England and Wales High Court (Administrative Court) Decisions

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Case Nos: CO/5491/2007
CO/4438/2007

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

CO/4438/2007
Royal Courts of Justice
Strand, London, WC2A 2LL
11/04/2008

B e f o r e :

MR JUSTICE STANLEY BURNTON

Between:

OFFICE OF GOVERNMENT COMMERCE	**Appellant**
- and -	
INFORMATION COMMISSIONER	**Respondent**
- and -	
HER MAJESTY'S ATTORNEY GENERAL on behalf of THE SPEAKER OF THE HOUSE OF COMMONS	**Intervener**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Jonathan Swift (instructed by the Treasury Solicitor) for the Appellant
Timothy Pitt-Payne (instructed by the Office of the Information Commissioner) for the Respondent
Martin Chamberlain (instructed by the Treasury Solicitor) for the Intervener
Hearing dates: 3, 4, 5 March 2008

HTML VERSION OF JUDGMENT

Stanley Burnton J :

Introduction

1. This is a statutory appeal by the Office of Government Commerce (the OGC) against two decisions of the Information Tribunal. Both relate to gateway reviews carried out by the OGC of the Government's identity card programme. The first decision, dated 2 May 2007, upheld decision notices of the Information Commissioner requiring the disclosure to one of the complainants, Mark Dziecielewski, of both gateway reviews, subject to an issue as to the disclosure of the names of those who participated in the reviews, whether as persons conducting the reviews or as persons interviewed by them, and the disclosure to the other complainant, Mark Oaten MP, of the traffic light status of the reviews. By the second and supplemental decision, dated 4 June 2007, the Tribunal decided that the names of those who had participated in the reviews should be redacted when the gateway review documents are disclosed, apart from the names of the politicians who had been interviewed, the name of the Senior Responsible Owner ("SRO", an acronym that is also thought to stand for Senior Responsible Officer) and the name of the person recruited as Programme Director as a result of the second gateway review. However, the Tribunal also required disclosure of the numbers and status of those interviewed, in the form set out in the Tribunal's supplemental decision. That decision is a closed decision: i.e., it remains confidential until the final determination of these appeals, and will become public if the appeal against both decisions ultimately fails, but not otherwise.

2. This appeal is the first occasion on which the Court has been required to consider the effect and application of the provisions of the Freedom of Information Act 2000 ("FOIA") as to qualified exemption from disclosure.

3. For convenience, the first decision of the Tribunal is annexed to this judgment.

Gateway reviews

4. I can take the description of gateway reviews and the practice relating to them from paragraphs 9 to 21 of the Tribunal's decision, which has not been criticised by either party.

The facts

5. The first of the gateway reviews relating to the identity cards programme was completed in June 2003, and the second in January 2004. Both were gateway zero reviews. The Identity Cards Bill was published in November of that year, but was lost when the General Election was called in 2005 and Parliament was prorogued. The Bill was re-introduced the following year, and received the Royal Assent on 30 March 2006.

6. The fact that the identity card programme is controversial as a matter of principle, because of its civil rights implications, and in relation to its technical practicability and its cost, is highly relevant to this appeal. It is not suggested that the programme is not the legitimate subject of public interest.

7. In December 2003, in evidence given to the Home Affairs Committee of the House of Commons, it was informed that there had already been gateway reviews of the identity card programme, and that a gateway zero review was to take place in January 2004. That evidence was published in July 2004 with the Fourth Report of the Committee on the programme.

8. In December 2004, in a Parliamentary question, Mr Oaten asked the Home Secretary which stages of the gateway process the programme had passed through. In a written answer, he was informed that it had completed a gateway zero review in January 2004.

9. By an email dated 1 January 2005, Mr Dziecielewski made a formal request under FOIA for the stage zero gateway reviews of the identity card programme. He stated that they were relevant to his correspondence with his local MP, Dr Vincent Cable, like Mr Oaten a member of the Liberal Democrat Party. Mr Dziecielewski gave no further information as to the subject of this correspondence.

10. By an email dated 1 February 2005, the OGC claimed that section 33(1)(b) of FOIA applied to all of the information Mr Dziecielewski had requested and that section 35 applied to some of that information. It stated that it had not yet decided on the balance of public interest, and promised to do so by 22 February. In a further email, dated 22 February 2005, the OGC set out the considerations it had taken into account that militated against disclosure of the requested information and those that favoured disclosure, and asserted that the former outweighed the latter.

11. By an email dated 23 February 2005, Mr Dziecielewski requested an internal review of the refusal of disclosure. The result of the internal review, which had been carried out by the deputy chief executive of the OGC, was communicated to him by email on 24 March 2005. The OGC maintained its decision that the information sought should not be disclosed. In summary, the author of the internal review concluded:

    (a) The Gateway process had delivered a public benefit, in that it had accounted for over £700 million of savings in the SRO2 period.

    (b) It depends on candour and confidentiality. Senior Responsible Owners (i.e., the civil servants with responsibility for projects, universally referred to as SROs) will be deterred from requesting a gateway

review if an adverse review is liable to become public; members of project boards and others who are interviewed for the purposes of a gateway review will be less outspoken if their views are liable to be published; and gateway reviewers will be less forthright in their reports if there is a danger of disclosure to the public.

(c) Disclosure could undermine the still live policy development process relating to identity cards.

12. Mr Dziecielewski exercised his right to apply to the Information Commissioner for disclosure of the information he sought. The Information Commissioner's decision was dated 31 July 2006. He decided that the OGC had failed to comply with its obligations under section 1(1) of FOIA, and required disclosure within 35 days. He was satisfied that the OGC is a public authority to which section 33(1) of the Act applies, but he was not satisfied that the release of the requested information would, or would be likely to, prejudice the exercise of its functions, and accordingly held that the exemption in section 33 was not engaged. He was prepared to accept that section 35 was engaged, but held that the public interest in maintaining the exemption did not outweigh that in disclosing the information.

13. The OGC appealed to the Tribunal against the Information Commissioner's decision.

14. The second request for disclosure originated in a Parliamentary question asked by Mark Oaten MP:

> To ask the Chancellor of the Exchequer what traffic light status was awarded to the identity card scheme by the Office of Government Commerce at the gateway review 1 stage.

15. The traffic light (RAG) status awarded to the scheme would not have been informative as to the health or practicality of the programme, but only an indication of the time within which the recommendations made by the reviewers should be considered and implemented. Nonetheless, the then Chief Secretary to the Treasury, Paul Boateng MP, in his written answer of 16 March 2005, stated:

> The ID Cards programme has not yet undergone a Gate 1 Review. It has, however, undergone two OGC Gate 0 Reviews, in June 2003 and January 2004 respectively. The traffic light status awarded by these reviews is exempt from disclosure under the Freedom of Information Act 2000 as disclosure would be likely to prejudice both the ability of OGC to examine the effectiveness, efficiency and economy with which other Government Departments exercise their functions and also the formulation and development of Government policy. I believe the public interest in disclosure of such information is outweighed by the public interest in non-disclosure.

16. Mr Oaten was dissatisfied with this response. He wrote to Mr Boateng on 16 March 2005 stating:

> I find the reasons provided to justify withholding this information inadequate. I specifically asked for the scheme's traffic light status rather than any of the detail of the OGC's work. Given the unprecedented scale, expense and constitutional implications of the scheme, I believe there is a clear public interest case for disclosure. I note that the independent assessment conducted by the London School of Economics warns that the scheme may run over the budget by several billion; the public is surely therefore entitled to know whether the project is on course.

> I would therefore ask you to review your decision not to provide the information requested.

Mr Oaten's letter was responded to by the Director, Customer Systems and Services of the OGC, who said that the Chief Secretary had asked for a review of the decision, and that the review would be conducted in accordance with the OGC's Freedom of Information internal review procedure. The result of the review was communicated to Mr Oaten by letter from John Healey MP, the Chief Secretary to the Treasury, dated 22 June 2005. It concluded that the information sought was subject to the exemptions in sections 33 and 35 of the Act, and that the need for candour and confidentiality in relation to gateway reviews was such that it would not be in the public interest for the information requested to be disclosed.

17. On 11 July 2005 Mr Oaten applied to the Information Commissioner, whose decision dated 5 October 2006, not surprisingly in view of his earlier decision, required disclosure. Paragraph 10 of his decision was as follows:

> "Mr Healey advised the commission by letter dated 26 September 2005 that the initial response provided to the Parliamentary Question was consistent with that which would have been given had a Freedom of Information request been made. He also confirmed that the complainant's letter of the 16 March 2005 requesting an internal review was dealt with as an FOI request. It should be noted that the Commissioner does not consider a Parliamentary Question to be a valid request for the purposes of the Act. Alternatively the Commissioner takes the view that the request for an internal review to the Treasury Minister can be treated as the freedom of information request. In considering the application for a decision by the Commissioner under s.50(2) of the Act, the Commissioner has decided that the complainant has effectively exhausted the internal complaints procedure and the Commissioner is therefore able to make a decision under s.50."

18. The OGC appealed against the Information Commissioner's decision to the Tribunal, which ordered the consolidation of the appeals. In fact, as has been seen, Mr Oaten's application was for a far more limited disclosure than Mr Dziecielewski's: the former sought only disclosure of the RAG assessment, the latter of the entirety of the reviews.

19. Neither Mr Dziecielewski nor Mr Oaten participated in the appeals to the Tribunal; nor did they seek to appear before me. The order for disclosure has been stayed pending the decision on this appeal.

The issues before me

20. The grounds of appeal by the OGC against the first decision of the Tribunal (to which I shall refer as "the decision") may be summarised as follows:

(a) The Tribunal failed to identify a material and substantial public interest justifying disclosure notwithstanding its decision that both section 33(1) and (2) and section 35 applied to the information in question. It therefore erred in the application of section 2 of FOIA.

(b) The Tribunal failed to apply its finding that disclosure would prejudice the OGC's exercise of its functions when making its decision under section 2.

(c) The Tribunal erred in failing to take as its starting point for the purposes of section 35 that, on a proper

construction of the Act, disclosure of information falling within such an exemption is of itself to be regarded as harmful to the public interest.

(d) The Tribunal wrongly characterised the case of the OGC as seeking to maintain an absolute exemption from disclosure, and thus inconsistent with the statutory provision of qualified exemption.

(e) The Tribunal's conclusion on the application of section 2 erred in law, in that:

(i) The Tribunal had regard to an irrelevant consideration, namely its criticism of the training provided by the OGC in relation to gateway reviews and the application of FOIA.

(ii) The Tribunal 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 The Tribunal (at paragraphs 52 and 89 of the decision) had regard to an irrelevant consideration, namely the extent to which the potential harm from disclosure could be minimised if the OGC adopted different practices in undertaking and reporting on gateway reviews.

(iii) The Tribunal 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.

(f) The Tribunal wrongly concluded (at paragraph 85 of the decision) that the public interest that is the subject of sections 33 and 35 was diminished by the fact that a Parliamentary Bill relating to identity cards had been introduced, and therefore, as the Tribunal considered, the Government's policy relating to identity cards had been decided. This was particularly erroneous because the Bill was in the nature of an enabling measure, leaving many questions of policy to be determined later when subordinate legislation was introduced.

(g) The Tribunal failed to address the existence or extent of the public interest in the disclosure of the information in question. If the Tribunal accepted the submissions of the Commissioner set out in paragraph 78 of its decision, it failed to explain the basis of its conclusion that the public interest test under section 2 required disclosure, or why the generic considerations relied on by the Commissioner were not appropriately addressed elsewhere or would be furthered by disclosure.

(h) The Tribunal erred in relying on the opinion of the Parliamentary Select Committee on Work and Pensions, which advocated disclosure of gateway reviews to it rather than to the public.

(i) The finding of the Tribunal to the effect that the evidence of the OGC as to the importance of maintaining confidentiality was "unconvincing" was perverse, given the experience of the OGC's witnesses and their evidence to the effect that confidentiality was needed and the absence of any evidence to the contrary, moreover, the Tribunal's decision at paragraphs 88 and 89 discloses a misunderstanding of their evidence.

21. Mr Pitt-Payne, in his effective submissions, contended that none of these grounds of appeal was well-founded. His more detailed submissions will appear from the remainder of my judgment.

22. As will be seen, the rival submissions on behalf of the OGC and the Commissioner raise a number of basic

questions as to the interpretation and application of FOIA, which I consider below.

23. The submissions of the Speaker of the House of Commons relate only to the first decision of the Tribunal. On his behalf, Mr Chamberlain made the following submissions:

(a) The assumption by the Information Commissioner or Information Tribunal of jurisdiction to consider the adequacy of a Ministerial reply to a Parliamentary question would infringe Article 9 of the Bill of Rights 1689 and the wider principle of Parliamentary privilege. The Freedom of Information Act 2000 confers no such jurisdiction.

(b) The Tribunal infringed Article 9 of the Bill of Rights and/or the wider principle of Parliamentary privilege:

(i) by relying on the conclusions of the Parliamentary Select Committees as authority supporting its decision on a contested issue before it; and

(ii) by examining the extent to which the Government had complied with public commitments given to a Select Committee.

24. The Speaker did not intervene before the Tribunal, and none of these submissions had been made to it. In relation to submission (a), the Tribunal had confirmed by letter dated 4 October 2007 that it does not seek to assume jurisdiction over Parliamentary questions or answers, but I was asked to address the point of principle because of its possible significance in other cases.

25. Mr Chamberlain did not make any submission as to the effect of his submissions on the substantive issues in the appeal. However, as will be seen, his submissions under (b) necessarily affect the substantive outcome of this appeal, as Mr Swift and Mr Pitt-Payne appreciated. Mr Swift adopted Mr Chamberlain's submissions under (b), which as developed went to the relevance and admissibility of the Select Committee report referred to at paragraph 84 of the decision, and submitted that they must lead to the quashing of the decision of the Tribunal. In addition, in support of the ground of appeal at paragraph 20(h) above, he submitted that the Tribunal had misunderstood the report of the Select Committee, which advocated disclosure of gateway reviews to it, and not necessarily to the public. Disclosure under FOIA would necessarily be public.

26. On Mr Chamberlain's submission (a), Mr Pitt-Payne pointed out that, as appears from the citation at paragraph 17 above, the Commissioner had accepted Mr Oaten's application on two bases, namely that the OGC and Mr Oaten were willing for it to be considered as if made under FOIA, and on the basis that the request for internal review of Mr Boateng's decision could be treated as a FOIA request. The first basis did not involve challenging a Parliamentary question or answer; the second was effectively independent of the previous Parliamentary answer and was therefore unobjectionable. Nonetheless, the Commissioner did not object to the Court indicating whether he or the Tribunal should treat Parliamentary questions as requests under FOIA.

27. On Mr Chamberlain's more substantial submission (b), Mr Pitt-Payne submitted that it went beyond any existing authorities, all of which on analysis concerned attempts to attack or to challenge the legality or good faith or adequacy of Parliamentary proceedings. The Tribunal had done no such thing. Moreover, both the Commissioner and the Tribunal, in addressing the question whether the balance of public interest

under section 2 requires disclosure, are bound to consider whether there are effective means of public scrutiny of the public authority action in question other than disclosure under FOIA; this necessarily involves considering the work of Parliamentary authorities such as Select Committees; the Tribunal did not in fact question or criticise the efficacy of the work of the Public Accounts Committee or the Select Committee on Work and Pensions referred to at paragraphs 23, 77 and 84 of the decision; reports of Parliamentary Select Committees have been referred to in many judgments without any suggestion that Parliamentary privilege was engaged; and it follows that no breach of Parliamentary privilege occurred.

