winning formula, and it has been for Carillion to demonstrate the uniqueness of their offering.

138. There was also no evidence from anyone else in the PFI industry about the consequences of disclosure on competitiveness in the industry. While it may have been unusual to have had a competitor of Carillion give evidence on its behalf, in view of Carillion's position that the Financial Model is of such great importance to its competitive advantage, it is perhaps not unreasonable to suppose that that might equally be the case for other companies in the PFI industry who have also won PFI contracts, and who might also have a keen interest in protecting the competitive landscape. We do not criticise Carillion for not providing more or different evidence than it did. We do not know what considerations informed their decision as to what

evidence to put forward but we can, of course, only make a decision based on the evidence that we have before us.

139. Finally, we have not attached much weight to the Commissioner's decisions relating to other PFI projects. As the Commissioner himself says, those decisions were fact specific. They cannot assist us on a different PFI project.

140. We turn now to the more specific factors as to the harm and benefit of disclosure (to the extent that they are different from the generic factors), in relation to the the individual items of the Disputed Information.

Applying the Public Interest Balance to the Disputed Information

141. The Disputed Information comprises the following, or parts of the following. As already noted, in some cases, the information that has been withheld consists of limited redactions from documents that have otherwise been disclosed.

- Project Agreement, clause 19.1B
- Project Agreement, clauses 35.A1 and 35.A2
- Project Agreement, clause 35.A15
- Project Agreement, Schedule 8, Part 4
- Project Agreement, Schedule 8, Part 8
- Project Agreement, Schedule 13
- Project Agreement, Schedule 14
- Project Agreement, Schedule 15
- Project Agreement, Schedule 18
- Project Agreement, Schedule 19
- Project Agreement, Schedule 21
- Project Agreement, Schedule 22
- Project Agreement, Schedule 23
- Project Agreement, Schedule 29

We will consider each in turn. In doing so, we will take into account the parties' position, and the generic public interest factors, as set out above. While it is not practicable to reiterate them, we will refer to them where it would be helpful to explain our findings.

Project Agreement

142. As described in Ms Woodward's witness statement, the Project Agreement is the overarching agreement between the Trust and the Project Company. Three sets of numbers have been redacted from the the main body of the Project Agreement. Except for these numbers, the main body of the Project Agreement, which on any measure is a substantial document, has been disclosed in its entirety.

143. Clause 19.1B - this is a liquidated damages provision in the event of delay to advance works. It specifies how much the Project Company agreed to pay the Trust for each week of delay in the completion of Phase 1A of the Project. The provision was not called on as Phase 1A was completed on time.

144. Clause 35.A1 and 35.A2 – this is the weekly damages amount for delay in temporary works. There was no actual delay. It gives rise to the same considerations as in relation to clause 19.1B.

145. Clause 35.A15 - this figure represents the amount the Trust was liable for in relation to delays concerning preliminary works. Again there was no actual delay.

146. Carillion argues that the above information is an important component of its commercial strategy and its offering in securing the Project. It is a concrete indicator of how much risk they were willing to take, and how much comfort they were prepared to offer the Trust in this respect. They say that this is a crucial aspect of commercial negotiation, as timely delivery is essential for hospital facilities. It was a live competitive advantage as at February 2014, to be redeployed in subsequent bids. Disclosure would provide an opportunity for competitors to improve their own bids in respect of future projects. Carillion say that even a small margin could prove critical.

147. The Commissioner now accepts that this information is properly withheld.

148. Mr. Ryan says that compensation on project delays are the core reason why PFI procurement is, supposedly, so attractive. If a project overruns, then the private sector is liable for the costs and the public sector is protected. He says that if a project has been sold to the public largely on this basis, the public has a right to know whether it is a good deal or not.

149. He further says that although the figure may be an indicator of how much risk the private sector is willing to take on, it is also a measure of how much risk was passed on to the public. He says it is apparent from the Business Cases that the damages would not have covered the actual costs to the Trust of any delay. If the Project had been delayed, the Trust would still have lost money and the figure is therefore more in the way of an incentive to get the Project completed in time.

150. We have considered the likelihood of commercial prejudice to Carillion, particularly in the context of Carillion's participation in competition for the one open hospital PFI project as at February 2014, namely the Sandwell hospital project. We accept that damages for delay will likely have been a feature of the tender for that project. However, Carillion have not shown how disclosure would have damaged its competitive position. They have not shown that the information was neither too old nor too project specific to cause harm to Carillion's competitive position. No figures have been adduced in evidence to show how the liquidated damages provisions here or the calculations underlying them were replicated or formed the basis of Carillon's bids for any other project, nor even is there any evidence from the Trust as to the importance of these figures in Carillion's success in winning the Project. We agree with Mr Ryan that a competitor may be able to look at the liquidated damages provisions, but would not be able to make meaningful comparisons with other projects due to the array of Project-specific factors that likely make up the figure.

151. For all these reasons, we do not find that disclosure would be likely to damage Carillion's position or undermine the effectiveness of a competitive market.

152. We accept that the transfer of risk from the public to the private sector is one of the main justifications for the use of PFI, and that acceptance of risk is a key factor in assessing whether a PFI project has been successful. Risk borne by the Project Company is also a significant factor in assessing credit and cost of capital. In our view these factors support a finding that the public interest balance favours disclosing this information.

Schedule 8, Part 4

153. This comprises technical drawings and plans for the details of construction, running to over 50 folders, and comprising thousands of documents, which were so numerous that they were provided to the Tribunal only on CD. We were taken through certain documents and plans during the hearing as examples of the overall content. We are satisfied, and indeed there was no suggestion otherwise, that these samples are sufficiently representative of the whole body of this material so as to allow us to assess the effect of disclosure of the whole of Schedule 8 Part 4.

154. Carillion say that in their experience, some of their competitors have dropped out of or lost out on tenders precisely because they have struggled to match Carillion's competitive advantage in terms of the comprehensive project planning embodied in this document. Carillion also say that there is no conceivable public interest in these drawings and plans, but that they would be of great interest to competitors and would give them insight into Carillion's approach, much of which will be common from one hospital project to the next. They say that this information represents a huge amount of experience time and investment which should not be handed over to competitors for free.

155. Mr Ryan says that in other cases, disclosure has been the only way in which the public could find out who was responsible for construction errors and mistakes. He refers in particular to the case of Hereford Hospital where there have been concerns about whether it was built with inadequate structural fire safety.

156. For the Commissioner, Ms John queried what remained secret about a building which is now complete and accessible to the public to see its features for themselves. She also suggested that some of the redacted information was self-evidently anodyne.

