



IN THE FIRST TIER TRIBUNAL

Appeal No: EA/2015/0283

GENERAL REGULATORY CHAMBER

INFORMATION RIGHTS

On appeal from the Information Commissioner's Decision Notice No FS50582869 dated 12.11.15

Before

Andrew Bartlett QC (Judge)

Narendra Makanji

Steve Shaw

Heard at Field House, London EC4

Date of hearing 13 May 2016

Date of decision 15 July 2016

Date of promulgation 18 July 2016

APPELLANT: CHRIS AMES

FIRST RESPONDENT: INFORMATION COMMISSIONER

SECOND RESPONDENT: DEPARTMENT FOR TRANSPORT

Representation:

For the appellant Mr Ames in person

For the 1st respondent Robin Hopkins

For the 2nd respondent Rory Dunlop

Environmental Regulations 2004 – Definitions – Environmental information – Exceptions – Request relates to unfinished material – Internal communications – Public interest test

Cases:

All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner and Ministry of Defence [2011] UKUT 0153 (AAC)

Cabinet Office v IC and Aitchison [2013] UKUT 526 (AAC)

Department of Health v IC and Lewis [2015] UKUT 159 (AAC)

Amin v IC and Department of Energy and Climate Change [2015] UKUT 527 (AAC)

Department of Energy and Climate Change v IC and Henney [2015] UKUT 671 (AAC)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the appeal.

REASONS FOR DECISION

Introduction

1. In 2012 the Government set up a Commission to consider aviation capacity in the United Kingdom, chaired by Sir Howard Davies. This appeal is concerned with a request for information about the proposals and discussions by which the Commission's terms of reference were settled.

The request, the public authority's response, and the complaint to the Information Commissioner

2. On 25 February 2015 Mr Ames, who is a journalist, requested the following information from the Department for Transport:

All records of discussions or proposals for the task of the "Independent Airports Commission" (subsequently incorporated into the Airport Commission's formal terms of reference) as announced by the Secretary of State on 7 September 2012, ie

"The Commission will:

examine the scale and timing of any requirement for additional capacity to maintain the UK's position as Europe's most important aviation hub

identify and evaluate how any need for additional capacity should be met in the short, medium and long term"

<https://www.gov.uk/government/speeches/increasing-international-competitiveness-of-uk-airlines-and-airports>

To include discussions/proposals between the DfT and any/all of: Sir Howard Davies; the Treasury; and No 10 and any records held by DfT of discussions between those parties.

3. In this request we understand the words 'subsequently incorporated' to refer to the 'task' of the Commission, not to the 'records' or to the 'discussions or proposals'. Thus Mr Ames was seeking discussions or proposals about how the task of the Commission was to be defined, irrespective of whether their content made it into the final terms of reference. This meaning is clear from the clarification at the end ('To include'). The request was understood in this sense by the Department. (For brevity, we shall refer to the terms of reference as the ToR.)
4. On receipt of the request, the Department initially took the words 'as announced' to refer to the description of the Commission's task as announced on 7 September 2012. The announcement was made in a written statement to Parliament by the Rt Hon Patrick McLoughlin MP, as Secretary of State for Transport. The Department therefore initially searched only for information which related to the period ending 7 September 2012. However, the details of the Commission's task were still being fleshed out and developed until 2 November 2012, when fuller and final ToR were published.
5. At a later stage (see below) the Department decided that it should search for material up to and including 2 November 2012. The logical basis for this was presumably that the words 'as announced' were intended to refer not to the 7 September 2012 description of the Commission's task but to the announcement that there would be a Commission. Thus the words 'as announced' were not intended to limit the request to records of discussions or proposals up to 7 September 2012. In our view the Department was right to revise its interpretation of the request in this way. While the request was somewhat ambiguously worded, it was reasonable to infer from its terms as a whole that it was directed at the full process by which the Department arrived at the final formal ToR, not merely at the initial description used in the 7 September 2012 announcement.
6. The Department's responses to Mr Ames' request came in a number of stages:
 - a. 14 April 2015 – initial response (some documents released, others withheld).
 - b. 14 May 2015 – outcome of internal review (further documents released).
 - c. 21 August 2015 – further review, resulting from the changed interpretation of the request during the Information Commissioner's investigation (further documents found, some withheld, others released).
 - d. 3 November 2015 (further release, owing to reassessment of public interest).

