Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2006/0068 & EA/2006/0080
Information Commissioner's Ref: FS50070196 & FS50132936

Heard at Procession House, London, EC4	**Decision Promulgated**
On : 29,30,31 October 2008 & 10 December 2008	**On: 19 February 2009**

BEFORE

CHAIRMAN

DAVID MARKS

and

LAY MEMBERS

DR MALCOLM CLARKE
DR HENRY FITZHUGH

Between

OFFICE OF GOVERNMENT COMMERCE

Appellant

and

INFORMATION COMMISSIONER

Respondent

Subject matter:

Sections 33(1)(b) and (2) and 35(a)(iii) Freedom of Information Act 2000 – meaning of prejudice in section 33 – balance of public interest in relation to reports regarding project management controls maintained by Appellant called Gateway Reports completed in 2003 and 2004 regarding identity cards – OGC's working assumptions – section 40 of Freedom of Information Act 2000 – redaction.

Cases

Office of Government Commerce v Information Commissioner and HM Attorney General [2008] EWHC 774 (Admin); (2008) ACD 54

Secretary of State for Work and Pensions v Information Commissioner EA/2006/0040

John Connor v Information Commissioner EA/2005/0005

Guardian Newspapers and Brooke v Information Commissioner and the BBC EA/2006/0011 and 0013

Hogan and Oxford City Council v Information Commissioner EA/2005/0030

Department for Education and Skills v Information Commissioner and Evening Standard EA/2006/0006

R (Law) v Home Secretary [2003] EWHC 2073 (Admin)

Re H & Others (minors) [1996] AC 563

Three Rivers District Council v Governor and Company of the Bank of England (No 4) [2005] 1 WLR 210

Scotland Office v Information Commissioner EA/2007/0128

Representation

For the Appellant: James Maurici
Benjamin Hay

For the Respondent: Timothy Pitt-Payne

JUDGMENT

The Tribunal upholds the Decision of the Information Commissioner in his Decision Notice dated 31 July 2006 and orders the disclosure of the two Gateway Reports there set out save that the names of all other parties to the said Reports, both interviewees and reviewers, be redacted and/or deleted, the said disclosure to take place within 28 days of the promulgation of this Decision.

Reasons for Decision

Introduction

1. This is the remitted appeal on an appeal first heard by a differently constituted Tribunal in 2007. The original appeal dealt with two specific reports made by a public authority known as the Office of Government Commerce (OGC). The role and function of the OGC will be set out in much greater detail below. For the moment, it is enough to describe its role, which is a highly important one in relation to modern day government projects, as ensuring that proper and efficient cost and other controls are imposed and maintained with regard to such projects across those government departments. The OGC conducts what it calls Gateway Reviews (GRs). The first GR in question is in relation to identity cards and was completed in June 2003 and the second in January 2004. Both were so-called Gateway Zero Reports which can be abbreviated as GR0. The Identity Cards Bill was the subject of publication in November 2004. Its progress was stopped in effect on the calling of the General Election in 2005. A new Bill was reintroduced in 2005 and received the Royal Assent on 30 March 2006.

2. The original Tribunal's decision was appealed. The appeal was determined by Stanley Burnton J, as he then was, and can be found reported at [2008] EWHC 774 (Admin); (2008) ACD 54. The learned judge's decision was cited extensively in argument before this Tribunal. However the strict ratio decidendi of the case has a relatively narrow scope focusing principally on the applicability of the doctrine of Parliamentary privilege to the original Tribunal decision. The learned judge also made many extensive observations on the original Tribunal decision and in relation to the appeal which were not strictly material. There will be a need to refer to many of these observations in this judgment.

3. The upshot of the appeal before the learned judge not only was to cause him to remit the matter but for a fresh hearing and also to curtail the number of requests which were to be determined on the remitted appeal to only one. There remains however a great deal of overlap between the scope of the two original requests.

4. This is the first occasion on which an appeal has been remitted to the Tribunal by the High Court. It inevitably involved a reconsideration by a freshly constituted panel of much of the earlier material which the original Tribunal had heard. It also involved hearing from the same as well as expanded evidence proffered by the same witnesses as had been heard by the original Tribunal. A fresh written statement by a major witness put forward by the OGC was submitted. The cross examination of both that witness and two other witnesses took place, as had taken place for more witnesses at the original Tribunal hearing.

5. For what are, on any view, fairly obvious reasons, this Tribunal has addressed the evidence and the arguments without in any way being influenced or swayed by the decision of original Tribunal. The Tribunal has been greatly helped in this respect by the extremely detailed and careful presentations by the three Counsel who appeared before it. It duly expresses its gratitude for their very great assistance.

The request

6. The sole request with which this appeal is concerned was made by email dated 3 January 2005 by Mr Mark Dziecielewski (referred to as Mr D at the hearing as he will be in the judgment). He asked the OGC to provide him with:

   "The two pre-stage Zero and the actual Stage Zero Gateway Reviews of the Identity Cards Programme project being run by the Home Office."

   He added:

   "The Gateway Review Zero was completed a year ago in January … Please provide the information requested by Friday 21st January 2005. The information is needed within that timeframe because the House of Commons debate on the Committee Stage of the Identity Cards Bill is due to be completed by Thursday 27th January 2005 …"

7. The OGC replied, by its Head of Information Management, by letter dated 1 February 2005. The OGC confirmed that it held the information requested. However it relied on the exemptions set out in sections 33(1)(b) and (2) as well as section 35(1)(a)(iii) of the Freedom of Information Act 2000 (FOIA). These sections will be set out in

detail below. For the moment it is enough to summarise them as follows. The former section deals with public authorities with functions in relation to the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions. The exemption applies in the event disclosure would or would be likely to prejudice the discharge of those functions. The OGC contended that the candour of the interviewees and the reliance placed on the GRs by those to whom the requests are "solely addressed", called Senior Responsible Owners or SROs, would be adversely affected. Section 35 deals with information relating to development of government policy.

8. Both sections 33 and 35 are qualified exemptions requiring a balance of the respective competing public interests. Section 33, however, entails a need to show that disclosure would, or would be likely to, prejudice the authority's functions. The OGC required further time to consider where the balance actually lay in the wake of Mr D's request. In a follow up letter dated 22 February 2005 the OGC then disclosed a document entitled "Background Information Contained in the Gateway Review" which dealt, as it suggests, with the background to what were two Zero Reports of June 2003 and January 2004. The remainder of the request was rejected. In terms of the public interest, the OGC claimed that there was "a clear public interest" in maintaining the integrity of the Gateway Process and in ensuring the overall success of that process. As against the desirability of transparency and accountability, there had to be taken into account the candour already referred to, the confidence attained during the Gateway Process as a whole and the importance of completing the Reports "extremely promptly". The decision not to disclose the content of the two Gateway Reviews was subsequently affirmed following an internal review. One particular point that was emphasised in the review conducted by the OGC was that the Identity Cards (ID Cards) Programme was then one of over a hundred so-called Mission Critical projects, and one of what were called twenty Key Government Projects. The OGC contended that disclosure of the GRs in relation to the ID Cards Programme will harm the contribution of the Gateway process to remaining projects. As pointed out by Stanley Burnton J at paragraph 11, in maintaining its decision that the information should not be disclosed, the author of the OGC's letter pointed out that the Gateway Process had delivered a public benefit in that it had accounted for over £700million of savings in the so called SRO2 Period.

9. Later exchanges between the Information Commissioner (the Commissioner) and the OGC involved the latter providing further details of the GR scheme. Extremely detailed submissions supported by factual documentation were made available reflecting the earlier contentions of the OGC to Mr D. These largely had regard to the issues of candour and promptness. Most, if not all, of these issues were revisited during the course of this appeal.

The Decision Notice

10. The Decision Notice in relation to Mr D's request is dated 31 July 2006. The Commissioner confirmed that in his exchanges with the OGC, the OGC explained it held two Stage Zero Reports but did not hold any pre-Stage Zero Reports. It did however explain that there was an earlier review carried out by the Home Office based on the same information.

11. The Commissioner said that he was satisfied that section 33 applied. However in paragraph 4.13 he stated that he was "not persuaded" that the information in the GRs was "of such a nature that its disclosure would discourage further cooperation by those providing information to the OGC". In particular, he did not accept that interviewees contributed information to the process "on a genuinely voluntary basis in that they are at liberty to refuse to cooperate with future Gateway Reviews." The Commissioner therefore did not accept that "officials responsible for gathering and collating the request for information would cease to perform their duties on the grounds that the information may be disclosed". In other words, there would be no resultant failure on the part of government departments to provide any or any complete information. As the Commissioner put it:

    "It is a matter for the bodies concerned, including the OGC, to ensure that their officials continue to perform their duties according to the required ethical standard, including the completion of reports such as those falling within the Complainant's request".

    There was, therefore, in the Commissioner's view, no warrant for the view that release of the request for the information would be likely to prejudice the exercise of any of the OGC's audit functions. Section 33 was therefore not engaged.

12. In relation to section 35, the Commissioner determined that it was "arguable" that the exemption in question was engaged. This was because there was "a strong argument" that the information contained in the two GRs related to "the implementation of the ID Card Project, rather than to the formulation or development of government policy on ID Cards". This was because the original Identity Cards Bill announced in the Queen's Speech of November 2004 by the time of the Decision Notice, at least, had been superseded by the 2006 Act. Nonetheless, the Commissioner was prepared to accept that section 35 was engaged.

13. As to the balance of the competing public interests, the Commissioner decided in favour of disclosure and focused upon the significant impact that ID Cards would have on an individual, the fact that in the Commissioner's opinion, the GRs in questions did not contain any information which would cause participants to be less willing to contribute openly and fully in future reviews, the fact that the two Reports in question had been prepared in June 2003 and January 2004 were followed by a Home Office Press Release in April 2004 which confirmed that the Gate Zero Review of the ID Cards Programme had been successfully completed in January of that year, coupled with the fact that the review process had since moved on to the Gate Zero 1 Stage, the fact that no evidence had been produced to show that disclosure of the request for information would slow down the process and the fact that nothing had persuaded the Commissioner that disclosure of the two Reports in question would lead to any public misunderstanding of the ID Cards issue generally.

Notice of appeal

14. The Notice of Appeal is dated 29 August 2006. There were six enumerated Grounds of Appeal. Without intending any disrespect to the authors of those Grounds, the Tribunal believes that all the critical contentions were fully canvassed at the hearing of the appeal. The same observations can be made with regard to the Commissioner's reply which followed dated 21 September 2006.

The second request

15. As indicated above, the first and now the only request is the one made by Mr D. As noted in the original Tribunal's decision as well as in the judgment of Stanley Burnton J, a request dated 16 March 2005 sought disclosure of "what traffic light status has

been awarded to the identify cards Scheme" by the OGC at the Gateway Review 1 Stage. For the moment it is enough to record the fact that by common consent between the parties, this request can be in effect taken as being reflected in, at least if not subsumed by, Mr D's request. In effect a traffic light status formally known as a RAG Status, using the colours red, amber and green, was awarded to a project at the end of each stage. The description is largely self-explanatory but the awarding of either a red or an amber signal to a project did not necessarily entail automatically at least the cessation or any real qualification upon the continuation of the project despite what those two colours might indicate in other contexts. The RAG Status system as such is no longer employed by the OGC. OGC now give a Delivery Confidence assessment to a report however it is still a RAG status in the sense that it is colour coded with the same demarcations, albeit with the addition of Amber / Green and Amber / Red status.

<u>The Gateway process: further explanation</u>

16. The Tribunal has been shown a plethora of material regarding the Gateway Process. In one of the OGC's publications entitled "Gateway to Success: OGC Best Practice" in the introduction, the following appears, namely:

    "The OGC Gateway process examines a programme or project at critical stages in its life cycle to provide assurance that it can progress successfully to the next stage …"

    The Gateway Process was said to meet the requirements of the Gershon Report named after Sir Peter Gershon, which dealt with Government Procurement as well as with the Cabinet Office Report entitled "Successful IT: Modernising Government in Action". Sir Peter Gershon himself provided a witness statement and had been examined at the original Tribunal hearing.

17. There are potentially six or more Gateway Reviews in the lifetime of a project since Gate Zero can be applied along with Gates 1-5 and each of these Gates can be repeated a number of times. Gates 1 and 2 are pre contract, Gate 3 is the contract award stage, not a look at implementation etc. Gate 4 is also a forward looking stage which reviews a projects readiness for service. Gate 5 alone looks back to ensure that the desired benefits of a project are being achieved

18. A Gateway Stage Zero Review is described in this publication as a “programme-only review that is repeated throughout the programme’s life: it can be applied to policy implementation, business changes and other types of programme. It sets the programme review in the wider policy or corporate context.”