157. We accept that there would be a public interest in disclosure if certain events were to occur, for example, if an aspect of the design proved to be defective and there was danger or risk to the public, or a need to close or withdraw facilities, or if a dispute arose about liability for defects. However, there is no evidence that any such issues have arisen in relation to this Project. We accept that this information represents a considerable investment by Carillion, and that disclosure in the context of the competitive circumstances as at February 2014, could have been damaging to Carillon's commercial interests. We are not persuaded that this would be offset by a sufficient public interest in disclosure, and therefore, that the public interest balance favors maintaining the exemption. In short, we find that this information should not be disclosed.

Schedule 8, Part 8

158. This document is called the Design and Construction Quality Plan. Carillion says this is an extremely detailed project management blueprint, explaining how all aspects of the Project will be organized, overseen and implemented. It amounts to a 'how to" guide for planning large scale and highly complex construction projects. As such, it constitutes part of Carillion's "winning formula", and reflects its considerable

expertise and experience. It would be readily exploited by competitors to their commercial advantage and to Carillion's detriment.

159. The Commissioner argues, again, that some parts are entirely anodyne, and are unlikely to be of commercial value to competitors.

160. Mr Ryan says that such plans are not overtly sensitive and have not been proven to be a "winning formula."

161. We are persuaded, however, given the very detailed information in issue, and its nature, that this information would likely be of benefit to competitors for similar projects in the circumstances as at February 2014. We find there is no strong countervailing public interest in disclosure of what is a very technical document. We consider that the generic public interest considerations have less application to this type of information, and Mr. Ryan has not put forward any specific public interest considerations of any real weight to support disclosure. We accept, therefore, that this material should not be disclosed. It may be that some parts of it could be disclosed without a risk of commercial harm. However, we find that identifying and severing this would be an impractical exercise, and that the more anodyne information that might be disclosed as a result, would be of such limited public interest as to make such an exercise disproportionate.

Schedule 13

162. This schedule deals with hospital equipment and consists of lists of equipment, including a unit price budgeted for each specific piece of equipment, inclusive of installation cost. There are also daily liquidated damages amounts in the event of delays in the delivery of specific items.

163. Carillion say that these lists reveal exactly what it expects to pay for each piece of equipment. Disclosure would be damaging to future negotiations with suppliers of such equipment, as they would not reasonably be expected to offer to supply at a lower price than they knew had been budgeted. Disclosure would also be valuable to competitors who could adjust their future offering accordingly. They would know what sort of "target" figures they had to beat, and they would plan their supply chains and tailor their bids accordingly. Carillion points also to the Commissioner's findings in his Decision Notice (at para 42), in respect of this information, that "there is a real risk that competitors, knowing how pricing is set and the methodologies used by a company will put them at disadvantage in any future tendering for services".

164. At the hearing, the Commissioner accepted that in the case of more highly specialised pieces of equipment (at pages 260, 261, 262-3, and 264 of the closed bundle, for example) the information was properly withheld, but questioned whether the same arguments applied in respect of the more standard items (for example, the lists at pages 265 and 266-271). Carillion argued, however, that some of these items (for example, laundry and kitchen equipment), are in fact highly specialised and sometimes bespoke because of the particular demands of an operating hospital environment (for example, in relation to temperature, speeds and throughput for laundry).

165. Mr. Ryan contended that disclosure of similar information in other contexts has attracted attention because of the apparently excessive costs charged for the supply and installation of simple equipment. Disclosure would help to inform public perception of whether PFI contracts, with their highly specific and lengthy fixed cost provisions, are in fact efficient and reasonable as is often claimed.

166. We have some sympathy with Mr. Ryan's arguments. There is also some implausibility in holding to fixed costs for these items of equipment when they have to be replaced over the life of a contract with an operational period of 32 years. Whether there may be a case for contracts to be written to allow more readily for equipment cost adjustment is not, however, a matter within our remit.

167. There may well be an argument for disclosure after a restricted time period, and indeed Schedule 35 (Part 2, item 4), limits the period of confidentiality of prices for works and services to the extent that this reveals information about the Project Company's or subcontractors' costs, rates, build-ups, forecasts and or profit levels, to 6 years from the date of issue of the pricing details. That would not necessarily include equipment prices if equipment was to be tendered for, and in any event, the 6 years had not expired as at February 2014. In a competitive supply market there should be no reason why potential suppliers would expect to secure the budgeted amount at a future date, especially if the general price of a product has changed over time. However, the issue before us concerns the position as at February 2014, and in particular, the circumstances of the competition for the Sandwell hospital project as at February 2014. We accept that as at that date, disclosure would have been likely to damage Carillion's commercial interests. We accept that there is a public interest in disclosure on the basis of the generic factors set out, above. We do not find that there is a strong public interest in this information, specifically. For these reasons, we find that the public interest in withholding this information outweighs the public interest in disclosure. We also accept Carillion's argument, based on the evidence at the hearing, that some of the apparently less specialised equipment is indeed bespoke. It may be that there could be disclosure of a few items without giving rise to commercial prejudice, but for the same reasons as set out in relation to Schedule 8, Part 8, above, such an exercise would be disproportionate.

168. The liquidated damages provisions did not need to be relied upon – the Project Company delivered on time. As with liquidated damages in the Project Agreement, discussed above, we see no strong public interest in maintaining the exemption, and we find in favor of disclosure.

Schedule 14

169. This schedule is entitled "Service Requirements". Two parts of the document are withheld, namely, Part 2 entitled "Method Statements" and Part 3 entitled "Services Quality Plan". Carillion describes this information as a comprehensive and extremely detailed expression of their know-how in setting up and implementing a PFI hospital project, which would be useful to competitors wishing to emulate Carillion's "winning formula". They say that their arguments are essentially the same as for the Design and Construction Quality Plan. These documents explain in detail how each requirement for the Project will be applied.

170. The Commissioner now considers that the public interest balance favours withholding the information, but considers that some parts could be disclosed without giving rise to potential commercial prejudice.

171. Nevertheless, in the context of the competitive situation as at February 2014, we find that there would likely have been a competitive disadvantage to Carillion in having this material published. The ongoing competition for the potentially similar Sandwell hospital project gives weight to this consideration, and we see no strong specific public interest in disclosure that outweighs it. In line with our finding in relation to Schedule 8, Part 8, above, we find that the public interest balance favors maintaining the exemption.

Schedule 15

172. This is a distinct contract entered into with an external third party, known as the "Independent Tester". As Carillion explains it, it provides expert independent scrutiny of all aspects of the Project.

