



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

**Appeal Reference: EA/2018/0001
EA/2018/0002**

**Heard at East London Tribunal Hearing Centre
On 23 May 2018
Panel Deliberations 13 June 2018 and 26 November 2018
Representation:
Appellant: (Department of Health): Azeem Suterwalla (Counsel)
First Respondent: (The Information Commissioner): Zoe Gannon (Counsel)**

Before

JUDGE BUCKLEY

HENRY FITZHUGH NIGEL WATSON

Between

THE DEPARTMENT OF HEALTH

and

THE INFORMATION COMMISSIONER

Appellant

Respondent

CLOSED ANNEX TO DECISION
CORRECTED UNDER RULE 40 AND AMENDED PURSUANT TO THE
DIRECTION OF THE UPPER TRIBUNAL IN GIA/1552/2019 & GIA/1553/2019

REDACTED VERSION FOR RELEASE

REDACTED VERSION FOR RELEASE

1. A redacted version of the closed annex will be released but not until 35 days have elapsed after the promulgation of this decision or until after the conclusion of any further appeal in this case.
2. The drafts are referred to in this decision as drafts A-F:
 - 2.1.1.1.1. Draft A **REDACTED**
 - 2.1.1.1.2. Draft B (draft number 35 dated 1 February 2016)
 - 2.1.1.1.3. Draft C (official draft dated 5 February 2016)
 - 2.1.1.1.4. Draft D (draft number 68 dated 4 July 2016)
 - 2.1.1.1.5. Draft E (official draft dated 6 July 2016)
 - 2.1.1.1.6. Draft F (official draft dated August 2016)

REDACTED

3. **REDACTED**

4. **REDACTED**

Closed evidence

REDACTED

5. **REDACTED**

6. **REDACTED**

7. **REDACTED**

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REDACTED

31. **REDACTED**

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39. REDACTED

REDACTED

40. REDACTED

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41. REDACTED

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42. REDACTED

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50. **REDACTED**

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62. **REDACTED**

63. **REDACTED**

64. **REDACTED**

65. **REDACTED**

66. **REDACTED**

Closed discussion and conclusions

ISSUE 3: Was the policy live at the relevant date?

67. We accept that all **REDACTED** specific policies or initiatives listed in paragraph 19 of Mr Sangster’s witness statement have been worked on at some point since the Plan was published, some extensively.

68. REDACTED

69. REDACTED

70. REDACTED

71. REDACTED

72. REDACTED

73. In the absence of detailed evidence or submissions on the state of the other specific policies contained in the drafts at the relevant date, we have assumed that policy formulation or development work was live to some extent because it came under the umbrella of obesity, but we have given this more weight where we were given specific evidence on the state of ongoing policy formulation or development work.

ISSUE 4: *On the facts, does the public interest in maintaining the exemption outweigh the public interest in disclosure in relation to the entire document irrespective of content, due to the status or nature of the document as a working or official draft?*

74. In support of the approach set out in the open decision we note that Draft F, which appears in the closed bundle at p 233 is, as far as we can tell, identical to the published Plan save for the words ‘and independently monitored’ which have been removed in the published Plan. Those words appear in line 4 of the first paragraph under the heading ‘taking out 20% of sugar in products’ on p 236 of the Closed Bundle. They are not in the equivalent paragraph on p 377 in the Open Bundle. The Tribunal cannot identify any other differences. Unless the contents-based approach is adopted this would be irrelevant to assessing the public interests in disclosing or withholding this draft, which cannot be right.

ISSUE 5: *On the facts, does the public interest in maintaining the exemption outweigh the public interest in disclosure in relation to the specific contents of the document/the information contained in the document?*

75. We do not accept that the general negative impression created by either the length of the previous drafts or the greater number of measures contained in the previous drafts carries much weight. It is unlikely to impact on the policy development process. Providing a short statement to explain this will take some time, but not a disproportionate amount.