19. Ownership of any report which is produced is stated to rest with the SRO. The RAG Status has been referred to above. A red status generally meant that some fairly immediate remedial action should be taken. For present purposes, and of particular importance to the present appeal, in the said publication there was express reference to FOIA to the effect that guidance to departments on handling requests for the disclosure of OGC Gateway Review Reports under FOIA was, and indeed still is, available on the OGC Gateway page or pages of the Members of Justice (MOJ) website. Much argument turned on this guidance and further reference will be made in detail to the relevant document called the Working Assumptions below.

20. A related OGC publication is entitled “Running an Effective review”. This publication sets out details of the procedures which attend each Gateway Review. There is a brief description of the meetings and parties to be held and gathered together with particular stress being put on the required “spirit of openness and mutual trust” required between mainly the project team who would generally be the interviewees and the Review Team as well as on the types of issues and questions which each stage of a typical Gateway Review Process might involve.

21. The documents which have just been described in brief were supplemented by a Workbook. Here, there is yet further detail on the GR Process again setting out the areas and issues which those involved in a Gateway Review might expect to address or be addressed. In effect, there were and are, separate Workbooks for each of the five stages covered by the entire Gateway Review Process.

22. The Tribunal has carefully perused the Workbooks describing the five Gates involved. Each Workbook includes a section entitled “Purposes of the Review”. As will be seen below, the MOJ’s FOIA guidance or Working Assumptions accepts, that disclosure should be made with regard to Reports for Gateway Reviews 4 and 5. However it is no exaggeration to say that the range of issues and matters which

constitute these so called purposes for all five stages is much the same in terms of the key questions which need to be asked and explored.

The High Court Decision

23. In *Office of Government Commerce v Information Commissioner*, *and HMs Attorney General (Intervener 2008) supra*, Stanley Burnton J held that the original Tribunal and the High Court were precluded from considering the second request. This was principally on the basis that since that request came in the form of a Parliamentary question asked by a Member of Parliament and since the response took the form of a Ministerial statement which stated that the information sought was subject in the case of Mr D's request to the exemptions in sections 33 and 35, Parliamentary privilege precluded the Tribunal and the court from considering a challenge to the accuracy of something said in Parliament. The application of FOIA to a particular case was a matter that had to be determined by the courts. In the case of the appeals from the two requests, however, and in relying in relation to both on the opinion of a Select Committee, the original Tribunal had taken into account illegitimate and irrelevant matters. Both decisions of the original Tribunal were therefore quashed and the matter remitted as explained above.

24. In paragraph 20 of his decision, the learned judge summarised the Grounds of Appeal which were before the Tribunal in the original appeal and for the sake of completeness, they can be set out as follows. They were:

    (a) failure by the Tribunal to identify the material and substantial public interest justifying disclosure notwithstanding its decision that both sections 33 and 35 applied to the information therefore erring on the application of section 2 of FOIA which requires that a balance of the public interests be conducted in all the circumstances of the case;

    (b) failure by the original Tribunal to "apply its finding" that disclosure would prejudice the OGC's exercise of its functions when makings its decision under section 2;

    (c) erring in failing to take as its starting point for the purposes of section 35 the fact that on the proper construction of FOIA disclosure of information falling within

such exemption was of itself to be regarded as harmful to the public interests (a ground not in effect really pursued on the present appeal);

(d) wrongly characterising the case of the OGC as seeking to maintain an absolute exemption from disclosure;

(e) erring in its conclusion on the application of section 2 in that:

   (i) the Tribunal had regard to an irrelevant consideration namely its criticism of the training provided by OGC in relation to Gateway Reviews and the application of FOIA;

   (ii) it had regard to a further irrelevant consideration, namely the extent to which potential harm from disclosure could be diminished by the OGC changing its procedures for carrying out reviews, as well as having regard to a further irrelevant consideration, namely the extent to which the potential harm from disclosure could be minimised if the OGC adopted different practices in undertaking in reporting on Gateway Reviews; and

   (iii) it failed to have regard to a relevant consideration, namely the availability of other means of public scrutiny of government procurement projects and programmes by the work of the National Audit Office and the Parliamentary Accounts Committee (with various degrees of emphasis each of these grounds will be revisited on the appeal);

(f) wrongly concluding that the public interest that is the subject of sections 33 and 35 was diminished by the fact that a Parliamentary Bill relating to the ID Cards Programme had been introduced and therefore, as the Tribunal considered, the Government's policy related to Identity Cards had been decided, particularly in the light of the fact that the said Bill was no more than an enabling measure; (this ground too was revisited on the appeal);

(g) failing to address the existence or extent of the public interest in the disclosure of the information and in particular failing to explain the basis of the original Tribunal's conclusion that the public interest require disclosure under section 2;

(h) erring in relying on the opinion of the Parliamentary Select Committee on Work and Pensions (a ground not relevant to the present appeal); and

(i) making a perverse finding to the effect that the evidence of the OGC is of the importance of maintaining confidentiality was "unconvincing" given the experience of the OGC's witnesses and their evidence generally; (this too in general terms was revisited on this appeal).

25. As will become apparent, quite apart from the parenthetical comments made above, most of these arguments save as to Parliamentary privilege, were revisited in one way or the other during the hearing of this appeal. Both parties accepted that the only true ratio of the learned judge's decision was limited to the effect of Parliamentary privilege. As indicated above, both parties however referred at various points in their submissions to the judgment. In particularly, Mr Maurici for the OGC urged the present Tribunal at least to take into account the observations of the learned judge on matters which were otherwise strictly obiter.

26. At paragraph 67 of the decision, the learned judge reaffirmed his concerns and decision on the issues raised by Parliamentary privilege. He then went on to say that because he had heard further argument on the other issues in the appeal he would address these, but expressly stated that he did not propose to reach a final conclusion on all of them. In the circumstances, the Tribunal is quite happy to note and, as and when necessary, take into account the learned judge's remarks. However, it remains mindful of the fact that such observations that it does take note of have to be weighed in each case against the evidence which it and not the learned judge has carefully considered during the hearing of this appeal.

27. At paragraph 71 the learned judge expresses agreement with the statement made by the Tribunal in another case entitled *Secretary of State for Work and Pensions v Information Commissioner* EA/2006/0040 which has now become what can be called common currency in the Tribunal's decisions generally, to the effect that FOIA embodies an *assumption* that disclosure will be "of value" i.e. that there will always be some public interest in disclosure with the content of the particular public interest to be assessed on a case-by-case basis.

28. At paragraphs 75 and 78 the judge rejected the OGC's contentions that once section 35 was engaged there was "necessarily a public interest in maintaining the exemption" by stating at paragraph 78 that once section 35 was engaged, and if the information was not already in the public domain, the public authority would have to weigh up the public interest in disclosure against the public interest in maintaining the exemption. If the public authority cannot then identify a "significant" public interest in maintaining the exemption, application of the public interest test contained in section 2(2)(b) of FOIA (which perhaps need not be set out here) would lead to disclosure. If it can identify that pubic interest, and if it is substantial, the public authority will then need to consider the public interest on disclosure and decide whether the former outweighs the latter. In any event, the learned judge was not prepared to accept that section 35 created or creates a presumption of public interest in non-disclosure. If nothing else, section 35 was expressed in very wide terms and if interpreted literally, information could not possibly be confidential.

29. The present Tribunal respectfully agrees with those observations. In any event, Counsel for the OGC on this appeal did not seek to maintain the same contentions as had been maintained in the High Court.

30. At paragraph 81 the learned judge dealt with section 33 and referred to the controversy that had been put before the original Tribunal as to the meaning of the word "likely" in the context of a showing that prejudice would or would be likely to occur. The learned judge declined to rule on this issue which was readdressed with great care before this Tribunal. This was because even though the original Tribunal had rejected the OGC's submissions as to its meaning, it nonetheless had found that disclosure of the Gateway Reviews in questions would be likely to prejudice the exercise of the OGC's functions.

31. This then led the learned judge next to consider whether the Tribunal had failed to identify a public interest justifying disclosure. Here, although the judge inferred that the Tribunal "must … have had in mind" the grounds advanced by the Commissioner at the original Tribunal hearing and revisited before this Tribunal, namely the public interest in open scrutiny of major public IT projects such as the ID Cards project, the judge said the Tribunal failed to identify the public interest in express terms. As

indicated above, however, the judge expressly stepped back from reaching a final conclusion on this ground.

32. At paragraph 85 the learned judge addressed another matter that was canvassed at length before this Tribunal. The original Tribunal had "envisaged" that the OGC would have to change its current practice if GRs were liable to be disclosed. Before the learned judge, it had been contended that by the original Tribunal considering that the OGC could and would mitigate the prejudice caused by disclosure, the first Tribunal took into account an irrelevant consideration. The learned judge disagreed. He confirmed that the original Tribunal had to consider what would happen in the future if disclosure were ordered. Indeed, section 33 itself contemplates a forward-looking exercise. The Tribunal respectfully agrees and has attempted to adopt the same approach in considering and applying section 33 in this appeal.

33. Where the learned judge did however depart from the original Tribunal was in relation to what was called "a lack of cross references or clarity at important points" (see paragraph 86). He said that this deficiency occurred in relation to the reasoning of the Tribunal in relation to the point just touched on. The Tribunal, he held, had failed correctly to identify and assess the prejudice to the public interest for the purposes of the public interest balancing test set out in section 2 of FOIA. Failure to identify and assess the finding of prejudice meant that it was correspondingly difficulty to see how that finding was "carried forward" within the section 2 assessment. In retrospect this point may seem largely self-evident. However, again, this Tribunal notes and takes into account the court's observations.

34. If there is a particularly significant set of comments by the High Court, albeit strictly obiter, it is in relation to what the Tribunal ought to have done given that the judge confirmed that there had been material before the original Tribunal which would justify a finding that the Gateway Reviews sought to be disclosed were of exceptional public interest. If nothing else, this was because the ID programme was said to be "mission critical" as well as a "key" programme in the way already indicated. This caused the learned judge to make the following observations at paragraph 89, namely:

"Thus the Tribunal could have found that the gateway reviews in issue, should be disclosed whereas in future only very few would be in similar exceptional cases; or it might have concluded that in general gateway reviews should be disclosed, with doubtless exceptions in particular circumstances; or it could have found that there could be no presumption of disclosure or non-disclosure so that every application for disclosure would depend on its individual circumstances. This matter was important, since it was the basis of the OGC's objection to disclosure and of this appeal."

35. This Tribunal has revisited these issues during the hearing in the present appeal. It is enough to point out that at this stage and given the evidence which the Tribunal has considered which involved a revisiting of much of the evidence before the original Tribunal, and as will be seen below, it has been almost by definition very difficult, if not impossible, to justify a finding that would have fallen within the first two possibilities highlighted by the learned judge. This Tribunal did ask for sight of other Gateway Reviews other than the two Gateway Reviews in question, but for obvious reasons, limited material only was produced with suitable redactions being made. It would be difficult for this Tribunal, seised as it is with the particular request in this case, to take anything like a wider view. Almost by dint of force of circumstance, it could be said that a Tribunal in this Tribunal's position would be bound at least to consider the probable appropriateness of the third possibility canvassed by the learned judge.

36. The reasons for referring to these matters is that the learned judge ended this part of his judgment by reaffirming that not only did the original Tribunal's reasoning on the issue of future Gateway Reviews lack clarity but that it was not "sufficient". He added at paragraph 91:

"Given the basis of the OGC's appeal, a specific finding and explanation as to the implication of the order made by the Tribunal on requests for disclosure of other Gateway Reviews were necessary".

37. This Tribunal naturally pays heed to what a High Court judge has said. It feels there is some difficulty stemming from the matters set out in the previous paragraph. Nonetheless this Tribunal will, as will be seen, attempt to set out some general observations at the end of this judgment.

38. The learned judge then touched on another matter which was much emphasised in the present appeal. At paragraph 93 of his judgment he quoted from what has been called the Working Assumption, there having been two versions as has been mentioned. He quoted from the earlier version, which is the relevant version in 2004. The relevant passage read as follows:

    "In summary, the prospect of disclosure has the potential to prejudice the quality of Gateway reviews. These perform an important role in ensuring that public authorities are using their resources in an efficient and effective way and there is therefore a strong and vital public interest in maintaining their efficacy. The general working assumption is that the Conclusion and Summary of findings, the Findings and Recommendations, the RAG Status, the list of interviewees, and a summary of recommendation should be withheld citing s33 of Act and where held by the auditee using s35/s36 in the alternative."

    The learned judge then commented that he did not "find this objectionable". The OGC in the present appeal contends that this comment in terms acts by way of endorsement as to the correctness of this approach and in particular as to the correctness of the Working Assumption referred to which only applies to GRs 0-3 in respect of requests for information which is less than 2 years old.

