Case Reference: EA-2022-0042

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard by: CVP

Heard on: 1 July 2022
Decision given on: 1 July 2022

Before

TRIBUNAL JUDGE SOPHIE BUCKLEY
TRIBUNAL MEMBER MARION SAUNDERS
TRIBUNAL MEMBER DAVE SIVERS

Between

GEORGE GREENWOOD

Appellant

and

(1) THE INFORMATION COMMISSIONER
(2) MINSTRY OF DEFENCE

Respondents

Representation:
For the Appellant: In person
For the First Respondent: Did not appear
For the Second Respondent: Mr Ustych (Counsel)

Decision: The appeal is dismissed.

REASONS

Introduction

1. This is an appeal against the Commissioner's decision notice IC-126663-G3R9 of 25 January 2022 which held that the information held by the Ministry of Defence ('the MoD') was exempt from disclosure on the basis of s 35(1)(a) (formulation and development of Government policy) and that the public interest favoured maintaining the exemption. The Commissioner did not require the MoD to take any steps.

2. Although the MoD included evidence and submissions on both s 35 and s 43, it was not necessary for us to made any findings on s 43 and we have therefore limited the matters included in this decision to those relevant to s 35.

Factual background

3. On 30 May 2021 the prime minister announced the construction of a new national flagship ('the Flagship'). The Flagship is intended to showcase cutting-edge British design, engineering and green technology while boosting trade and driving investment.

4. The announcement indicated that the Flagship would enter service within the next four years, that the tendering process for design and construction would be launched shortly and that the costs of construction/operation would be confirmed following the completion of the tendering process.

5. The Defence Secretary carried out a National Flagship Engagement Day in Greenwich on 28th July 2021. The Defence Secretary said that, subject to working through bids, competition and technology, the MoD aimed to commission the ship for between £200 and £250 million on a firm price. Once built, according to the Defence Secretary, the Flagship would function as:

> a floating embassy to promote the UK's diplomatic and trading interests in coastal capitals around the world: hosting high level negotiations, trade shows, summits and other diplomatic talks. [1]

6. The first part of the procurement process involved an international design competition, with the winning design forming the basis of the invitations to negotiate sent out to firms bidding for the build contract. The design tender process began in July 2021 and is ongoing and the build tender has yet to begin.

[1] According to the Secretary of State in a speech delivered on 28 July 2021 https://www.gov.uk/government/speeches/defence-secretary-national-flagship-engagement-day-speech

7. The Outline Business Case contains a 'table of probable risks'. That table is the withheld information which the MoD have determined falls within the scope of the request.

Request

8. This appeal concerns the following request made on 16 June 2021 by Mr Greenwood:

> Please provide a copy of the project risk register for national flagship taskforce, and for the flagship delivery project itself if this is a separate entity.

15. The MoD replied on 15 July 2021 confirming that it held the requested information and stated that they believed that the information fell within the scope of s 35 (formulation of Government Policy) and s 43 (commercial interests). The MoD provided a substantive response on 4 August 2021 withholding the information under those sections.

16. The MoD upheld its decision on internal review on 27 August 2021.

17. Mr Greenwood referred the matter to the Commissioner on 28 August 2021.

Decision notice

18. In a decision notice dated 25 January 2022 the Commissioner decided that the information was exempt from disclosure under s 35(1)(a) and that the public interest favoured maintaining the exemption.

Engagement of the exemption

19. The Commissioner was satisfied that the withheld information clearly related to the formulation of policy in relation to the National Flagship programme. The Commissioner concluded that the policy making in question was government policy making. Although the government announced its intention on 30 May 2021 to build the National Flagship that does not alter the fact that the withheld information relates to the formulation of that policy. The withheld information was therefore exempt from disclosure on the basis of s 35(1)(a).

Public interest test

20. The Commissioner accepted that significant weight should be given to the MoD's safe space arguments where the policy making process was live and requested information related to that policy making. The Commissioner accepted that the policy making was live and in its early stages of formulation. In the Commissioner's view, this added notable weight to the safe space arguments.