76. REDACTED

77. REDACTED

78. REDACTED

79. REDACTED

80. REDACTED

81. REDACTED

82. In relation to Draft F, we find that none of the harm highlighted by the Department would flow from the disclosure of this draft. None of the policies in it were live at the relevant point. Any harm such as chilling effects caused purely by the disclosure of 'a draft' are caused by the FOIA itself and we discount them. Although policy development in the area of obesity in general was live, we cannot see what harm could be caused to the development of policy by the disclosure of this draft. We find therefore that there is very limited, if any, public interest in maintaining the exemption. On the other side, the public interest in disclosure is much diminished because the draft is virtually identical to the published Plan. It may inform public debate a small amount to know that the words 'independently monitored' had been removed. Overall, we conclude that the interests in relation to Draft F are evenly balanced and therefore the public interest in maintaining the exemption does not outweigh the public interest in disclosing Draft F.

83. In making decisions about which information to disclose we have not had the benefit of further evidence or submissions addressing the specific information contained in the drafts. The parties were given the opportunity to provide this evidence and/or submissions but declined to do so and/or provided very limited further submissions. We have therefore proceeded on the basis of the evidence available to us, but we note that this did not specifically address all of the information contained in the drafts. For example, neither party highlighted at any point the fact that Draft F is, apart from one sentence, identical to the final published Plan.

84. We note that drafts B and C are very similar to each other and so are drafts D and E. Where they differ, we have considered the differences and reached the necessary conclusions. We have assessed the information in drafts B-E and categorised it as 'No longer live', 'Lower risk of harm' or 'Live and harm'. A description of and our conclusions on each of these categories follow.

No longer live

85. This information relates to policies that were announced in the draft Plan or, in the case of calorie reformulation, before the relevant date. We have not heard any evidence that leads us to conclude that policy formulation or

development was ongoing in relation to any of these policies at the relevant date, save for **REDACTED** academies, which we have placed in a different category. We accept that policy formulation or development on obesity was ongoing in general at the relevant date.

86. The public interest in maintaining a safe space is much reduced in relation to these policies even though policy formulation or development work was still ongoing in this general area. There is no risk of prejudicing policy formulation or development on these specific policies by, for example, revealing the government's hand. Any effect on the formulation or development of future policies flowing from the fear of disclosure flows from the FOIA itself.
87. We accept that the government may face scrutiny if changes have been made to these policies and may have to spend some resources dealing with that, but we do not think that this weighs heavily in favour of maintaining the exemption.
88. In relation to the soft drinks levy, we do not accept that any information contained in these drafts reveals any details that could be harmful to policy formulation or development. **REDACTED**
89. We accept that the public interest in disclosure is reduced because these policies have been announced and therefore the ability for the public to have an impact on the steps the government takes is reduced. We accept that some of the information relating to these policies is contained in the Plan and therefore is in the public domain.
90. However, this is an issue which impacts on a large number of people as individuals and families and has a huge impact on the resources of the NHS. Some of the information on the policies that were announced in the Plan is fuller in the previous drafts, some of it takes a different approach to that finally adopted. We find that there remains plenty of information in relation to these policies in the drafts that could contribute to a better-informed public debate. We find that the public debate would have been informed by the release of this information, because it casts light on how the policy that was announced was developed. We also take account of the more general points on transparency etc and weigh them in the balance.
91. Overall, we conclude that the public interest in maintaining the exemption is outweighed by the public interest in disclosure in relation to the information that we have categorised as 'no longer live' in the table below.