39. Quite apart from the obiter nature of the judge's comments, this Tribunal is not quite sure what the learned judge meant by his use of the word "objectionable". If he meant that the OGC could on its own initiative impose what in effect was a very high threshold as to disclosure under FOIA and yet leave determination as to the merits of a particular request for disclosure to the Commissioner and to this Tribunal in any given case, the Tribunal would respectfully agree. To that extent the learned judge's comments add very little to the actual position. If it is suggested that the learned judge was implying that the Tribunal should have applied the Working Assumption, this Tribunal respectfully disagrees and very much doubts that the learned judge would have ever intended as much.

40. At this stage, the Tribunal feels there is no further need to refer to the learned judge's decision.

The Working Assumption

41. The Tribunal was provided with a number of additional documents prior to the hearing of the appeal under cover of a letter dated 27 October 2008 from the Treasury Solicitor's Office. They included two documents which were frequently referred to at various stages by witnesses as well as by Counsel for both parties. First is the document which has been called the Working Assumption referred to by Stanley Burnton J. The document bears an emblem referring to Freedom of Information which though on its face undated, was issued in December 2004. The second document is headed simply "Gateway Review" and is again undated on its face. The Tribunal was informed it was produced in July 2008. Both documents were called Working Assumptions, but particular reliance was placed on the first document because of its date and its relevance in time to the reports which were being sought.

42. Much of the 2004 version is taken up with the basic nature and content of the Gateway Reviews Nos. 1 to 3. It also deals with the question of whether a GR or its content can be disclosed from the point of view of FOIA. So, for example, information as to whether or not a GR had been carried out and its date of issue could in general be disclosed. So could the background, the reasons or objectives for the particular project as well as the list of documents reviewed. On the other hand, the names of the team leader and his members and the conclusion and summary of findings including any RAG Status afforded to the Review were to be withheld. Paragraphs 15 and 16 provided:

> "15 There is a clear public interest in public authorities being robustly audited and examined by an external public authority to ensure that a public authority is discharging its functions in an efficient and effective way. The OGC process provides this function to Government departments and other public authorities through the OGC Gateway Review Process.
>
> 16 There is an overriding public interest in the continued robust assessment of major procurement projects in order to ensure that the maximum benefits are realised by the project."

Reference is made to the relevance of s.33 as well as s.35 of FOIA and the value of full and frank exchanges between interviewees and reviewers.

Paragraph 21 reads as follows, namely:

"21. In summary, the prospect of disclosure has the potential to prejudice the quality of Gateway reviews. These perform an important role in ensuring that public authorities are using their resources in an efficient and effective way and there is therefore a strong and vital public interest in maintaining their efficacy. The general working assumption is that the Conclusion & Summary of findings, the Findings & Recommendations, the RAG Status, the list of interviewees and the summary of recommendations should be withheld citing s33 of the Act and where held by the auditee, using s35/s36 in the alternative."

43. Paragraph 24 stated in terms that working assumptions "do not fit all situations". This was a point that was echoed to some extent by the OGC's witnesses. However, the paragraph went on to add that the fact that the assumption did not apply did not "mean you should automatically release information." (those letters were put in bold type). The paragraph ends after a number of bullet points which deal amongst other things with the distinction already drawn attention to above between Gateway Reviews 4 and 5 on the one hand and earlier reviews with the following bullet point:

"This working assumption should only be considered to be valid in respect of requests for information less than 2 years old, since the public interest in withholding the information is likely to have changed, meaning that a more careful argument is needed when refusing to release information. All such cases should be referred."

44. The 2008 version is a two-page document only. The gist of it is much the same as the earlier version. The final section is in effect a duplication of the last quoted bullet point passage which has just been referred to.

The Evidence

45. The Tribunal was invited to read all the witness statements which had been produced to, and considered by, the original Tribunal. These were the statements of Peter Gershon, Keith Boxall, Derek Baker, Andrew Edwards and Bernard Herdan. David

Richards supplied a lengthy witness statement regarding the GR Process. Robin Woodland provided a closed witness statement as did Mr Boxall. Messrs Woodland, Boxall and Richards were cross examined on this appeal. There were two other witnesses, Steven Harrison and Antony Melville, but the Tribunal feels that their evidence added nothing to the overall picture provided by the other witnesses.

46. The Tribunal however will start with Sir Peter Gershon's evidence. Sir Peter was the first Chief Executive of the OGC. It is fair to say that much of his evidence was developed elsewhere both by other witnesses and on submissions. He states that the "gates" in the life of a project could only be passed as a result of successful reviews conducted by independent appraisers. He envisaged further refinements to the process as evidenced by past changes such as the RAG Status. Nonetheless, certain core principles existed and he considered that they should remain "sacrosanct". These were factors which the OGC has throughout maintained as the basis for its overall contention that GRs should not be disclosed at least until a healthy timeframe had elapsed, eg the two year period of the working assumption.

47. The first factor was the confidentiality attaching to the review, the second was the privacy that attended the giving of the advice, the next was the desirability that the Review Team should be objective. Disclosure, he claimed, would undermine these core principles. He pointed to the undoubted success of the GR process referring to savings of approximately £1.45billion of wasted or avoidable costs between 2003 and 2005. Reference has already been made to the fact that the same types of observations were made by the learned judge. He also pointed to the use of the GR process in non-central civil government departments such as the Ministry of Defence, the National Health Service, adding the GR process had become part of the "DNA" of government, about 2000 reviews having been completed in the six years prior to his statement of February 2007. In his view, disclosure would "adversely affect" the value of the management tool the process represented. It follows, he said, that there were three reasons why disclosure should not be ordered. First, interviewees would be more guarded in their dealing with the interviewers, i.e. the benefits of a shared perception of confidentiality would be threatened. Secondly, reviewers would be less inclined to volunteer to participate. Thirdly, the risk of disclosure would be likely to result in "bland and anodyne reports". In his submissions, Mr Maurici for the OGC

stressed in particular the third factor which Sir Peter said would result in less explicit reports and more oral exchanges which would thereby devalue the process as a whole.

48. Mr Boxall is the Head of Standards and Practice at the Identity and Passport Service (IPS). He is responsible for implementing best practice across the IPS. The IPS is responsible for the National Identity Scheme (NIS) which is the programme according to which the ID Cards is now to be delivered. The nomenclature is now changed so that the former expression, i.e. NIS, describes what was formerly the ID Scheme. He explains in his witness statement in diagrammatic form the way in which the programme such as the ID programme is delivered. Although the document is headed "Restricted – Commercial" it is enough to say that the diagram displays immensely detailed stages by which various Boards within the IPS, and at one stage the Home Office, are expected to control the process. Apart from the various Boards which oversee the process, Mr Boxall himself heads an internal review group responsible for undertaking project assurance on a daily basis. A further diagram produced by him also marked "Restricted – Commercial" shows what are called various filters, i.e. the checks and balances to which all IPS projects are subject during their life cycle. He described the whole arrangement as being equivalent to an increasingly fine filter or set of filters put in to test the project as it develops. The GR process runs alongside the IPS' own system. Overall the IPS relied on a balance of its own checks and balances in the form of its own internal reviews on the one hand and on the GR process on the other.

49. In the 14 months prior to his statement, signed in February 2007, Mr Boxall estimated that the IPS had conducted 8 to 10 external reviews and 20 to 25 internal reviews with regard to the ID programme. He drew a distinction between the GR and the National Audit Office (NAO). The latter had the benefit of public scrutiny and accountability while the GR provided independent advice with the aim of increasing the prospects of successful delivery of the entire programme on a very short timescale. As in the case of Sir Peter Gershon, he affirmed the benefits of candour on the part of the interviewees based in turn on the feeling of confidentiality which they enjoyed or felt they enjoyed, as well as the benefits of the reports drafted, as he put it, "on the basis that they are private advices for the SRO". He expressed his

concern on what he called the medium term and the long term impact if GRs were disclosed. He stated at paragraph 25 of his statement that he suspected that "the risk of disclosure in the case of any single report would be unlikely to have any immediate impact". There would however be a loss of confidence if a few reports were "misconstrued". A loss of confidence would in turn cause senior civil servants to be reluctant to take on the role of the SRO if misinterpretation or misconstruction were the possible result. As will be seen, this particular issue was canvassed with Mr Richards when he was asked about the impact of FOIA on the full processes of present Gateway Reviews.

50. Equally, SROs, according to Mr Boxall, would increase the number of their challenges as to the factual content of the reports process which came to be called during the course of the appeal a process of "negotiation". In addition, reviewers would be more guarded. From the point of view of reviewers, which he himself was, he stated that he would be concerned that the quality of his advice might be challenged in the public domain for political gain. Finally, there would be commercial implications since disclosure might cause the private sector if commented on adversely to be less willing to be involved in projects generally, quite apart from GR Reviews themselves.

51. Mr Boxall also provided a closed witness statement. Much of it concerns the passage of the Identity Cards Act 2006 and its subsequent history, a matter dealt with by Mr Woodland to whom reference will be made below. The obvious reason for the production of a closed witness statement was that he referred to the two Gateway Reviews in issue. However, he described the NIS as "the largest, most complex and sensitive undertaking in Government at the moment". In particular he stated that the ID programme and the NIS had been characterised by the OGC as "high risk" and thus part of what has come to be called the OGC's Major Programme Project Portfolio (MPP). A project rated as high risk does not automatically mean it is a 'Major Project' and included on the MPP list, only a percentage of high risk programmes / projects are 'Major Projects'. The term "mission critical" (already referred to) was also applied to the ID project. As at May 2008, the estimated cost of providing passports and ID cards to British and Irish Citizens resident in the UK from April 2008 to April 2013 was put at £4.74billion. The cost of the ID Cards programme in respect of

foreign nationals was put at £311million. He confirmed that a number well into double figures reflected the number of times there had been GRs on the NIS and its constituent parts since early or mid-2003. He also set out in detail the ways in which certain specific GRs in his view had contributed to the progress and the development of NIS generally.

52. Mr Boxall was cross examined in closed session. He confirmed that he had been involved in the GR, both as an interviewee as well as a reviewer though only on one occasion in the latter respect. Like other witnesses, he also confirmed that the NIS was not only an amalgamation of a number of different programmes but also unique in its nature and extent. As in the case of Mr Woodland, he did not seek to claim that were either GR to be disclosed in this case, this would single-handedly change the direction of the overall programme: rather he said it would “influence” such a change.

53. He referred to the IPS’ awareness of the need to keep the public informed. Reference will be made in relation to Mr Woodland’s evidence as to the number of documents and publications available from the IPS website which deal with the NIS and previously the ID Card Scheme. Mr Boxall referred to and duly procured the production of a publication entitled “Lessons Learnt” as well as two published articles in a number of publications, in particular in relation to computers such as “Computer Weekly” where there were reports on the ongoing progress of the ID Cards scheme. No evidence was produced to the Tribunal about similar publications issued by other government departments in such circumstances where there might have been or might be expected to have been Gateway Reviews. In relation to the diagrams which have been referred to, he explained that each phase of the ID programmes such as those dealing with card production and passport production was subject to the entire fully numbered GR process.

54. In cross examination, he also emphasised the abiding value of the GR process referring in particular to a Gateway Review that had taken place regarding the NIS in 2006 which had caused the rethink of the direction in which the IPS was otherwise going. He agreed that the public perception of how well large projects such as the ID Scheme or NIS were managed “rather lags behind the improvements”. The “Lessons Learnt” publication produced to the Tribunal (he said) provided public confidence as

to the way in which IPS' various programmes were being managed. He was not in favour of disclosure of the two Reports in question. However he accepted that the relevant IPS team at the time of Mr D's request missed an opportunity to publish progress reports on the ID Scheme and its status as at that stage. He claimed that the "Lessons Learnt" reports were drafted in such a way that they actually did identify in his words "where things were done well and things were not done so well". He stated that the two Reports in question were written at a very early point in the life cycle of the ID Scheme and in terms of the filter-like diagram describing the stages of the scheme which he produced, these would have occurred at a time before the actual programme entered into the start of what the diagram indicated as a form of tunnel, i.e. when the very strategic and basic policies were being formed. In essence, and this clearly followed from what he said in evidence, he accepted that there was "a strong public interest" in disclosing information but that such interest was not served by the disclosure of the GR Reports here in question.

55. He was asked about the possibility of a SRO being able to draw the conclusion from the contents of the report which contain any form of comment, critical or adverse, as to which person or persons might have provided such comments. He accepted however that such a possibility had not and did not inhibit people from taking part in the GR Process in his experience.