7. By the time of the last release Mr Ames had received a significant number of documents within the scope of his request, including successive drafts of the ToR. But some documents within the scope of his request were still withheld.
8. In its responses the Department relied on various provisions both of the Freedom of Information Act ('FOIA') and of the Environmental Information Regulations ('EIR') to justify the withholding of information.
9. Mr Ames complained to the Commissioner on 20 May 2015. The Commissioner published his decision on 12 November 2015.
10. The Commissioner decided that the request fell under the provisions of the EIR. One of the exceptions relied on by the Department was regulation 12(4)(d), which applies where the request 'relates to material which is still in the course of completion, to unfinished documents or to incomplete data'. He decided that the information which was within the scope of the request, and which the Department was still withholding after 3 November 2015, was protected by this exception and that the public interest in maintaining the exception outweighed the public interest in disclosure. The Commissioner expressed no view on other provisions relied on by the Department.

The appeal to the Tribunal and the questions for the Tribunal's decision

11. Mr Ames appeals against the decision that the Department was right to withhold information falling within the scope of the request. The issues which arise on the appeal are:
 - a. Which statutory regime applied, FOIA or EIR?
 - b. If FOIA, whether some or all of the disputed information was covered by relevant exemptions.
 - c. If EIR, whether some or all of the disputed information was covered by relevant exceptions.
 - d. Where exemptions or exceptions applied, whether the public interest test favoured the maintenance of the exemptions or exceptions.
12. The application of the public interest test under the two statutory regimes is similar, though not identical. In particular, the relevant public interests are not exactly the same, and under the EIR there is a positive presumption in favour of disclosure.
13. We only need to arrive at firm views on which regime applies to which documents if it would make a difference to the result. On the facts of this case none of the parties has suggested that the end result, as regards disclosure, should be affected by our decision on which regime applies. On that question Mr Dunlop expressly submitted on behalf of the

Department: 'the public interest balance is the same, in either event, so there is no point in the tribunal spending time on this issue'.¹

14. Although not raised by Mr Ames (understandably, since he has not seen the withheld information), we also have to decide which withheld documents fall within the scope of his request.

Evidence

15. The evidence is all in the form of documents.
16. Mr Ames provided to us the full wording of the Minister's Parliamentary Statement of 7 September 2012, and also some press comment, partly based on interviews with politicians:
- a. Guardian Online 28.8.12 (Nick Clegg, Deputy Prime Minister, apparently indicating a personal preference for enabling Heathrow to fulfil its role as a hub airport by moving flights unnecessary for its hub status to other London airports);
 - b. Guardian Online 2.9.12 (George Osborne, Chancellor of the Exchequer, in a BBC interview, apparently expressing a firm view that new runway capacity was needed in South East England);
 - c. New Statesman 10.9.12 (suggesting an internal battle in the Coalition Government between Tories and Lib Dems over the ToR);
 - d. London Evening Standard 24.12.13 (Nick Clegg, apparently stating that he had personally intervened to change the draft ToR to ensure they took proper account of the environmental impact of any new runway, that he refused to accept the Commission's Interim Report, and that its conclusions were not set in stone).
17. Mr Ames also referred us to the Airports Commission Interim Report, from which he provided an extract.
18. The Department provided the withheld information to the Commissioner and the Tribunal for confidential examination.
19. The Department supplied the full ToR as published on 2 November 2012. It also provided correspondence in which it explained the considerations relevant to the application of the exceptions and exemptions. Pursuant to directions made under Rule 14, some of this correspondence was partly redacted, in order to avoid revealing the contents of the withheld information to Mr Ames or the public; redacted material was made available to the Commissioner and to the Tribunal.
20. At the commencement of the oral hearing the Tribunal raised with the Department a concern that the redactions in the correspondence went further than was necessary. As a

¹ Open version of Second Respondent's Closed Submissions, 9 May 2016.

result Mr Ames received some copy letters with reduced redactions, which we gave him time to consider before resuming the hearing.