173. The contract has been disclosed except for four sets of financial figures, namely, the Independent Tester's total fee (page 638); the required minimum professional indemnity insurance (page 639); a schedule of draw-down of fees, and a schedule of daily rates for different categories of staff (pages 640 to 644).

174. Carillion says that together, this data reveals, in detail, the full pricing strategy of the Independent Tester. They say that these fees and rates are a commercial matter between the Project Company and the Independent Tester, and that disclosure would be likely to seriously disadvantage the Independent Tester in negotiations about fees for similar work in future.

175. The Commissioner now accepts that the public interest balance favours maintaining the exemption. Mr Ryan says that no credible arguments have been put forward as to how the business of the Independent Tester will be prejudiced by disclosure.

176. Mr Ryan is right to point out that there is no evidence before us from the Independent Tester as to any actual or potential prejudice to it that might arise from disclosure. However, we accept, as the Commissioner now does, that some prejudice would be likely. We note that confidentiality for the level of PI cover and remuneration contained within the independent tester contract lapses after 12 years (Schedule 35, Part 1, item 7). We accept that there is a case for general transparency of public sector contracts, but there is no overriding case for dictating a shorter period of confidentiality than that agreed between the parties in circumstances where there is no evidence of a strong countervailing public interest reason to accelerate this. Mr Ryan says that the experiences of Hereford hospital where the independent tester failed to detect the fire safety problem, shows how important the role of an independent tester is. However, what is in issue is not the scope of the Independent Tester's role, but certain financial figures. If a problem were to arise, there may well be a strong public interest in disclosure, but that has not happened. In these circumstances, we find that albeit not by a wide margin, the public interest favours maintaining the exemption.

Schedule 18

177. The schedule is entitled Payment Mechanism. The first item of information withheld is the amount of increase to the service payment if the Trust terminates a retail lease.

178. Carillion says this is the sum as an annual value, index linked, for the amount by which the annual service payment would be increased if the Trust exercised its right to terminate the Retail Lease. It shows the price Carillion is prepared to put on one of the income streams associated with the facility. As for other sub elements, Carillion says that disclosure would prejudice its commercial interests.

179. The Commissioner considers that the public interest balance favours maintaining the exemption.

180. We can see a public interest in confidentiality. In the event of termination of a lease, there would need to be an adjustment in the service payment because the Project Company would no longer have the benefit of operating the lease. The sum in

question may also be relevant to any competition to set up alternative arrangements.

181. The second item of Disputed Information in this schedule is from Appendix C, at page 648. It comprises a list of specific services (facilities management, estates and grounds, pest control, help desk, energy, and utilities management. etc), some of which might need to be procured externally, and the expected total cost of each category of service. Carillion say that the same arguments apply as for Schedule 13. The Commissioner considers that the public interest balance favours maintaining the exemption.

182. Non-disclosure of the total service element conceals what part of the annual unitary payment relates to the cost of capital. There is no public interest in maintaining this obscurity. We therefore find in favour of disclosure of the total service cost. This will vary from one PFI project to another, depending on the particular bundle of services provided under the contract and the scale of the tasks involved, so it is not information we find would likely be particularly useful to a competitor for a different contract with a different bundle of services. The case against disclosing the service cost for each item of service provision, estates, grounds, pest control, etc, is not that competitors would learn anything useful, but that bidders for subcontracts would be able to see what provision had been made for the original base date service prices, item by item. The argument is analogous to that presented for the confidentiality of unit costs of equipment in Schedule 13. We find that the public interest balance favours disclosure of the total. Given effective competition for sub-contracts, we find that there is no reason why those bidding would have an unfair advantage if they know the budgeted costs for particular services.

183. The 6-year restriction on confidentiality of service information in Appendix 35, noted above, indicates that the parties themselves recognised the diminishing value of this information. Its confidentiality is no longer protected at the present time, but as at February 2014, there was a stronger case if any sub contracts had not yet been tendered and agreed. We therefore find, and this is a finely balanced decision, that the total in the table at the end of Appendix C should be disclosed, but not the service elements.

Schedule 19

184. This is the most complex item of Disputed Information and has been withheld in its entirety. It was the most strongly contested item of the Disputed Information and has been the focus of the most of the evidence and submissions before us.

185. Mr Ryan sees the Financial Model as the most valuable item of Disputed Information from the perspective of the public interest. He says that the monetary figures presented in the Trust's accounts do not allow him or even experts in this field to calculate the financing costs of the PFI, which he argues is information that should routinely be published and clearly presented. He asks for the whole of the Financial Model to be disclosed. In his words "the money is where the most public interest lies and the money is in the Financial Model" (para 40 of his witness statement). He finds Carillion's reverse position that no part of the Financial Model should be disclosed, even the title page and a list of contents, to be untenable.

186. He reiterates the difficulty he has in making a contents based argument, without being privy to the contents. His "reasonable guess" is that the Financial Model will include costs for individual service packages, profit margins or variants of "rates of return," estimates for inflation, interest, the costs of advisors and legal fees, the costs of construction, repair works, budgets for the next 30 years etc". (para 42 of his witness statement). He argues that whatever it's precise contents, the Financial

Model represents exactly what the project costs, and why. He contends that it is not enough to be told that the Project costs £50m per year; there is a clear and irrefutable public interest in knowing the detail. He argues that this kind of request fills the gap between what the authorities are telling the public and what is actually happening.

187. Carillion's position was set out in Mr Hopkin's skeleton argument dated 21 May 2015, in witness statements and evidence from Mr Travis and Mr Howard, and in a further note from Mr Hopkins dated 1 December 2015 which was intended to assist in finding relevant information within the Financial Model, and brings together Carillion's arguments against disclosure. Mr Hopkins cautions the Tribunal against "adjudicating between competing political judgements about how major construction projects should be delivered', taking a position one way or the other on the merits of PFI, allowing itself to be influenced by irrelevant examples of PFI failures, or endorsing FOIA as a vehicle for a blanket, un-particularised fishing expedition to search speculatively for anything that might be open to legitimate public criticism. It has not been our approach to seek to decide between competing claims as to the value of PFI. It is our role to decide, in balancing the public interest in disclosure against the case for continuing confidentiality, whether there is a significant public interest in releasing information that assists the public, including those with relevant expertise and experience, to reach an informed view. As we have already said (at paragraph 126), we do not agree with Carillion's characterisation of Mr Ryan's efforts.

188. Carillion argues that disclosure of the Financial Model would cause them very significant commercial harm. Competitors would use the model to learn about Carillion's successful and unique financing strategies. They would seek to replicate those strategies in future bids, including (at the time of Mr Ryan's request) for the Sandwell Hospital project, in respect of which bids were being formulated.