21. The Commissioner considered the safe space arguments to attract particular weight given the context of this policy making and the content of the withheld information itself. The National Flagship policy is a controversial one. The Commissioner agrees with the MoD that there is a heightened risk that disclosure of the withheld information would infringe on the MoD's and the government's ability to be able to debate ideas and reach decisions away from external interference and distraction in relation the National Flagship project. The Commissioner considered the risk to be genuine given the content of the withheld information i.e. a frank analysis of the risks of the project. The Commissioner's view was that the safe space arguments attracted very significant weight.

22. With regard to the chilling effect arguments, the Commissioner recognised that civil servants are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. Nonetheless, chilling effect arguments cannot be dismissed out of hand and are likely to carry some weight in most section 35 cases. As noted above, the Commissioner had accepted that the policy making was live and in the early stages of formulation.

23. Having taken into account the content and context of the withheld information, the Commissioner accepted that disclosure of the withheld information risked having some chilling effect on future policy discussions on the National Flagship project, particularly in respect of how risks are identified and presented. In light of this the Commissioner concluded that the chilling effect arguments attracted considerable weight.

24. Having had the benefit of reviewing the information itself, as well as the MoD's submissions which referred directly to it, the Commissioner was satisfied that disclosure would be significantly damaging. In reaching this conclusion, the Commissioner placed particular regard on the MoD's submissions which referred to the information as these contained specific arguments about the harm that would result from disclosure.

25. The Commissioner accepted the MoD's position that the arguments above apply to the entirety of the table outlining the risks to the project and as a result, disclosure of the information in the scope of the request that is not sensitive would, as suggested, render the document meaningless.

26. The Commissioner agreed that there was significant public interest in the disclosure of information relating to this project given the controversial nature of it. The Commissioner acknowledged that there has been widespread concern about the policy rationale for the project, as well as the lack of clarity of its costs. The Commissioner accepts this added to the controversial nature of the project, and in turn, the public interest in disclosure of information about it.

27. The Commissioner accepted the MoD's point that the information in question would arguably not address these points directly. In the Commissioner's view there was still a clear public interest in disclosing information which would inform the public about the strategic risks that had been identified early in the formulation of this policy and the MoD's plans to mitigate them. The disclosure of the withheld information would do this. The Commissioner considered there to be a significant and weighty public interest in the disclosure of the withheld information. The Commissioner disagreed with the MoD's suggestion that the public interest arguments in favour of disclosure are ones which were largely generic.

28. On balance, and by a relatively narrow margin, the Commissioner concluded that the public interest favoured maintaining the exemption. In reaching this conclusion the Commissioner emphasised that he recognised the weighty public interest in disclosure and in particular the value in better informing the public about the risks of such a controversial project at the early stages in its development. However, in the Commissioner's view it is precisely the early stages and controversial nature of the project which have led him to attribute such weight to the safe space arguments, which in his view ultimately tip the balance in favour of maintaining the exemption.

29. The Commissioner did not go on to consider s 43(2).

Grounds of appeal

30. The Grounds of Appeal are, in essence, that the Commissioner determined the balance of public interest wrongly and did not give due weight to a number of key public interest factors that strongly support the release of this information. In particular Mr Greenwood argues:

    30.1. It is not clear that policy development is at an early stage. Either significant policy work and due diligence had already been completed or the policy was announced before the supporting process had been fully developed, strengthening the argument in favour of disclosure should risks later have been identified.
    30.2. A risk register is not the same as a record of half-formed ideas batted around by civil servants at an early stage. A risk register is a serious piece of work.
    30.3. The public interest balance is likely to be different for different risks. Partial disclosure seems very possible.
    30.4. There is, for example, a very strong public interest in disclosure if the MoD privately thought that the programme was undeliverable as advertised, would be a lot more expensive than claimed or would not be able to meet the various intentions the government set out for it.
    30.5. Some risks are likely to be so fundamental that officials would have to make the same decisions whether the information was in the public

domain or not, as such their disclosure would be unlikely to harm policy making processes.