21. Most of the withheld information consists of emails internal to Government. We needed further explanation of the withheld information, to gain a better understanding of the nature and context of the documents and why the Department contended that certain exceptions or exemptions applied to them. We therefore held a closed session from which Mr Ames was excluded. After the closed session a brief indication was given to him of the nature of the session. We also requested the Department to provide written submissions on two particular documents which required further consideration (nos 11 and 15); these submissions were provided on 20 May 2016.

Scope of the request

22. We were provided with a confidential list of items possibly within the scope of Mr Ames' request. By reference to the list, the following were placed in the public domain prior to the hearing of the appeal (in some cases, subject to redactions of information outside the scope of the request): nos 1-2, first page of no 5, nos 10, 13, 14, 16, 17, 18, 19, 20, attachments to email no 21, attachments to email no 24, attachments to email no 31, and no 34.
23. The Department very properly included with the withheld information a number of items in relation to which it was open to argument whether they fell within or outside the scope of Mr Ames' request. In our view, based on the wording which he used, his request was directed to discussions or proposals about how the task of the Commission was to be defined. We have therefore determined that certain items were outside the scope of the request. This applies in particular to some comments about resources and to discussions of other matters, such as presentational aspects (for example, things to be said before announcing the ToR).
24. In line with our determination of the scope of the request, the following items from the list are outside scope: nos 3-4, no 5 after 1st page, nos 6, 7, 8, 9, 11, 12, 15, 27, and redacted parts of 34.
25. In the list nos 29 and 30 are duplicates appearing in other items, so do not require separate consideration.
26. The effect is that the disputed information, in respect of which we need to consider the exemptions or exceptions and the balance of public interest, consists of the following items: nos 21 (except the released attachments), 22, 23, 24 (except the released attachments), 25, 26, 28, 31 (except the released attachments), 32, and 33. The documents comprising this disputed information were all generated in the period 22 October to 1 November 2012 inclusive. Stripping out duplicates, the disputed information consists of emails within that period as follows ('X2' means two emails):

No 21 – 22 Oct

No 22 – 23 Oct, 30 Oct X2, 31 Oct X2,

No 23 – 23 Oct, 24 Oct, 29 Oct

No 24 – 31 Oct

No 25 – 31 Oct X5

No 26 – 1 Nov X2

No 28 – 30 Oct X2, with two withheld attachments to the later email

No 31 – 31 Oct X3

No 32 – 29 Oct X2

No 33 – 30 Oct X2

27. Before leaving the topic of scope, we wish to express our commendation of the Department's approach in this case, which was to be open with the Tribunal about the documents which it held which might reasonably be regarded as either within or outside the scope of the request, so as to enable the Tribunal to take an independent decision on which side of the borderline they fell.

Which statutory regime?

28. Mr Ames and the Commissioner contend that the correct regime for dealing with the information request was the EIR. The Department contends that for much, if not all, of the disputed information the applicable regime was FOIA.
29. The Commissioner points to the definition of environmental information in reg 2(1) of the EIR, which refers first to information on '(a) the state of the elements of the environment' and '(b) factors ... likely to affect' those elements. The definition then extends to refer to '(c) measures ... likely to affect' those elements and factors. 'Measures' includes 'policies', 'plans' and 'activities'.
30. The Commissioner relies on the broad approach adopted in *Department of Energy and Climate Change v IC and Henney* [2015] UKUT 671 (AAC), with particular reference to paragraphs [17]-[22], [32]-[37] and [80]-[96], and with special emphasis on Judge Wikeley's dictum at [83]:

... when identifying the relevant "measure" for the purposes of regulation 2(1)(c), ... it is permissible to look beyond the precise issue with which the disputed information is concerned and to have regard to the "bigger picture".