189. As to the public interest in disclosure, Carillion submits that there is no real public interest in the disclosure of the contents of the Financial Model, which exhaustively details *inter alia* every aspect of the financial facilities used by Carillion in the Project. Carillion further submits that the Financial Model is an integrated and very complicated whole. It does not lend itself to "carving up."

190. They say that disclosure of the whole model would be disproportionate, of very little use to the general public, and would bring no public benefit commensurate with the risk of damage to Carillion's legitimate private interests. Risks to the private interests of actual and potential PFI providers will operate against the public interest if disclosure were to damage competition, make bidding less competitive, reduce innovation and discourage product improvement as each company seeks to find its own way of introducing a competitive edge over others. In summary, the Second and Third Respondents maintain that the public interest lies in maintaining the exemption. They accept that disclosure would add something to the public's understanding, but argue that it would do much more harm than good.

191. The Commissioner doubts that competitors could make much use of the Financial Model and considers that there is an overriding public interest in disclosure. For the Commissioner, Ms John accepted that the key issue is the specific content, and that a content based approach must be adopted.

192. It is not for us to reach a view on whether the content indicates a cost of capital on the high side or the low side. However, the fact that this is a very large contract in monetary terms, and that the public do not know what the financing cost is when the cost of capital of PFI projects is a much disputed issue, weighs heavily in favour of disclosure. The fundamental difference between PFI and conventional procurement

is that in a PFI contract, the public pays for the cost of private financing rather than the cost public financing. If a £400m capital cost project is going to cost £2bn over the life of the contract, it is very difficult for the public to find out why unless they have information about the financing costs. These cannot be derived from the unitary charge because that pays for a combination of financing costs and servicing. Even if there are no problems with this particular Project Agreement, which has not been long in operation, and even if it is an example of the public authority getting it right and getting a good deal, there is a strong public interest in knowing the financial details. We find it likely that many aspects of the information would not be as useful to competitors as has been claimed. They could not simply copy it. They have their own cost profiles, their own risk profiles, and the risks in any new project will be different. Competitors will have their own pot of cash, their own equity possibilities, their own credit rating and their own borrowing possibilities. They will also have their own financial advisors and will get advice on financial structures most appropriate to their own financial circumstances and the particulars of any new project.

193. The Commissioner accepts that disclosure is commercially sensitive, but not that it will tip the public interest balance towards withholding it.

194. Mr Ryan says that he is simply trying to work out the cost of the Project, and in relation to other methods of procurement (whether or not conventional procurement was an available option). However, the evidence is that this information is not available through other channels, and there has to be a public interest in satisfying a need that is not met elsewhere. The fact that a layman may find it difficult to understand the information is not an argument against disclosure; there are experts who can reach a more informed view.

Our Findings in Relation to the Financial Model

195. We would note first that some of the information in the Financial Model may already be in the public domain.[i] This includes:

- debt structure and amount,
- the identity of lenders,
- rates of interest on debt,
- the fact that the Financial Model features an equity bridge, who funded it, and when it was to be repaid
- capital cost of the build
- the inclusion and extent of interest rate and RPI swaps, and
- the amount of the unitary charge.

196. All had, by early 2014, or have since, appeared in public documents. We are mindful, of course, that we are looking at the position as at February 2014. However, to the extent that any of the information has entered the public domain since then, it undermines Carillion's position as to damage arising from disclosure. We also note, from the terms of clauses 52.2.2 and 52.2.10 of the Project Agreement, that the commercial confidentiality provisions do not apply to information released through audit, company accounts, or released following reports to the Department of Health or Treasury. It may be that neither the Hospital Company, nor the Trust, have published information directly. It may also be that some numbers that are in the public domain do not correspond directly to those in the Financial Model (they may, for example, be in real or nominal terms or at prices based on different years), but we are satisfied that an assiduous researcher can put an incomplete picture together, and that there is enough information in the public domain to disturb the argument that the whole content of the Financial Model is sensitive, or that

disclosing even the headings would be likely to damage Carillion's financial interests.

197. We do not say that Carillion misled the Tribunal. They may not themselves know whether or when something became public if they did not authorise the disclosures that may have occurred. We also do not say that because of these disclosures, the exemption is not engaged. We find that there is enough left of a commercially sensitive nature which has retained its confidential character so as to engage the exemption.

198. We turn now to consider whether disclosure of the Financial Model would be likely to have the adverse effect on Carillion's competitive position as has been claimed.

199. The central factual question is whether competitors could have used disclosure as at February 2014 to take advantage and improve their own bids relative to Carillion's in the Sandwell Hospital competition, or could do so in relation to other PFI competitions for hospital provision that may arise in future. For reasons we have set out earlier in this decision, we place little weight on the argument that competition for prisons and other types of PFI project might be prejudiced by disclosure of the Disputed Information.

200. The claim that serious competitive harm would arise depends on showing that Carillion's financial structure is unique, confidential and likely to be copied by others bidding for projects in a way that erodes Carillion's competitive edge. There was an opportunity for Carillion's witnesses to explain, in closed session if necessary, what exactly was unique about the financial aspects of Carillion's "winning formula". We find that they did not do so to any material extent. Nevertheless, we still need to look at the Financial Model and make an assessment of the public interest balance, based on the evidence and arguments that have been put forward.

201. Carillion's concern is that bids cost a lot to prepare, that success can turn on very fine margins, and that disclosure of the detail will therefore help competitors to anticipate what Carillion will do in future competitions. In his witness statement, Mr Howard sets out information which would be useful to a competitor under several headings. Our broad findings on each heading are as follows:

- Construction and operational costs: As Mr Howard says, the Financial Model is not finely detailed on these matters, and we have noted that the contractual protection of confidentiality on certain elements of cost expires after 6 years. On the headline numbers, it is hard to see that by 2014, competitors would not have broadly known the final construction costs (it is published in several places, including at page 1 of the Appointment Business Case of 2009 which states that "The hospital is 110,000sqm and has an out-turn capital value of £435m").

- Financing costs: We find that extensive information on borrowing terms, interest rates and sources is available in annual hospital company accounts (we have been provided these to end 2014).

- Shareholder investment returns: Ms Woodward's evidence (see endnote (viii) below), suggests that IRRs for PFI projects throughout the country have been reported in returns to the Department of Health, with IRRs for some contracts held back where the commercial party to particular PFI contracts have relied on contractual terms as to confidentiality to protect them. It is not for us to comment on whether this is a satisfactory state of affairs. Clearly, the profitability of PFI contracts is a matter of public interest because it is central to the question whether the extra financing costs of PFI are

worthwhile. Whatever inconsistencies there may be in public reporting, the issue for us is in relation to this particular Project. As we have already noted, contractual provisions as to confidentiality, while relevant, are not determinative in the public interest balancing exercise.