28. In a letter dated 4 October 2007, the Chairman of the Tribunal made it clear that it does not seek to exercise jurisdiction over Parliamentary questions. He expressed concern that the Tribunal might be precluded from referring to reports of Select Committees. He said:

> The second point (Use of Parliamentary Material in the Tribunal's Decision) raises an issue of considerable practical importance, both for information requesters and for public authorities, in relation to proceedings in the Tribunal, which in my view it is important for the Court to be aware of. The Tribunal does not seek to question or impeach any proceedings in Parliament, and recognises that it has no power to do so. However, parties before the Tribunal, and the Tribunal itself, find that the explanations and information provided by knowledgeable members of Parliament, for example in Select Committee reports, are of very great utility in helping the Tribunal reach its decisions on whether information should be released under the Freedom of Information Act. The Tribunal's work would be significantly hampered and artificially constrained if the Tribunal were prohibited from referring to such material. It should be possible to make such reference, for the assistance which it affords, without that involving the "impeaching or questioning of proceedings in Parliament" as properly understood. (I have in mind particularly paragraphs 10, 14 and 19 of the opinion in the recent Privy Council case of *Toussaint v Att Gen of St Vincent.)* To derive assistance from statements made in Parliament, so as the better to understand executive action, does not amount in my view to questioning or challenging those statements. If parliamentary material is admissible in a judicial review to explain executive action that took place outside Parliament, it should equally be admissible to explain the position taken by a Government department outside Parliament on issues of disclosure under the Freedom of Information Act.

29. In relation to the second decision of the Tribunal, Mr Swift submitted that the Tribunal had erred in ordering the disclosure of information that was not in either of the gateway reviews and in addition was not at the relevant date in the possession of the OGC. It has no power to make such an order. Mr Pitt-Payne submitted that the second decision of the Tribunal was consistent with its generally accepted power to direct disclosure of a summary or gist of the contents of a document.

Discussion: the first decision of the Tribunal

Parliamentary privilege

30. The statutory basis of Parliamentary privilege is Article 9 of the Bill of Rights 1689:

> the freedome of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament.

31. This is not, however, a comprehensive statement of the privilege. In *Prebble v Television New Zealand Ltd* [1995] 1 AC 321, Lord Browne-Wilkinson (for the Privy Council) held at 332D:

> In addition to article 9 itself, there is a long line of authority which supports a wider principle, of which article 9 is merely one manifestation, *viz.* that the courts and Parliament are both astute to recognise their respective constitutional roles. So far as the courts are concerned they will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges... As Blackstone said in his *Commentaries on the Laws of England,* 17th ed. (1830), vol. 1, p. 163:
>
> > "the whole of the law and custom of Parliament has its original from this one maxim, 'that whatever matter arises concerning either House of Parliament, ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere.'"

32. It is clear from the judgment of the Privy Council that, in relation to Parliamentary privilege, the law of New Zealand, which was the subject of the judgment, is the same as the law of England and Wales. In *Prebble*, the argument had been advanced (on the basis of the Supreme Court of New South Wales' decision in *R v Murphy* (1986) 64 ALR 498) that Article 9 and the principle of Parliamentary privilege applied to prevent the deployment of statements made in Parliament only where the object of the proceedings was to render the maker of the statement legally liable. In Australia, the effect of *Murphy* had been statutorily reversed by section 16(3) of the Parliamentary Privileges Act 1987, which provided "for the avoidance of doubt" that:

> In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of—(a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament; (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

33. In the Privy Council's judgment in *Prebble*, Lord Browne-Wilkinson, at 333, referred to the Australian statute and said:

> That Act, therefore, declares what had previously been regarded as the effect of article 9 of the Bill of Rights 1689 and section 16(3) of the Act of 1987 contains what, in the opinion of their Lordships, is the true principle to be applied.

34. However, later in his judgment, at 337A, Lord Browne-Wilkinson used a narrower formulation of the rule:

> For these reasons (which are in substance those of the courts below) their Lordships are of the view that parties to litigation, by whomsoever commenced, cannot bring into question anything said or done in the House by suggesting (whether by direct evidence, cross-examination, inference or submission) that the actions or words were inspired by improper motives or were untrue or misleading. Such matters lie entirely within the jurisdiction of the

> House, subject to any statutory exception such as exists in New Zealand in relation to perjury under section 108 of the Crimes Act 1961.

35. In the result, the New Zealand Court of Appeal had been correct to stay an action in which one of the parties had sought to submit that statements made in Parliament were misleading or improperly motivated. Lord Browne-Wilkinson added this caveat at 337:

> But their Lordships wish to make it clear that if the defendant wishes at the trial to allege the occurrence of events or the saying of certain words in Parliament without any accompanying allegation of impropriety *or any other questioning* there is no objection to that course. (Italics added.)

One of the questions I have to consider is: what is meant by "other questioning", and what is the effect of this prohibition?

36. The decision of the Privy Council in *Prebble* is consistent with the earlier decision of the Supreme Court of the Australian Capital Territory in *Comalco Ltd v Australian Broadcasting Corporation* (1983) 50 ACTR 1. In that case Blackburn CJ ruled that Hansard was admissible to show what had been said in the Queensland Parliament as a matter of fact, without the need for the consent of Parliament. He added:

> "… I think that the way in which the court complies with Article 9 of the Bill of Rights 1689, and with the law of the privileges of Parliament, is not by refusing to admit evidence of what was said in Parliament, but by refusing to allow the substance of what was said in Parliament to be the subject of any submission or inference."

This would seem to be at least one of the origins of the formulation in paragraph (c) of section 16(3) of the Parliamentary Privileges Act 1987. The other may have been the reference in the judgment of Brown J in *Church of Scientology of California v Johnson-Smith* [1972] 1 QB 522 to the submission of the Attorney-General:

> But the Attorney-General limited what he said about the probable attitude of Parliament to the use of *Hansard* by agreement by saying that *Hansard* could be read only for a limited purpose. He said it could be read simply as evidence of fact, what was in fact said in the House, on a particular day by a particular person. But, he said, the use of *Hansard* must stop there and that counsel was not entitled to comment upon what had been said in *Hansard* or to ask the jury to draw any inferences from it. …. But the general principle is quite clear I think, and that is that these extracts from *Hansard* which have already been read must not be used in any way which might involve questioning, in a wide sense, what was said in the House of Commons as recorded in *Hansard*.

The judgment of Brown J was approved by the House of Lords in *Pepper v Hart*.

37. *Prebble* was followed by the House of Lords in *Hamilton v Al Fayed* [2001] 1 AC 395. Lord Browne-Wilkinson (giving the only reasoned speech, with which the other members of the Appellate Committee agreed), perhaps unsurprisingly, expressly endorsed "the wide scope of Parliamentary privilege" as discussed in *Prebble*. He said, at 403:

> In *Prebble* it was stated that section 16(3) contains the true principles to be applied, a view shared by the Joint Committee on Parliamentary Privilege (H.L. Paper 43-1) (1998 - 1999) which recommended a statutory provision confirming "as a general principle" the traditional view of article 9, i.e. that it is a blanket prohibition on the examination of parliamentary proceedings in court. "The prohibition applies whether or not legal liability would arise: p. 28, para. 85."
>
> It is in my judgment firmly established that courts are precluded from entertaining in any proceedings (whatever the issue which may be at stake in those proceedings) evidence, questioning or submissions designed to show that a witness in parliamentary proceedings deliberately misled Parliament. To mislead Parliament is itself a breach of the code of parliamentary behaviour and liable to be disciplined by Parliament: see *Church of Scientology of California v. Johnson-Smith* [1972] 1 Q.B. 522; *Pickin v. British Railways Board* [1974] AC 765 at p. 800 per Lord Simon of Glaisdale. For the courts to entertain a question whether Parliament had been deliberately misled would be for the courts to trespass within the area in which Parliament has exclusive jurisdiction.

38. It can be seen that, as in *Prebble*, Lord Browne-Wilkinson expressly endorsed the formulation of the rule in section 16(3) of the Parliamentary Privileges Act 1987 of Australia, including paragraph (c) of the subsection, which makes no reference to misconduct. However, *Hamilton v Al Fayed* itself concerned an allegation of impropriety on the part of a Member of Parliament in Parliament, and in the second paragraph of the above citation Lord Browne-Wilkinson restricted his formulation to allegations that "a witness in parliamentary proceedings deliberately misled Parliament". But he continued, at 403H:

> I have stressed this feature of parliamentary privilege because of the way in which this case has developed. As will appear, the Court of Appeal seem to have taken the view that parliamentary privilege is mainly relevant to cases where a party applies to strike out a court action on the grounds that the relief claimed in that action in some way trenches on conclusions reached in parliamentary proceedings. Although no doubt such cases may arise, they are, I believe, rare compared with those in which a party to litigation wishes to challenge the accuracy or veracity of something said in parliamentary proceedings. In such a case, the other party does not apply to strike out the whole of the plaintiff's action: the action will often be about something quite different to that under consideration in Parliament. The other party applies to prevent the giving of that specific evidence or the challenging of a particular witness. If parliamentary privilege is held to exclude such evidence normally the only result (serious though it may be) is that the case is decided in the absence of that evidence.

39. That Parliamentary privilege does prevent a challenge to the accuracy or veracity of something said in Parliamentary proceedings is, I think, confirmed by what he said at 407F:

> … The normal impact of parliamentary privilege is to prevent the court from entertaining any evidence, cross-examination or submissions which challenge the veracity or propriety of anything done in the course of parliamentary proceedings. Thus, it is not permissible to challenge by cross-examination in a later action the veracity of evidence given to a parliamentary committee.

"Veracity" is apt to include accuracy.

40. Thus *Hamilton v Al Fayed* is authority for the proposition that Parliamentary privilege precludes the Court from considering a challenge to the accuracy of something said in Parliament. It is also plain from *Hamilton v Al Fayed* that, in the absence of statutory authority (as in section 13 of the Defamation Act 1996), the rule enacted by Article 9 cannot be waived by the parties: see per Lord Brown-Wilkinson at 404; see also *Weir v Secretary of State for Transport* [2005] EWHC 2192 (Ch) at [233] - [243].

41. It is common ground before me that paragraphs (a) and (b) of section 16(3) of the Parliamentary Privileges Act 1987 of Australia are declaratory of the common law. The controversy in this case concerns paragraph (c), which literally applied would prevent any reference to a Parliamentary proceeding notwithstanding that there was no any allegation of impropriety or inadequacy or inaccuracy. Mr Chamberlain submitted that the Privy Council's and House of Lords' endorsement of the whole of section 16(3) is an essential part of the reasoning of Lord Browne-Wilkinson in both *Prebble* and *Hamilton v Al Fayed*, and therefore constitutes part of the *ratio* of both decisions. Mr Pitt-Payne submitted that the wide formulation in section 16(3) was unnecessary to both decisions, and that the *ratio* of both decisions is to be found in Lord Browne-Wilkinson's own narrower formulations, which were confined to allegations of misconduct in Parliamentary proceedings. I tend to the view that Mr Pitt-Payne is right on this, but I also agree with Mr Chamberlain that the search for the *ratio* may be academic, since it is in any event clear that the formulation in section 16(3) received the authoritative endorsement of both the Privy Council and the House of Lords. However, in *Prebble* itself Lord Browne-Wilkinson narrowed the scope of the rule by limiting it to cases in which there is some "questioning" of a Parliamentary proceeding.

42. Whether section 16(3)(c) represents English Law was subsequently considered by Bean J in *R (Bradley and others) v Secretary of State for Work and Pensions* [2007] EWHC 242 (Admin), and by me in *R (Federation of Tour Operators) v HM Treasury* [2007] EWHC 2062 (Admin). The substantive issue in *Bradley* was whether the Secretary of State had acted unlawfully in rejecting a recommendation of the Parliamentary Commissioner for Administration, commonly referred to as the Ombudsman. The question arose whether the Court could take into account the evidence of the Ombudsman to the Public Administration Select Committee ("PASC") of the House of Commons or the report of that Committee. Bean J referred to *Prebble*. He considered that the *ratio* of the case was to be found in the narrower formulation of Lord Browne-Wilkinson at 337A cited above. Bean J said, in a passage that was not the subject of comment when the case went to the Court of Appeal [2008] EWCA Civ 32:

> 32. Sub-sections (a) and (b) of the section cited from the Australian statute are uncontroversial. But sub-section (c), if read literally, is extremely wide. It would seem to rule out reliance on or a challenge to a ministerial statement itself on judicial review of the decision embodied in that statement (which was permitted in *R v Secretary of State for the Home Department ex parte Brind* [1991] 1 AC 696, and to which no objection has been raised in the present case), or to resolve an ambiguity in legislation (*Pepper v Hart* [1993] AC 593), or to assist in establishing the policy objectives of an enactment (*Wilson v First County Trust Ltd* [2004] 1 AC 816). It would also prohibit reliance on reports of the Joint Committee on Human Rights, which, as Mr Lewis' submissions rightly state, have been cited in a number of appellate cases in this jurisdiction: a very recent example is *R v F* [2007] EWCA Crim 243 at paragraph 11. As Lord Nicholls of Birkenhead observed in *Wilson*, "there are occasions when courts may properly have regard to ministerial and other statements made in Parliament without in any way 'questioning' what has been said in Parliament, without giving rise to difficulties inherent in treating such statements as indicative

> as the will of Parliament, and without in any other way encroaching upon Parliamentary privilege by interfering in matters properly for consideration and regulation by Parliament alone". I therefore do not treat the text of subparagraph (c) of the Australian statute as being a rule of English law.

43. Nonetheless, Bean J refused to take into account the Ombudsman's evidence to the PASC or its report. He considered that to admit the evidence of the Ombudsman to the PASC would inhibit the freedom of speech in Parliament, and therefore contravene Article 9 of the Bill of Rights. In relation to the report of the PASC, he said:

> My view is that I should not place reliance on the PASC report for an entirely different and more fundamental reason, which is that, in the words of the Privy Council in *Prebble*, the courts and Parliament are both astute to recognise their respective constitutional roles. It is for the courts, not the Select Committee, to decide whether the Secretary of State has acted unlawfully in rejecting the findings and recommendations of the Ombudsman in this case. I note and respect the views of the Select Committee but in the end they are not of assistance on the questions of law which I have to determine.

This passage of the judgment of Bean J was not commented upon in *Bradley* in the Court of Appeal [2008] EWCA Civ 36.