30.6. If the benefits of the project are as strongly evidenced as is claimed, then proper accountability through transparency should not change the outcome.

30.7. Even just the "gist" of the concerns could meet the public interest in transparency without causing significant harm to the policy safe space, if there are concerns about disclosing specifics.

The Commissioner's response

31. The parties do not contest that the exemption is engaged.

32. On the facts of this particular case, whilst it may be the case that some policy work had been carried out concerning the strategic intent by the time of the Government's announcement of the project in May 2021, at the material time, the Commissioner understands from the MoD that the programme itself was still in its early stages such that listed actions proposed to mitigate risks were strategic in nature, difficult to quantify and many had yet to be tested with industry. Key policy decisions were still being considered and potential areas of risk had yet to be fully articulated.

33. In any event, it is clear on the facts that, at the material time, the policy process was "live", i.e. the policy continued to be formulated or developed. While the policy process is live, there is a strong public interest in maintaining the relevant safe space.

34. It is reasonable for the Government to make an announcement of a decision of intent whilst still having the safe space to debate the formulation and development of policy surrounding that decision.

35. Whilst it may be true that 'a risk register is not the same kind of record as half-formed ideas batted around by civil servants', the Commissioner considers that, on the facts, the issue was nevertheless still live and there was still a need for safe space for policy formulation.

36. The Commissioner has had sight of the withheld information and did carefully consider whether the public interest balance favoured disclosure of parts of the risk register. However, the Commissioner nevertheless maintains that she was correct to conclude that the public interest factors against disclosure apply to the entirety of the withheld information.

37. Mr Greenwood speculates as to the content of the withheld information. The Commissioner, having reviewed the information, maintains her position in relation to the public interest balance.

38. The tribunal does not have jurisdiction to order the public authority to disclose a 'gist' of the withheld information.

39. Taking into account the content and context of the withheld information, the Commissioner maintains that she was correct to conclude that disclosure of the withheld information would risk having some chilling effect on future policy discussions on the project, particularly in respect of how risks are identified and presented.

The open response of the MoD

S 35(1)(a)

40. The MoD submits that significant weight should be given to the MoD's safe space argument, with reference to:
    40.1. the early stage of the policy's formulation notwithstanding the settlement of the overall strategic intent to build the Flagship.
    40.2. the policy formulation process being live.
    40.3. disclosure of project risks undermining the ability to consider policy options in private, limit options in the future and create unrealistic expectations/distort perceptions of the project.
    40.4. the high-profile nature of the project and the frank nature of the risk analysis accentuates the importance of maintaining a safe space.

41. The MoD submits that significant weight should be given to the importance of enabling frank assessments for the ongoing discussions relating to the development of a National Flagship as the policy has not been finalised.

42. The MoD acknowledges the significant public interest in disclosure of the information but maintains that the public interest in withholding the information convincingly outweighs the interest in disclosing it.

43. The announcement of strategic intent to build the Flagship did not mean that underlying policy work was at an advanced stage. At the material time, the programme was at an early stage.

44. The public interest arguments against disclosure prevail in respect of the entire document.

45. Mr Greenwood's contention at para 21 of the grounds of appeal is based on speculation. The Tribunal will have the benefit of assessing the withheld information.

46. The MoD agrees with the Commissioner's position that a 'gist' is not a remedy within the Tribunal's jurisdiction.

47. The Appellant argues that some risks (if identified in the withheld information) could be so fundamental that the same decisions would need to be made whether

or not the information has been made public. Having regard to the content of the withheld information and its policy context, the MoD's arguments on the importance of maintaining a 'safe space' to ensure frank assessments of risks within this live policy (as well as developing ideas and making decisions away from external interference and distraction) remain undiminished.