- Structure of the financing support: Structural features mentioned by Mr Howard include the possibility of additional financial support in the form of bonds or guarantees from financial institutions, and the inclusion of an equity bridge. Both are mentioned in open documents. Mr Howard said that the equity bridge for the Project was new to Carillion and has been used again since. However, almost all PFI schemes face and must find solutions to the same problem. Payment by the procuring body for construction under PFI is not made up-front as in conventional procurement. The unitary charge starts only when the asset is available for use. The basic problem of a period of cash outflows without cash receipts must be tackled one way or another in every PFI scheme. To get through the period when there is no incoming payment, each scheme must have some solution for meeting its cash flow needs in order to be solvent. The cash must come from some combination of senior debt, or owner's cash in the form of equity, or subordinate debt supplied or borrowed for the purpose, or a Government stake or loan. The fact that Carillion used an equity bridge was not secret, as it is mentioned in both the Appointment Business Case and the Confirming Business Case. More detailed information is available in the annual accounts of the Hospital Company. Having thus been disclosed, this information ceases to be confidential under the terms of the Project Agreement.

- On the approach to pricing of other aspects of the Project such as bid fees and management services, we note that bid fees have been cited by the Treasury as one reason why PFI costs more than conventional procurement. They are, therefore, a matter of public interest. Management costs may be sensitive while any associated subcontracts are being set up, but again such sensitivity is time limited.

- On timing, Mr Howard accepts that the age of financial information is relevant to its sensitivity, but draws attention to the continued relevance of the information to future PFI competitions. This appears to extend to an argument for indefinite protection while there is a possibility of further PFI competitions. We accept the relevance to the Sandwell hospital competition, but to a much lesser extent the more general concerns about the relevance to possible prison contracts.

202. We turn to more specific considerations about debt costs, equity returns, and Project and Equity IRR. There was, in this case, a Preferred Bidder Debt Funding Competition ("PBDFC") to test the market immediately before financial close and in the light of the details of the Project, and the financial situation at the time. The competition leading to the selection of a preferred bidder is not the same as the market testing of debt financing after a preferred bidder has been selected.[ii] So the issue that impacts on competition is whether, if competitors knew in great detail what financial terms Carillion had in earlier competitions, they could apply that information to a bid that makes their initial tender in a subsequent competition more attractive on price than Carillion's. Clearly, they cannot simply transfer information about financing drawn from earlier competitions in order to undercut their rivals. Their initial offer must depend on what finance costs they have, based on their own track record, and on the financial market conditions at the time. The financial details required are extensively prescribed by the commissioning party on advice from the Treasury and Department of Health, and settled on the basis of current market testing which takes place after the preferred bidder is selected. A competitor could

derive some guidance from the IRR settled in earlier projects. For some projects this will have been published, for others not. In any case, the IRRs will be one of the matters finalised in a debt competition because the composition of debt (senior and subordinate), and the bearing on shareholder's risk are part of the overall financial structure. This applies whether or not, in the Sandwell hospital case, there was a separate competition for equity[iii]

203. For all these reasons, we find that as at February 2014, disclosure of financial terms and such financial information as contained in a 2009 financial model would have had limited impact in terms of competition and market distortion. Quite apart from the fact that the commissioning party in respect of any new project will have its own extensive and detailed specification as to financial details, we find that interest rates, returns on equity etc, in an earlier financial model will likely have been overtaken by developments in financial markets. The greater the passage of time, the less relevant earlier outcomes would become. [iv]

204. The details of the Financial Model for this Project continues to have an important impact on any future commercial negotiations between parties over contract terms into the future, and we consider this to be a matter of strong public interest favouring disclosure. In particular, the structures of interest rate and RPI swaps carry a significant redemption cost if refinancing or early termination become an issue. Mr Howard says (in his witness statement at para 34), that the parties need to be able to conduct such negotiations away from the public gaze. However, in our view, confidentiality of negotiations is quite a different matter from confidentiality of contract terms. The significant costs of securing stability in the financing component of the unitary charge, and hence a degree of predictability in relation to its share of claims on the Trust's future resources carries a potential redemption cost. This would be relevant to any future issues on refinancing or termination. Such hedging costs are a notable feature of this Project, and are common according to the National Audit Office. They are part of the additional financing cost of PFI compared to the up-front payment in conventional public procurement. We found the witness evidence to the effect that the financial provisions were locked in and unchangeable puzzling. Although Mr Travis said (see paragraph 58 above), that refinancing was not an option for this Project, Schedule 29 indicates the terms on which refinancing can be initiated, the role of the Trust and the Hospital Company, and the extent to which the Trust can benefit from any reduction in costs. Insertion of these provisions dates from the debt funding competition.[v]

205. We find, in short, that Carillion have not shown what is unique about their equity bridge approach, or about their Financial Model as a whole. They have not shown that competitors would be likely to want to use Carillion's template of how to finance a winning PFI hospital bid. They have also not shown that imitation by others to any material extent would be likely or even feasible, given the extent to which detailed financial requirements are laid down by the commissioning party in each major competition. To the extent that financial details comply with requirements prescribed by the Trust in public documents, it is not in any event, confidential.

The Public Interest in Disclosure of the Financial Model

206. The public interest in disclosure lies largely in terms of greater public understanding and accountability. Disclosure would afford the public an opportunity to understand the financing cost and terms. We are satisfied, on the basis of Mr Ryan's evidence, which was unchallenged in this regard, that the public have no way, or no straightforward way, of finding out how profitable the Project is to Carillion. Rates of return and other financing costs are not published in any coordinated national statistics. Technical treatment of profitability is certainly complex, and IRRs can take different forms with different target rates of return to different participants in the

financing of a project. Annual Treasury data does not assist the public to understand the cost of capital because it does not distinguish between the service and non-service components in the unitary charge.[vi] For all these reasons, we find that disclosure of the Financial Model would materially increase the opportunity the public will have to understand the profitability and financing costs of the Project.

207. In our view, Mr Hopkins is right to say that the Financial Model cannot alone answer Mr Ryan's questions on value for money. However, we consider that it would give him and other members of the public a truer picture of the financial aspects of the Project, and allow calculation of the additional cost of private finance over public finance. Put together with other information about efficiency gains and improvements (which we agree cannot be found in the Financial Model), disclosure would enable more informed criticism, and therefore stronger accountability. It would enable comparisons to be made with financing costs of other projects and in other sectors. It would also enable a better understanding of the financial detail of options for refinancing or buying out PFI projects. We accept that the average member of the public may not understand the Financial Model, but we also agree with Mr Ryan that there are experts who will be able to make an informed assessment.