44. In my judgment in the *Federation of Tour Operators* case I referred to the decision of the Privy Council in *Toussaint v. The Attorney General of Saint Vincent and the Grenadines* [2007] UKPC 48, [2007] 1 WLR 2825 to which the Chairman of the Tribunal also referred in his letter of 4 October 2007. I said:

> 115. *Toussaint* clarifies, and in my view limits, the exclusion resulting from an allegation of impropriety. It establishes that it is proper for a claimant to rely on evidence of what was said by a Minister in Parliament to show what was the motivation of the executive's action outside Parliament, in that case the compulsory purchase of Mr Toussaint's land. He alleged that the compulsory purchase was discriminatory or illegitimate expropriation: an allegation of impropriety. He was entitled to rely on the Minister's statement to show what was the true motivation for the compulsory purchase. It is to be noted that Mr Toussaint did not allege that the Minister had misled Parliament; to the contrary, it was alleged that what he said to Parliament disclosed his true motivation. The allegedly wrongful act in that case was not the statement to Parliament, but the compulsory purchase to which it related: see paragraphs 19 and 20 of the judgment of the Judicial Committee. Mr Toussaint was similarly entitled to rely on what the Minister said to Parliament in support of his allegation that the purpose stated in the declaration for compulsory purchase was a sham: paragraph 23.

45. However, like Bean J, I refused to take into account evidence given to a Parliamentary Committee or its report on the issue whether an increase in Air Passenger Duty had been imposed with retrospective effect or on other issues in the case before me:

> 117. …In general, the opinion of a Parliamentary Committee will be irrelevant to the issues before the Court (as in *R (Bradley) v Secretary of State for Work and Pensions* [2007] EWHC 242 (Admin) …

…

120. In my judgment, the Speaker's submissions, and the authorities to which I have referred, demonstrate the importance of identifying the purpose for which evidence of proceedings in Parliament is relied upon. Like Bean J in *Bradley*, it is the relevance of that material as well as its origin that the Court must consider. It is necessary to consider whether this material would otherwise be admissible on or relevant to the determination of the Claimants' substantive claims, before deciding whether its origin precludes their adducing it in evidence.

121. Whether the increase in APD was retrospective is to be determined objectively, by reference to the terms of the provision effecting the increase and its practical financial effects. Whether a Parliamentary Committee did or did not consider it to be retrospective is, in my judgment, irrelevant to the legality of the increase, and on that account its opinion is inadmissible.

122. Whether any witness gave a complete or an incomplete account of APD or its increase or the effects of the increase to a Parliamentary Committee is also irrelevant to the determination of the substantive issues before me. It is for Parliament, not the Courts, to assess the completeness and reliability of such evidence. This Court is not concerned with such matters, which do not affect or go to the lawfulness of the increase.

123. Similarly, whether the Parliamentary procedure by which the increase was introduced was appropriate has no bearing on its legality. That is most certainly not a matter for judicial investigation or comment.

124. The efficacy or otherwise of APD as an environmental measure is also, in my judgment, a question which, if relevant, is to be determined on the basis of evidence and argument before the Court, and not on the basis of the opinion of anyone whose evidence is not before the Court. There is, however, no reason why the Claimants cannot take from what has been said to or by a Select Committee points that can be put before the Court. For example, what was said by the Financial Secretary to the Treasury to the Select Committee on the Environment is not rocket science, but something that would be obvious to anyone who gave the matter some thought. The points he made can be made independently, without reference to his statement.

125. Thus, in the end, I do not think that the Parliamentary material referred to by the Claimants, which I have looked at *de bene esse*, as such advances their case.

46. These authorities demonstrate that the law of Parliamentary privilege is essentially based on two principles. The first is the need to avoid any risk of interference with free speech in Parliament. The second is the principle of the separation of powers, which in our Constitution is restricted to the judicial function of government, and requires the executive and the legislature to abstain from interference with the judicial function, and conversely requires the judiciary not to interfere with or to criticise the proceedings of the legislature. These basic principles lead to the requirement of mutual respect by the Courts for the proceedings and decisions of the legislature and by the legislature (and the executive) for the proceedings and decisions of the Courts.

47. Conflicts between Parliament and the Courts are to be avoided. The above principles lead to the conclusion that the Courts cannot consider allegations of impropriety or inadequacy or lack of accuracy in the proceedings of Parliament. Such allegations are for Parliament to address, if it thinks fit, and if an allegation is well-founded any sanction is for Parliament to determine. The proceedings of Parliament include Parliamentary questions and answers to. These are not matters for the Courts to consider.

48. In my judgment, the irrelevance of an opinion expressed by a Parliamentary Select Committee to an issue that falls to be determined by the Courts arises from the nature of the judicial process, the independence of the judiciary and of its decisions, and the respect that the legislative and judicial branches of government owe to each other.

49. However, it is also important to recognise the limitations of these principles. There is no reason why the Courts should not receive evidence of the proceedings of Parliament when they are simply relevant historical facts or events: no "questioning" arises in such a case: see [35] above. Similarly, it is of the essence of the judicial function that the Courts should determine issues of law arising from legislation and delegated legislation. Thus, there can be no suggestion of a breach of Parliamentary privilege if the Courts decide that legislation is incompatible with the European Convention on Human Rights: by enacting the Human Rights Act 1998, Parliament has expressly authorised the Court to determine questions of compatibility, even though a Minister may have made a declaration under section 19 of his view that the measure in question is compatible. The Courts may consider whether delegated legislation is in accordance with statutory authority, or whether it is otherwise unlawful, irrespective of the views to that effect expressed by Ministers or others in Parliament: *R (Javed) v Secretary of State for the Home Department* [2001] EWCA Civ 789, [2002] QB 129 at [33]:

> … Legislation is the function of Parliament, and an Act of Parliament is immune from scrutiny by the courts, unless challenged on the ground of conflict with European law. Subordinate legislation derives its legality from the primary legislation under which it is made. Primary legislation that requires subordinate legislation to be approved by each House of Parliament does not thereby transfer from the courts to the two Houses of Parliament, the role of determining the legality of the subordinate legislation. …

50. See too at [37]. Indeed, generally, a view expressed in Parliament as to the law is strictly irrelevant to the decision of the Court as to the law. (I am not referring to what is said in relation to the specific legislation that is before Parliament, although even in that case it is relevant only if the requirements of *Pepper v Hart* [1993] 1 AC 593 are satisfied.) The Queen in Parliament enacts legislation, and under our constitution its validity must be accepted by the Courts (unless it conflicts with European law); but the interpretation of legislation, and the determination of the provisions of the common law, are for the Courts alone.

51. It is for these reasons, and in particular the need for mutual respect by members of Parliament for the functions of the Courts and of the Courts for the functions of the legislature and executive, that I think it would be better if Parliamentary questions are not answered by a Ministerial statement as to the result of the application of FOIA to a particular case. I consider that no breach of Parliamentary privilege is involved in my so stating, because I have been invited to address this matter by the Speaker. The application of FOIA in a particular case is ultimately a matter to be determined by the judiciary in accordance with the machinery established by that Act. The Information Tribunal exercises a judicial function, and it is part of the judicial arm of government. In response to a Parliamentary question, a

Minister may choose to disclose information notwithstanding that it is exempt from disclosure under FOIA; he may disclose information to a Member of Parliament on terms as to confidentiality that are not available if a disclosure is made under FOIA; and subject to any Parliamentary sanction, he may refuse to disclose information the disclosure of which may be obtained under FOIA. If, however, he answers a Parliamentary question by making a statement as to the result of the application of FOIA, he creates the potential for a judicial ruling to the contrary effect, as indeed happened in this case: implicitly, and obviously, the effect of the Tribunal's decision is that the Parliamentary answer given by Mr Boateng, that the gateway reviews were exempt from disclosure under the Act, was wrong. It is, I think, undesirable for the potentiality for such conflicts to be created.

52. It is, of course, open to any Member of Parliament to make a request for disclosure under FOIA outside the framework of a Parliamentary question. Any such request will then fall to be dealt with under FOIA without any concern as to conflicting answers being given in Parliamentary proceedings and in judicial proceedings. The potentiality for conflict, or the appearance of conflict, is the more acute in the case of the application of FOIA than in other contexts, because the Act creates its own machinery for the determination of disputes. It would have been far better if, having received Mr Boateng's answer, Mr Oaten had made his request again outside Parliament, by letter to the OGC. In that event, the machinery of the Act could have been operated without any concerns as to a breach of Parliamentary privilege.

53. For these reasons, I endorse the refusal of the Information Commissioner to treat a Parliamentary Question as a valid request for the purposes of the Act. By doing so, he rightly avoided having to decide expressly and specifically whether the Parliamentary answer of Mr Boateng was correct or incorrect, and equally avoided the Tribunal having to do so.

54. There are also difficulties in the basis on which the Commissioner accepted jurisdiction in relation to Mr Oaten's request. The review requested by Mr Oaten necessarily challenged the correctness of the Ministerial answer to his Parliamentary question, and such a challenge cannot be the subject of judicial decision. It is irrelevant that the Ministers of the Treasury agreed that the request for a review should be treated as if made under the Act, since Parliamentary privilege cannot be waived, at least by the Executive, other than as authorised by section 13 of the Defamation Act 1996.

55. However, I have every sympathy with the position of the Commissioner and the Tribunal in relation to Mr Oaten's request. No issue of Parliamentary privilege was taken before them, and the application of FOIA had been expressly raised first by Mr Boateng and then by Mr Oaten's request for a review of Mr Boateng' refusal to disclose the information that had been requested.

56. Turning to the first decision under appeal, I understand that it was the Tribunal that raised the question whether there was a report of a Parliamentary Select Committee relevant to the questions of the confidentiality or disclosure of gateway reviews. This created a risk of a breach of Parliamentary privilege by the Tribunal. More importantly the Tribunal erred in being influenced by the opinion of the Select Committee on Work and Pensions, for two reasons.

57. First, as in *Bradley* and the *Federation of Travel Operators* cases, the opinion of the Select Committee was irrelevant to the decision of the Tribunal. What I said at paragraphs 121 and 124 of my judgment in the latter case is *mutatis mutandis* equally applicable to the decision of the Tribunal. It was the duty of the Tribunal to determine the issues before it judicially, on the basis of the evidence and arguments before the Tribunal. There is nothing in FOIA or in the Information Tribunal (Enforcement Appeals) Rules 2005,

which make provision for the procedure of the Tribunal, which could lead to a contrary conclusion. By way of example, rule 14(2)(c)(i) and (ii) authorise the Tribunal to require the parties to file and to serve statements of facts and evidence which will be adduced, and a skeleton argument which summarises the submissions which will be made at the hearing of an appeal. The Select Committee had arrived at its view on the evidence before it, and not on the evidence that was before the Tribunal. Indirectly, in relying on the opinion of the Select Committee, the Tribunal relied on evidence that was not before it, and failed to make its decision only on the basis of the evidence and submissions before it.

58. In addition, in my judgment, there is substance in Mr Chamberlain's further submission, summarised at paragraph 23(b)(i) above. If a party to proceedings before a court (or the Information Tribunal) seeks to rely on an opinion expressed by a Select Committee, the other party, if it wishes to contend for a different result, must either contend that the opinion of the Committee was wrong (and give reasons why), thereby at the very least risking a breach of Parliamentary privilege, if not committing an actual breach, or, because of the risk of that breach, accept that opinion notwithstanding that it would not otherwise wish to do so. This would be unfair to that party. It indicates that a party to litigation should not seek to rely on the opinion of a Parliamentary Committee, since it puts the other party at an unfair disadvantage and, if the other party does dispute the correctness of the opinion of the Committee, would put the Tribunal in the position of committing a breach of Parliamentary privilege if it were to accept that the Parliamentary Committee's opinion was wrong. As Lord Woolf MR said in *Hamilton v Al Fayed* at [1999] 1 WLR 1586G, the courts cannot and must not pass judgment on any Parliamentary proceedings.

59. If it is wrong for a party to rely on the opinion of a Parliamentary Committee, it must be equally wrong for the Tribunal itself to seek to rely on it, since it places the party seeking to persuade the Tribunal to adopt an opinion different from that of the Select Committee in the same unfair position as where it is raised by the opposing party. Furthermore, if the Tribunal either rejects or approves the opinion of the Select Committee it thereby passes judgment on it. To put the same point differently, in raising the possibility of its reliance on the opinion of the Select Committee, the Tribunal potentially made it the subject of submission as to its correctness and of inference, which would be a breach of Parliamentary privilege. This is, in my judgment, the kind of submission or inference, to use the words of 16(3) of the Parliamentary Privileges Act 1987, which is prohibited.

60. In *Bradley*, as mentioned above, Bean J said that section 16(3)(c) of the Australian statute does not represent the law of England and Wales. I would prefer to say that if given a broad literal interpretation it is an over-general statement of the law. It must be interpreted somewhat narrowly, in the sense to which I have referred in paragraph 58 above, and as subject to the exceptions or qualifications to which Bean J himself referred. This is consistent with its endorsement by the Privy Council in *Prebble* and by the House of Lords in *Hamilton v Al Fayed*, and the approval in *Prebble* the Privy Council of the decision in *Comalco*.

61. In accepting in substance Mr Chamberlain's submission concerning reliance on an opinion expressed by a Parliamentary Committee, I have not forgotten that the Courts do from time to time refer to the reports of such Committees. Lord Browne-Wilkinson himself did so in *Hamilton v Al Fayed* itself, when he said, at 403E:

> In *Prebble's* case it was stated that section 16(3) contains the true principles to be applied, a view shared by the Joint Committee on Parliamentary Privilege (HLP 43-1) (1998-1999)

> which recommended a statutory provision confirming "as a general principle" the traditional view of article 9, i.e. that it is a blanket prohibition on the examination of parliamentary proceedings in court. "The prohibition applies whether or not legal liability would arise": p 28, para 85.

I accept Mr Chamberlain's submission that that reference was made in the special context of an examination of the scope and effect of Parliamentary privilege, on which it is important for Parliament and the courts to agree if possible. However, there have been many other such references by the Court. In *Bentley* itself in the Court of Appeal, Sir John Chadwick referred to the Report of the Select Committee on the Parliamentary Commissioner for Administration at paragraph 64 of his judgment, with which the other members of the Court of Appeal agreed. Again, however, that report concerned Parliamentary proceedings and the jurisdiction of Parliament. In *R v F* [2007] EWCA Criminal 243 [2007] QB 960, at [11], the reference was incidental and irrelevant to the issues before the Court. In *Conway v Rimmer* [1968] AC 910, Lord Reid referred to a statement made by the Lord Chancellor in the House of Lords in order to ascertain the practice of the Government in claiming what was then called Crown privilege, and is now public interest immunity.

62. Generally, however, I do not think that inferences can be drawn from references made by the Court to the reports of Parliamentary Select Committees in cases where no objection was taken to its doing so. In addition, as I said in the *Federation of Travel Operators* case, whether there is any breach of Parliamentary privilege in such a reference will depend on the purpose for which the reference is made. For example, it seems to me that there can be no objection to a reference to the conclusions of a report that leads to legislation, since in such a case the purpose of the reference is either historical or made with a view to ascertaining the mischief at which the legislation was aimed; the reference is not made with a view to questioning the views expressed as to the law as at the date of the report.

63. It follows from the above that in relying on the opinion of the Select Committee the Tribunal took into account an illegitimate and irrelevant matter, and for this reason alone the first decision, and in consequence the second decision, must be quashed.