31. The Commissioner says that the disputed information is on a number of interlinked matters: the Airports Commission and its work and, at a higher level, government policy on future airport capacity. These constitute measures, activities or policies likely to affect the elements of the environment, since the policy question in view is whether to build a new airport

runway or what other action to take which facilitates changes to the volume or distribution of flights to and from the UK.

32. Mr Ames's submission marches in step with the Commissioner's: since the Department contends, for the purposes of assessing the application of exemptions, that the withheld communications relating to the TOR were part of a larger process of deciding on new airport capacity, the Department cannot in the same breath contend that the information is not closely connected with the future state of the environment.
33. The Department argues that much of the information is a step removed from the state of the environment. A minimal connection with an environmental factor is not enough: *DECC* at [36]. The fact that information is relevant to a project, which itself will have environmental impact, does not necessarily mean that the information is environmental information within the EIR definition: *DECC*, at [91].
34. There are only minor differences between the parties' submissions concerning how we should interpret the definition in the EIR. The important difference between the parties is how it should be applied in this borderline case. It would not be unreasonable either to regard the disputed information, concerning the ToR, as information on measures likely to affect the environment (and so, falling within the definition) or to regard it merely as preliminary to such measures (and therefore not falling with the definition). On balance, having read the withheld information, and taking on board the broad approach in the *DECC* case, it seems to us appropriate to accept that it falls within the definition in the EIR. It is information on formulating the ToR; the ToR would control the Commission's work; and the Commission's work would influence the Government's ultimate decision, which would have obvious environmental impacts, one way or another.

The applicable exceptions

35. In his Decision Notice, the Commissioner took the view that the disputed information fell within reg 12(4)(d) as 'material which is still in the course of completion'. The basis for this was that-
 - a. While a particular document (such as the ToR) may itself be finished, it may be part of 'material' which is still in the course of completion.
 - b. The withheld information concerned the draft ToR, which were part of the larger process of settling Government policy on the provision of airport capacity.
 - c. The material (and, as was pointed out at the hearing, the request itself) therefore related to the formulation and development of the Government's policy position regarding future airport capacity, which was still in the course of completion.
36. Subject to its argument that FOIA applied, the Department supports this analysis of the application of reg 12(4)(d).

37. We can sufficiently summarise Mr Ames' argument on reg 12(4)(d) as-
- a. The request was not for material in the course of completion; it was for the discussions which led to the final ToR, which had been completed and published before the request was made. The request therefore 'related to' finished rather than unfinished material.
 - b. While it is reasonable to regard the information as environmental, because it is information on the Airports Commission, and therefore on 'measures' 'likely to affect' environmental factors, it is artificial to characterise the request as relating to unfinished material on the basis that it relates to the formulation of Government policy on aviation capacity.
38. We accept the Commissioner's general proposition that, while a particular document (such as the ToR) may itself be finished, it may be part of 'material' which is still in the course of completion. But we agree with Mr Ames that it is artificial on the facts of this case to regard information on finalising the ToR as information relating to material which was still in the course of completion. The request did not relate to government aviation policy material; it related to the particular matter of the formulation of the ToR, and the disputed information concerns that topic. An ongoing policy process is not in and of itself 'material' within the meaning of reg 12(4)(d).
39. Accordingly we do not accept the application of reg 12(4)(d) on the principal basis that was put forward by the Commissioner and the Department.
40. In oral argument at the hearing Mr Hopkins raised a new argument concerning the application of reg 12(4)(d). This was that the 'material ... still in the course of completion' was not the ToR (which had been finished) but was the final report of the Airports Commission. With all respect, this seems to us to be as artificial as the principal argument.
41. However, in our view it is clear that reg 12(4)(e) applied to all of the documents identified in paragraph 26 above. They were all internal communications.² If the EIR applied, the application of reg 12(4)(e) to the disputed information was not disputed by any party.
42. It might have been arguable that reg 12(4)(d) applied on the basis that the request 'related to' material still in the course of completion simply because the discussions and proposals, which were the subject of the request, related to the drafting of the ToR as at a time when the ToR had not been finalised. This argument was not put forward. We did not consider it necessary to raise it with the parties for comment, given that in any event reg 12(4)(e) applies and the public interest considerations are similar in this case whichever of the two exceptions is relied on. We express no view on it.