Reply by Mr Greenwood

48. Mr Greenwood filed a short reply in which he submits that removing elements of the risk register that are more sensitive would achieve the 'gist' that he referred to in his submissions and would not render the document meaningless.

Closed response of the MoD

49. It is necessary that the closed response is withheld from Mr Greenwood in order to avoid the purposes of the proceedings being defeated.

50. In its closed response the MoD provides further detail of the progress of the project.

51. The MoD makes submissions with reference to the specific content of the withheld information, submitting that certain specific content, inter alia, supports the MoD's submissions that the table was created at a very early stage of the project/policy development.

52. The MoD submits that, with the benefit of the withheld information, the tribunal can assess that many of Mr Greenwood's arguments on the public interest, which are understandably speculative as he had not seen the withheld information, carry little or no weight. The MoD makes specific submissions on this with reference to the withheld information.

Evidence and closed submissions

53. We read an open and a closed bundle. The open bundle included a statement from Robert Wixey.

54. The closed bundle consists of:
    - 54.1. the MoD's closed response, a gist of which is provided above,
    - 54.2. a closed letter dated 1 April 2022 from the MoD to the tribunal, making an application for a rule 14(6) order,
    - 54.3. the letter from the MoD to the Commissioner dated 3 November 2021 (which is included in the open bundle) and an unredacted version of its attachments,
    - 54.4. a copy of the withheld information,
    - 54.5. a 3 page closed witness statement from Robert Wixey, containing 8 paragraphs,

54.6. a letter from the MoD to the tribunal dated 20 May 2022, making an application for a rule 14(6) order.

55. It is necessary to withhold the above information from Mr Greenwood because it refers to the content of the withheld information, and to do otherwise would defeat the purpose of the proceedings.

56. We heard oral evidence from Robert Wixey. His open evidence, both oral and in his witness statement, in summary and where relevant, was as follows.

57. The programme/policy was commissioned in late February 2021 with the MoD receiving direction in April 2021 to take responsibility for delivery. The withheld information was developed during this period in support of an Outline Business Case ('OBC') submission in June 2021.

58. There is a three-stage approval process for defence investment approvals: the Strategic Outline Case ('SOC') followed by the OBC and then the Full Business Case ('FBC'). A separate SOC was not developed for this programme/policy.

59. Industry had not been engaged save contacting some client advisors to assist in mobilising the programme/policy. Risks associated with delivery were high level and indicative at that time. It was the job of the subsequent phase following OBC approval to further consider these risks.

60. Disclosure of the government position on risks at the start of the process would discourage change and undermine the process of producing a robust, well considered and effective Risk Register. It would infringe on the safe space to consider policy options in private and would dissuade from honest assessment being made in future.

61. The following is a gist of the closed session, prepared by Mr Ustych and approved by the tribunal. A copy was provided to Mr Greenwood during the lunchtime adjournment:

> 1. At the hearing of the appeal on 1st July 2022 a brief closed session was held. The purpose of the closed session was to allow the questioning of Mr Wixey in respect of his Closed Witness Statement and for the representative of the Ministry of Defence to develop points with reference to specific parts of the Withheld Information.
>
> 2. Prior to the closed session, the Panel identified, from the Appellant's open questions to Mr Wixey and with the Appellant's input, questions to be asked of Mr Wixey in closed sessions. These questions were asked.
>
> 3. The MoD agreed that the following paragraph from the Closed Witness Statement can be released into open proceedings:
>
> *As part of the bidding process, the MoD will assess bidders' evaluations of risks involved in the project. Disclosure of the Risk Register would detract from this*

aspect of the process since bidders would be likely to mirror the MoD's own assessment of risks.