64. My conclusion does not lead to the exclusion from consideration by the Commissioner or the Tribunal of the opportunity for scrutiny of the acts of public authorities afforded by the work of Parliamentary Select Committees. They may take into account the terms of reference of Committees and the scope and nature of their work as shown by their reports. If the evidence given to a Committee is uncontentious, i.e., the parties to the appeal before the Tribunal agree that it is true and accurate, I see no objection to its being taken into account. What the Tribunal must not do is refer to evidence given to a Parliamentary Committee that is contentious (and it must be treated as such if the parties have not had an opportunity to address it) or to the opinion or finding of the Committee on an issue that the Tribunal has to determine. Nor should the Tribunal seek to assess whether an investigation by a Select Committee, which purports to have been adequate and effective, was in fact so.

65. The risks involved in relying on Parliamentary proceedings are demonstrated by the last sentence of paragraph 84 of the Tribunal's decision, which is open to the interpretation (which was placed on it by the Speaker) that it is a criticism of the Government's failure to fulfil an offer made to the Select Committee. Whether the Government fulfils a promise or offer made to a Select Committee is a matter for the judgment of Parliament, not for the Courts, and it would therefore be wrong for the Tribunal to give the

impression that its decision was affected by its assessment of the response of Government to such a promise or offer.

66. I should add that I would reject Mr Swift's submission that the Tribunal misunderstood the effect of the 2004 Report of the Select Committee on Work and Pensions. The Committee was clearly primarily concerned with disclosure to Parliament for the purposes of Parliamentary scrutiny; but it was also concerned with publication, i.e., disclosure to the public, expressly referred to at paragraph 119 of its report, cited under paragraph 77 of the Tribunal's decision.

Other grounds of appeal

67. My conclusion on the issues of Parliamentary privilege makes it unnecessary for me to decide on all the other grounds of appeal. However, since they have been argued fully before me, and they raise some issues of general importance, I shall address them, although I do not propose to reach a final conclusion on all of them.

The public interest in disclosure and the public interest in maintaining the exemption: grounds (a), (c) and (g)

68. It was formerly generally thought that there was a culture of confidentiality, if not secrecy, in the administration of public authorities, and in particular central government. The climate had however been changing in favour of greater transparency, and therefore of disclosure, for some time. It was reflected in the willingness of the Courts to require disclosure of relevant documents for the purposes of litigation, heralded by the decision of the House of Lords in *Conway v Rimmer*. FOIA introduced a radical change to our law, and the rights of the citizen to be informed about the acts and affairs of public authorities.

69. In my judgment, it is both implicit and explicit in FOIA that, in the absence of a public interest in preserving confidentiality, there is a public interest in the disclosure of information held by public authorities. That public interest is implicitly recognised in section 1, which confers, subject to specified exceptions, a general right of access to information held by public authorities:

> 1. *General right of access to information held by public authorities*
>
> (1) Any person making a request for information to a public authority is entitled–
>
> > (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
> >
> > (b) if that is the case, to have that information communicated to him.
>
> (2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.

70. The public interest in disclosure is explicitly recognised and affirmed in section 19(3). Section 19(1) imposes on every public authority a duty to adopt and to maintain a scheme for the publication of information by it. Section 19(3) is as follows:

> In adopting or reviewing a publication scheme, a public authority shall have regard to the

public interest –

(a) in allowing public access to information held by the authority, and

(b) in the publication of reasons for decisions made by the authority.

71. Thus I agree with the statement of the Tribunal in *Secretary of State for Work and Pensions v The Information Commissioner* Appeal no. EA/2006/0040:

> 29. It can be said, however, that there is an *assumption* built into FOIA that the disclosure of information by public authorities on request is in itself of value and in the public interest, in order to promote transparency and accountability in relation to the activities of public authorities. What this means is that there is always likely to be some public interest in favour of the disclosure of information under the Act. The strength of that interest, and the strength of the competing interest in maintaining any relevant exemption, must be assessed on a case by case basis: section 2(2)(b) requires the balance to be considered "in all the circumstances of the case".

72. Disclosure under FOIA is always to the person making the request under section 1. However, once such a request has been complied with by disclosure to the applicant, the information is in the public domain. It ceases to be protected by any confidentiality it had prior to disclosure. This underlines the need for exemptions from disclosure.

73. The exemptions from disclosure are of two kinds, absolute and qualified. Qualified exemptions are the subject of the so-called public interest test in section 2(2), to which I shall have to refer below. The present case is concerned with qualified exemption under two heads, the subjects of sections 33 and 35 respectively, the application of which to the gateway reviews in question is common ground. Section 35 provides, so far as is relevant:

> 35 *Formulation of government policy, etc*
>
> (1) Information held by a government department or by the National Assembly for Wales is exempt information if it relates to–
>
> (a) the formulation or development of government policy,
>
> (b) Ministerial communications,
>
> (c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or
>
> (d) the operation of any Ministerial private office.
>
> (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, or

(b) for the purposes of subsection (1)(b), as relating to Ministerial communications.

(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 has been used, or is intended to be used, to provide an informed background to decision-taking.

74. Section 33 is as follows:

33 *Audit functions*

(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 to in subsection (1).

(3) The duty to confirm or deny does not arise in relation to a 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).

75. It can be seen that section 35 creates a class exemption: it applies to all information within the statutory description, irrespective of its nature or the public interest in its confidentiality or in its publication. Those public interests come into play under section 2.

76. Mr Swift submitted that if information is within section 35, there is necessarily a public interest in maintaining the exemption, i.e. in non-disclosure. Mr Pitt-Payne disagreed: he submitted that the effect of section 35 if to require the public authority in question (in the first place) to consider whether there is a public interest in its not being disclosed, and only if it concludes that there is such does the public interest test required by section 2 come into play.

77. In order to consider these submissions, it is also necessary to refer to section 2:

(1) Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either–

(a) the provision confers absolute exemption, or

> (b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information,
>
> section 1(1)(a) does not apply.
>
> (2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that–
>
> (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
>
> (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
>
> (3) For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption–

Sections 33 and 35 are not among the provisions listed under subsection (3), and thus create qualified rather than absolute exemptions.

78. Having considered the effect of section 2(2)(b), I think that this issue under section 35 is always likely to be arid. Once it has been decided that information is subject to section 35, if the information is not already in the public domain the authority will have to weigh up the public interest in disclosure against the public interest in maintaining the exemption. If it is unable to identify a significant public interest in maintaining the exemption, application of the public interest test in section 2(2)(b) will lead to disclosure. If it is able to identify that public interest, and it is substantial, it will consider the public interest in disclosure and decide whether the former outweighs the latter.

79. Be that as it may, if it is interpreted literally I do not think that section 35 creates a presumption of a public interest in non-disclosure. It is true that section 2 refers to "the public interest in maintaining the exemption", which suggests that there is a public interest in retaining the confidentiality of all information within the scope of the exemption. However, section 35 is in very wide terms, and interpreted literally it covers information that cannot possibly be confidential. For example, a report of the Law Commission being considered by the Government with a view to deciding whether to implement its proposals would be or include information relating to "the formulation or development of government policy", yet there could be no public interest in its non-disclosure. It would therefore be unreasonable to attribute to Parliament an intention to create a presumption of a public interest against disclosure. I therefore agree with the view expressed by the Information Tribunal in *The Department for Education and Skills v the Information Commissioner and the Evening Standard*, Appeal no. EA/2006/0006 ("the *DFES* case") at paragraphs 60 to 63. I reject the ground of appeal referred to at paragraph 20(c) above.

80. I add that, because of the relationship between section 35 and section 2, for the reason given in paragraph 79 above, it matters not whether the former is interpreted as restricted to information that is not in the public domain. Section 21, which exempts from disclosure under the Act information that is reasonably accessible by other means, suggests that such an interpretation is inappropriate.

81. Section 33 does not create a class exemption. That exemption is dependent on there being prejudice, or a sufficient risk of prejudice, to the public interest if the information in question is disclosed. Thus the claim of the OGC to exemption under section 33 required the Tribunal to determine whether disclosure "would, or would be likely to, prejudice the exercise of any of the authority's functions": only if it answered this question affirmatively would it be necessary to carry out the balancing exercise required by section 2(2)(b). It was common ground that the OGC exercises functions in relation to the matters specified in section 33(1), as obviously it does. There was controversy as to the meaning of the word "likely" in section 2(2) and (3), a controversy that I am not required to seek to resolve, since although the Tribunal rejected the OGC's submission as to its meaning, it nonetheless found that disclosure of the OGC reports in question would be likely to prejudice the exercise of the OGC's functions. That finding is contained in paragraph 52 of the decision, a passage I find somewhat opaque. But it is at this point that the controversy becomes real.

82. Having decided that the OGC reports qualified under section 33, the Tribunal had to assess both the public interest in maintaining the exemption and that in disclosure, and decide whether the former outweighed the latter: the "default" position, as Mr Pitt-Payne put it, where the competing interests are equal, is disclosure. For the purpose of both section 33 and section 2(2)(b), it was necessary to identify and assess the prejudicial effect of disclosure. In relation to section 33, that effect had to be on the exercise of the relevant functions of OGC. It may be that in assessing the public interest in maintaining the exemption, for the purposes of section 2(2)(b), other prejudice would also be relevant, but the point does not arise on this appeal.

83. The question then arises whether the Tribunal failed to identify a public interest justifying disclosure (the ground referred to at paragraph 20(a) above). The section of the decision under the heading "The Tribunal's Analysis and Findings" is remarkably short. Mr Pitt-Payne had in his submissions to the Tribunal, summarised at paragraphs 78 to 80, provided ample material for it to identify and assess the public interest in disclosure. The tone of those paragraphs indicates that they found favour with the Tribunal. However, the Tribunal did not in my view expressly adopt those submissions. The reference in paragraph 86 of the decision to paragraphs 64 to 73 is clearly wrong. Mr Pitt-Payne submitted that the reference is to paragraphs 76 to 80, in which the Tribunal summarised his submissions as to the public interest in disclosure. However, paragraph 96 must, I think, be read as referring to paragraphs 66 to 75, as Mr Swift submitted, i.e., the paragraphs in which the Tribunal set out Mr Pitt-Payne's submissions on the 14 areas of harm resulting from disclosure identified by the OGC. That interpretation is consistent with the subject matter of paragraph 86, i.e. the potential harm to the public interest resulting from disclosure, and the number of paragraphs referred to, 10. The Tribunal must, I think, have had in mind the public interest in open scrutiny of major public IT projects such as the identity card project referred to in the extract to the Select Committee report cited under paragraph 84 of the decision, which was essentially the public interest identified by the Commissioner. I think it accepted the submissions of Mr Pitt-Payne summarised in paragraphs 76 to 80 of the decision; but it should have so stated. It is the failure of the Tribunal to identify the public interest in disclosure which it found that justifies the ground of appeal summarised at paragraph 20(a) above. A benevolent consideration of the decision is required if this ground is to be rejected. Having regard to my conclusion that the decision must in any event be quashed, it is unnecessary for me to reach a final conclusion on this ground, and I have not done so.

84. Turning to the countervailing public interest required to be addressed by section 2, it is clear that the Tribunal found that the OGC had over-stated the prejudice that would come from disclosure Although its

reasons for this conclusion, in paragraph 86, were brief, I think that they were sufficient. In general, a statement in a judicial decision that the tribunal prefers one party's submissions to the other's is uninformative, since it does not explain why the former's submissions have been preferred; but there is sufficient elsewhere in the decision (such as paragraph 88) in which the reasons can be found.

85. In paragraph 52 of its decision, the Tribunal envisaged that the OGC would have to change its current practice if gateway reviews are liable to be disclosed. The OGC submits that in considering that it could and would mitigate the prejudice caused by disclosure, the Tribunal took into account what is in law an irrelevant consideration: see paragraph 20(e)(ii) above. I do not think that there is substance in this ground. The OGC's case was that disclosure of the gateway reviews in question in the appeal would have a detrimental effect on future reviews. Necessarily, the Tribunal had to consider what would happen in the future if disclosure was ordered; and that included the action OGC might take as a result of its decision. Moreover, as Mr Pitt-Payne submitted, section 33 itself requires the public authority to look forward in order to assess whether disclosure would or would be likely to prejudice the exercise of its functions; and section 2 therefore requires the authority to assess the extent of that prejudice.

86. There is, however, substance in the complaint that the reasoning of the Tribunal on this point is unclear. Mr Pitt-Payne submitted, correctly, that the Tribunal's decision must be read as whole, and that it would be wrong to read any particular passage in isolation. Nonetheless, one of the difficulties with the decision is that there is a lack of cross-references or clarity at important points. I regret that, as mentioned above, I find paragraph 52 opaque: the decision does not identify the "underlying way that GR's are undertaken" or "the currently practised GR process". Mr Pitt-Payne submitted that the change referred to in paragraph 52 was that referred to at paragraph 89, i.e., a change in the drafting of reports, making them read more diplomatically. But it is difficult to read paragraph 52 in that way. The drafting of reports of gateway reviews is not naturally referred to as "the underlying way that GR's are undertaken" or as "the currently practised GR process". This is important, because the reader of the decision needs to know whether the Tribunal correctly identified and assessed the prejudice to the public interest for the purposes of its application of section 2(2). Nor do I find in paragraph 64 a clue to what the Tribunal had in mind. It is this lack of explanation that has led to the OGC's complaint (paragraph 20(b) above) that the Tribunal, having found that disclosure would be likely to prejudice the OGC in the exercise of its functions, failed to carry forward that finding when making the assessment required by section 2. The answer is, I think, that the Tribunal accepted that some prejudice would result from disclosure, but that the OGC had overstated it, as stated in paragraph 86.

87. Another difficulty in the present decision is understanding whether the Tribunal based its decision on a finding that the application of section 2 would result in gateway reviews being generally disclosable, or on a finding that the gateway reviews that were the subject of the appeal were to be disclosed because of the exceptional public interest in their disclosure, or that in future there would be no presumption either way. The public interest test applied by section 2 takes into account "all the circumstances", and so its application will depend on the facts of individual cases. Nonetheless, generalisations, admitting of exceptions, may be possible.

88. The basis of the appeal of the OGC related to the effect of disclosure of the gateway reviews in question on future gateway reviews. This issue had been addressed on behalf of the OGC and on behalf of the Commissioner in submissions summarised at paragraphs 60 to 75 of the decision, If, for example, the disclosure of the gateway reviews in issue was exceptional, the fears of the OGC of the effect of their

disclosure on future reviews would be diminished; and there was material before the Tribunal that would justify a finding that these gateway reviews were of exceptional public interest. As the Tribunal recognised in paragraphs 16 and 17 of the decision, the identity card programme was both "mission critical" and a "key programme", and the gateway reviews led to the Government's decision to proceed to introduce the Identity Cards Bill into Parliament. In addition, the identity card programme was (and is) controversial both in terms of principle, in relation to the civil rights questions it raises, and in terms of practicality and cost. Before the Tribunal, Mr Pitt-Payne emphasised the importance of the identity card programme: see paragraph 78 of the decision.

89. 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 its appeal.

90. The implications of an order for disclosure of the gateway reviews in issue in the appeal on future applications for the disclosure of other (and in particular future) gateway reviews was addressed by the Tribunal in paragraph 87 of the decision. However, it did so in terms that leave its conclusion, and therefore the basis of its assessment under section 2, unclear. It stated that "There is no reason to believe the floodgates would open ...", but did not explain in that paragraph the basis for that statement, i.e., why the circumstances considered under section 2 relating to the instant gateway reviews differed from other gateway reviews. On balance, I think that the Tribunal concluded that every application would have to be considered on its individual facts. This may have implied that the Tribunal considered that it was the importance of the identity card programme that led to the assessment under section 2 resulting in disclosure; but the Tribunal did not so state. To the contrary, in other parts of the decision, the Tribunal seems to have envisaged that gateway reviews generally should be disclosed.