Lower risk of harm

92. This is information that relates to policies on which formulation or development was potentially still 'live' at the relevant date to a varying extent. With a few exceptions dealt with below we have not heard any evidence or had submissions in relation to the *extent* of policy development or formulation in relation to the specific policies in this category at the relevant date. We know from Mr Sangster's evidence that some proposals had been 'paused' and therefore would not, in our view, have been live at the relevant date. Again, subject to the same exceptions, we have heard no evidence or submissions about any particular harm which might result from the release of any particular information falling within this category, unless it is evidence or submissions that we have rejected.
93. We did hear detailed evidence on the ongoing work on academies. We concluded that this was largely implementation **REDACTED**, but we accept that to some extent policy development and formulation was ongoing **REDACTED** We have concluded that the disclosure of the particular information on academies in drafts B, C, D and E, which goes no further than that in the published Plan, is highly unlikely to result in any of the harm identified by the Department.
94. We also heard evidence on the ongoing policy development in schools and local authorities. This was said to be more nebulous, rather than about a specific policy. Having reviewed the information in the draft plans in this area, we have placed information in this category where we think it is unlikely that the potential harm identified by the Department will flow from its release. As set out in paragraph 145 of our open decision, we think that there is a low risk that disclosure of earlier drafts would affect the government's ability to persuade stakeholders that it was serious about tackling obesity, or that it was not taking discussions with them seriously because those measures did not appear in a particular draft. Stakeholders will understand the nature of a draft and, if necessary, with a short explanation from the Department, will appreciate that it is a snapshot of the process.
95. Some of the information that falls into this category is a summary of the relevant evidence. Some of it consists of broad high-level statements of intent. None of it consists of detailed discussion of policy options. Having considered all this information in detail and in its context, we conclude that disclosure of this information is highly unlikely to result in any of the harm identified by the Department.
96. There has always been a risk that information falling within the scope of s35(a) would be disclosed, even while policy formulation or development was still live. This risk flows from the fact that this is a qualified exemption under FOIA. Any consequences that the Department has identified as flowing from fears of the risk of disclosure flow, in the Tribunal's view, from

FOIA itself. We do not accept that the mere fact that part of a draft plan has been disclosed will have any chilling effect over and above any chilling effect caused by the FOIA itself.

97. The public interest in the disclosure of some of this information is reduced because of its relatively anodyne content, but we find that the public debate would have been informed to a greater or lesser extent by the release of all of this information.

98. Given the limited potential for harm and the significant impact of measures on the public in terms of the cost to the NHS and the number of individuals and families directly affected, we find that the public interest in disclosure outweighs the public interest in maintaining the exemption in relation to information falling within this category.

REDACTED

99. **REDACTED**

100. **REDACTED**

REDACTED

101. **REDACTED**

REDACTED

102. **REDACTED**

REDACTED

103. **REDACTED**

104. **REDACTED¹**

105. **REDACTED**

106. **REDACTED**

107. **REDACTED**

REDACTED

108. **REDACTED**

Identifying the information to disclose

¹REDACTED

109. **Draft A** should be withheld in its entirety. **Draft F** should be disclosed in its entirety.
110. The following table identifies the category in which the information in drafts B-E falls and specifies whether this information should be disclosed or withheld. We have used the page numbers of the closed bundle, not the internal page numbering of the drafts. We have used the internal paragraph numbers.

DRAFT E		
Page or paragraph number	Disclose or not disclose	Category
195-199, 201-206	Disclose	Lower risk of harm
P 200	Disclose except withhold the following bullet points: REDACTED	Lower risk of harm or no longer live/live and harm
P207 paras 9, 10, and 11.	Disclose	Lower risk of harm
P207 paras 12 and 13	Withhold except “we will also introduce [redacted] new measures to provide better information and support for families - including introducing a new rating scheme for schools and funding for school sport”	Live and harm/no longer live
P207-208 paras 14, 15, 16	Disclose	Lower risk of harm
P209	Disclose in part: redact bullet point REDACTED	No longer live/live and harm
P210	Disclose	No longer live
P 211 paras 26 and 27	Disclose	No longer live
P211 Title ‘ REDACTED ’ and para 29	Withhold	Live and harm
P211 para 28	Disclose	Lower risk of harm
P212 Bullet points	Withhold bullet points 1 and 2. Disclose bullet points 3 and 4.	Live and harm/No longer live or lower risk of harm
P212-213 para 30-32 including title	Withhold	Live and harm
P213 para 33,34	Disclose but redact first sentence REDACTED	Lower risk of harm/live and harm
P213 para 35	Withhold	Live and harm
P214 para 36 and 37	Disclose	No longer live