208. Mr Ryan provided a body of academic material[vii] which, unsurprisingly, given that he had made the selection, tend to question the merits of PFI. A number of those concerns could better assessed, or rebutted, in connection with this Project, if the Financial Model were disclosed. Examples of such concerns are that the value for money assessment can be manipulated by cherry picking or fine tuning different inputs to produce a positive result, that the limited number of contenders for complex PFI projects limits competition, that preferred bidders can take advantage of the post selection processes to transfer risks back to the public sector, that the complexity of processes drives up costs, and that the indexation factors used and the profiling of repayment of senior and subordinate debt, can be manipulated so as to produce an unreasonable rate of profitability for the owners of equity across the whole life of a project, and more particularly in the final few years, when senior debt has been paid off, give very high returns in relation to the initial investment. Disclosure of the Financial Model would significantly assist the public's understanding of such issues.

209. A further set of concerns is that even if reasonable at the moment of financial close and through the subsequent construction phase, financial returns are set by contract for the whole life of the Project, subject to refinancing rules set out in the Project Agreement. There is National Audit Office and Treasury evidence and analysis to the effect that the inclusion of hedging or swaps within financial arrangements can make buy out or refinancing, even if technically available within contract terms, more and potentially prohibitively expensive[viii]**.** Disclosure of the whole Financial Model would support accountability on these matters as well.

210. Carillion's case that disclosure of the Financial Model would harm the public interest relies materially on the argument that disclosure would harm their competitive edge, and would, in turn, discourage innovation, lead to a lowering of standards, and reduce improvements within the PFI industry, generally. We are not persuaded that disclosure would have that effect. We also do not consider that there would be an adverse effect on the cost of capital. The aim of the debt competition is to find the lowest rates of return at which an efficient company can make a reasonable return on capital and the debt or equity provider is still willing to invest.

211. We also note, as we did at the hearing, that there appears to be a stark contrast between the process of arriving at the cost of capital in the world of PFI, on the one hand, and in the regulated utility sector on the other. In the latter, there is open debate based on knowledge of the returns settled in recent regulatory decisions and

the rates at which companies have been able to finance and refinance their capital spending needs. The cost of capital for regulated utilities is consistently lower than that allowed for PFI projects.[ix] A track record of allowed utility returns is available to the public and there is a possibility of informed debate. If PFI rates of return are concealed for the life of the contract (in this case for 30 years), the information will be more accessible to investors and providers of debt and the secondary market, than to the paying public. The uneven nature of disclosure is evident in the difficulty of compiling public statistics (the National Audit Office seems to have needed to assemble information by checking published accounts). There is a public interest in comparative information being more readily available.

212. Also, a fixed price PFI financial deal, if closed to public view for 30 or so years, affords limited scope for correction or review, in the event of mistakes or failure to predict future movement in market rates if it should turn out that there is a material difference between the forward allowed rates of return and the actual cost of raising and refinancing debt. We consider that this is not in the public interest.

213. In short, we strongly disagree with Carillion's submission that there is no real public interest in the disclosure of the Financial Model. For the reasons we have given, we see a significant public interest in disclosure, as against a very limited risk of public harm through a race to the bottom on quality or driving out innovation, and private harm which is much less certain and extensive than Carillion asserts. For all these reasons, we find in favour of disclosure of the Financial Model.

Other Points

214. We have considered the argument that however strong the case for disclosure of the Financial Model may be, one-sided disclosure by a single company would be disproportionate and unfair. However, the only question before us is about disclosure of the Financial Model, and for the reasons given, we have found that the balance of public interest favours disclosure.

215. We have also considered whether there is scope for disclosure of only selected details from the Financial Model, for example, a subset of headlines or other information, to address more specifically, the key areas of public interest. However, this would involve a selection based on a subjective judgement of what is most likely to serve the public interest, and may overlook details that may be of significant interest to expert analysts. On careful consideration, we agree with Carillion to this extent at least, that the Financial Model is a very complicated whole which does not easily lend itself to carving up. It is of course not our role to construct information, but to decide whether the Disputed Information should be disclosed We therefore direct disclosure of the whole of the Financial Model. Where particular details appear which we have accepted elsewhere in this decision should not be disclosed, those details can be redacted.

216. As regards the form in which the Financial Model should be disclosed, Mr Ryan prefers disclosure in excel spreadsheet form. That is likely to be the most practicable form of disclosure, involving the least cost. It is the form in which we received it. In his witness statement (at para 5), Mr Howard referred to the impracticability of printing the document. We consider that the Financial Model should be disclosed in the same digital form as was received by us. The parties can make an application for directions about this, if needed.

217. Finally, our decision as set out above on the Financial Model decides the two items of redaction in Schedule 23 (the Project IRR), and Schedule 29 (the threshold equity IRR). Both should be disclosed, for the same reasons as apply to the Financial Model as a whole.

Schedule 21

218. This schedule is entitled Required Insurances. A single figure has been redacted taken from the Financial Model. This is the base cost of insurance for aspects of the Project.

219. Carillion say that the figure is based on its track record and the specifics of the Project. They point out that it is covered by the confidential information provisions in schedule 35 to the Project Agreement, which they say indicates the commercial sensitivity of the figure to the parties. They argue that there is very little public interest in disclosure. The public could not interrogate or understand the figure, but competitors would gain very valuable information from it, which would be useful to them in tailoring future tenders.

220. Schedule 35 (part 1, item 5), protects the confidentiality of references to insurance amounts in Schedule 21 until the earlier of 6 years from the commencement date or the termination date. The period of protection has now ended. As to disclosure as at February 2014, the number will have been both specific to Carillion's track record and bespoke to the Project. It is not easy to see how competitors, with their own track record and in respect of a different project, could arrange to improve on it, by knowing the figure.

221. References to insurance amounts are listed in Schedule 35, (part 1, item 4), as confidential for a period ending 6 years after the commencement date of the Project Agreement. They are an indicator of the extent to which certain risks have been offset and are therefore, in our view, of public interest.

222. For all these reasons, we find that disclosure would not have been damaging in the way claimed, and that the public interest favours disclosure.

Schedule 22

223. This schedule is entitled Variation Procedure. It contains four elements of Disputed Information:

- Provisions for small works (at page 681), which relates to cost of works in the event of variations;
- Rates for dealing with asbestos (at page 682-4);
- Schedule for ad hoc small works (at page 685-6); and
- Supply and fit rates for small works (at page 687).