4. Mr Wixey's evidence (to the extent it can be gisted for purposes of the open proceedings), was that:

a. He generally agrees with and adopts the views given by Assistant Head (Ships) of the Defence and Equipment Support Secretariat in Annex B [86-86 of Open Bundle in redacted form];

b. An update was provided on the National Flagship programme, which remains live;

c. The Panel had gone through the table with Mr Wixey line-by-line and his evidence is that, if making the original decision, he would not have disclosed any of it (i.e. would have redacted all of it). There was one line within the Risk table (described as a short document which covers many of the areas that would influence the MoD's commercial approach) in respect of which he would have less concern if disclosed, but he would nonetheless have been minded to redact the entire document. His view was that including that line would in any event render the document meaningless. He referred to the detrimental effect on 'safe space' inherent in such early risk assessments if parts of it were disclosed;

d. If he was writing this document and knew it would be made public, he would not have written it as drafted at all, but would likely take the approach to forecast risks to the next stage only. However, doing so would risk it becoming a meaningless or less useful document from the project's perspective;

e. The MoD can at any point release anything it chooses to, but the impact will then play out in terms of value for money. There is a strong commercial element for this—the programme needs to establish risk and opportunities—not go into public with early views of what could/couldn't be the case. There are subsequent steps to mature the policy prior to a full investment decision (Full Business Case). The risk register is live throughout the programme and a detailed risk register is submitted with the Full Business Case;

f. It is not unusual to announce a project in principle even where detailed work remains to be done (as per the process in the Open Witness Statement);

g. In relation to the Appellant's point 2 in the Reply about uneven impact on bidders, he highlighted that disclosing an early version of the risk table would lead to confusion or be misleading for bidders thus affecting their commercial position.

h. There is a significant difference between what a member of the public or industry may speculate about the risks of the programme to be, as opposed to the MoD's authoritative view as recorded in its document.

5. MoD's representative then made submissions, in summary that:

a. The disclosure of a single line of the table (even if that information is in itself less damaging) would nonetheless undermine the safe space which attaches to such documents and discourage frank views for future risk assessments;

b. Mr Wixey's concerns about the Appellant's suggestion in his Reply (i.e. disclosing the Withheld Information as part of the bid documentation in order to ensure a level playing field between potential bidders) should be given significant weight;

c. The Withheld Information does not disclose any impropriety such that it may enhance the public interest in its disclosure;

d. The MoD maintains both s. 35 (1) (a) and s. 43 (2) exemptions remain made out with reference to Mr Wixey's evidence including in response to the Appellant's questions.

Open oral submissions

Mr Greenwood's oral submissions

62. Mr Greenwood, in concise and focussed submissions, submitted that there was a very strong public interest in transparency in this case. He submitted that a redacted version of the request information would still serve this interest without disclosing the more sensitive elements.

63. In relation to the MoD's submission as to the early stage of the process, Mr Greenwood submitted that there had already been a public announcement and a significant amount of policy work should already have taken place. If it had not, this increases the public interest in disclosure.

64. Civil servants are used to giving robust advice and have a public duty. It is not realistic to suggest that they would not offer advice about risks even if they knew that the information was going to be made public.

Oral submissions by the MoD

65. The purpose of the exemption is to protect the effective, efficient and high-quality formulation and development of government policy. The need for a safe space is strongest at the earliest stage of policy formulation. It is agreed that this is a very controversial programme.

66. Mr Ustych summarised the evidence on the stage the project had reached at the relevant time, including further detail of the stage reached in July 2021 (adduced by submissions rather than by recalling Mr Wixey, with the agreement of Mr Greenwood and the tribunal). On this basis Mr Ustych submitted that this was very early in the process and the Commissioner was justified in attaching very significant weight to the safe space argument. The withheld information does not disclose any impropriety. There is a strong but not overwhelming public interest in disclosure.

67. The safe space arguments apply to the whole document, and disclosure even of the parts of the document about which Mr Wixey has less concerns would still bring about the harm which the exemption is intended to protect against. In addition redacting the document would render it meaningless.

68. The relevant parts of s 1 and 2 of the FOIA provide:

General right of access to information held by public authorities.