56. Overall, he maintained the stance he had adopted in his witness statement, namely that if any GR Report was released, whatever its actual content, there would be what he called "irreparable damage to the process". Nonetheless, he accepted that after a suitable period of time they ought to be released. In this connection he referred to the Working Assumption, which has been referred to above, to the effect that if a report were to be disclosed, it should only be for reports that were two years old and then only after consultation. This was entirely in keeping with the relevant bullet point in the Working Assumption. Somewhat curiously, however, he appeared to accept that although freedom of information considerations in general terms would be known to interviewees, "… people were asked on their way into interviews … whether that was something they had thought through, that the possibility of the release was there, they would say no …".

57. As for the present appeal and its earlier passage through the original Tribunal and then the High Court, he again somewhat significantly disputed the assumption that the proceedings were "generally known of across government departments". He modified that answer by saying that OGC operated under the premise that there would be no disclosure or at most disclosure under the Working Assumption "until a decision is taken by OGC to change that". In exchanges with the Tribunal, Mr Boxall confirmed that to his knowledge there had been no discussion with the IPS about the impact of FOIA in connection with its internal reviews.

58. When pressed, perhaps justifiably, on whether that attitude indicated that the prospect of publication was not in fact as great a concern as Mr Boxall would perhaps have made out, he responded saying that there was a general belief that the way in which the GR process was being run was "the right way". It was put to him by Mr Pitt-Payne for the Commissioner that if disclosure of any sort were to take place as a result of this Tribunal's ruling, it would be for the reviewers to ensure that interviewees understood the rules of the game. As Mr Boxall pointed out however, that was not a matter for the IPS.

59. Mr Robin Woodland provided a closed witness statement. The reason for this as in the case of Mr Boxall's closed statement, was that it also contained details of the contents of the GRs which are the subject of the request. However, much of what Mr Woodland related in his witness statement was of a non-confidential nature and of importance to the appeal.

60. He is Director of Policy at the IPS. He has been involved with all aspects of the Identity Cards Act 2006 as well as the draft Bills which preceded it. He is now in charge of preparing the requisite secondary legislation. He was directly involved in one of the GRs in questions.

61. He relates in his statement that the ID Cards Scheme was conceived in the wake of the September 2001 terrorist attacks in the United States. A White Paper published in February 2002 evidenced the then Government's intent to consult on a cards scheme. In July 2002, the Cabinet Office published a paper entitled "Identity Fraud: a study" which sets the costs of identity fraud at £1.3billion per annum. It addressed the need to improve identification because of identity fraud. The Home Office

conducted a similar simultaneous exercise in the form of a Consultation Paper. In the wake of that consultation and in February and March 2003, a technical assessment of the possibility of delivery of a card scheme was conducted by independent consultants for the Home Office. It was facilitated by the OGC.

62. In June 2003, the Government commissioned a Gateway Review Zero. This particular review was unusual, since normally such a review would be planned on the basis that a policy was already in place with an "up and running programme". As at June 2003, the Government had made no commitment to Identity Cards in principle.

63. In November 2003, the Cabinet agreed to proceed with the introduction of an ID Scheme in principle. In that respect there was in effect a response to the Consultation Paper and that coincided with a White Paper entitled "Identity Cards, the Next Steps". It appeared therefore that the decision to proceed with the ID Scheme was not based solely on the GR Review. The terminology had also changed. Entitlement cards which had been the subject of the Gateway Review Zero were now called Identity Cards.

64. The Government White Paper envisaged two stages. The first foresaw a National Identity Register, where there would be recording of passports, driving licences and the like, an Identity Card scheme based on a voluntary basis, and the introduction of mandatory biometric identity documents for foreign nationals coming to the UK for more than three months. A second stage foresaw a move to a compulsory card scheme subject to the holding of a full debate in both Houses. Prior to the first stage however, the White Paper envisaged that the OGC conduct its Gateway Zero Review. Mr Woodland stated that he understood that the Government wanted this second Gateway Review Zero to assess whether the Home Office had set up the appropriate structures, recruited the appropriate personnel and secured the right level of funding. The result is the second Gateway report in issue this appeal, namely the Gateway Review Zero conducted in January 2004.

65. In April 2004, a draft Identity Cards Bill was published. This was followed by a 12 week consultation exercise regarding draft legislation. On 11 November 2003, the Home Affairs Select Committee had announced it was to be holding an inquiry into all aspects of identity cards including scrutiny of the draft bill. On 30 July 2004, the

same Committee published its report entitled "Identity Cards". The Inquiry on the Report examined all aspects of the ID Scheme. In November 2004 the Identity Cards Bill was given its first reading in the House of Commons and was approved. A second reading was in fact frustrated, as explained above, by the dissolution of Parliament pending the General Election in 2005. After the Election the Bill was duly produced to the House of Commons on 25 May 2005. A Regulatory Impact Assessment confirmed the benefits of the policy as justifying the costs. The Identity Cards Act 2006 received Royal Assent on 30 March 2006 and the IPS was formed as an executive agency of the Home Office on 1 April of that year.

66. The Act did not reflect the two stage process which was initially envisaged and as set out above. It contemplated compulsory registration as being many years away which would in turn require further primary legislation rather than secondary legislation as originally envisaged. Since the passage of the Act, there have been various developments in relation to the implementation of the related policy and strategy. In particular, in December 2006, the Home Office published a further paper entitled "Strategic Action Plan for the National Identity Scheme – Safeguarding your Identity". It assumed contrary to the previous policy that from 2008 onwards, biometrically enabled identity documents would be issued for foreign nationals from outside the EU, but already in the UK. It also envisaged that from 2009 identity cards were to be issued to British citizens. In 2006, the Government published a Consultation Paper entitled "National Identity Scheme – Delivery Plan"; it revisited the concepts in the December 2006 Home Office publication by announcing in Mr Woodland's words "… a new approach to the delivery of the National Identity Scheme, including greater choice to the public" with various important policy implications. For example, it foresaw the issue of identity cards to British as well as foreign nationals working in sensitive roles, eg at airports. In addition, it foresaw from 2011/2012 the enrolment of all British nationals on the National Identity Register with a choice being offered of either a biometric passport, identity card or both. The latter event is not legislated for in the 2006 Act and would therefore require amending primary legislation. All in all, Mr Woodland confirmed the NIS is still "a developing programme". Key matters such as biometrics remain to be definitely resolved and implemented.

67. In his witness statement, although he reiterated the same general benefits stemming from non-disclosure of GRs, as did Mr Boxall, Mr Woodland freely admitted in paragraph 39 that he did not consider that he had “sufficient experience, knowledge or insight” into the Gateway Review Process to comment on the arguments for or against disclosure of the Reports.

68. In his oral evidence, Mr Woodland qualified his statement by saying that the decision in November 2003 was what he called a headline decision and that throughout the history of the programme of legislation, many continuous changes had been effected. This was, in his words, in keeping with a project such as Identity Cards which by definition was a long-term project with an incremental development inbuilt into the project.

69. In relation to disclosure, had there been disclosure in January 2005 at the date of the request, he would not have regarded that as “particularly welcome” on the ground that anything that could have been interpreted as bad news would have been “grist to the mill” for those who did not wish the project well, coupled with the risk of the possible chance of change of mind on the part of other government agencies.

70. As for information otherwise publicly available, Mr Woodland emphasised the point in his witness statement that as at August 2008, there were approximately 70 publications on the IPS website ranging from legislative-type publications to more corporate publications regarding identity cards and related issues in support of the OGC’s overall contention that disclosure of the requested Gateway Reports would in any event add little, if anything, to the sum total of public knowledge as to identity cards at that time as to their evolution.

71. The chronology set out above in relation to this appeal confirms that a Decision Notice was issued in relation to the first request, i.e. Mr D’s request, on 31 July 2006. Mr Woodland admitted he had been involved in two reviews in 2008. In the light of the Commissioner’s decision in favour of disclosure, he admitted that it had “certainly made me think as to what I should say” but he assumed that anyone in public life would in turn assume at some point something they might do or say, might at some stage become public. He maintained however that he believed he was nonetheless frank and candid in the answers he gave during the interview. He confirmed that the

decision to go ahead in principle with the Identity Cards Scheme occurred as a result of the Cabinet's November 2003 decision, accepting that it was unusual for a Gateway Review as such to determine whether a decision to go ahead in principle should be made. He was not aware himself of any other case in which a Gateway Review had been used to inform a decision at Government level of that type.

72. Mr Woodland reiterated a point made by various other witnesses that had a particular Gateway Review been published at the time of the request, it might have been interpreted in a negative way. He also accepted quite fairly that given the passage of time between the Gateway Review in question and the request, any impact afforded by its contents would have been overtaken by events in the sense that the informed reader would have taken such events into account. However he did qualify that admission by saying that the broad way in which some contents of Gateway Reviews were expressed in Reports led themselves to a mere summary way of expressing the intention of the reviewers thereby increasing the risk of the content being misunderstood, if not being misinterpreted.

73. Mr Woodland, however, did accept that were there to have been an appropriate time for public debate, if not disclosure, that would have happened at the time of the Home Affairs Select Committee's consideration of the programme occurring in November 2003 and ending with its Report in July 2004. Those dates of course pre-dated the date of Mr D's request. This in turn led to his general acceptance of the fact that by the time of the second Gateway Report in 2004, the essential elements of policy-making had been activated and that what the review was dealing with at that stage, in the main, was what he called "organisational matters concerned with the programme" such as "who reports to whom, and what particular structures should be in place" ie, as he put it "programme management, good practice and so on". He remained of the view however that disclosure of both Gateway Reports, not being intended for publication, would not have helped the public debate.

74. The third and final witness from whom the Tribunal heard was Mr David Richards. Mr Richards was the only OGC representative. He helpfully produced a fresh statement for the appeal which revisited many matters in his original statement. Both this later witness statement and his evidence were lengthy.

75. Mr Richards is the current Gateway Portfolio Leader for the Home Office and the Department of Culture, Media and Sport. He has overseen reviews of some of the largest projects in Government, including the NIS and the 2012 Olympics. He also occupies the post of OGC project leader in relation to other major Government programmes. He is himself an accredited reviewer for the high risk projects which have been referred to.

76. He joined OGC in 2003 having been previously employed in a similar role in the oil industry. He was, on any view, not only an extremely important but also a vastly experienced witness. The Tribunal is duly grateful for the extensive evidence he gave.

77. Much of his written evidence was reflected in the documentation and in the witness statement he produced as well as in the evidence of other witnesses, particularly Messrs Woodland and Boxall. In his witness statement he did point out a number of additional important elements and factors in relation to the Gateway process to which the Tribunal now turns.

78. He explained that a “project” was a piece of work designed to achieve specified outputs within a specified timeframe, whereas a programme is a portfolio of projects considered to deliver greater outcomes and benefits. A project was subject to Gateway Reviews Nos. 1 to 5 which largely corresponded to a project’s life cycle. The first three generally preceded delivery or implementation of a contract and the final two were, in effect, reviews that looked back at the implementation and any operational benefits. Since January 2004 only programmes, as distinct from projects, were subject to Gateway Review Zeros. Such reviews would be applied at the beginning of a programme. For reasons which do not remain wholly clear, a programme will not undergo a Gateway Review 1 to 5, but might undergo a Gateway Zero which might itself include elements of a Gateway Review 1 to 5. Such distinctions are perhaps not relevant to the issues in this appeal and were undertaken at a time when Gateway Zeros were applied to programmes as well as to projects.

79. He confirmed that the Gateway Review Process had been mandatory for all procurement IT-enabled and construction programmes and projects across central

government. Since 2002, a programme or project subject to the GR Process has been classified either as high, medium or low risk and once acquired, the risk status will determine the level of experience, expertise and scrutiny that the Review Team may bring to bear upon it. As has been said several times already the ID project has at all times been a high risk project. Such projects since 2003 have been redesignated as part of the MPP and apart from the NIS, such projects include the M25 widening, Crossrail and similar programmes.

80. Reverting to Gateway Review Zeros in the words of Mr Richards' witness statement, a Gateway Review Zero, as set out above, since 2004 has constituted a repeatable review for programmes only, though at a development stage. It is designed to assess first why a programme is needed, secondly what would be required to deliver the outcome and thirdly to seek to identify high level risks which are likely to be a bar to delivery at the earliest possible stage. A Gateway Review Zero exercise might then be repeated at appropriate key decision points in a programme's life or where there has been a significant change to the desired outcome. The RAG Status to which reference has already been made was introduced in June 2002. It was removed in 2008. Again, as indicated above in brief terms, the RAG indicated the urgency status to be given to each recommendation. A red status did not mean in any way the end of a programme or project. It was simply an indication as to the importance of a recommendation or sets of recommendations. The new 2008 classification uses the following self-explanatory classification terms, namely, Critical, Essential and Recommended. These would now be followed by a Review Team's judgement of the overall "Delivery Confidence".

81. Mr Richards stressed in his statement that following the production of a Gateway Review Report, the SRO, and only the SRO, became its owner free to share its content and recommendations with whomever he chose.