224. Carillion describe the small works provisions as the Project Company's mark up or profit margin on certain categories of works. They say that if known to competitors, it would be used by them to tailor their bids for comparable future projects. Mr Ryan says that disclosure of similar material in other PFI contracts has revealed some extraordinarily expensive provision for the cost of fitting everyday items and other small works, raising value for money issues.

225. The Commissioner accepts that this information is appropriately redacted, on the basis that the same reasoning applies here as to Schedule 13 (in relation to hospital equipment), and Schedule 18 (in relation to costs for individual services, though not the total for such services).

226. We agree that this information is comparable to equipment and services costs. Were we making a decision on the impact of disclosure today, we would find in favor of disclosure. Indeed, after six years, it may no longer be protected under the terms of the contract as a result of Schedule 35, Part 2, Item 4. However, we accept that the information could have been useful to competitors if released as at February 2014, and we find, in the absence of any countervailing or equivalent public interest in disclosure, that as at that date, the public interest in withholding the information outweighed the case for disclosure.

Schedule 23

227. The schedule is entitled Compensation on Termination. There is one item of Disputed Information, namely, the Project IRR (at page 690), taken from the Financial Model.

228. As set out at paragraph 217 above, and the fact that returns on both debt and equity are already in the public domain, we find in favour of disclosure of this information.

Schedule 29

229. The schedule is entitled Refinancing. There is one item of Disputed Information, namely the Threshold Equity IRR (at page 693). Carillion say that this is a variant on the Project IRR, here calculated by reference to Carillion's equity funding.

230. We have dealt with this in the context of the Financial Model, above. We have accepted that the public has no convenient way of finding out the level of profitability of a PFI project. Ms Woodward, in her witness statement at para 37 (reproduced in endnote vi below), reports that for PFI projects across the country, equity and project IRRs have been reported selectively by the Department of Health, but that this does not happen for projects where the parties maintain the confidentiality of this information. IRRs are not reported in the Treasury's annual spreadsheet.

231. IRRs are a key measure of profitability, and will take various forms including the rate of return on equity overall, and the target rate of return to individual holders of equity. They may be made up partly from the permitted interest on shareholder subordinate debt. There will also be a project or blended IRR taking account of returns on senior debt, equivalent, as Mr Howard confirmed, to the weighted average cost of capital that is a common measure in utility regulation.

232. We find that disclosure of this information would enhance the public's understanding and promote accountability. We also find, given the separate and highly prescriptive arrangements for settling financial detail after a preferred bidder has been selected and in the light of market testing and current financial market data immediately prior to financial close, that disclosure will not cause material harm to Carillion's interests or to its participation in competition for future projects. We do not accept that a contractual provision as to confidentiality, inserted in this case, but apparently not in many others, should be afforded such weight so as to tilt the balance away from disclosure.

233. For all these reasons we find that that the public interest in disclosing the information outweighs any private interest in keeping it confidential.

Summary of Findings

234. For convenience, we have set out our decision as regards the individual items of information comprising the Disputed Information.

Document	Decision
Project Agreement • Clause 19.1B • Clauses 35A.1 and 35A.2. • Clause 35A.15.	 Disclose Disclose Disclose
Schedule 8 • Schedule 8, Part 4. • Schedule 8, Part 8.	 Withhold Withhold
Schedule 13 (Equipment) • Equipment • Liquidated damages	 Withhold Disclose
Schedule 14 (Service Requirements)	Withhold
Schedule 15 (Independent Tester Contract)	Withhold
Schedule 18 (Payment Mechanism)	Disclose total but not individual service elements.
Schedule 19 (Financial Model)	Disclose in full
Schedule 21 (Insurances)	Disclose
Schedule 22 (Variation Procedure)	Withhold

Schedule 23 (Compensation on Termination)	Disclose
Schedule 29 (Refinancing)	Disclose

Signed
Anisa Dhanji
Judge **Date: 26 June 2016**

ENDNOTES

Given the large volume of evidence that has been involved in this appeal, these endnotes set out some of the key sources for some of the evidence referred to in the decision. They are for convenience only and are not intended to show all the sources for all the evidence.

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[i] Information in the public domain on various components of the Financial Model

- Borrowing and interest, hedging agreements and equity bridge loan

  Accounts for the Hospital Company, lodged at Companies House for 2014 and reproduced as an annex to Mr Ryan's witness statement show that:

  - Term loan facilities are provided by Lloyd's bank (£255m) and the European Investment Bank (£248.6m) at 5.93% nominal interest rate), repayable in 60 instalments commencing March 2015.

  - The company has entered interest hedging agreements to be applied to the expected future borrowings under the agreements. For the term loan facility provided by Lloyd's bank there are 5 hedging agreements with Lloyd's, Royal Bank of Scotland, National Australia Bank, Credit Agricole and Societe Generale, all fixing the interest rate at 4.728%.

  - The equity bridge loan is provided by Lloyd's Bank plc and is repayable in one instalment on 30 September 2015.

  The same document has data on tax, total financial assets and liabilities, certain fees, interest swaps, RPI swaps and other matters.

- Capital cost and service element of unitary charge

  North Bristol NHS Annual Accounts 2014-15 reproduced as an annex to Mr Ryan's witness statement (at page 243) refers to the Brunel Hospital as fully operational since 26 March 2014, at a "total construction cost recognised in the accounts to date of these two assets (ie hospital and multi-story car park operating since 2011) of £431.250m

  Service element of the unitary charge for 2014/15 was £6.648m (as well as being subject to the movements in RPI, this element can change as a result of service or performance variations)

- Capital cost and annual predicted nominal value of unitary charge

  The annually revised Treasury spreadsheet on current PFI projects in operation (which was not included in the bundles in paper form but we were referred to it) confirms that:

  - The Project has a Capital value of £430m
  - The unitary charge for each year given in predicted nominal terms rises from £43m for the first year to £94m for 2045-46 and £48m for following half year
  - The sum of these unitary payments (not in table but calculated from table) is £2,117m
  - The first equity holder is Carillion (50%)
  - The second equity holder Aberdeen Asset Management (50%)

- Debt and other details from National Audit Office table of 10 SPVs with the highest debt (see page 231 of Mr Ryan's witness statement) shows the following in connection with the Project:

    - Capital value as at financial close; £0.4bn
    - Debt: £483.5m
    - Annual interest paid: £32m
    - Cash; £0.1m
    - Swap Liability: £118m
    - Debt to capital value ratio: 110%

[ii] **Terms of Preferred Bidder Debt Funding Competition**

The terms of the PBDFC are described at section 8.5 and 12 of the Appointment Business Case.