P214-215 paras 38-44 including title	Withhold	Live and harm
P215 paras 45-50	Disclose	No longer live
P216 para 51	Disclose	Lower risk of harm
P216 para 52 First 3 bullet points	Withhold	Live and harm
P216 para 52 last bullet point	Disclose	Lower risk of harm
P216-217 para 53-56	Disclose.	Lower risk of harm
P217 para 57 and title	Disclose	No longer live
P218	Withhold third and fourth bullet points REDACTED . Disclose the rest.	Live and harm/no longer live
P219-221 paras 60-71	Disclose	No longer live or lower risk of harm
P221 para 72-77	Disclose	No longer live or lower risk of harm
P222 Diagram	Disclose	Lower risk of harm
P222-223 para 78-85	Withhold	Live and harm
P223-224 para 86-89	Disclose	No longer live
P224 para 90	Disclose	Lower risk of harm
P224 para 91.	Withhold last sentence REDACTED Disclose the rest.	Lower risk of harm/Still live and harm
P224 para 92	Disclose	Lower risk of harm
P225 Heading and box	Disclose except bullet point 1 and 3.	No longer live/live and harm
P225 Title ' REDACTED '	Withhold	Live and harm
P225 para 93	Disclose	Lower risk of harm
P225-226 para 94-95	Withhold	Live and harm
P226 para 96-97	Disclose	No longer live
P227 title REDACTED	Withhold	Live and harm
P227 para 98, 99, 102 and 103.	Disclose	Lower risk of harm
P227 para 100-101	Withhold	Live and harm
P227-228 para 104-106 (including title), 108, 109 and grey box.	Disclose	No longer live or lower risk of harm
P228 para 107	Withhold	Live and harm
P229-232	Disclose unless footnote comes from withheld section.	Lower risk of harm
DRAFT D		

REDACTED VERSION FOR RELEASE

Page or paragraph number	Disclose or not disclose	Category
P157-161, 163-168	Disclose	Lower risk of harm
P162	Disclose except withhold the following bullet points: REDACTED	No longer live or lower risk of harm/live and harm
P169 para 11, 14, 15 and 16	Disclose	Lower risk of harm
P169 para 12 and 13.	Withhold except "We introduce new measures to provide better information and support for families - including introducing a new rating scheme for schools and funding for school sport"	Live and harm/no longer live
P170	Disclose in part. Withhold last bullet point REDACTED	No longer live/live and harm
P171	Disclose	No longer live
P172 para 26 and 27	Disclose	No longer live
P172 para 28	Disclose	Lower risk of harm
P172 Title " REDACTED " and para 29	Withhold	Live and harm
P173 Bullet points	Withhold bullet point 1 and 2. Disclose bullet point 3 and 4.	Live and harm/No longer live or lower risk of harm
P173 paras 30-32 including title	Withhold	Live and harm
P174 para 33 and 34	Disclose but withhold first sentence REDACTED	Lower risk of harm/live and harm
P175 para 35	Withhold	Live and harm
P175 para 36 and 37	Disclose	No longer live
P175-176 para 38-44 including title	Withhold	Live and harm
P176 para 45-50	Disclose	No longer live
P177 para 51	Disclose	Lower risk of harm
P177 para 52 First 3 bullet points	Withhold	Live and harm
P177 para 52 last bullet point	Disclose	Lower risk of harm
P177-178 para 53-56	Disclose except withhold last sentence of para 56: REDACTED	Lower risk of harm/live and harm
P178 para 57 and title	Disclose	No longer live