> 1(1) Any person making a request for information to a public authority is entitled—
> (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
> (b) if that is the case, to have that information communicated to him.
>
> Effect of the exemptions in Part II.
> .....
> 2(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—
> (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
> (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

S 35(a) FOIA

69. Section 35(a) FOIA provides as follows:

> 35 Formulation of government policy, etc.
> (1) Information held by a government department or by the Welsh Assembly government is exempt information if it relates to—
> (a) the formulation or development of government policy,

70. Section 35 is a class-based exemption: prejudice does not need to be established for it to be engaged. It is not an absolute exemption. The Tribunal must consider if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.

71. Case law has established in the FOIA context that "relates to" carries a broad meaning (see APPGER v Information Commissioner and Foreign and Commonwealth Office [2016] AACR 5 at paragraphs 13-25). In UCAS v Information Commissioner and Lord Lucas [2015] AACR 25 at paragraph 46 the Upper Tribunal approved the approach of the FTT in the APPGER case where it said that "relates to" means that there must be "some connection" with the information or that the information "touches or stands in relation to" the object of the statutory provision.

72. The question of whether the policy-making process is still 'live' is an issue that goes to the assessment of the public interest balancing test, and not to whether the section 35(1)(a) exemption is engaged in the first place (Morland v Cabinet Office [2018] UKUT 67 (AAC).

73. The intersection between the timing of the FOIA request and its relevance to the public interest balancing test is helpfully analysed by the First-tier Tribunal in Department for Education and Skills v Information Commissioner and the Evening Standard (EA/2006/0006) ("DFES") at paragraph 75(iv)-(v) (a decision approved in Office of Government Commerce v Information Commissioner [2008] EWHC 774 (Admin); [2010] QB 98 ("OGC") at paragraphs 79 and 100-101):

> (iv) The timing of a request is of paramount importance to the decision. We fully accept the DFES argument, supported by a wealth of evidence, that disclosure of discussions of policy options, whilst policy is in the process of formulation, is highly unlikely to be in the public interest, unless, for example, it would expose wrongdoing within government. Ministers and officials are entitled to time and space, in some instances to considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy. We note that many of the most emphatic pronouncements on the need for confidentiality to which we were referred, are predicated on the risk of premature publicity. In this case it was a highly relevant factor in June 2003 but of little, if any, weight in January 2005.
>
> (v) When the formulation or development of a particular policy is complete for the purposes of (iv) is a question of fact. However, s. 35(2) and to a lesser extent 35(4), clearly assume that a policy is formulated, announced and, in many cases, superseded in due course. We think that a parliamentary statement announcing the policy, of which there are examples in this case, will normally mark the end of the process of formulation. There may be some interval before development. We do not imply by that that any public interest in maintaining the exemption disappears the moment that a minister rises to his or her feet in the House. We repeat – each case must be decided in the light of all the circumstances. As is plain however, we do not regard a "seamless web" approach to policy as a helpful guide to the question whether discussions on formulation are over.

74. The public interest can wax and wane and the need for a safe space changes over time in relation to development of policy.

75. If disclosure is likely to intrude upon the safe space then there will, in general terms, be significant public interest in maintaining the exemption, but this has to be assessed on a case by case basis.

76. In considering the factors that militate against disclosure the primary focus should be on the particular interest which the exemption is designed to protect, in this case the efficient, effective and high-quality formulation and development of government policy (see e.g. para 57 in the FTT decision in HM Treasury v ICO EA/2007/0001).

77. The APPGER case gives guidance on how the balancing exercise required by section 2(2)(b) of FOIA should be carried out:

> "… when assessing competing public interests under FOIA the correct approach is to identify the actual harm or prejudice that the proposed disclosure would (or would be likely to or may) cause and the actual benefits its disclosure would (or would be likely to or may) confer or promote. This … requires an appropriately detailed identification of, proof, explanation and examination of both (a) the harm or prejudice, and (b) benefits that the proposed disclosure of

the relevant material in respect of which the exemption is claimed would (or would be likely to or may) cause or promote."