82. The pool of reviewers available to the OGC included about 1329 civil servants and 215 private sector consultants. The former included currently extremely high ranking civil servants as well as extremely distinguished retired civil servants. They underwent appropriate training for their roles as reviewers which would generally involve them in about two reviews per year.

83. As other witnesses confirmed, the Gateway Review Process itself would normally take place over no more than 5 days or so at a fairly intensive level followed by the submission of a final Report to the SRO within a very short timeframe thereafter. The Team's recommendations could not be "negotiated" to quote from Mr Richards' statement (and to reuse the term which has been referred to above). This meant in other words that the SRO was not in a position to alter on their face any recommendations which were expressed in the Report. Although a draft would previously have been shown to the SRO, a final Report would be provided to the SRO within a week of the final meeting.

84. Both in his witness statement and in his oral evidence, Mr Richards insisted that there was a "risk" that individuals in the private sector attached to a project such as the Olympics would be unwilling to be interviewees if the final Report were to be publicly disclosed, on account of the perceived inability of the Review Team to exclude commercially sensitive information from the Gateway Review. He put particular stress on the fact that in 40% of high risk programmes, i.e. often MPPs, Ministers are interviewed. The risk attendant on disclosure would, he said, be the undermining of collective Cabinet responsibility. The Tribunal pauses here to note that no Cabinet Minister was apparently interviewed in relation to the two Reports here in question. In any event, the contended for benefit and indeed the philosophy of the entire GR process is that interviewees express their personal views and experiences with regard to the particular project or programme under consideration and are not affected by any wider considerations or responsibilities.

85. He accepted that Reports often bore "rough edges" given the speed with which they were compiled. Again, as other witnesses emphasised, their content and scope differed vastly from the reports produced by such bodies as the National Audit Office (NAO) and its Reports which are designed for public consumption. Moreover, a NAO Report tended to constitute a historical audit contrary to the essential purpose of a GR Report. It was not uncommon, he claimed, for a NAO Report to refer to a Gateway Review. Mr Richards did not suggest that material otherwise not treated as being the subject of release under the Working Assumption was thereby disclosed.

86. As for FOIA, in his witness statement, Mr Richards expressly stated that the OGC:

" … has always taken its responsibilities under the FOIA 2000 and its application to the Gateway Review Process very seriously. For the avoidance of doubt the OGC have never operated a blanket exemption for Gateway Reviews from the FOIA 2000 rather each request is considered on a case-by-case basis." (see para107).

87. Mr Richards also quoted from the OGC website where the same principle is repeated and at paragraph 108 of his witness statement he stated that:

"OGC prides itself on the clear advice that it provides on FOIA 2000 (as evidenced by the guidance on the website) and keeping all its clients, partners and associates informed of the impact of the legislation and any legal decisions that may influence interpretation under the FOIA 2000. Whilst the OGC does not provide specific FOIA 2000 training to the Review Team, the SROs or the interviewees, we do when asked, update any interested parties as to the present position regarding disclosure of Gateway Reviews and inform them that each and every request must be considered on a case-by-case basis in accordance with the guidance provided by the Ministry of Justice …".

88. Mr Richards then set out the contents of the 2004 and 2008 Working Assumptions referred to above. At paragraph 113, he added that although there was "great public interest" in what he called the continued "robust assessment" of programmes and projects, disclosure of the detail of the assessment processes "is likely to prejudice the quality of Gateway Reviews and significantly undermine the strong public interest in the unrestrained and unprejudiced examination of the programmes and projects …". Accordingly, in his words, the occasions on which the Assumption should not be applied "are likely to be exceptional". He then refers to Stanley Burnton J's statement referred to above that he, the judge, did not find the OGC approach "objectionable". In his oral evidence, Mr Richards also accepted that the Working Assumption did not apply to Gateway Reviews 4 and 5. The Tribunal again pauses to note at this point that out of all the witness statements presented by or on behalf of the OGC, only Mr Richards appeared to afford any, or any due recognition, to the impact of FOIA albeit as reflected in the Working Assumptions.

89. At paragraph 115 he summarised the OGC's position as being to the effect that despite the constant existence of the risk of disclosure under FOIA, "the OGC has

not noticed any deterioration in the quality of the information exchanged in Gateway Review and that the culture of confidence and confidentiality has been maintained by such assurances."

90. As an alternative means of providing information relating to the matters which Gateway Reviews would otherwise address, he referred, as did other witnesses, to NAO Reports, the Lessons Learnt Reports issued by the IPS, costs reports issued under the provisions of the Identity Cards Act 2006 and the ability of Parliament to convene a Select Committee such as the Home Affairs Inquiry in identity cards concluded in July 2004.

91. He then, to all intents and purposes, qualified the Working Assumption by repeating the phrase to which reference has already been made, namely that "one size did not fit all" so that Gateway Review Zeros still retained extremely significant implications and information even after a number of years since they were repeatable Reviews held during the lifetime of a programme where the same issues tended to recur. Overall he claimed that his views were shared by many senior civil servants "of the highest calibre who participated in the Gateway Review Process under the aegis of the OGC".

92. At the outset of his evidence and prior to his cross examination by Mr Pitt-Payne for the Commissioner, Mr Richards produced a three-page document entitled "OGC Gateway Board Principles – Refresh 2008" which was a public document and which reiterated the purposes and aims of the Gateway Review Process. At Box 13, the following major principle was set out, namely:

"The OGC Gateway review process will be undertaken in a confidential manner, with a non-attributable report."

He claimed that that Principle as well as others reflected a practice that had been applied with regard to Gateway Reviews in 2004.

93. In his cross examination, Mr Richards alluded to the fears regarding disclosure which he said were experienced by reviewers. He added that he knew of two reviewers who had said "… we are not doing any more" given what he or they called "the threat of FOIA" with FOIA having, as he put it, "no place". In support of this, he referred to

the GR Processes being "embedded" in Government practice, no doubt an echo of the "DNA" expression used by Sir Peter Gershon and he also alluded to the specific feeling that interviewees did not feel threatened "by the fact that they could be in the newspapers within a very short time".

94. He rejected the suggestion that if the relevant government department instructed their interviewees to be frank and candid in their exchanges with the OGC, the interviewees would have nothing to fear if any adverse observations or remarks were then put into the public domain.

95. As for the content of the Reports generally, he claimed that with few exceptions they set out to be "punchy" and "robust" given the short time available in which to write them. Were there to be disclosure he claimed, then the reports would be far less so and would take longer to write.

96. He also dealt with the issue of the attribution of particular comments and criticism to particular interviewees despite the Principle which has been set out above. He suggested that the reviewers would refuse to attribute particular criticisms to specific individuals in their exchanges with the SRO or in the Report. He also said that reviewers and the compilers of the Reports would endeavour not to rephrase detrimental comment in the reports again in such a way as to be attributable to any particular party or persons.

97. This was confirmed by his assertion that in his own experience he had not come across a case where a particular individual had been identified as the supplier or source of a critical or adverse comment on a particular programme or upon those running it. On the other hand, he was concerned that disclosure would lead to adverse and incorrect inferences being drawn as to the particular project despite the non-attribution, i.e. as he put it "the loyalty of the relevant department was to the programme" as well as to the project itself and any adverse inferences would not be drawn with regard to individuals but with regard to the overall programme and possibly the relevant department.

98. As for FOIA, he largely repeated the contents of his witness statement. However, at one point he ventured to say that if it were up to him "I would say no. Don't release them" i.e. the reports in question. This was so even though he admitted that

Gateway Reviews 4 and 5 would constitute an exception even to that approach. In his answer to another question, he maintained on behalf of OGC that the Commissioner in relation to the present appeal was "wrong" adding that "… so therefore, until we are told otherwise we are working by the assumption".

99. He was then asked about the degree to which a SRO might share a report. He maintained that such sharing as there was varied between "very limited viewing to not very wide at all". Mr Richards remained concerned about the possible adverse Press reactions were a Gateway Review to be disclosed if any form of criticism were contained in the Report in question. He was particularly anxious about the setting of any precedent which could lead to further disclosure. He admitted that this was likely to be the case only in a handful of reviews and only in those cases which concerned projects or programmes of a high profile.

100. On his own admission however and when pressed by Mr Pitt-Payne, Mr Richards accepted that he held a particular view about the risk of Press misrepresentation which perhaps did not equate with the views of OGC generally. He did however at a later stage, indeed on the second day of his cross examination, appear to admit that many of the "players" involved in the GR Process "actually are not concerned about the Press" largely because of the Working Assumption, since the interviewees at least, were "more concerned about their programme" than they were about publicity even in the Press or elsewhere.

101. Reverting to the two reviewers out of the total pool of some 1600 reviewers who threatened no longer to act as reviewers any longer, he later confirmed they were now "off the list" and that they had come, according to him, from the private sector. He was also asked about his own position were disclosure to be ordered. He merely said that he would "think very carefully" about whether he would want to do further Gateway Reviews.

102. When asked about the views or opinions which interviewees might have in a case where reviewers had written a critical report, he claimed that because all concerned were above all anxious to promote the advancement of the programme or project in question, there was, in his expression, no room for any grievance experienced by a

team or team member whose role had been the subject of criticism, direct or otherwise.

103. Again, in his experience, much in keeping with his last response he confirmed in cross examination a passage in his witness statement to the effect that he had never come across a case where an interviewee had been directed or instructed to take part in a Gateway Review. To be fair however, he also admitted that if such had been the case, it was not something he was aware of. The position, he claimed, might be different in the case of private sector interviewees.

104. He accepted that there might have been or indeed might still be a "perception" that central Government was not "good at big IT projects" but if there was such a perception, it was one he said that was sought to be dispelled. Given the balance of other publicity available by way of information as to government activities, he did not feel that disclosure of Gateway Reviews would assist in that direction.

105. Mr Richards confirmed that no Gateway Reviews had to his knowledge ever been disclosed.

106. In further questions put to him by the Tribunal, Mr Richards explained in some detail why the names of interviewees were listed in the Reports. He explained that this was done to enhance what he called "the validity" of the report, in other words, to show that the right people had been interviewed.

107. In further questions in closed session, Mr Richards reiterated his fear that were disclosure to occur, this would have a knock-on effect on the way, what he called, action plans were presently drafted. Actions plans were basically a list of recommendations which reflected the recommendations in the report. They would not then, in his words, express what was really intended and much might be left to a verbal exchange between the Review Team or its Leader and the SRO which would not assist the relevant programme or project. It is perhaps important to note that Mr Richards confirmed that although action plans were now drawn up by SROs, such plans did involve the reviewers "very closely". Mr Richards stressed that disclosure of a Gateway Review did not in any way further the necessity for a SRO to be compelled in some way to abide by and/or implement the action plan. He therefore strongly disagreed with the suggestion that disclosure would act, as Mr Pitt-Payne

put it, as a "spur" to a reluctant department to act on criticisms. To repeat what was said above, it was the programme itself, he said, that acted as the spur. Moreover, in his experience, action plans were invariably acted upon within a reasonable time. It was however doubtful whether either of the Gateway Review Reports in the present appeal had prompted any action plans at all.

Other witnesses

108. Reference has been made above to the fact that the Tribunal was presented with other witness statements which had been produced to the original Tribunal. A word about their contents will be said shortly. The Tribunal noted in the course of the appeal that various passages in the statements of more than one witness read virtually identically. Although the net result of such a practice may be merely to increase the volume of material to be digested, the Tribunal noted and duly again notes that it is important in all cases which come before it, especially those involving major government departments or agencies, for the simple principle to be observed that witnesses should express themselves in their own words. It is certainly not as if the resources are lacking to ensure that such a course is complied with.

109. Apart from Messrs Melville and Harrison, the Tribunal was asked to read the witness statements of three witnesses which had been prepared in respect of the original Tribunal hearing.

110. The first was from Derek Baker, the Director of Managed Service Operations within the OGC. He is responsible for the operation and delivery of Gateway Reviews of what he called the Government's portfolio of acquisition-based delivery programmes and projects. He is also responsible for managing and developing the Gateway reviewers' pool throughout central civil government. As has been noted, the pool includes well over 1100 civil servants and about 120 private sector consultants.

111. His witness statement presented a detailed description of the Gateway Review Process including a description of the RAG Status. The Tribunal did not find anything in his statement which greatly added to the evidence that was produced in documentary form or which it had learned from other witnesses.

112. The second such witness was Andrew Edwards. He is a retired senior civil servant. He is an experienced Gateway Review leader having led many such reviews in the past four years. He says he had been involved in about 35 reviews overall as the majority Team Leader. He confirms that the ID Cards Scheme is, in his words, "tremendously sensitive" as well as being very controversial. In particular he points out that the current Opposition though initially it supported the ID Scheme, "have recently given the impression that they would scrap it".