91. The Tribunal's reasoning on this issue certainly lacks clarity, and I do not think that it was sufficient. Given the basis of the OGC's appeal, a specific finding and explanation as to the implications of the order made by the Tribunal on requests for disclosure of other gateway reviews were necessary.

The Tribunal wrongly criticised the OGC's case as seeking to maintain an absolute exemption from disclosure; and the Tribunal had regard to an irrelevant consideration, namely its criticism of the training provided by the OGC in relation to gateway reviews.

92. I can conveniently consider these grounds of appeal together. As to the first, in my judgment, the Tribunal adequately summarised the OGC's case in paragraph 81 of the decision. While I might not share its description of that case, it contains no error of law.

93. The Tribunal criticised the OGC's training in relation to gateway reviews and FOIA, and its case that any disclosure at all would be damaging. These comments are the subject of the grounds of appeal summarised at paragraph 20(d) and 20(e)(i) above. I have some difficulty with the Tribunal's criticism. It may be that when formulating its training the OGC failed to anticipate how the Commissioner and the Tribunal would apply sections 33, 35 and 2 to gateway reviews, and over-estimated the strength of its case for maintaining the exemptions conferred by section 33 and 35, but that is not necessarily justification for criticism. The application of section 33 and section 2 could conceivably lead to the conclusion that

information of a particular category should not be disclosed save in exceptional circumstances, because the prejudice from disclosure would be so great. That is not the same as seeking to confer an absolute exemption that Parliament has not sought fit to confer. The guidance on FOIA and gateway reviews issued by the Department for Constitutional Affairs and the OGC in 2004, and subsequently reviewed, states:

> "In summary, the prospect of disclosure had 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 the summary of recommendations should be withheld citing s 33 of the Act and where held by the auditee, using s 35/s36 in the alternative."

I do not find this objectionable. The evidence of Sir Peter Gershon, who had been the first chief executive of the OGC between April 2000 and March 2004 and had introduced gateway reviews, and of Derek Baker, who had been the Director of Managed Service Operations of the OGC, was to the same effect: see the transcript of day 1 at pages 25 to 26 and 61 to 65. A similar approach to that of the OGC was taken by the Department for Trade and Industry in relation to investigations under the Companies Act 1967 into the affairs of companies, and was considered by the Tribunal, differently constituted, in Appeal no. EA/2006/007. In that case, the complainant sought disclosure of the purpose of for which an investigation had been instituted. The Department refused disclosure, relying on the qualified exemption in section 30. The Tribunal did not criticise the Department's approach, which came very close to a claim for absolute exemption, and upheld the Department's refusal. Indeed, in paragraph 87 of its instant decision, the Tribunal suggested that the disclosure of the gateway reviews in question would not necessarily lead to their disclosure in other cases.

94. However, whether the Tribunal's criticism of the training provided by OGC was justified is a matter of fact, which cannot be the subject of appeal to this Court, not of law. It is only if the criticism was perverse that this Court can interfere on this ground. While I do not share that criticism, it was not perverse. In my judgment, that training was properly the subject of consideration by the Tribunal, since it was relevant to the effect of disclosure of the instant gateway reviews on the conduct of future reviews. I therefore reject the ground of appeal that the training was not a matter that the Tribunal could lawfully take into account.

The Tribunal 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 NAO and the Parliamentary Accounts Committee

95. There is a contradiction between this ground of appeal and the complaint of the OGC that the Tribunal failed to appreciate that the Select Committee on Work and Pensions was advocating disclosure of gateway reviews to it rather than to the public. In any event, however, this ground is not made out. The Tribunal considered other means of public scrutiny in paragraphs 22 to 27. In paragraph 24 it mentioned that the National Audit Office and Parliamentary Select Committees conduct retrospective reviews whereas gateway reviews are conducted during the currency of a programme or project. It clearly took this into account. The defect with the decision is, as stated above, that the Tribunal took into account the opinion of a Select Committee as to the desirability of disclosure of gateway reviews, not that the work of such Committees was ignored.

96. During the course of argument, I referred to section 37 of the Identity Cards Act 2006, which requires the Secretary of State to lay before Parliament an estimate. Before the end of every six months beginning with the laying of a report under this section, the Secretary of State must prepare and lay before Parliament a report setting out his estimate of the public expenditure likely to be incurred on the ID cards scheme. It was brought into force on 30 September 2006, i.e., after the dates of the requests for disclosure and of the Commissioner's decision on the complaint of Mr Dziecielewski, but before the dates of his decision on the complaint of Mr Oaten and before the decision of the Tribunal. Section 37 was not referred to by the Tribunal in its decision.

97. There was in this context discussion as to whether subsequent changes in circumstances, such as the coming into force of section 37, could be taken into account by the Commissioner. Mr Pitt-Payne submitted that the Act required questions of disclosure to be determined on the basis of the facts at the date of the request under section 8. He submitted that "the circumstances" referred to in section 2 are the circumstances as at that date, and that this is made clear by section 50, which requires the Commissioner to decide whether a request for information made to a public authority "has been dealt with in accordance with the requirements of Part I": the tense clearly refers back to the date of the request. He submitted, cogently, that any other interpretation would enable public authorities to benefit by refusing a request and thereby at least postponing disclosure. It is unnecessary to require the Commissioner to take subsequent changes of circumstances favouring disclosure into account: if there are such changes, the complainant is able to make a further request for disclosure. If, on the other hand, the change of circumstances favoured and would lead to non-disclosure, the authority would have benefited from its original wrongful refusal.

98. It is unnecessary for me to decide whether Mr Pitt-Payne's submissions on this point are correct, since no point had been taken by the OGC on the information available to the public as a result of the reports submitted to Parliament under section 37, but I am not sure that they are. Take a case in which the information requested is relevant to criminal proceedings that are begun after the date of the request, and the disclosure of that information would prejudice the fairness of the trial. In that case, the information was not exempt when requested, but became so under section 31 subsequently. It would be undesirable for the Commissioner to be obliged to require disclosure in such a case. Conversely, if the change of circumstances favours disclosure, the complainant can make a new request. Section 50 is not entirely clear in this respect, in that the past tense of subsection (1) is not repeated in subsection (4) in the phrase "in a case where it is required to do so by section 1(1)", or in the requirement that "the decision notice must specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken". As it happens, in paragraph 85 of the decision the Tribunal took into account circumstances post-dating the original requests for information under FOIA in deciding whether disclosure should be ordered. It seems to me to be arguable that the Commissioner's decision whether a public authority complied with Pt I of the Act may have to be based on circumstances at the time of the request for disclosure of information, but that his decision as to the steps required to be taken by the authority may take account of subsequent changes of circumstances.

99. For completeness, I mention that the evidence of Sir Peter Gershon to the Tribunal at day 1 page 76 was that the NAO does report on current projects. He instanced its report on preparations for the London Olympics (which can be found at http://www.nao.org.uk/pn/06-07/0607252.htm). The Tribunal did not refer to this evidence. However, the OGC's skeleton argument does not allege that the Tribunal misunderstood the work of the NAO, and I say nothing further about it.

Failure to appreciate that the Government's decision to introduce the Identity Bill to Parliament did not mean that its policy in relation to identity cards had been decided

100. Section 35 of the Act reflects the public interest in confidential information held by a government department relating to the formulation of government policy remaining confidential. The Tribunal accepted, in paragraph 85, that Government needs to operate in a "safe space" "to protect information in the early stages of policy formulation and development". In doing so, it followed the statement at paragraph 75(iv) of the decision of the Tribunal in the *DFES* case:

> The timing of a request is of paramount importance to the decision. We fully accept the DFES argument, supported by a wealth of evidence, that disclosure of discussions of policy options, whilst policy is in the process of formulation, is highly unlikely to be in the public interest, unless, for example, it would expose wrongdoing within government. Ministers and officials are entitled to time and space, in some instances to considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy. We note that many of the most emphatic pronouncements on the need for confidentiality to which we were referred, are predicated on the risk of premature publicity. In this case it was a highly relevant factor in June 2003 but of little, if any, weight in January 2005.

The underlining is in the original.

101. Having referred to the fact that the Identity Cards Bill had been presented to Parliament, and was being debated publicly, the Tribunal found that it was no longer *so* important to maintain the safe space at the time of the Requests. I have italicised the adverb because it makes it clear that the Tribunal did not find that there was no public interest in maintaining the exemptions from disclosure once the Government had decided to introduce the Bill, but only that the importance of maintaining the exemption was diminished. I accept that the Bill was an enabling measure, which left questions of Government policy yet to be decided. Nonetheless, an important policy had been decided, namely to introduce the enabling measure, and as a result I see no error of law in the finding that the importance of preserving the safe place had diminished. Accordingly, this ground of appeal is not made out.

The finding that the OGC's evidence as to the importance of maintaining confidentiality was unconvincing was perverse.

102. Mr Pitt-Payne submitted to me that this ground of appeal was ambitious, and I agree. In his submissions summarised in paragraphs 66 to 75 of the decision, Mr Pitt-Payne had given ample grounds for the Tribunal to find that the OGC's evidence was not convincing. The Tribunal accepted those submissions. It gave added reasons, in paragraphs 88 and 89 for its finding that the need for confidentiality had been overstated. The Tribunal was entitled to examine the evidence given on behalf of the OGC critically, and was not obliged to accept it because no witnesses were called by the Commissioner. This ground is not made out.

Conclusion on the first decision

103. For the reasons given above, the first decision will be quashed and the appeal from the decisions of the Commissioner remitted. My provisional view is that the appeal will have to be heard by a differently

constituted Tribunal, since the decision will have to be heard and determined afresh.

The second decision

104. My conclusion on the first decision means that the second decision must fall away, and it too must be quashed. However, since the appeal against it was fully argued before me, and raises an important issue as to the practice of the Tribunal, I propose to address it.

105. During the course of the hearing before the Tribunal, it requested information as to the status of the civil servants who had participated in the gateway reviews in question. The OGC obtained and provided that information. Following its consideration of the written submissions made by the OGC and the Commissioner in accordance with the invitation in paragraph 92 of the first decision, the Tribunal handed down its second decision in which it set out the information it required the OGC to disclose, which, as stated above, included the information as to the status of those civil servants that the OGC had provided.

106. Mr Swift submitted that the Tribunal had no power to require disclosure of this information because it was not in the possession of the OGC at the date of the requests for disclosure.

107. In my judgment, Mr Swift's submission is well-founded. It is for this reason that Mr Pitt-Payne did not seek to support the second decision of the Tribunal.

108. Section 1 so far as relevant is as follows:

> (1) Any person making a request for information to a public authority is entitled–
>
> > (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
> >
> > (b) if that is the case, to have that information communicated to him.
>
> (2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.

It can be seen that subsection (1) refers to and is confined to information held by the public authority at the time of the request. When deciding under section 50 "whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I", the Commissioner is similarly restricted to the information held by the authority at the date of the request. If the authority did not hold that information at the date of the request, Part I did not require it to inform the complainant that it did hold the information, and Part I did not require it to disclose it.

109. There is another, and in my judgment more fundamental, reason why the Tribunal had no power to direct disclosure of the status of the participants in the gateway reviews. It is one that does not depend on evidence being put before the Court that the information in question was not held by the OGC at the dates of the requests for disclosure. In the second decision the Tribunal directed the OGC to disclose information that was not contained in either of the gateway reviews. Mr Oaten has not requested disclosure of that information. Mr Dziecielewski had requested disclosure of the gateway reviews. Since the gateway reviews did not include that information, his request did not extend to it. It followed that it

could not be said that the OGC had been required by Part I of the Act to provide that information. Nothing in section 50 or in section 58 authorises the Commissioner or the Tribunal to decide that an authority must disclose information that has not been requested by a complainant. It follows that for this reason also even if the first decision stood the second decision could not.

110. I recognise that this finding may cause some inconvenience when the Commissioner or the Tribunal decide that a document should be redacted, and wish a gist or summary to be disclosed in the place of the redacted information. I see no objection to a requirement of disclosure of a gist or summary, as "the steps which must be taken by the authority for complying with (the requirement of Pt I)" (see section 50(4)), but that gist or summary must be of information that was the subject of the original request, not of alternative and different information.

111. Mr Swift also submitted that the decision require disclosure of the status of the civil servant participants in the gateway reviews would lead to unfair processing of personal data for the purposes of the Data Protection Act 1998, and that that information was therefore absolutely exempt from disclosure by reason of section 40 of FOIA. This submission was made to the Tribunal but is not addressed in the second decision. The submission involves the proposition that civil servants are given express or implied undertakings of confidentiality. It so, it would be necessary to consider whether those undertakings are given in terms that are consistent with the qualified exemptions contained in FOIA. The submission implies that processing may be unfair within the meaning of the first data protection principle although the public interest as determined under section 2 of FOIA would otherwise require disclosure. It is unnecessary for me to decide whether this submission is well-founded, and I do not propose to do so.

112. It is similarly unnecessary for me to address the further submission of Mr Swift, that the Tribunal failed to identify or to address the public interest in the names of the SROs or in the status of the participants in the gateway reviews.

Addendum

113. The controversy concerning identity cards, and the OGC's objections to disclosure of the gateway reviews relating to the programme, may have led to speculation that they include undisclosed information that could be regarded as damaging to the programme. If there were a "smoking gun" in the reviews, the case for disclosure would, on one view, be considerably strengthened. I have read both reviews. There is, in my view, no "smoking gun". So far as the first gateway review is concerned, this is not surprising, given that it led to the government's decision to introduce the Identity Cards Bill, a step which would have been irrational if the review had concluded that the programme was impracticable.

114. My judgment is not a judgment on whether the gateway reviews in issue should or should not be disclosed under FOIA. As mentioned above, that issue will be determined by the Tribunal applying the law in accordance with this judgment.

Information Tribunal Appeal Numbers: EA/2006/0068 and 0080

Freedom of Information Act 2000 (FOIA)

BEFORE

INFORMATION TRIBUNAL CHAIRMAN
John Angel
And
LAY MEMBERS
David Wilkinson and Peter Dixon

Between

OFFICE OF GOVERNMENT COMMERCE

Appellant

And
INFORMATION COMMISSIONER

Respondent

Representation:

For the Appellant: Mr Robin Tam QC.

For the Respondent: Mr Timothy Pitt-Payne

Decision

The Tribunal upholds the decision notices dated 31st July 2006 and 5th October 2006, except that we find that section 33 as well as section 35 FOIA is engaged, and dismisses the appeals.

REASONS FOR DECISION

…..

Background to Gateway Reviews

9. In 1998, against a background where many large, complex, novel and often IT-enabled civil programmes and projects had missed their delivery dates, run over budget or failed to fulfil requirements, the Government asked Sir Peter Gershon (Sir Peter) to review civil procurement in civil government. *The Review of Civil Procurement in Central Government,* April 1999 (the Gershon Report) recommended that a common strategic framework should be established within which all central government departments would conduct their procurement activities.