The role of the Tribunal

78. The Tribunal's remit is governed by s.58 FOIA. This requires the Tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether he should have exercised it differently. The Tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Discussion and conclusions

79. The issues we have to determine under s 35 are:
    79.1. Does the withheld information relate to the formulation or development of government policy?
    79.2. Does the public interest in maintaining the exemption outweigh the public interest in disclosure?

ISSUE 1: Does the withheld information relate to the formulation or development of government policy?

80. Although this does not appear to be in dispute, we have reviewed the withheld information and we are satisfied that it relates to the development of government policy. We find that the exemption is engaged.

81. The relevant date for determining the public interest is at the date of the response to the request. In this case we find that the substantive response was on 4 August 2021.

Public interest in maintaining the exemption

82. Our primary focus when considering the public interest in maintaining the exemption is on the particular interest which the exemption is designed to protect, in this case the efficient, effective and high-quality formulation and development of government policy.

83. We accept Mr Wixey's evidence on the different stages of the project and make the following findings on that basis.

84. The programme/policy was commissioned in late February 2021 with the MoD receiving direction in April 2021 to take responsibility for delivery. The withheld information was developed in support of the OBC (outline business case), which was submitted in June 2021. In July 2021 the MoD was carrying out market engagement. A prior information notice was sent on 2 July to potential tenderers

and the design competition, with contact notice and pre-qualification questionnaire was launched on 19 July. The design tender was issued in November 2021.

85. Although the request was for the 'project risk register' it is clear that at the date of the request, no formal project risk register had been drawn up. The withheld information is a table of probable risks that had been created for the purposes of the Outline Business Case. It is a preliminary high-level assessment of the likely risks, made at an early stage in the project, not a formal risk register compliant with DE & S procurement policy. It was created before the submission of the Outline Business Case.

86. There are normally three stages in the approvals process (Strategic Outline Case – SOC, Outline Business Case – OBC and Final Business Case – FBC). In certain circumstances Departments can tailor the process to submit an OBC covering elements of a SOC and an OBC. In this project, the first and the second stages were elided. There was no separate SOC, so the OBC also contained information consistent with a SOC. As the diagram in exhibit RW1 demonstrates, it is not until the FBC stage that a major commitment is made to a project, and the OBC takes place between 'concept' and 'assessment'.

87. In terms of its place in the structural chronology, therefore, we conclude that the table of risks was drawn up a very early stage in the process. We also accept that the identification of risks at this early stage was necessarily a high-level and indicative initial assessment, made without the benefit of what was to take place later in the process. Further work in the subsequent programme phases was required to clearly identify risks and detailed mitigation actions to enable a risk register to be drawn up at the appropriate time. Further, having reviewed the document we accept that it contains a frank and candid initial assessment of the likely risks.

88. We find that there is a very strong public interest in protecting the safe space for such high-level frank and candid initial assessments of risk. It is essential for the purposes of efficient and high-quality formulation and development of government policy that there is a safe space in which to make these early assessments of risk, which can be refined and then tested later in the process with the benefit of further work.

89. The request for disclosure also came at an early stage in the process. Although there had been a public statement of the government's overall strategic intent on 30 May 2021, followed up by a more detailed speech by the minister on 28 July 2021 it is clear that, in reality, the development of the policy and the process behind the scenes was still at a very early stage at the beginning of August when the substantive response was given.

90. Disclosure of the unvarnished high level assessment of risks at this early stage, while work to create a formal risk register had not yet been completed, and while

engagement with the industry was still at a very early stage, would, in our view, have been likely to harm the efficient and high-quality formulation and development of government policy.