113. Again, most of the substantive content of Mr Edwards' statement can be said to be contained in other evidence put before the Tribunal. He confirmed that although a Review Team had "no authority" to compel anyone to attend an interview, indeed adding that such would be contrary to the spirit in which reviews were conducted, he had never heard of a case where anyone had refused to attend an interview or had been ordered to do so. Although Gateway Reviews were not concerned with policy formulation as distinct from implementation and delivery of projects and programmes, there was nonetheless "an extensive grey area between policy and implementation". A report, according to him, might well therefore have to address policy-related issues. The ID Cards programme was such a case.

114. The third and final witness in this group of witnesses was Bernard Herdan. He was the Executive Director for Service Planning and Delivery at the IPS. He managed a workforce of about 3000 and is responsible for all IPS operational service delivery. He has been both a reviewer and a SRO. He expressly recognised the need for public accountability. Mindful of that requirement, he published, or was responsible for the publication of, an internal report into lessons learned from a particular programme dealing with electronic passports. Nevertheless, the reasons advanced by the OGC such as the need for candour and confidentiality, the risk of not committing sensitive information and issues to writing, the risk of misrepresentation or misconstruction were viewed by him as constituting the risks which would follow with disclosure. This, he claimed, would diminish the benefits derived from Gateway Reviews generally thereby adversely affecting the overall delivery of complex public projects.

115. A copy of a Lessons Learnt Report was produced to the Tribunal. It is fair to say that with regard to the Electronic Passport Application system, the Report (clearly a public

document) in 2006 appeared to summarise an IPS internal Review Team's findings as well as the actions that were taken to address those findings and recommendations.

The issues

116. Before turning to the issues, it is necessary to set out the two sections of FOIA which are involved in this matter. Section 33 of FOIA provides that:

"(1) This section applies to any public authority which has functions in relation to –

(a) the audit of the accounts of other public authorities, or

(b) the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions.

(2) Information held by a public authority to which this section applies is exempt information if its disclosure would, or would be likely to, prejudice the exercise of any of the authority's functions in relation to any of the matters referred in subsection (1).

(3) The duty to confirm or deny does not arise in relation to the public authority to which this section applies, if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the exercise of any of the authority's functions in relation to any of the matters referred to in subsection (1)."

117. Section 35 which deals and is headed with the phrase "Formulation of government policy, etc" reads as follows, namely:

"(1) Information held by a government department … is exempt information if it relates to –

(a) the formulation or development of government policy …

***

(2) Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded –

(a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy …

***

(3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).

(4) In making any determination required by section 2(1)(b) or 2(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which is being used, or is intended to be used, to provide an informed background to decision-taking."

118. Section 35(1), unlike section 33, is a class-based exemption rather than the prejudice-based exemption. There needs to be no demonstration that any specific prejudice or harm would follow from disclosure to engage the former section.

119. The principal issues are:

(1) is the exemption in section 33 engaged and in particular is the prejudice test satisfied?

(2) if yes to (1), does the public interest in maintaining the exemption outweigh the public interest in disclosure?

(3) in any event, does the public interest contained in the section 35 exemption outweigh the public interest in disclosure?

A fourth and further issue is raised as to whether, and if so as to what extent, the Tribunal should make any conclusion as to the applicability of section 40 of FOIA which deals with personal data. This will be dealt with later.

<u>The prejudice test</u>

120. Section 33 is engaged if the disclosure of the disputed information, would, or would be likely to, prejudice the exercise of any of the public authority's functions in relation

to any of the matters referred to in subsection (1). It was common ground that the OGC is a public authority which has functions relating to the examination of the economy, etc pertaining to other public authorities.

121. The issue is not a new one. Differently constituted Tribunals in three previous decisions have confirmed that with regard to prejudice-based exemptions where the disclosure would prejudice any matters which are specified, requires a consideration of whether prejudice is more likely than not; and whether disclosure would be likely to prejudice, requires a consideration of whether what is now commonly described as a significant and a weighty chance of prejudice exists. See, eg *John Connor v Information Commissioner* EA/2005/0005; *Guardian Newspapers Limited and Brooke v Information Commissioner and the BBC* EA/2006/0011 and 0013; *Hogan and Oxford City Council v Information Commissioner* EA/2005/0026 and 0020, especially at paragraphs 34 and 35.

122. In a nutshell, the OGC, by Mr Maurici, contended that a real as opposed to a marginal or fanciful risk of prejudice, will be sufficient. If a Tribunal were to find that the OGC had an objectively reasonable belief that there existed a weighty chance of harm, the arguments of either of the parties on this issue would be academic.

123. For the reasons which will appear below, the Tribunal is of the view set out in the previous paragraph. However, out of due consideration to the careful way the parties deployed their arguments on this issue, and since the matter may go further, the Tribunal will deal with the OGC's submission and the response of the Commissioner.

124. Mr Maurici made what he called two key points. First he pointed out that a determination as to whether or not prejudice existed did not prohibit disclosure: it merely triggered the engagement in this case of section 33. There was still a public interest balancing test to be applied. He claimed that this approach was confirmed by other Tribunal decisions including *Department of Education and Skills (DfES) v Information Commissioner and the Evening Standard* EA/2006/0006. That case involved however section 35(1)(a). The OGC claimed that because the Tribunal in that case accepted arguments advanced by the public authority, namely the *DfES*, that section 35 should be given a broad construction, thereby requiring the public authority to adopt what the OGC called a common sense approach to the disclosure

of information, such an approach was therefore "directly analogous" to the arguments advanced with regard to the prejudice test.

125. This Tribunal respectfully disagrees. Section 33 embodies elements which are clearly absent in section 35. The *DfES* in that case had noted in its contentions that no evidence of prejudice was there required. The statutory context is entirely different and the absence of any reference to any notion of prejudice does not help elucidate the meaning of section 33.

126. The second argument goes to a point which the Commissioner, by Mr Pitt-Payne, made throughout the appeal even before the original Tribunal i.e. the words "likely to prejudice" must mean something less than the stated alternative, namely "would prejudice". That is clearly correct.

127. However the crux of the argument lies in readdressing the basic case law relied on by the three Tribunal decisions mentioned above, namely and principally, *R(Lord) v Home Secretary* [2003] EWHC 2073 (Admin) especially at paragraphs 99 and 100. Put shortly, Mr Maurici contended that the learned judge in that case, namely Munby J, had then been considering section 29(1) Data Protection Act 1998 which exempted personal data processed, for example, for the prevention and detection of crime from subject access provisions "to the extent to which the application of those subject access provisions would be likely to prejudice" any of the matters further contained in section 29(1).

128. Mr Maurici claimed:

(1) the exemption in section 29(1) constituted an absolute, rather than a qualified exemption in accordance with the learned judge's comments in paragraph 99; and

(2) section 29(1) had to be read in the light of the relevant Council Directive 95/46 EC of 24 October 1995 which imposed or implied a test of necessity.

As noted both by Mr Maurici in argument and in his very useful speaking note, it is perhaps significant that section 29(1) did not contain a contrary distinction between "would" and "would be likely to" and to that extent, he said that it was difficult to see how beyond focusing on the words "would be likely to" it could throw any further light on

the distinction that is contained within section 33. Nonetheless, this Tribunal adopts the approach applied in the earlier Tribunal decisions in regarding this case as being of very useful weight in characterising the distinction that is drawn in section 33.

129. The basic stumbling block in Mr Maurici's way is that the lower threshold test advocated by him, does not really find expression, in terms of linguistic expression at least in the words "would be likely to". As Mr Pitt-Payne pointed out, had a lower threshold test been intended then an appropriate phrase would have been "would or might prejudice". As noted in argument, the Tribunal takes the view that the context which has to be taken into account involves the fact that this threshold test must be a workable one. This is because as with all exemptions under FOIA, section 33 has to be applied on a regular basis by public authorities whenever section 33 issues are put before them.

130. There can be little doubt that when contrasted with the possible use of the words or notion of "might prejudice" which do not find expression in this section, a FOIA officer would in all probability reasonably conclude that the words "likely to" connoted a real and weighty risk rather than one which was merely as would follow from Mr Maurici's contentions, non-fanciful. This Tribunal feels that the relevant FOIA official would have less difficulty in drawing a distinction between the mere existence of prejudice on the one hand and the real and weighty risk of prejudice on the other than between the former and some lesser standard which meant or connoted a real, but real in a sense of a non-fanciful risk. Mr Maurici accepted, albeit reserving his overall position, that over complication was to be avoided if public authorities were to be engaged on a day to day basis in the application of an exemption such as section 33. In those circumstances, the Tribunal would respectfully suggest that the Commissioner's construction is more in keeping with the overall Parliamentary intention.

131. Mr Maurici also referred this Tribunal to the leading decision of *Re H and others (Minors)* [1996] AC 563 especially at 584. Here Lord Nicholls stated that the word "likely" had more than one meaning. The statutory context in that case was, it could be said, of a more compelling nature than the present statutory context dealing as it did in decision with the care of young and vulnerable children. Lord Nicholls there postulated two meanings which he suggested were attributable to the term or notion

of "likely", namely a real (in a sense of non-fanciful) risk i.e. the OGC construction, and secondly likely in the sense of "more likely than not". Neither approach, Mr Maurici claimed, reflected the so called Lord approach. In fairness however Mr Maurici accepted that he could not go so far as to claim that either approach advocated by Lord Nicholls, let alone his own, represented in some way the application or manifestation of a canon of construction. In the Tribunal's view, the fact remains that both the normal reading afforded to the words as a matter of impression as well as with regard to the practical factors which has been referred to with regard to the day to day application of a workable test by a public authority, point to the Information Commissioner's reading as being the more appropriate one. See eg *Three Rivers v Governor and Company of Bank of England* [2003] 1 WLR 210 at paragraph 22 per Chadwick LJ, where the learned Lord Justice said that the word "likely" takes its meaning from its context. See also paragraph 42 of the speaking note submitted by Mr Maurici which stated in terms that the key to the meaning of the same term, namely "likely", was the context.

132. For all the above reasons, the Tribunal is not minded to depart from the views of the earlier Tribunal decisions. It gratefully adopts a number of other points made by Mr Pitt-Payne. First, account should also be taken of the effects of the time limits in section 10 of FOIA. If a qualified exemption is relied on or is relevant, but is not engaged, the requested information must be disclosed within 20 days. If the exemption is engaged, the public authority does not have to disclose it within that time. A reasonable time will do, and further time can be taken to consider the applicability of the public interest test. In the Tribunal's view, this factor points to the more workable construction attributed to the phrase by the earlier decisions in this Tribunal.

133. Secondly, and in conjunction with the last point, the Commissioner's argument is more in keeping with the normal every day use of the word "likely". Despite Lord Nicholls' observations in *Re H* about the ways in which the word "likely" can be employed, it is certainly a persuasive argument to contend that one would not normally say something was "likely" to happen if one intended to mean that there was a "non-fanciful risk" or chance of an event occurring, eg by saying that an otherwise unfancied horse was "likely" to win the Derby.

134. Third, the OGC's approach departed from the Commissioner's own expressed and published guidance on the matter.

135. Fourth, the OGC argument is tantamount to a *de minimis* approach on the basis that it would encompass any sensibly discernible risk, thus on a scale, say of 100, the OGC approach might, it was claimed, cover a 5% as well as a 51% chance. The Tribunal feels that reliance on a numerical approach of this sort is perhaps not necessary even though it lends flavour to the difference between the parties' respective approaches. There is force however in the Tribunal's view in Mr Pitt-Payne's contention that the OGC approach tends towards equating likelihood and risk.

136. Fifth and finally, the Lord decision has not in fact been treated as binding in the earlier Tribunal decisions. Nor does this Tribunal so hold. It is no more than a helpful reference point and guidance to use Mr Pitt-Payne's expression. Section 33 is not the only prejudice-based exemption. Reference can be made to section 31 of FOIA as well as others.

<u>Finding of prejudice</u>

137. Despite the Tribunal's rejection of the OGC's contentions regarding the meaning of the words "likely to", the Tribunal does find that even adopting the Commissioner's approach and in the light of the evidence it has considered and which has been set out above, it was reasonable for the OGC to take the view that there was here a strong and weighty chance of prejudice existing should the present Zero Reports be disclosed. It is enough to summarise the major points which justify that finding in the Tribunal's view. The Tribunal is happy to adopt the approach taken by the Tribunal in the *Hogan* decision (see paragraph 30) which casts an evidential burden on the decision-maker to be able to show to its or their own satisfaction that some causal relationship existed between a potential disclosure and the prejudice and that such prejudice was real and weighty.