10. The Government accepted the recommendations of the Gershon Report and in 2000 the OGC was set up with Sir Peter as its first Chief Executive. The OGC introduced a number of initiatives to promote best value for money in government procurement, the central of which was the Gateway process, through which programmes and projects are examined at critical stages in their life cycle to provide assurance that they can progress successfully to the next stage.

11. As Sir Peter explained in his written evidence to the Tribunal, the Gateway process is now mandatory across Central Civil Government departments and Executive Agencies and that others such as the Ministry

of Defence, the NHS and local government have adopted the process on a voluntary basis. The process is set out in detail in the *OGC Gateway Process Review Pack*.

12. A Gateway Review (GR) is a review of a delivery programme or procurement project carried out at a key decision point by a team of experienced people who are independent of the team running the project. Each programme or project has a Senior Responsible Officer (SRO), a senior individual in the department concerned who takes on personal responsibility for its success. SROs use Risk Potential Assessments to determine the level of risk associated with a programme or project and this helps determine the composition of the GR team and the extent of its independence from the department.

13. GR's are conducted on a confidential basis for the SRO. Typically (and this was the case in the Gate Zero Reviews that are the subject of this appeal) the review teams are made up of three people (the Reviewers) who take four days to conduct the on-site review. Reviewers are mainly senior civil servants or outside consultants with extensive experience of the area under review. The members of the review team conduct their interviews on a confidential basis with interviewees (the Interviewees) and present their findings in a non-attributable manner in the report to the SRO. The review team has access to all the stakeholders in a project and, for high risk projects, Ministers and Permanent Secretaries are usually interviewed. At the end of each day, the review team provides a progress report to the SRO and, before they leave the site on the final day, the team presents him/her with a draft report. The SRO has the opportunity to correct factual errors but the substance of the report, its recommendations and their RAG status (see paragraph 17 below) are not open to negotiation. In brief, the philosophy of the Gateway process is that an independent review team should come in, conduct a quick peer review, and leave behind a short, clear and sometimes blunt report that is easily digested by the SRO who can put it to immediate use in pursuit of the success of the project or programme.

14. The number and nature of GR's has evolved since 2000. There are now five numbered Gates during the life cycle of a project which, for this purpose, is defined as a piece of work designed to achieve specified outputs within a specified period of time and within planned cost, quality and resource constraints. Three of the reviews are conducted before the award of the contract, one examines the implementation of the service and one confirms the operational benefits.

15. A major upgrade of the process resulted in the introduction in January 2004 of Gate Zero Reviews, although there is evidence that they had started to be used earlier than this date but the process was not formalised until later. Gate Zero Reviews, two of which are the subject of this appeal, are undertaken only for programmes. A programme is defined in the Cabinet Office's Review of Major Government IT Projects as a portfolio of projects that aim to achieve a strategic goal of the lead government department, and that is planned and managed in a coordinated way. Gate Zero Reviews may be repeated through a programme's life and such reviews might typically be undertaken during the phase when the programme is being defined, when the programme is being implemented and when the programme has been completed.

16. Some programmes are more important than others. Some are deemed "mission-critical", such as the Identity Cards programme that is the subject of these two appeals, because they are essential to the successful delivery of a legislative requirement, a key departmental target, or a major policy initiative announced or owned by the Prime Minister or a Cabinet Minister. Also additionally "mission-critical" is used to define programmes or projects whose failure would have catastrophic implications for a delivery of a key public service or national security.

17. A "key" programme is a mission-critical programme that the Prime Minister's Office regards as having the greatest reputational risk or operational impact on government as a whole. The Chief Executive of the OGC is required to give the Prime Minister regular reports on the status of these programmes. As at December 2006 there were 15 such key programmes, one of which was the Identity Cards programme.

18. About June 2002, the R(ed) A(mber) G(reen) status (RAG Status) was introduced to prioritise review recommendations. Red means that immediate action must be taken. Amber means that action must be taken before the next review. Green means that the recommendation is considered beneficial to the project but not essential for its success. The overall RAG status of a review is derived from the RAG status given to the individual recommendations: one or more reds produces an overall RAG status of red; no reds but one or more ambers produces an overall RAG status of amber; and no reds or ambers produces an overall RAG status of green.

19. Since April 2003, a project or programme given an overall red RAG status in consecutive reviews triggers what is known as a "double red" Gateway procedure. The Chief Executive of the OGC sends a letter to the Permanent Secretary of the Department concerned, with a copy (since June 2005) to the National Audit Office (NAO). Since February 2006 the NAO has passed on information about "double reds" to the Chairman of the Public Accounts Committee (PAC).

20. The Tribunal was provided with evidence that GR's, of which there have been several thousand conducted since the process was introduced, have succeeded in improving the extent to which government projects are delivered on time, to quality and to budget. This has produced substantial benefits: it is claimed that GR's saved the Exchequer some £1.5 billion between 2003 and 2005.

21. In addition to GR's, internal reviews that mirror the Gateway process are undertaken by departments and their agencies. We were shown a funnel and pipe shaped diagram of these in relation to a particular department and how they relate the various OGC review gates. The internal reviews are carried out without external help in contrast to GR's where Reviewers come from outside the department. We were informed in evidence that the Interviewees are often more candid, open and critical than they are during GRs.

Opportunities for public scrutiny

22. There are several ways to scrutinise procurement projects and programmes publicly. The NAO, headed by the Comptroller and Auditor General (C&AG), is totally independent of Government and scrutinises public spending on behalf of Parliament. It audits the accounts of all central government departments and agencies, as well as a wide range of other public bodies, and reports to Parliament on the economy, efficiency and effectiveness with which they have used public money. On the basis of reports by the C&AG, the PAC (whose main function under the National Audit Act 1983 is to examine whether the sums of money agreed by Parliament for public spending are properly spent) subjects departments to rigorous and public scrutiny.

23. In addition to the PAC with its government-wide remit on public spending, each government department is also subject to scrutiny by a Parliamentary Departmental Select Committee whose role is to examine 'the expenditure, administration and policy' of the relevant department and its 'associated public bodies'. Committees determine their own subjects for inquiry, gather written and oral evidence and make reports to the House of Commons to which the Government replies. In the course of this hearing, the

Tribunal was referred to the inquiry conducted by the Select Committee on Work and Pensions that reported in 2004 on *Management of Information Technology Projects: Making IT Deliver for DWP Customers*. It considered, amongst other things, the arguments for and against publishing GR's.

24. GR's are conducted 'live' and make recommendations while the programmes/ projects are still going forward. In contrast the NAO, the PAC and other Parliamentary Select Committees conduct historical audits and reviews whose recommendations are generally based on lessons learnt usually after the programme/project has been launched and often after it has been completed. In particular the NAO conducts retrospective audits that are looking at value for money rather than actually seeking to contribute to the successful delivery of the programme/project. Whereas NAO audits and PAC and Select Committee reports and proceedings are public and undertaken on a retrospective basis, GR's have remained private, are current reviews and look forward.

25. In evidence we were informed that GR's had been taken into account by the NAO, the PAC and Select Committees, but without disclosing the contents of the reviews. However the 27th PAC Report 2004-05 published on 6th April 2005 concluded that:

"this Committee believes that, to further enhance external scrutiny, there is a strong case for the publication of Gateway review reports, particularly given the repeated failures of public sector IT-enabled projects and programmes in recent years. "

Also the Work and Pensions Select Committee in its 3rd Report of the 2003-04 Session published in July 2004 recommended that;

"the Government should publish GR's with appropriate safeguards or failing that to set out how Parliament otherwise can be provided with the level of information it needs in order to scrutinize adequately questions of value for money from major IT contracts."

26. The Government response to the PAC in the form of the Treasury minutes of the 19th and 27th PAC reports presented to Parliament in November 2005 also record that despite the conclusions reached in the previous paragraph that:

"The OGC does not agree with routine publication of Gateway reports. However, it does not operate a "blanket" exemption for Gateway information. Under the Freedom of Information Act 2000 each request for information is considered on a case-by case basis and the public interest is carefully considered in each case. Where information is disclosed simultaneous publication on the OGC website is also considered."

27. In its Response to the Work and Pensions Select Committee, published in October 2004, the Government said:

"The Government recognises the concerns of the Committee with respect to the information provided to Parliament on IT projects and IT contracts. It takes seriously the need to consider requirements under the Freedom of Information Act 2000 (FOI) and Parliament's need for sufficient information to perform effective scrutiny. Equally, however, the Department and the OGC have been frank about their concerns around the provision of commercial information and the publication of OGC Gateway Reviews. There are legitimate concerns around the need to

protect Government departments' onward programme of competitive supply, and to protect the inherent value of the openness and candour of the OGC Gateway Review process currently afforded by confidentiality. "

The evidence presented to the Tribunal was that no GR had been disclosed under FOIA.

Witnesses before the Tribunal

28. Mr Tam on behalf of the OGC called 7 witnesses. Sir Peter Gershon who was the first Chief Executive of the OGC. He was the instigator of the introduction of the Gateway Review process by Central Government. Keith Boxall, the Head of Standards and Practice at the Identity Passport Service, who has had experience of implementing projects both before and after the introduction of the Gateway Review Process. Derek James Baker, Director of Managed Services Operations at the Better Projects Directorate of the OGC, who was formerly Gateway Project Director responsible for developing and rolling out the Gateway programme across Central Civil Government, developing and maintaining the design of the Gateway process and communicating the benefits of that process throughout Central Civil Government. Andrew Edwards a retired civil servant with more than 31 years experience, mostly at the Treasury. Since his retirement he has provided consultancy services to Government Departments and has led many GR's. Bernard Herdan, the Executive Director for Service Planning and Delivery at the Identity and Passport Service (IPS), who is responsible for all IPS operational delivery and for planning future evolution of services and capabilities. Anthony Melville Deputy Chief Constable of Devon & Cornwall Constabulary and finally Stephen Harrison Acting Executive Director, Strategy at the IPS.

29. These witnesses provided extensive evidence about the introduction and operation of the Gateway Review Process from the perspective of policy makers and project and programme initiators, managers, SROs, Reviewers and Interviewees both in relation to central government departments and other authorities who use the GR process on a voluntary basis. Their evidence forms the basis of the sections of this decision under the headings the 'Background to Gateway Reviews' and the 'Public Interest Test: Factors in favour of maintaining the exemption'. In a nutshell this evidence describes the GR process and how it works and their view of the future should GR's be disclosed under FOIA. In relation to the latter we would summarise their evidence as overwhelmingly of the view that notwithstanding the risk that GR's might be disclosed, they all considered that even the remotest possibility of disclosure would undermine the whole system which, it is claimed, has resulted in major benefits for government projects including substantial savings.

30. Mr Pitt-Payne on behalf of the Commissioner did not call any witnesses which we find surprising as it would have been helpful to have had a different perspective on the GR process. We have glimpses of this perspective from Mr D's email correspondence exhibited to the Tribunal and in reports of other bodies such as the PAC and the Select Committee on Works and Pensions.

FOI training

31. We were informed in evidence by several of the witnesses that they had undertaken general FOI training. There had also been some briefing on FOI during training for the GR process. The witnesses seemed to believe that there was little risk of GR's being disclosed under FOIA or other means, which appears to have come from the briefings. Only in cross examination did some of the witnesses recognise that there could be no guarantee of non-disclosure. Mr Herdan said "OGC practice was that this

information would not be disclosed and that people could talk without fear and that it would be non-attributable to them, but we were not able to say that there was a 100 percent guarantee that this information would never get into the public domain. "

32. There was no evidence that the OCG had reviewed its training or briefing in relation to FOIA following the Commissioner's findings in the Decision Notices.

Background to the ID card scheme

33. This is set out in detail in the Tribunal's decision in *Department of Works & Pensions v The Information Commissioner's (DWP case)* at paragraphs 34 to 53. Briefly the Government completed its consultation exercise in relation to ID cards in January 2003 and announced its decision to introduce a scheme in November 2003 after the first Gate Zero Review in this case. A Bill was presented to Parliament in October 2004 after the second Gate Zero Review. At the time of the Requests the Bill was being debated in Parliament.

34. In evidence Mr Harrison confirmed that the Bill would not have been published without the benefit of the two Gate Zero Reviews. He also commented on why the GR process was used at such an early stage in the programme: "We were in the odd position where we could not set up a programme team because Government had not decided to have ID cards, so we eventually got there I think slightly subverting the gateway zero process, but it was the only process that was there at the time and that importantly other Government departments, particularly Number 10 and the Treasury would sign up to something that was an adequate assessment of the issues before they would agree to the policy. " Mr Harrison added "It was made very clear to us from Number 10 in particular that they wanted a Gateway process. "

The Questions for the Tribunal

35. In this case the Tribunal needs to address the following questions:

a. Whether the exemption at section 33 of FOIA was engaged in respect of the requested information, i. e. whether the "prejudice" test was satisfied;

b. If the section 33 exemption was engaged, whether the public interest in maintaining that exemption outweighed the public interest in disclosure;

c. Whether the exemption at section 35 of FOIA was engaged in respect of the requested information;

d. If the section 35 exemption was engaged, whether the public interest in maintaining the section 35 exemption outweighed the public interest in disclosure.

The Tribunal's powers

36. These have been set up out clearly in other decisions of the Tribunal, for example the *DWP* case. The Tribunal's general powers in relation to appeals are set out in section 58 of the Act. They are in wide terms. Section 58 provides as follows.

(1) If on an appeal under section 57 the Tribunal considers-

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

The question whether the exemptions in sections 33 and 35 apply is a question of law or alternatively of mixed fact and law. The Tribunal may consider the merits of the Commissioner's decision as to whether the exemption applies, and may substitute its own view if it considers that the Commissioner's decision was erroneous. The Tribunal is not required to adopt the more limited approach that would be followed by the Administrative Court in carrying out a judicial review of a decision by a public authority.

The examination exemption

37. The Commissioner found that section 33 was not engaged in this case. Mr Tam challenges this finding.

38. Under section 33(1) of FOIA "*any public authority which has functions in relation to – (b) the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions*" is caught by this exemption provided that:

"(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 to in subsection (1)."

39. This is a qualified exemption which is subject to two tests. Firstly the "prejudice" test set out in section 33(2) above and provided that is met then the public interest test has to be considered under section 2(2)(b), namely that "*in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information*."

40. The Tribunal has considered the meaning and application of the prejudice test, which is common to a number of qualified exemptions under FOIA, in several decisions e. g. *Hogan and Oxford City Council v Information Commissioner* and *John Connor Press Associates Limited v Information Commissioner*. These cases have found the term "would prejudice" means that it is "more probable than not" that there is prejudice to the specified interest set out in the exemption. The other part of the prejudice test, "would be likely to", has been found by the Tribunal to mean something less than more probable than not but where "there is a real and significant risk of prejudice." (*Hogan* at paragraph 35). This finding has drawn support from the decision in *R (on the application of Lord) v Secretary of State for the Home Office* [2003] EWHC 2073 (Admin).

41. In other words the Tribunal has found that the occurrence of the prejudice to the specified interest in the exemption has to be more probable than not or that there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not. The probability of prejudice expressed by these two limbs of the test are not too far apart.