91. It was the job of subsequent phases in the process to consider those risks further, through a properly administered commercial process, which would be likely to be undermined if the initial assessment was placed in the public domain. In terms of the actual harm of disclosure of this particular information, we accordingly conclude that disclosure of this document at this early stage is likely to have caused harm to the policy development process.

92. The controversial nature of the project magnifies these difficulties in our view, because there is likely to be greater public discourse and newspaper coverage.

93. Based on all the above, we find that there is an extremely strong public interest in protecting the safe space given the nature of the document in which the withheld information is contained, its position at a very early stage in the process and the fact that, at the relevant date, the development of policy on this issue was still at an early stage despite the fact that a number of public announcements had been made.

94. All these features increase the importance of the 'safe space' for Government to consider policy options out of the public eye, and its weight in the public interest balance. It is in the public interest that officials and ministers have 'time and space…to hammer out policy exploring safe and radical options alike, without the threat of lurid headlines depicting what has merely been broached as agreed policy' (DfES para 75(iv)).

95. We also place significant weight on the 'chilling effect' of releasing a document of this nature. The tribunal approaches suggestions of a chilling effect with some caution. We accept Mr Greenwood's submission that, as a general point, officials can be expected not to shy away from giving their honest advice on the risks in a project or policy by the prospect of publicity.

96. However, we accept Mr Wixey's evidence that, if had been the person responsible for drafting the document, and if he had known that the document was to be made public, he would not have written it as drafted at all, but would likely have taken the approach to forecast risks to the next stage only. We accept that doing so would risk it becoming a less useful document from the project's perspective.

97. Further, given the early stage in the policy development process, the high level and indicative nature of the risks being considered and the frank nature of the initial assessment we accept that disclosure would have led to a real risk of a chilling effect on those ongoing policy discussions which carries significant weight in the public interest balance.

98. In our view, the harm identified above flows from the release of the document as a whole, rather than from the specific risks that might arise from particular information contained in that document. Mr Wixey identified, in closed, particular harm that was likely to flow from the release of specific information. In our view, this illustrates the point that this was an early stage, high level unvarnished and frank assessment of risks, carried out in what the officials considered was likely to be a safe space. Whilst, in our view, this increases the public interest in withholding those specific sections, it does not impact on our general conclusion that there is an extremely strong public interest in protecting the safe space which would be undermined by releasing any of the document, even in redacted form.

99. For those reasons, we place very significant weight on the need to maintain a safe space to enable the efficient and efficient, effective and high-quality development of policy. We place less, but still significant, weight on the potential 'chilling effect' of disclosure. Overall we find that there is an extremely strong public interest in maintaining the exemption in relation to the entire document.

Public interest in disclosure

100. We accept that this is a controversial project, involving the expenditure of large sums of public money. We accept, for the reasons put forward persuasively by Mr Greenwood, that there is, in general, a very strong public interest in disclosure of the risks that had been identified by the government before the public announcements were made.

101. We accept that this issue is very significant, given the cost to the public. We find that there is a very strong public interest in transparency and informed scrutiny of the process and decision making behind the government's policies in this area. Release of the requested information would have contributed to an informed public debate and is likely to have enabled more informed challenge and scrutiny.

102. We do not accept that there is any significantly increased public interest in disclosure because of the state of development of policy when the public announcements were made. We accept Mr Wixey's evidence that it is not unusual to announce a project in principle even where detailed work remains to be done.

103. We have reviewed the withheld information with reference to Mr Greenwood's specific concerns arising from his speculation as to the content of the document. There is nothing in the document which, in our view, increases the public interest in disclosure in relation to these specific concerns to any material extent. The document does not reveal any impropriety.

104. Further we accept that there is a general public interest in promoting transparency and openness in the way public authorities operate and a general public interest in transparency of discussions and policy development within government.

105. Taking all the above into account, we find that the extremely strong public interest in maintaining the exemption, as detailed above, outweighs the very strong public interest in disclosure.

Signed Sophie Buckley

Judge of the First-tier Tribunal
Date: 6 July 2022