138. First, there is the undoubted success story which attends the GR Process as a whole. This was emphasised most forcibly by Mr Richards, supported by Mr Edwards and Sir Peter Gershon, while Sir Peter of course referred to the process as

part of the "DNA" of Government. The success rate as he confirmed was coupled with massive costs savings involving sums in excess of £1billion.

139. Second, the Gateway Review Process has now permeated all types of government programmes and not simply IT-enabled and/or construction programmes albeit of a high and heavy nature, still less does it deal only with high risk or mission critical programmes such as the ID Scheme and the London Olympics. This is coupled with what many witnesses referred to as an increasing overseas interest in the process.

140. Third, the above success story and the growth of the process has been maintained principally by three motivating features all of which were later stressed by the witnesses both inside and outside the OGC itself, namely:

(1) the exchange of free, candid and confidential information between reviewers and interviewees;

(2) the equally candid and robust content of the subsequent reports; and

(3) the mutual trust and confidence expressed by the interviewees and the SRO in the Review Team and the process as a whole based on the preceding two factors.

Fourth, there was a generally and genuinely held belief felt by all those involved in the GR process as was evidenced by the witnesses who were presented before this Tribunal that what was called "untimely" disclosure would seriously damage the three factors articulated in the preceding paragraph in the following way and with the following consequences, namely that:

(1) there would be a more guarded response;

(2) there would be the likelihood of more bland and anodyne reports; and

(3) there would be a resulting unwillingness on the part of SROs to be willing to cooperate with the attendant delays in what was called and has been described above as the increased risk of negotiation in the wake of the submission of the reports.

141. It is of course true that the question here is whether the disputed information here requested would be or would be likely to prejudice the specified interest. The Commissioner took the view in his Decision Notice that disclosing the information sought in this case was not likely to prejudice the specified interests. The Tribunal respectfully disagrees for the reasons given in paragraph 137 and following. It has seen the disputed information and further comment will be made about it below. Although one view of the information in question might be to say that it contains nothing of any great moment, echoing to some extent the expression used by the learned judge in the High Court decision that there was "no smoking gun", the information has to be viewed in the context of the OGC's operation as a whole. The Tribunal is not thereby in any way giving a form of blanket protection, let alone a signal to that effect, which will apply to all information which would constitute a Gateway Report or Gateway Reports and Gateway Reports Zero in particular. Indeed, as will be made clear, and as has been indicated above, this Tribunal has felt obliged to act on a case-by-case basis and is only making determination with regard to the contents of the information which is sought in this case.

142. The Tribunal is particularly mindful of the fact that the evidence shows that to date no disclosure of any Gateway Review Reports has ever occurred at least in the knowledge and to the awareness of the witnesses, and in particular, Mr Richards. In this situation, any assessment of the likelihood or extent of prejudice is inevitably speculative. It is not unreasonable to set the voice of experience as articulated by Mr Richards when he speaks of the unease and uncertainty which he and the other witnesses collectively feel were disclosure, even as to these Reports, to occur. In the event of these, or any other, GRs being released, either as a result of this case, and/or following any further decisions taken by the OGC, the Commissioner or a future Tribunal to disclose other GRs, all parties should be in a better position to assess evidence on the existence or extent of any resultant prejudice. For all these reasons, the Tribunal finds that the risk of prejudice, even advocated by the Commissioner, has been made out.

<u>Section 33</u>

143. The Tribunal must therefore consider the respective public interests in play with regard to section 33. These are very similar to those which are relevant to section

35. To that extent the Tribunal adopts the approach advocated by the Commissioner, namely that the public interests considerations that arise under section 33 are very similar to that which apply to section 35. For this reason, the comments that now follow apply to both sections, but the Tribunal will begin by referring to section 35 for this overall purpose.

144. The application of the public interest test in relation to section 35 has been considered in a number of Tribunal cases particular the *DfES* decision referred to above. See also *DWP v Information Commissioner* EA/2006/0040. In particular, see paragraph 75 of *DfES* decision as to the general guidance as to the principles to be applied. See also more recently *Scotland Office v Information Commissioner* EA/2007/0128. The principles which were endorsed as set out in the *DfES* decision are no more than guidelines: see paragraph 40 of the *Scotland Office* decision. The Tribunal will therefore act in accordance with those general guidelines.

145. First, if after assessing all the factors for and against disclosure, the Tribunal finds that the factors are equally balanced, disclosure should generally occur. Each case must be assessed on its own individual merits and facts.

146. Second, as noted by Stanley Burnton J in the High Court judgment at paragraph 68 to 71, there is an assumption that disclosure itself entails or embodies a public interest since it thereby promotes transparency.

147. Third, a general factor such as accountability has to be analysed against the background of the request in question and the information which is sought pursuant to that request.

148. Fourth, although the critical time for the assessment for the competing public interests is the time when the request is made, there are many cases which come before the Tribunal where consideration is given to the so called “age” of the information, i.e. the period of time which has elapsed between the date of the information and the date of the request: see eg the *DfES* case itself. The length of any such age cannot be determinative, much weight, if not most of the weight to be afforded lying in the competing public interests themselves.

The public interest in disclosure

149. As already noted, the learned judge in the High Court decision observed in his judgment that the original Tribunal did not properly identify the public interest favouring disclosure. In this Tribunal's view, there are three general preliminary observations which have to be taken into account as suggested by the OGC. First, the question must always be, in what way will the disputed information bolster or improve the desired aims of transparency and accountability? Second, it is important to view other means available to the public whereby the same information can be accessed. Third, it cannot, in the Tribunal's view, be enough to rely on the fact that the ID Scheme is by common consent a high profile, if not a controversial programme, which may or may not see the light of day should a new Government be elected in due course. Again, the same critical question which has just been raised applies here: would disclosure have contributed to the debate at the relevant time?

150. This Tribunal endorses a three-fold analysis afforded to the public interest in favour of disclosure put forward by the Commissioner. First, there is an undoubted debate as to the merits of the scheme, second, there are the practicalities involved and third, there is the history as to the decision-making which underlies the scheme and which continues even today. These questions can in themselves be further broken down. In relation to the first question, there is clearly a public interest in analysing the benefits, in particular but not limited to, the related costs to which reference is made, not simply financial terms, but also with regard to non-financial costs. In relation to the second and third questions, there is clearly a public interest in seeing how the scheme has evolved with its various complexities and how the Government has come or may have come to a decision or decisions as to how to deliver the scheme as a whole. The Tribunal cannot but note that the second and/or third questions can usefully and justifiably be broken down into a series of further sub-questions which find expression and reflection in paragraph 19 of Mr Edwards' witness statement, eg as to the scope of the programme and the objectives to be delivered, etc.

151. This is not to say that each major question set out above must be fully answered by disclosure of the information sought in this case. As has been said, the Tribunal has read the information and comments will be made below. Just because the reports themselves may in certain ways not read in any form of self-contained or clearly

obvious way, this is not to say that they would not be clearly of interest and of meaning to an interested or educated observer in further understanding the subject matter of the last two questions which have been posed in the previous paragraph, namely whether and to what extent the ID Scheme was feasible in 2003 and 2004 and the steps taken to deliver it.

152. Of particular importance is the fact openly recognised by many witnesses that there is or has been and indeed remains a perception that central government does not have a particularly good track record with regard to IT projects. In the Tribunal's view, disclosure of the requested information would clearly add to the public's knowledge in this respect and therefore to the public interest which sought to ensure that schemes as complex albeit as sensitive as the ID Cards Scheme were properly scrutinised and implemented.

153. The Tribunal also notes the importance of the chronology. The 2003 Report preceded the White Paper in November 2003 which in effect acted as a pre-condition to the introduction of draft legislation. The second report preceded the draft Bill. At the time the request was made, the Bill was before Parliament. Mr D undoubtedly reflected the strong public concern felt at the time: indeed he stated that the information he was seeking was relevant to his correspondence with his local MP.

154. The Tribunal pauses here to note that in its final submissions, the OGC denied that by the time of the request the production of the Bill had in effect coincided with the crystallisation of the Government's policy relating to Identity Cards. It contended first that the public interest in favour of maintaining the exemptions or either of them under sections 33 or 35 then arose principally from the value of confidentiality as to the conduct of future Gateway Reviews. The Tribunal respectfully disagrees that this represents in any way a complete answer to the justification for disclosure. As Mr Pitt-Payne pointed out, although there clearly is a public interest militating in favour of confidentiality, it still had to be weighed against the effect of what he called a milestone in the history of the evolution of the policy regarding ID cards as a whole and in relation to a key question facing Government and then the public as to whether the Government, in principle, should implement the ID Scheme in a legislative form.

155. Related to the above point, the OGC further contended that whether a Bill effectively signalled the cessation of the formulation of government policy depended on the circumstances. That is certainly true as a general proposition as was the valid argument that ID Cards remain even today.

156. The Tribunal, with respect to the OGC's approach, regards its approach as being too rigid and thus not conducive to a realistic assessment of the competing public interests. A project such as the ID Cards Scheme has been a very high profile matter of overwhelming concern to the public from the moment it was first addressed by Government. The degree of public interest might justifiably be said to come and go during the history of such a major undertaking. However, a Bill remains a high level watermark in terms of legislative history. As Mr Pitt-Payne rightly claimed, the issuance of a Bill is commonly a time when the searchlight of public scrutiny is particularly bright.

157. Understandably the OGC took issue with any generalised contention by the Commissioner as might otherwise have been inferred from the Decision Notice that the nature of the Identity Card project and its implications for the public constituted a highly significant factor in favour of disclosure.

158. This Tribunal does not regard the Commissioner as making any such form of blanket contention. As indicated above, the analysis and the issues involved can be broken down into far more pointed questions reflected in paragraph 150. There are some additional observations that can be made militating in favour of disclosure.

159. First, it could be said that ID Cards represents something of an exceptional case if not a unique one. Enough has been set out above in relation to the evidence given to show that the OGC's own witnesses in effect regarded it as such albeit perhaps comparable with a programme as large and as important as the London Olympics. Second, it is too narrow a perception of the disputed Gateway Reviews here in question to regard them as being solely, or even mainly, concerned with what was called "the technical deliverability of the project" of this scheme. The OGC went so far as to claim in its closing written submissions that the disputed information added "nothing" to a debate on the merits of identity cards as a whole. In the Tribunal's view this misses the point. The debate was and is not purely about the merits.

Public interest is served by knowing how a project has been implemented and is being implemented. It is not for the Tribunal, let alone the OGC or the Commissioner, to second-guess the scope and content of the possible public debate. There was evidence in the form of Mr Woodland's closed witness statement to the effect that the first Gateway Review Zero in 2003 was "atypical" of a normal Gateway Zero Review as policy had at that stage yet to be finally formulated. Finally, as the OGC itself quite rightly argued, the disputed information itself needs to be carefully examined to see whether it would have "materially added" to any debate. It is enough for this Tribunal to confirm that on examining this information, it would, in the Tribunal's view, undoubtedly make an important contribution to the debate for the reasons which have been set out above, namely that there must be an assumption that an interested and educated observer would be likely to glean something material from the Reports.

160. Although this point will be revisited below, the Tribunal is not impressed by any form of equation with or similarity between the Gateway Review and a NAO Report. Enough has been said already in this judgment to show that they are entirely different. A NAO Report is a form of retrospective audit which on any view is totally removed from the content and purpose of a Gateway Review. Reference is made to the Lessons Learnt publications. This Tribunal did not find that analogy helpful. Such reports do not reveal, as do reports which are of the kind in question, how a Government department actually came to a decision or how it may have done so, which is what the disclosure of the reports in question would help towards showing.

161. The OGC sought to claim that the Gateway Reviews in questions were or might be uninformative or hard to understand. This, to some extent, has been referred to above. The Tribunal had no difficulty in understanding the vast bulk of the information they contained. The position might, as indicated, be clearer to the educated or informed student of or commentator upon ID Cards as a whole.

162. Finally, there is a public interest in assessing the value of the Gateway Review Process itself. Without in any way disparaging the fears expressed by Mr Richards, that the entire Gateway Process would be at risk were disclosure ordered, in the Tribunal's view there can be no doubt that there is a public interest in seeing that the Gateway Review Process itself in fact works. The point was made by Mr Pitt-Payne

that reviewers would have a greater incentive to be candid and complete in the carrying out of their functions in the knowledge that their actions might at some stage be subject to public scrutiny. The Tribunal regards this as a very telling consideration. The system it embodies is clearly standard practice in industry and now across Government as a whole. Many readers of the requested information would, the Tribunal feels, be reassured by disclosure that the system does work and that the Reports do in fact represent a thorough, though robust form of review of an ongoing project. If disclosure is ordered as to the Reports in this case, it is hard to see how this particular public interest would not be furthered.