42. Mr Tam, although accepting the definition of the first limb of the test, challenges the definition of the second limb. He argues that in the Lord case the court was concerned with section 29(1) of the Data Protection Act 1998 (DPA) which provides, relevantly:-

"Personal data processed for any of the following purposes:-

(a) the prevention or detection of crime,

(b) the apprehension or prosecution of offenders, or . . . are exempt from . . . [the subject access provisions] in any case to the extent to which the application of those provisions in the data would be likely to prejudice any of the matters mentioned in this subsection" (emphasis added).

43. He continues, Munby J held that 'likely' in section 29(1) connotes a degree of probability where there is a *very significant and weighty chance* of prejudice to the identified public interests. The degree of risk must be such that there *'may very well' be prejudice* to those interests, even if the risk falls short of being more probable than not" (judgment paragraph 100, emphasis added by Mr Tam).

44. Mr Tam then argues that Munby J's conclusion in that case provides no assistance to the Tribunal in this case, and presumably that the Tribunal's previous findings on this point have been wrong, for the following reasons:

a. Munby J was considering an exemption in a different statutory scheme. The exemption, if applicable, would have the effect of preventing subject access to the data requested. It was therefore an absolute rather than a qualified exemption. This was, and was treated by the judge, as a reason to construe its requirements strictly. See in particular paragraph 99 of the judgment, where Munby J said:-

> ". . . I cannot accept that the important rights intended to be conferred by section 7 are intended to be set at nought by something which measures up only to the minimal requirement of being real, tangible or identifiable rather than merely fanciful. Something much more significant and weighty than that is required . . ."

b. Equally, the construction adopted by the judge was influenced by the need to construe the DPA in the light of the requirements of Council Directive 95/46/EC of 24 October 1995 (see judgment paragraph 83). At paragraph 99, the judge observed that the Directive permitted:-

> ". . . restrictions on the data subject's right of access to information about himself only (to quote the language of recital (43)) 'in so far as they are necessary to safeguard' or (to quote the language of Article 13(1)) 'constitute a necessary measure to safeguard' the prevention and detection of crime (emphasis added). The test of necessity is a strict one."

45. Mr Tam concludes that by contrast, FOIA stands alone and is not to be interpreted by reference to any Directive or other instrument, still less by reference to one that requires a test of "necessity" to be satisfied before rights of access to information may be denied. Consequently, Munby J's judgment was not a sound basis for the adoption of a "very significant and weighty chance of prejudice" test in relation to FOIA, or indeed for any test higher than "not insignificant", "real, as opposed to fanciful", "not insubstantial" or "not minimal".

46. Mr Tam then refers us to a number of other authorities, namely -*Three Rivers District Council v*

Governor and Company of the Bank of England (No 4) [2002] EWCA Civ 1182, [2003] 1 WLR 210 at 221H, para 22. See also *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 at 568 - which he says support his contention that the phrase "would be likely to" means that

a. The chance or likelihood of prejudice resulting must be more than insignificant or fanciful; and

b. The prejudice anticipated must be more than trivial or frivolous, for the qualified exemption to be made out, but that no further or higher hurdles should be imposed.

47. In other words Mr Tam is asking us to find that the gap between the two limbs of the prejudice test is wide and that this means there is a lower threshold than required under Hogan and John Connor Press to engage the exemption.

48. We have considered these arguments and are not prepared to change our finding in the previous decisions of the meaning of the prejudice test for the following reasons:

a. The words in section 33(2) FOIA are closer to the words in the DPA interpreted in *Lord* than the words of the statutes being interpreted in other authorities cited by Mr Tam;

b. In terms of the statutory context the DPA and FOIA are closely connected, despite the fact the former implements a European Directive and FOIA does not. There are links between the statutes and at various points in the DPA they are now referred to collectively as "the Information Acts" and to some extent these two pieces of legislation form a common scheme for dealing with rights of access to information, both personal information and other information, with common enforcement mechanisms both via the Commissioner and via this Tribunal;

c. The Lord and the FOI cases are dealing with limitations on rights of access to information; in *Lord* with the subject access rights under section 7 DPA and in FOI cases with the general right of access to information under section 1 FOIA. Mr Tam says that in section 29 DPA, there is no public interest balance to be struck. Therefore if section 29 is engaged, the subject access right is lost, and that is an end of the matter. In the present context, even if a qualified exemption that is prejudice based is engaged, there is still the public interest test to go through. However, if a qualified exemption is engaged under FOIA, then what this means is that the important general right of access under section 1 is potentially lost. It is potentially at risk. The right of access to information held by a public authority is now under scrutiny and is subject to a public interest test after having gone through the gateway of the prejudice test. It is not simply a right that is enjoyed without qualification. So although if a prejudice exemption is engaged it does not take the right away, it does have significance in relation to the right. It means that the right is potentially at risk, depending on where the public interest balance lies in the circumstances of the individual case. Therefore although this position is not on all fours with the Lord case, there are important similarities with Lord which although not binding on us are of assistance as to what a phrase like "would be likely to prejudice" means.

d. In *Lord*, the expression "would be likely to prejudice" stands alone. In the present case, the phrase is "would or would be likely to prejudice". There is no disagreement that "would prejudice" indicates prejudice being more probable than not. If this phrase had been coupled with an alternative possibility whereby any non-fanciful, non-remote prospect of prejudice could engage the exemption, then the language that we would have expected Parliament to have used in FOIA is, as Mr Pitt-Payne submits,

"would or might" rather than "would or would be likely to prejudice".

Engagement of section 33

49. The implications of our above finding is that the OGC has a more difficult task in complying with the prejudice test as the threshold is higher than Mr Tam has been contending. The Commissioner found in the Decision Notices that this higher threshold had not been met and therefore the section 33 exemption was not engaged and there was no need, therefore, to move to applying the public interest test.

50. This Tribunal has the power to review the OGC's application of the prejudice test, despite our finding that the Commissioner applied the right legal test (see *DWP* at paragraph 16). We have decided to exercise this power and find that the OGC was correct to find that the exemption was engaged.

51. The public interest test requires the public authority to stand back and abnegate its own interests except and insofar as those interests are properly viewed as part of the public interest when applying the test (See *DWP* paragraph 24). The prejudice test, however, does not require such a balancing act. It requires the public authority to determine reasonably and objectively whether disclosure would, or would be likely to, prejudice the exercise of, in this case, the OGC's GR functions.

52. The OGC has provided considerable evidence in this case from witnesses appearing before the Tribunal and in statements attached to Refusal Notice 1 that the Public Authority considers that the GR process would be harmed by public disclosure. We find that the OGC was reasonable in concluding there would be a weighty chance of harm, because the underlying way that GR's are undertaken would need some change to the current practice if it were to be demonstrated under FOIA that there could be no guarantee that GR's would be kept from disclosure in the future. These changes would put the currently practised GR process at some risk. We make no comment here on the way the GR process is practised or whether it could be argued that the way it is practised has contributed to the likely harm. It certainly does not amount to maladministration. Therefore we find it was reasonable for the OGC to determine that disclosure of the disputed information would be likely to prejudice the undertaking of GR's and therefore the OGC's function. However we would not go so far as to find that it would prejudice the OGC's functions in this respect.

The formulation of government policy exemption

53. The other exemption claimed in this case is under section 35 FOIA, namely (1) *Information held by a government department. . . . . is exempt information if it relates to- (a) the formulation or development of government policy*. This is a class – based exemption which means that there is no need to show prejudice or harm as under section 33.

54. Both the OGC and the Commissioner consider that parts of disputed information are caught by this exemption and that the exemption is engaged. The Tribunal has reviewed the disputed information and agrees that the exemption is engaged, although we find, as the Commissioner recognised in the Decision Notices, that the policy in relation to the introduction of identity cards had been formulated and was well under development by the time of the Requests. Most of the information which is not caught by the exemption has already been disclosed to the complainants.

55. Therefore we need to consider the application of the public interest test. Both parties agree that the

factors to be taken into account are largely common to both exemptions so we consider these exemptions together in order to determine whether the test has been applied correctly by the Commissioner.

56. We would observe that we do not expect that section 35 would be engaged for every request for a GR. There will be little if any policy formulation or development in some reviews, particularly later in the project cycle where they are above all concerned with implementation and delivery.

Analogy to other exemptions

57. Mr Tam suggests to us that we should consider these exemptions as analogous to three other exemptions under FOIA, namely section 42 (legal profession privilege or LPP), section 40 (personal information) and section 41 (information provided in confidence). His reason for seeking to create such analogies is to require us to apply, in effect, a stricter test when considering the public interest balance.

58. In relation to the LPP exemption we have already considered such an analogy in the DWP case and rejected it in relation to section 35. We reject the analogy on similar grounds in this case in relation to both the section 33 and 35 exemptions engaged in this case.

59. In relation to the other two exemptions (sections 40 and 41), which are absolute exemptions, we again reject the analogy. If Parliament had intended the section 33 and 35 exemptions to be absolute exemptions than it would have provided as such. If these exemptions (sections 40 and 41) had been relevant to this case then the OGC should have claimed these exemptions. Mr Tam cannot expect us to allow him to introduce them in such an indirect manner. In any case both these exemptions are not as absolute as first appears. The application of section 40 will often require a similar balancing act to the public interest test when the date protection principles are being considered – see the Tribunal's decision in *House of Commons v Information Commissioner*. Section 41 will usually require the application of a public interest test as to whether there is an actionable breach of confidence at common law – see the Tribunal's decision in *Derry City Council v Information Commissioner*.

The public interest test

Factors in favour of maintaining the exemption

60. Mr Tam argues that there is a very strong public interest in maintaining the exemptions otherwise the success of GRs will be fundamentally undermined. There is a very strong public interest in the efficient and effective running of programmes and projects particularly where large sums of money can be saved. Mr Tam applies the same public interest to both of the exemptions engaged in this case and does not seek to apply separate and different factors to each exemption.

61. Mr Tam identifies two information flows within the Gateway process which he argues have to be protected. The first one is the information flow from Interviewees and other sources to the review team. The team uses this information to reach its conclusions and recommendations. It is important, he argues, to distinguish that flow from information flowing back to the Department concerned and the SRO in the form of advice and recommendations. The Requests touch on both flows in this case and it is important to recognize the difference and not to confuse the two when considering the public interest test.

62. The GR system, he argues, is based on maintaining confidentiality in order to promote openness,

honesty and the candid exchange of information. This is a fundamental philosophy resulting in a form of behaviour which makes the process work.

63. He identifies 14 areas of harm to GR's from even the remotest possibility of disclosure which is, in effect, a summary of the OGC's witnesses' evidence. He contends that if one of these is triggered, even the less substantial items, then all the other items will be triggered because they are interrelated, and that severe harm to the GR system will occur. He further argues that disclosure of a GR would essentially trigger an entire package of disadvantages and adverse effects on the whole process.

64. We set out the 14 areas briefly below, which are largely based on the witnesses' opinion of the future of the GR process should GR reports become routinely disclosable soon after publication:

a. The effect on Interviewees who would become more guarded and cautious in their communication with the review panel and less open and candid. This would have three possible effects. Juniors would be reluctant to criticise or be seen to be criticising superiors or others involved in the project. Anyone would be reluctant to be seen to be criticising the department as a whole, the particular project or perhaps a minister's approach to policy or decisions. Finally Ministers who are interviewed themselves may be reluctant to say anything critical about their own policies or decisions, for fear this would have an impact on the way they are seen.

b. Interviewees may refuse to be interviewed at all. Currently it is not actually a problem because of the way the process works, but past experience is no guide to the future where you are contemplating a wholesale change in the assumptions that are to be made by the participants to a review.

c. Reviewers will be less willing to be involved in reviews generally.

d. Reviewers might be less willing to become involved in reviews from a time commitment point of view because the whole process will lengthen due to concern that the content of the report might be published. The availability of Reviewers for increased periods of time would be less.

e. There will be an impact on civil servants wishing to become SROs for fear of adverse publicity.

f. The private sector would be less willing to be involved in reviews if they feared adverse publicity and this may have a knock on effect on their interest in working with government.

g. Although GR's are mandatory for central government there is flexibility in the timing of when reviews are undertaken and SROs would tend to delay reviews in order to maximize the chance of getting a green light RAG status.

h. It will affect the way reports are written. They would become more bland and anodyne if published. They would be drafted in "finessed language" or "Civil Service speak". The reports might omit issues of sensitivity which are then communicated orally rather than put in the report.

i. The time and energy taken to negotiate the content of reports in order to reduce the risk of criticism of the project or the review team, because the department involved feels obliged to take a public stand and defend itself against the criticism. Time and energy might also be expanded if things go wrong and the review team then gets criticized for not having done a thorough job.

j. This will not only result in delays but influence the way the GR report is communicated to SROs.

k. Some of the above effects would introduce an atmosphere of conflict and confrontation between the two sides in the review process.

l. It would also lead to a general loss of enthusiasm and confidence in the process.

m. There would be resistance to recommendations. Participants would take entrenched lines, defending themselves, rather than embracing the recommendations. This is a natural reaction to criticism which is said is avoided by the current system.

n. This would particularly effect information relating to policy options which are of a sensitive nature to government, and also commercially sensitive information.

65. In Mr Tam's words the Gateway process is currently protected from these 14 areas of harm through non disclosure and provides a "huge boulder of protection for the Gateway process" and should not be tampered with. Put another way, what he is saying is that the effect of all of these areas of harm is that any FOI disclosure of any GR, regardless of the content of the review or of the timing (except perhaps after 30 years or a considerable period of time) of the disclosure, he says in every case, creates a very strong public interest in favour of maintaining the relevant exemptions, because of the almost certain adverse effect of disclosure on the GR process generally which is regarded as having so much value to the system.

66. Mr Pitt-Payne deals with the 14 areas of harm under 7 headings. Firstly the "frankness" of Interviewees where Mr Tam draws a contrast between the current frankness as he sees it and the feared future lack of frankness if there was disclosure. Mr Pitt-Payne argues that this harm has been overdone. The most obvious concern of Interviewees will be the way that their superiors will respond to the content of the GR, and more specifically to anything that they say to Reviewers which, although non-attributable, is nonetheless most likely to be identified as coming from them by their superiors. The main constraint on frankness, he argues, is not the prospect or possibility of publicity. It is the concern of a junior employee who may say something to upset a superior.

67. According to Mr Pitt-Payne there are really two points relating to frankness. The first relates to Interviewees being identified in the reports as having made a particular point. He argues that as the way the process presently operates, which makes such points non-attributable to particular individuals in GR reports, means that this important practice would be completely unaffected by any prospect of FOI disclosure and can continue.

68. The second point he makes in relation to frankness is the culture or behaviour surrounding GR's. OGC reviews and mechanisms are likely to work well in organizations where the culture allows people to speak freely and, if necessary, critically, without recrimination. They will not work well in an organization that does not have that culture. Organizations either have that sort of culture or not. If they have it they are not going to lose it overnight merely by the prospect of FOI disclosure. It will be up to management to assure staff that frankness will still be valued despite the possibility of disclosure.