[iii] **Trust's requirements as to financial detail**

Ms Woodward describes this process at para 24 of her witness statement.

The extent to which the Trust prescribed the funding terms is set out in the Appointment Business Case, in particular at section 12, which includes tables giving required financial detail for bank debt terms and bond terms and two financial models to be tested, in 8 pages of precisely specified terms. These terms express the Trust's requirements rather than Carillion's choices.

The Trust's prescribed terms include details of front end fees, commitment fees, agency fees, gearing, duration of construction and contract period, duration of term loan and equity bridge loan, minimum financial covenants required. The duration of the equity bridge facility is prescribed and there is a requirement that it should be supported by a parent company guarantee and a bank letter of credit from a bank rated A-/A3 or better. Details of discount rates, buffer, Libor swap rates, Libor swap counter party credit margin, with similar details required for RPI swap rates. Required cash balances are also set out. Section 12.5 specifies bond terms in similar detail. Section 12.6 prescribes a mandatory variant bid.

Section 12.8 reports that the preferred bidder has used an equity bridge facility to reduce the cost of funds. There is a brief description in Section 12.10 of the steps taken to review the financial model as presented. This is done by the Trust's financial advisors who assess that inputs are consistent with accountancy guidelines, is tax efficient and the Trust receives full benefit from composite trading provisions. They also assess whether inputs are consistent with the capital, life cycle and other costs submitted by Carillion. Some detail, in particular on tax, is certified by Carillion's financial advisors (HSBC). The bid documentation and relevant sections of the financial model are then tested and benchmarked against other similar sized schemes. The value for money review at this stage (June 2009), considered the Project IRR and blended return from the equity/subordinated debt package and confirms that the elements of the funding package not subject to the funding competition represent value for money. It is the funding competition that ensures that the funding terms at Financial Close represent optimum value for money and that the form of funding is the best available. At the point of financial close, the cost of funds and interest rates are benchmarked to ensure the value for money position provided is acceptable.

[iv] **Information on PBDFC for the Project**

Ms Woodward refers to this process at para 24 of her witness statement.

Further information is set out in the three versions of the Business Case referred to at para 40 of the decision, namely, the:

- Outline Business Case (OBC), March 2007
- Appointment Business Case (ABC), August 2007
- Confirming Business Case (CBC), November 2009

The ABC contains information about Carillion's approach including their equity bridge facility from 2007. The CBC gives significant detail about the PBDFC which involved exposing financial details to 16 banks. Both documents redact certain financial information considered sensitive but they also reveal how far both the structure and content of the Financial Model were prescribed by the Trust.

[v] **Refinancing**

The insertions can be traced at CBC at Appendix I (pages 27 and 28):

> *"Insertion of Trust share of a Refinancing Gain of: 50% of up to £1 million Refinancing Gain;□60% of up to £3 million Refinancing Gain; and 70% of any other Refinancing Gain."*
>
> *"Insertion of new paragraph that Project Co shall notify the Trust of all Notifiable Financings, and include a provision in the Funding Agreements whereby it is entitled to be informed of any proposal which the Senior Lenders have to refinance the Funding Agreements".*
>
> *"Insertion of new paragraph relating to the Trust's right to request refinancing where it considers the funding terms generally available in the market are more favourable than those reflected in the Funding Agreements."*
>
> These entries are described as "Incorporation of latest HMT/SOPC4 guidance. They are recognisable in Schedule 29 of the Project Agreement.

[vi] **Information provided to the Department of Health on proportion of operating to finance costs and on Equity and Project IRRs**

Ms Woodward's witness statement at para 35 states that:

> "The Trust is required to make an annual return to the Department of Health which includes generic details of the Project … It also includes the proportion of operating to finance costs, details of the unitary charge value and the equity share ownership in Project Co."

At para 37, on information provided to Select Committees, she states:

> "Whereas I am not aware (and those colleagues that I consulted were not aware) of any information being provided by the Trust directly to the Select Committee, I am advised by the DH that they have previously submitted details of Equity and Project IRRs for PFI schemes throughout the country. However, it is noted that this information is only included where it is provided by the contracting authority for the relevant scheme. Some entries are marked "Commercial in Confidence" where the relevant Trust, on the advice of the counterparties to the PFI contract, does not wish to disclose that information for that reason"

[vii] **Academic analysis and concerns**

Paragraph 190 of Mr Ryan's Submission and Skeleton states:

> "One of the most difficult problems with PFI is that where there have been such issues identified with the inputs to the financial models used, it is next to impossible to actually make a meaningful comparison between projects precisely because it is so difficult to get access to even basic financial information such as the Internal Rates of Return, interest rates, swaps arrangements, senior vs subordinate debt arrangements etc."

He attaches examples of two such analyses:

- Jim and Margaret Cuthbert: Comparison of PFI and Public Funding, 2008
- Mark Hellowell: The UK's Public Finance Initiative: History, Evaluation and Prospects, 2010
-

[viii] **Cost of buying out swaps**:

National Audit Office, *The Choice of Finance for Capital Investment*, reproduced as an annex to Mr Ryan's witness statement (page 227) states:

> *"We reviewed the most recently available accounts more than 150 SPVs filed at Companies House. We estimate that the SPVs are collectively holding around £4 billion in cash. These companies are not in public ownership, so there is little, if any, scope to achieve efficiency savings from centralised management of working capital, for example via the Government Banking Service. Many SPVs have used a combination of bank loans and interest rate swaps to obtain long term financing at fixed rates and protection against higher borrowing costs if interest rates increase. We estimate that these swaps are currently about £6 billion out of the money (if the shareholders wanted to buy-out the contract this payment would be required to exit the swaps). We believe the total swap liability may exceed £6 billion because more than 25% of the sampled SPVs which used swaps and other hedging instruments did not disclose the liability in their accounts".*

[ix] **Regulated Utility Returns on Capital**

For comparison of PFI and Regulated Utility cost of capital and other information on value for money and choice of capital, see National Audit Office's *Review of the Value for Money Process for PFI* – October 2014 reproduced as an annex to Mr Ryan's witness statement (at pages 138 to 174), and the National Audit Office's briefing on *The Choice of Finance for Capital Investment*, March 2015, reproduced as an annex to Mr Ryan's witness statement (pages 177 to 233).

Paras 5 to 9 of Appendix One of *Choice of Finance for Capital Investment*, compares capital costs by type of funding. Private finance costs were approximately double the cost of long term Government borrowing in the period under review (up to 2001), and the cost of PFI was 2.4% higher than a benchmark utility rate. Reasons are discussed including high unsuccessful bid costs, cost of swaps and limited competition, resulting in excess returns.