Failure to call evidence by the Commissioner

163. The Tribunal pauses here to note a specific submission made by the OGC to the effect that the Commissioner had, at the hearing of the appeal at least, failed to call any witnesses. This was on the basis that there had been a specific indication at the conclusion of the previous appeal before the original Tribunal by Mr Pitt-Payne that there was "some evidence" that some commercial organisations connected with Gateway Reviews were content for there to be publication. At the opening of the appeal, it was accepted that the Commissioner would not be able to identify and call potential witnesses who might support the Commissioner's case and who had been involved in Gateway Reviews.

164. In the light of the Commissioner's failure to call such evidence at this hearing, the Tribunal will not assume, and indeed cannot do so, that there is on the part of any particular party such a desire. However the fact remains that the Tribunal is quite content to proceed as to its determination on the basis of the evidence it has heard, albeit emanating both from the IPS and from the OGC alone.

Factors in favour of maintaining the exemptions in sections 33 and 35

165. In its final written submissions, the OGC suggested that there were three key questions which related to this issue. First, the question was whether the Gateway Review Process delivered a public benefit. Second, there was a question whether the Gateway Process depended on candour, confidentiality and indeed participation which would be diminished by disclosure, and third the question was whether disclosure in the present case and contrary to the Working Assumption would

damage the Gateway Review Process as a whole. Enough has been said in this judgment already to answer the first question with an unequivocal affirmative answer. As for the second question, all the witnesses underlined the paramount importance of confidentiality and candour. However, as the evidence recounted in this judgment already demonstrates, there were serious qualifications to be attached to the third question, even though the second might also be answered in the affirmative.

166. First, the Tribunal feels bound to take into account the fact that despite the finding of the original Tribunal, albeit remitted to this Tribunal by the High Court, those involved in the Gateway Review Process feel that there has nonetheless been no alteration in their belief that confidence, candour and participation still apply even today (18 months or so after the original Tribunal decision) in relation to the process as a whole. The fact that only two interviewers out of a constituency of over about 1500 reviewers have apparently withdrawn from their roles, coupled with the fact that Mr Richards still himself is minded to consider his position depending on the outcome of this case, does not persuade the Tribunal that the anticipated damage is likely to materialise in the way suggested.

167. Second, although the parameters are set within time periods which the Commissioner took exception to, the existences of the Working Assumption nonetheless shows that FOIA considerations have been shown to be part of the OGC's overall methodology.

168. As to the first of the points just made, the OGC responded in effect by retreating behind the Working Assumption. It was also claimed by Mr Woodland that the present proceedings represented "unfinished business". The 2008 Working Assumption repeats the 2004 version more or less exactly.

169. The Tribunal regards such a response as indicated by Mr Woodland as unsatisfactory and even short-sighted. No doubt it is justified by the fortuitous fact that very few requests have ever been made for disclosure of Gateway Reviews and that no disclosure of any report has been alluded to or known of. The Tribunal regards the imposition of a two year period with regard to all Gateway Reviews save for Gateway Reviews 4 and 5 as an arbitrary yardstick which the OGC, for reasons of its own, may have regarded as justifiable in the light of its own specific and

somewhat unusual requirements, albeit subject to Government legal advice. In the Tribunal's view, the Working Assumption is no more than that: it must yield to the specifics of any given case. With regard to the second argument just advocated, which clearly overlaps with the first, the Tribunal feels some sympathy with the characterisation which is said to be afforded to the Working Assumption and as confirmed to some extent by the OGC and its witnesses that in effect, what was being proposed was tantamount to, or at least not very far from, the setting up of a new absolute exemption. This could, however, be said to be reflected in the fact noted above that all the witnesses save for Mr Richards made no reference in their statements to the fact or operation of the Working Assumption, let alone to FOIA.

170. Moreover and more importantly, the issue of timing in relation to the period which elapsed between the creation of the disputed information and the making of the request is not without significance. The Reports dated from June 2003 and January 2004 respectively. The request followed in January 2005 in the first case, 18 months after the Report in question. Eighteen months cannot be regarded as excessively removed from the two year period.

171. On the other hand the OGC, rightly in the Tribunal's view, stressed that just as much as confidentiality, if not more so, the non-attributability of comments made in Gateway Reports underlay the success of the process. As indicated above on various occasions, the Tribunal has carefully examined the disputed information. Reflecting the evidence it received from various witnesses, the Tribunal could see that the Reports, though including a list of interviewees, at no point attributed specific views to the names of the parties set out. In the case of one Report, the Tribunal found there to be little, if anything, to suggest such adverse comments as were contained could in any way be attributable to any particular interviewees or parties. It may be that an educated observer or commentator could speculate on the originator of a particular statement or opinion, but in the Tribunal's view, no-one apart from "insiders" could do so with any degree of assurance. Moreover, the insiders would already know, or be likely to know, who is likely to have said what. The form of the said Report addresses the state of affairs applicable to the stage that the project had then reached. The most that could be said in the Tribunal's view is that in both Reports, criticisms, such as they are, are mild. In particular, the Tribunal could not

find any material that could be regarded as constituting criticism by a specific civil servant of a colleague. In one Report, Government outsiders are referred to, but no specific views again are attributed to them. At no stage in the evidence was it suggested that the OGC regarded Ministerial comments made during an interview as being particularly sensitive. Although one of the two Reports refers to a Ministerial interviewee, no views are attributed to that party. Reference should again be made to the comments made in paragraph 84 above.

172. In short, both Reports appear to the Tribunal to constitute, as might be expected, sets of practical recommendations. In one case, there is identification of the progress made. As indicated above, the Tribunal feels it is extremely difficult to see how disclosure could damage the OGC process in the performance of its functions and in those circumstances, having concluded that s33 applied, the OGC got the balance of public interest wrong".

173. The Tribunal asked for and was shown, selective extracts from other anonymised final reports. Various extracts were provided to the Tribunal and it could admittedly be said that many were distinctly robust, if not in actual fact highly critical. It may well be the case that disclosure of the full reports in question from which extracts were taken might, of itself, suggest that any adverse comments emanated from a specific party or persons and were disclosure or occur, some damage might be said to arise with regard to the relevant project and/or the Gateway Review Process as a whole. However on the evidence it has seen, the Tribunal is entirely satisfied that non-attribution seems to be generally adhered to. In another case however, it may well be that redaction would be one way to deal with a more questionable case of attribution. This Tribunal cannot sufficiently stress the obvious fact that it is concerned on this appeal only with the two reports which were sought to be disclosed.

174. Considerations regarding the effect of the earlier decision in this appeal by the original Tribunal and the impact of FOIA therefore in the Tribunal's view greatly minimised the overall contention by the OGC that were there to be what was called untimely disclosure of GR Reports, those parties who would be interviewed in a GR process would tend to be more guarded and SROs would seek to "negotiate" Reports in a way that does not obtain at the moment. More significantly in the light of those

considerations, the Tribunal does not feel that disclosure of the two Reports would in any way threaten the GR Process as a whole either in the way suggested or in some other material way such as to alter the balance which the Tribunal finds should be struck in this case.

175. It is of course quite true that all the witnesses gave extensive evidence that interviewees in the course of a Gateway Review Process express themselves in an unguarded way and that that aspect of the process would be put at risk on disclosure. On balance, however, the Tribunal is not satisfied that this fear has been made out by the evidence which strongly suggests that the risk even now continues to be minimal and that were disclosure of these two particular Reports to be made, any adverse effect would follow.

176. In summary, the Tribunal concludes that the risk of the possible adverse effect of disclosure of these Reports can be answered in the following way.

177. First, there is sufficient evidence to show that in the case of these two Reports non-attributability will protect interviewees which will in turn tend to preserve the right to conduct interviews on a frank and candid basis. As the Commissioner points out there remains the risk that insiders might be able to attribute any adverse comments, but such has always been the case, as pointed out above.

178. Second, as to the risk of “negotiation”, this Tribunal, on the evidence it has heard, finds there can be no reason why the present process which has been explained above at length in the evidence, lasting as it does for a few days only, should not be maintained. In other words, the ground rules can be enforced. The OGC countered this by referring to the thrust of Mr Richards’ evidence that this could be regarded as being naive by way of approach. However, as already indicated, Mr Richards stated that only two reviewers out of the pool of 1500 or so felt sufficiently strongly to withdraw their services, and he himself has not yet made up his mind.

179. Third, the Tribunal is of the view that to the extent that the present Reports are made public there is, as indicated earlier, the benefit of a public assurance in the efficacy of the system, even if the same might otherwise attract some form of criticism, though it is difficult at the moment to see what form that criticism would take. Overall

therefore, this could be said to strengthen rather than weaken the GR Process as a whole.

180. Fourth, and to the extent this point is not already covered by the earlier considerations just listed, the Tribunal does not believe that publication of these two Reports will act as a disincentive to either interviewees or interviewers to continue to take part in the system. Rather, the Tribunal believes it will act as a positive incentive. The continued use of the process is well entrenched and the apparent retention of the pool of interviewers clearly confirms this. In particular, the Tribunal repeats the factors listed in paragraph 162.

181. Fifth, the Tribunal does not accept the separate contention made by the OGC that there would be some form of adverse impact on commercial organisations which take part in Gateway Reviews. Admittedly, this point was not forcefully argued on the appeal. The fact remains that if there were FOIA related concerns about confidential commercial information, suitable exemptions under the Act could be employed and engaged.

182. Sixth, and this too has already been dealt with, the OGC argued that Gate Zero Reviews, including no doubt the present two Reports, might be misunderstood. The Tribunal accepts the Commissioner’s contention that a risk of misunderstanding is not a valid public interest to be taken into account.

Should all Gateway Reviews be released?

183. Neither the Commissioner nor the Tribunal believes that all Gateway Reviews should be disclosed. This decision applies only to the two Gateway Reviews which have been requested to be disclosed by Mr D. In keeping with the learned judge’s observations referred to above at paragraph 34, this Tribunal had approached this appeal on what was called by him a case-by-case basis. There should be no suggestion in the wake of this decision that disclosure of Gateway Reviews as a whole is something that should follow automatically or at all.

184. It is entirely a matter for the MOJ to consider whether and if so, to what extent, the Working Assumption should be reviewed or revised. It has already been observed in this judgment that the Working Assumption is inappropriate as to the facts of this

case and this request. Even if the Working Assumption remains in its present form, the Tribunal respectfully suggests that some of the specific factors set out in the Commissioner's final written submissions should at least be considered, if not for inclusion, in any further addition to or amendment of the Working Assumption, or at least be taken into account on occasions when in future a request for disclosure of Gateway Reports from the OGC and/or SROs are made.

185. First, the subject matter of the report in question should be taken into account to consider what the project was about and what its importance is in the scale of Government activities as whole. Second, the question should be asked how critical or central would be the report to the particular project or programme in question. A distinction can probably be drawn between reports which deal with principle, either directly or indirectly, and the overall design on the one hand, and details of implementation on the other. Third, the question should be to what extent does the report contribute to Government decisions. Fourth, the question of timing should be addressed. In particular the question should be asked whether a substantial amount of time has elapsed since the compiling of the report and any request that might follow. Again, the question should be asked as to what extent would the contents of the report be a matter of live and important public debate at the relevant time, i.e. at the time of the request. Fifth, the question should be asked what topics or material there might be in the report such as to justify a possible redaction. Sixth, the question should be asked whether there are any particular features in the report which need particular attention, eg reference to fraud or malpractice or serious error which again might enter into the balancing test to be applied with regard to the competing public interests. Finally, but by no means exhaustively, the question should be asked whether the report contains material which might be said to reflect Government policy and which could be said to diverge from information already in the public domain.

<u>Section 40 and redaction</u>

186. Reference is made above to the possible implication of section 40 of FOIA. This deals with personal data and need not be set out in any further detail here. The issue concerns that possible disclosure of the names of reviewers and interviewees in relation to the two Reports here in question.

187. The OGC made detailed submissions on redaction. Its first contention was that in the event of disclosure there should be redaction of all names. There was an issue posed before the Tribunal as to the accountability of civil servants, but the Tribunal suggested, and maintains now, that names should be redacted, but not the individual parties' grades and/or functions. In any event, the Tribunal accepts the OGC's contention that the issues of public interest in favour of disclosure in this case do not suggest that identification of individual civil servants other than perhaps senior civil servants will assist.

188. There may be future cases which may well be of a somewhat exceptional nature where the identity of some particular interviewees or reviewers will be significant. Such is not the case here and the Tribunal says nothing further on this point.

189. Should there be any doubt about this Tribunal's ruling, it is not directing that the OGC or the parties effect disclosure of any summary or digest of information about the individuals who were interviewed or who acted as reviewers. It follows that there is no necessity to make any ruling or direction regarding the applicability or otherwise of section 40 of FOIA.

190. For all these reasons, the Tribunal makes the ruling set out at the head of this judgment.

Signed:

David Marks
Deputy Chairman Date: 19 February 2009