69. Mr Pitt-Payne points out that even with non-attribution there is still a risk that it will be possible from the context of a report to ascertain who must have been the source of particular comments or information in a report. But, he says, this is a risk that is present anyway from insiders particularly the SRO who

currently sees the report and will be most familiar with the position of Interviewees. It is unlikely, he argues, that people will simply decline to take part in OGC interviews. In Sir Peter Gershon's words the review process is part of the "DNA" of the public sector. It would be unrealistic to imagine that people would not take part in the system not least because, in accordance with the Civil Service Code, civil servants must fulfill their duties and obligations responsibly. This also goes for commercial partners who have an interest in ensuring that they have a good continuing relationship with public authorities.

70. The second heading of adverse effect referred to by Mr Pitt-Payne comes under the general remit of "delay": that if there is any perceived risk of GR reports being made public under FOIA then they would be negotiated and that will take time and use up everybody's energies and it will make the process confrontational. He argues that these consequences are largely in the hands of the public authority in general and the OGC in particular. The current ground rules are clear and work: the review is completed within a week; the SRO gets a draft report on the last day of the review; the report will include recommendations and a RAG status; these are non-negotiable; and there is a limited opportunity for the SRO to seek to correct matters of a drafting nature or factual errors. If the public authority and OGC makes it clear that these ground rules will still be applied, then the concerns will soon dissipate.

71. Mr Pitt-Payne labels the third area of concern as that of "deterrence": the concern that the prospect of publication would either deter people from having OGC reviews at all or deter them from having them in good time or deter them from acting on the recommendations made. He makes the point that they are compulsory for Civil Central Government. If an SRO deliberately chooses to delay a GR or ignore its recommendations the harm, he argues, would be even greater because of the risk to which the SRO might be placing the programme/project with the consequent risk of criticism say by the NAO or PAC. The prospect of a greater level of public accountability and transparency would operate as an incentive to cooperate with the review system rather than withdraw from it.

72. The fourth area of concern Mr Pitt-Payne labels as "self-censorship". The concern that Reviewers will be less frank, open and straightforward in their reporting than currently practiced. He argues that if the GR process is so highly valued then this is a matter for the OGC to get a strong message across to Reviewers that they should be frank, open and honest because that is in the public interest. If there is an increased level of publicity as would be expected under FOIA generally that is something that participants will have to be robust about.

73. The fifth area of concern identified by Mr Pitt-Payne comes under the general heading of "disincentives": disincentives for people to be Reviewers, SROs etc. He argues that this is not a realistic submission by Mr Tam because the SROs and Reviewers are on the whole senior Civil Servants who are committed to developing their own careers and it would be inconceivable that they would choose not to engage in the Gateway process because of a possibility of some GR material being disclosed under FOIA.

74. The sixth area of concern relates to the position of "commercial" organizations. Mr Pitt-Payne drew our attention to The Select Committee on Works and Pensions 2004 Third Report (2004 Report) (see paragraph 75 below) where it is clear that some outsourced suppliers would welcome publication of the GR reports and considered this was not a strong point. He accepted that commercial organizations would want to protect their confidential information and trade secrets but noted that there were specific FOIA exemptions for such information which had not been claimed in this case.

75. The final area of concern was that if information was disclosed it would be "misinterpreted". Mr Pitt-

Payne pointed out that the Tribunal had already considered this general issue in *Hogan and Oxford City Council v Information Commissioner* where it was not considered a good public interest argument in favour of maintaining the exemption to submit that if information was disclosed that it would be misunderstood. Mr Tam narrowed down the argument from misunderstood by the public to information disclosed would be misrepresented by the press. Mr Pitt-Payne quite rightly made the point that if such a general assumption could be made then it would undermine the whole public policy behind having a freedom of information regime in the first place.

Factors in favour of disclosure

76. Mr Pitt-Payne points out that the public interest in disclosure is very often stated at a rather higher level of generality than the public interest in maintaining the exemption which will centre on the interests set out in the exemption. The public interest in disclosure will be set out in terms of interests in transparency, openness, accountability and informed public debate and so on. However, in this case he argues there are actually some very specific public interests in disclosure at stake in relation to two matters; the ID cards scheme and OGC reports and GR's.

77. He then argues that one of the principal public interests in favour of disclosure is contained in the 2004 Report. The means of public scrutiny currently available such as NAOs and PACs are historical and retrospective reviews and not related to current projects. GR's would provide a level of public scrutiny of current projects. We set out the relevant paragraphs from 2004 Report:

118. We note that OGC guidance does not provide for a blanket refusal to publish Gateway Reviews. OGC guidance suggests that publication of reviews should be determined on the merits of each case. We asked the Department how Parliament could exercise its legitimate duty of scrutiny of the Department and its Agencies when the Department refused to publish any of the many reviews into projects, such as CSA. In response the Department defended the Government's decision not to publish Gateway Reviews and pointed out that the NAO had a clear responsibility to scrutinise the Department and that "a review of the Child Support Reform programme will almost certainly take place when implementation is complete. " We acknowledge the excellent work of the NAO. Indeed, in this report we have referred to some of the problems caused by defective IT that have been identified in successive NAO and PAC reports. The NAO, as the guardian of the public purse, discharges its responsibility in a highly effective manner. However, and this is not a criticism of its skill and dedication, the NAO tends to undertake post evaluations on projects as part of its value for money studies or as an audit. Although its reports are presented to Parliament and published, they are generally historic, whereas we believe major IT projects should also be subject to close scrutiny during their development. Current projects need to be subject to current scrutiny. Parliament and the public should not be required to wait years after the planning decisions were made or problems emerged before they can get a detailed account of what has gone wrong. Parliament requires the opportunity to scrutinise such projects armed with relevant detailed information. The NAO produces 60 reviews per year and cannot fulfil the necessary scrutiny process unaided.

119. It was noticeable from the evidence that a number of other witnesses supported the case for OGC Gateway Reviews being published. During oral evidence sessions, a number of major IT suppliers said that they would welcome publication of OGC Gateway Reviews, or had no problem

with publication, provided all major IT projects were treated equally. For example, Kevin Saunders said that SchlumbergerSema would be happy for them to be published. He added:

"I cannot see any problem that we would have with them being published, providing there is a clear understanding of the framework, obviously. I think the reviews would have to be perhaps even more tightly controlled in terms of the management and input to them but I cannot see why we would have a problem with publication because we have been through them, we know how they work and they make key decisions."

120. We found it refreshing that major IT suppliers should be content for the reviews to be published. We welcome this approach. It struck us as very odd that of all the stakeholders, DWP should be the one which clings most enthusiastically to commercial confidentiality to justify non-disclosure of crucial information, even to Parliament. We were surprised also that there is little central guidance to departments for dealing with those circumstances when the commercial IT suppliers are content for information to be made available and departments cling to commercial confidentiality. As regards damaging the review process, Tony Collins made the valid point that perhaps the reviewers are too close. He told us:

"If Gateway Reviewers believe the quality and rigour of their advice and work would suffer if their reviews were published, we would question whether they are too culturally close to those they are reviewing and therefore perhaps not be sufficiently independent and objective to reach the tough conclusions that Gateway Reviews sometimes demand.

"133. In general, no witness thought FOIA would have any effect on the disclosure of information relating to IT projects. It was thought that exemptions would apply. Equally, there was no evidence that FOIA was likely to put off suppliers from bidding for public sector contracts. Sheelagh Whittaker (EDS) told us that EDS was experienced in working under jurisdictions that operated freedom of information legislation and that the only test was to ensure that any claimed exemptions were genuinely commercial. "

Mr Pitt-Payne explains that this does not mean that GR's should be disclosed immediately under FOIA after being completed. That is not the position in this case where disclosure is being sought a year to 18 months after the relevant report was produced. It is still disclosure that would enable the delivery of what the House of Commons Select Committee is referring to in the previous paragraph, namely current projects, such as the ID card scheme, should be subject to current scrutiny. This, he argues, is a strong public interest.

78. Mr Pitt-Payne then argues that the public interest factors taken into account in the DWP decision at paragraphs 96 to 102 are all relevant to this case. In summary these are as follows:

a. The importance of the decision to introduce an ID card scheme;

b. The need for informed public debate of such an important decision;

c. The importance of allowing the public to better judge the Government's performance; and

d. The fact the disputed information was mature information.

79. Mr Pitt-Payne then refers us to Mr Edwards' witness statement where he sets out what a review team would be looking at in relation to the implementation of the ID cards programme. This includes whether the scope and priority had been sensibly defined? Whether the objectives have been clearly defined? Has a sensible range of options been properly identified? Have the technical options (for example, in relation to the National Identity Register, biometrics, etc) been properly identified and assessed? Have the procurement options been sensibly and rigorously assessed? Have promising options for rolling out the programme been similarly identified and assessed?

80. Mr Pitt-Payne agrees that these are all extremely good questions. They are questions he argues where there is a strong public interest element, in two respects. There is public interest in informed debate about these questions. There is a public interest in getting the right answer to these questions. There is also a public interest, he says, in understanding what answers the government has reached in relation to those questions and why, because these questions are all fundamental to the wider question, namely, is it a good idea to go ahead with the scheme? Is this a scheme that is do-able, that is deliverable? Is this a scheme where the benefits will outweigh or justify the costs? Are there sensible steps in place to ensure that those benefits are delivered for an acceptable cost and within an acceptable timeframe? If not, does that mean that the whole scheme should be abandoned or does that just mean that delivery should be rethought?

The Tribunal's Analysis and Findings

81. Although Mr Tam says he is not putting forward a case for GR's to be subject to an absolute exemption under FOIA it seems very like that to us. He says that the combined extent of the harm which will flow from disclosure is so overwhelming that there can be very few exceptions and then only possibly after a long period of time, say 30 years. His whole argument is based on the fact that the GR system can only continue to be successful if disclosure is not a realistic possibility.

82. The FOIA has been around for 7 years, from before the start of GR's. Parliament in its wisdom has absolutely exempted certain information from the Act, but it has not exempted GR's as such in this way. The OGC seems to us to have taken the view that they are exempt despite the Act and their public utterances that they will consider each request on its own merits is difficult to reconcile with their training of those involved in the GR process, their practice of not having released any GR's so far and the arguments being put forward in this case.

83. We cannot understand how the OGC appears to have given such internal assurances that reports would not be disclosed under FOIA. There has always been a possibility that GR's would be disclosed under FOIA. GR's are all about the management of risk. We would have thought that FOIA would have been factored into that risk assessment because cases like this appeal were foreseeable. To have developed a system on the apparent assumption that there was little or no risk of disclosure is at the very least unprofessional and at variance with one of the aims of GR's which is to encourage and support, in effect, more professionalism in the way programmes and projects are undertaken.

84. We are influenced by what the 2004 Report considered in relation to the publication of OGC GR's. The Government argued as in this case that publishing GR's would weaken the process. Despite this the Select Committee came to the following conclusion:

121. We are not convinced that the Gateway Review process is so fragile that the current levels of secrecy are necessary. We are genuinely sympathetic to any reasonable argument that justifies

some material to be excluded from the published version of a Gateway Review, but in our view, the Government's objection to publishing Gateway Reviews is based on an untested assertion that publication would invalidate the review process. Publication of inspections and reviews is a widespread feature of public life nowadays and there is no reason why a major public IT projects costing millions of pounds, should not be subject to the same open scrutiny that applies in other areas of public life. This is especially true when the projects in question have such a long history of poor service. ***We recommend that the Government should publish Gateway Reviews with appropriate safeguards or failing that to set out how Parliament otherwise can be provided with the level of information it needs in order to scrutinise adequately questions of value for money from major IT contracts.***

123. In short, we believe that more openness is needed and in our view one way to achieve this would be to give parliamentary committees greater access to Gateway Reviews. ***In the event that the case against full publication of Gateway Reviews can be substantiated, we call upon the Department to provide a summary document of each review within 6 weeks of the review being completed.*** *We consider that by providing more information to Parliament, Ministers and officials will be under corresponding pressure to be kept fully informed about projects. (Bold emphasis taken from the report.)*

We note that the 2004 Report records the Government and OGC's offer to develop a set of guidelines to cover increased access to information on IT contracts, which could then be used to inform decisions under FOIA about the amount of information provided on GR's and how it proposes to deal with requests for detailed information on publicly funded IT projects from members of the public. We were not provided with any evidence of progress on this offer, despite the fact the 2004 Report recorded that the guidelines were expected to be agreed by Ministers and published ready for the entry into force of FOIA on 1st January 2005.

85. We have accepted in *DWP and Department for Education & Science v The Information Commissioner* that Government needs to operate in a safe space to protect information in the early stages of policy formulation and development. We can understand the need for a similar safe space in relation to examination functions, despite what one witness described as an unusual use in this case of the Gate Zero Review process. However at the time of the Requests the decision had already been taken to introduce ID cards, a Bill had been presented to Parliament and was being debated publicly. We therefore find that in the circumstances of this case that it was no longer so important to maintain the safe space at the time of the Requests.

86. We find that the grave consequences for the Gateway process which Mr Tam maintains would result from even the remotest possibility that reports would be disclosed is overstated. We prefer Mr Pitt-Payne's arguments in paragraphs 64 to 73 above.

87. All the witnesses seem to be of the view that once one report was disclosed under FOIA the floodgates would open and they would have to work on the assumption that all reports would need to be disclosed very soon after publication. This is clearly incorrect. FOIA provides for many exemptions and where the public interest test is applicable it is applied to the circumstances of the particular request, not generally to say any GR's. There is no reason to believe the floodgates would open, but clearly GR's are subject to FOIA.

88. We find it difficult to accept that the OGC is really convinced by the arguments put forward by Mr Tam on their behalf. Mr Herdan, an experienced Reviewer and SRO, under cross examination accepted that although working under OGC rules and the care he took that nothing said to him by an Interviewee would be attributable, that given FOIA there could be no guarantee that a report would not be disclosed. Incidentally Mr Herdan had recently been involved with a GR relating to the Olympic Games, after at least one of the Decision Notices had been published, and despite the risks of disclosure following those Notices had still been able to undertake the GR successfully.

89. We are aware that some of the risks identified in Mr Tam's areas of harm are already being addressed in practice. For example Mr Edwards said in his evidence that he already draft's GR reports in a way which recognise that they may become public. He said to us:

"There is always a concern that these reports, like other public documents, may occasionally enter the public domain, for example as a result of leakage. For myself, therefore, I always try to ensure that the reports are drafted diplomatically so that if this did happen there would be no unnecessary political embarrassment and no unnecessary damage to the relationship between Government and officials. The style of the reports is therefore sensitive to that consideration."

90. The Tribunal has considered all the circumstances of this case and finds that the public interest in maintaining the exemption does not outweigh the public interest in disclosure. In other words we uphold the Commissioner's Decision Notices in this case.

91. The Tribunal observes that the RAG status only was requested under Request 2. If the Requests had not been consolidated this may have created a problem because the RAG status alone could be misconstrued unless other parts of Gateway report are disclosed. Therefore a public authority faced with such a limited request in the future might choose to disclose other parts of a report in order that the RAG status can be fully understood, unless of course an exemption is being claimed.

Remedies

92. The Tribunal orders that the disputed information is disclosed to the complainants. However before requiring this order to be carried out we are prepared to give the parties 14 days from the date of this decision to make written submissions to us as to whether the names of the individuals listed as Reviewers and Interviewees in the disputed information should be redacted. Once we have determined this matter we will then require the OGC to disclose the information in whatever format we determine within 14 days of that determination.

John Angel Chairman Date 02 May 2007