P179	Withhold third and fourth bullet points REDACTED . Disclose the rest.	Live and harm/no longer live
P180-181 paras 60-71	Disclose	No longer live or lower risk of harm
P182 para 72-77	Disclose	No longer live or lower risk of harm
P183 Diagram	Disclose	Lower risk of harm
P183-184 para 78-85	Withhold	Live and harm
P184 para 86-89	Disclose	No longer live
P185 para 90	Disclose	Lower risk of harm
P185 para 91.	Withhold last sentence REDACTED Disclose the rest.	Lower risk of harm/live and harm
P185 para 92	Disclose	Lower risk of harm
P186 Box	Disclose except bullet point 1 and 3.	No longer live/live and harm
P186 Title ' REDACTED '	Withhold	Live and harm
P186 para 93	Disclose	Lower risk of harm
P186-187 para 94-95	Withhold	Live and harm
P187 para 96-97	Disclose	No longer live
P188 title REDACTED	Withhold	Live and harm
P188 para 98, 99, 102 and 103.	Disclose	Lower risk of harm
P188 para 100-101	Withhold	Live and harm
P188-189 para 104-106 (including title), 108, 109 and grey box.	Disclose	No longer live or lower risk of harm
P189 para 107	Withhold	Live and harm
P190-193	Disclose unless footnote comes from withheld section.	Lower risk of harm
DRAFT C		
Page or paragraph number	Disclose or not disclose	Category
P115-119	Disclose	Lower risk of harm
P120 Diagram	Disclose	Lower risk of harm
P120 para 6	Disclose except for bullet points 2, 3, and 4.	No longer live/live and harm
P120 para 7	Disclose except final words REDACTED	No longer live/live and harm
P120-121 para 8	Disclose except bullet point 3.	No longer live/live and harm

REDACTED VERSION FOR RELEASE

P121 para 9	Disclose except bullet point 1.	No longer live or lower risk of harm/live and harm
P121 Para 10	Disclose except bullet point 1 and 4.	No longer live or lower risk of harm/live and harm
P121 para 11-12	Disclose	Lower risk of harm
P122-127	Disclose	Lower risk of harm
P128 Box	Disclose but withhold bullet points 2, 3 and 4.	No longer live/live and harm
P128 para 39	Disclose	Lower risk of harm
P128 para 40	Disclose except final sentence: REDACTED	Lower risk of harm/live and harm
P128-130 para 41-48	Disclose	No longer live
P130 para 49	Withhold	Live and harm
P130 para 50	Withhold	Live and harm
P130 para 51	Disclose	No longer live or lower risk of harm
P130 para 52	Disclose	No longer live
P130-131 para 53	Disclose	Lower risk of harm
P131 para 54	Withhold	Live and harm
P131-132 para 55-56 including title	Withhold	Live and harm
P132 para 57-58 and diagram	Disclose <u>except diagram</u>	Lower risk of harm/ <u>live and harm</u>
P133 title	Withhold	Live and harm
P133-134 para 59-65 including titles	Withhold	Live and harm
P134 para 66-68 including title	Disclose	No longer live
P135 Box	Disclose all except third bullet point	No longer live or lower risk of harm
P135-137 para 69-81	Disclose	No longer live or lower risk of harm
P137 para 82	Disclose	Lower risk of harm
P137 para 83	Withhold	Live and harm
P137-138 para 84-87	Disclose	Lower risk of harm
P138-140 para 88-96	Disclose	No longer live or lower risk of harm
P141 Box	Disclose except bullet point 1.	No longer live or lower risk of harm/live and harm
P141 para 97-98 including title	Disclose	Lower risk of harm
P141 title " REDACTED "	Withhold	Live and harm

REDACTED VERSION FOR RELEASE

P141-142 para 99-102	Disclose	Lower risk of harm
P142 para 103-104	Withhold	Live and harm
P142 para 105	Disclose	Lower risk of harm
P143-144 diagram and para 106-109	Disclose	Lower risk of harm or no longer live
P144 para 110-111 and title 'We will help local...'	Disclose	Lower risk of harm
P144 title ' REDACTED '	Withhold	Live and harm
P144-5 para 112-113	Disclose	Lower risk of harm
P145 para 114	Withhold	Live and harm
P145 115-116 and related title	Disclose	No longer live
P145-6 para 117 and related title	Withhold	Live and harm
P146 para 118	Disclose	No longer live
P147 bullet points	Disclose except bullet points 1 and 4	No longer live or lower risk of harm/live and harm.
P147-150 para 119-123 and 125-133	Disclose	No longer live or lower risk of harm
P148 para 124	Withhold	Live and harm
P150 para 134 and 136	Withhold	Live and harm
P150 para 135, 137 and 138	Disclose	No longer live or lower risk of harm
P151-152 all paras	Disclose	No longer live or lower risk of harm
P153-156	Disclose unless footnote relates to withheld section	Lower risk of harm
DRAFT B		
Page or paragraph number	Disclose or not disclose	Category
P73-77	Disclose	Lower risk of harm
P78 Diagram	Disclose	Lower risk of harm
P78 para 6	Disclose except for bullet points 2, 3, and 4.	No longer live/live and harm
P78 para 7	Disclose except final words REDACTED	No longer live/live and harm
P78-79 para 8	Disclose except bullet point 3.	No longer live/live and harm
P79 para 9	Disclose except bullet point 1 and 4	No longer live or lower risk of harm/live and harm