² By reg 12(8), for the purposes of the exception in 12(4)(e), internal communications includes communications between Government departments.

The public interest balance: the concerns raised by Mr Ames

43. This is a case where the motivation for the information request sheds some light on the public interest factors.
44. The primary relevant events following the publication of the final ToR on 2 November 2012 were-
 - a. On 17 December 2013 the Airports Commission published its interim report.
 - b. On 24 December 2013 the Evening Standard published the piece referred to at paragraph 16d above.
 - c. On 11 November 2014 the Airports Commission published a consultation on shortlisted options for a new runway. This consultation closed on 4 February 2015, after receiving over 50,000 responses.
 - d. On 25 February 2015 Mr Ames made his information request.
 - e. On 7 May 2015 the Coalition Government was replaced by a Conservative Government,
 - f. On 1 July 2015 the Airports Commission released its final report.
 - g. The Department's responses to the information request were made on 14 April, 14 May, 21 August and 3 November 2015.
45. Boiled down to its essence, Mr Ames's case is:
 - a. Public controversy on airport policy was continuing at the time when Mr Ames's request was made and dealt with, because of the strong public interests involved.
 - b. The published ToR were not fair and balanced, but were framed so as to steer the Commission towards a particular outcome. Whether this was done consciously or unwittingly, the public had a legitimate interest in knowing how this came about.
 - c. Alternatively, even if it were a matter of debate whether the ToR were fair and balanced, the public debate would have been better informed if the public knew how they came to be formulated as they were.
 - d. 'Information released in response to my request has already shown that the ToR for the Commission were amended prior to initial publication to remove an express requirement to consider whether new airport capacity was needed. This demonstrates that behind-the-scenes information from before the finalisation of the ToR can usefully inform the public debate.'
 - e. Moreover, in announcing the Commission, the Secretary of State made a promise of transparency, which should be honoured.

- f. Since Ministers expressed differing views in public, the Department should not be able to resist disclosure by reference to the doctrine of Cabinet collective responsibility.
46. In short, his factual assertion is that the Government decided in advance to expand airport capacity and planned to use an apparently objective but closely constrained Commission to reach the required conclusion on its behalf. In support of this view he refers to what Mr Osborne was reported as saying on 2 September 2012³.
47. As we understand it, Mr Ames's submission that the ToR were skewed to produce a particular result rests on two pillars. The first is the explicit objective in the Minister's statement to Parliament on 7 September 2012, and in similar documents, to 'maintain the UK's position as Europe's most important aviation hub'. Given that the aviation market was growing, he says, it would necessarily only be possible to maintain that pre-eminent position by increasing capacity.
48. The second pillar is a comparison of different versions of the ToR:
- a. An internal draft of the ToR as at 4 September 2012, released in response to his information request, stated that the Airports Commission (described at that time as the 'Review Group') would 'examine whether there is a need for additional capacity and, if so, the scale and timing of any such requirement to maintain the UK's position as Europe's most important global transport hub'.
 - b. Three days later, the Minister's written statement to Parliament on 7 September 2012 said the Commission would 'examine the scale and timing of any requirement for additional capacity to maintain the UK's position as Europe's most important aviation hub ...'.
 - c. The final version of the ToR substantially repeated the wording from the Minister's statement. It said the Commission would 'examine the scale and timing of any requirement for additional capacity to maintain the UK's position as Europe's most important aviation hub ...'.
49. Thus in relation to the second pillar his concern is that the explicit and open-ended question 'whether there is a need for additional capacity' was removed and was replaced by the shorter expression 'any requirement for additional capacity'.
50. The Department does not agree with Mr Ames' factual case or his analysis. It disputes his view that there is a significant difference between the two expressions concerning additional capacity, and points out that, in any event, the change from one to the other was made long before the date of the earliest item contained within the information which remains in dispute. Accordingly, while the remaining disputed information falls within the terms of the