REDACTED VERSION FOR RELEASE

P79 Para 10	Disclose except bullet point 1 and 4	No longer live or lower risk of harm/live and harm
P79 para 11-12	Disclose	Lower risk of harm
P80-85	Disclose	Lower risk of harm
P86 Box	Disclose but withhold bullet points 2, 3 and 4.	No longer live/live and harm
P86 para 39	Disclose	Lower risk of harm
P86 para 40	Disclose except final sentence: REDACTED	Lower risk of harm/live and harm
P86-87 para 41-48	Disclose	No longer live
P88 para 49	Withhold	Live and harm
P88 para 50	Withhold	Live and harm
P88 para 51	Disclose	No longer live or lower risk of harm
P88 para 52	Disclose	No longer live
P88-89 para 53	Disclose	Lower risk of harm
P89 para 54	Withhold	Live and harm
P89 para 55-56 including title	Withhold	Live and harm
P90 para 57-58	Disclose	Lower risk of harm
P90 title	Withhold	Live and harm
P90-92 para 59-65 including title	Withhold	Live and harm
P92 para 66-68 including title	Disclose	No longer live
P93 Box	Disclose all except third bullet point	No longer live or lower risk of harm
P93-95 para 69-81	Disclose	No longer live or lower risk of harm
P95 para 82	Disclose	Lower risk of harm
P95 para 83	Disclose	Lower risk of harm
P95-96 para 84	Withhold	Live and harm
P96 para 85-88	Disclose	Lower risk of harm
P96-98 para 89-97	Disclose	No longer live or lower risk of harm
P99 Box	Disclose except bullet point 1 and 4.	No longer live or lower risk of harm/live and harm
P99 para 98-99 including title	Disclose	Lower risk of harm
P99 title " REDACTED "	Withhold	Live and harm
P99-100 para 100-103	Disclose	Lower risk of harm
P100 para 104-105	Withhold	Live and harm
P100 para 106	Disclose	Lower risk of harm

P100-101 para 107-110	Disclose	Lower risk of harm/no longer live
P101 para 111-112 and title 'We will help local...'	Disclose	Lower risk of harm
P101 title 'REDACTED'	Withhold	Live and harm
P101 para 113	Withhold	Live and harm
P102 para 114-115	Disclose	Lower risk of harm
P102 para 116	Withhold	Live and harm
P102 para 117-118 and related title	Disclose	No longer live
P103 para 119 and related title	Withhold	Live and harm
P103 para 120	Disclose	No longer live
P104 bullet points	Disclose except bullet points 1 and 4	No longer live or lower risk of harm/live and harm
P104-107 para 121-125 and 127-135	Disclose	No longer live or lower risk of harm
P105 para 126	Withhold	Live and harm
P107 para 136 and 138	Withhold	Live and harm
P107 para 137, 139 and 140	Disclose	No longer live or lower risk of harm
P108-109 all paras	Disclose	No longer live or lower risk of harm
P110-113	Disclose unless footnote relates to withheld section	Lower risk of harm

Signed Sophie Buckley

Judge of the First-tier Tribunal

Date: 22 February 2019

Corrected and amended in accordance with direction of Upper Tribunal: 21 October 2021