³ Paragraph 16b above.

information request, it does not bear upon the principal concern expressed by Mr Ames as motivating his request. Similarly, in so far as Mr Ames' concern is fuelled by the phrase 'maintain the UK's position as Europe's most important global transport hub', this was firmly established from 4 September 2012 or earlier, long before the dates of the communications comprising the disputed information. The disputed information, as the Tribunal should see, does not contain any 'smoking gun' revealing some imagined conspiracy to rig the process.

51. In response, Mr Ames told us at the hearing that his point on the change of wording between 4 and 7 September was merely an example; he did not intend it to be the main focus; he was interested in the whole debate about how the ToR came to be what they were, and whether they were neutral or promoted a particular result. This response is consistent with the terms of the information request. It does not wholly negate the Department's contention, as expressed orally by Mr Dunlop, that the disputed information 'would not help Mr Ames take his arguments any further', but it reduces its force.

The significance of the disputed information for informing public debate

52. We see the force of the Department's point that it was open to the Commission to decide that additional capacity was not needed. At the same time we observe that it is difficult to see in the ToR any room for the Commission to conclude that nothing should be done, if it decided that there was a need for additional capacity, on the basis of a judgment that the environmental impact of necessary additional capacity might be regarded as too great.
53. However, it is not necessary for us to express a firm view on whether the ToR were skewed. Whatever the correct view of the ToR, the Airport Commission's report was to be expected to influence Government aviation policy and thereby have a considerable impact on the public. The formulation of the task of the Airports Commission was therefore, and remains, a proper and legitimate matter for public debate.
54. Having examined the disputed information, and having taken into account the open and closed materials and the parties' submissions, we have come to the view that the significance of the disputed information for informing such public debate is small. Mr Ames painted for us a vivid speculative picture of possible disagreements between Mr Osborne and Mr Clegg, or more generally between the Conservative and Liberal elements of the Coalition Government, and of behind-the-scenes pressure for the Commission's task to be defined in a way that neutered or effectively ruled out the option of declining, for environmental reasons, to increase airport capacity. But what we see in the disputed information in the period 22 October to 1 November 2012 is largely (ie, with only a few exceptions) a picture of officials dealing with the remaining fine details of the ToR wording so as to be able to publish the formal ToR promised by the Ministerial Statement of 7 September 2012 in a form not departing in substance from the contents of that Statement.
55. The Department submits that, given the extent of the disclosures already made (including drafts of the ToR and of the Operating Protocol for the Commission), the Minister's promise of transparency has largely been fulfilled and the public interest in transparency has largely

been met, and that the disputed information would add little. We accept that this submission has considerable force.

Factors favouring disclosure

56. We identify the factors favouring disclosure as follows:

- a. Openness concerning how Government operates internally may lead to increased trust and engagement between citizens and Government, and may enhance accountability.
- b. As noted above, the Airport Commission's report might be expected to influence Government aviation policy and thereby have a considerable impact on the public; the formulation of the task of the Airports Commission was and is a legitimate matter for public debate.
- c. There has been a particular public concern over whether the task of the Commission was framed in a way which steered the Commission towards a particular result; it would be desirable for the debate over this concern to be informed as far as possible by facts about what went on within Government rather than speculation about what may have taken place.

57. Given our conclusions about the nature of the remaining disputed information, our assessment of these factors is that, while they do exist, they have little weight in the present case. Considerable disclosure has already been given. Taken as a whole, the particular information remaining in dispute would in our view do little to advance public trust or accountability or to inform the debate over whether or how the ToR were skewed.

Factors favouring the maintenance of the exception

58. Item no 28 is a different kind of internal communication from the others in that it consists substantially of legal advice and is subject to legal professional privilege. There is a strong public interest in maintaining the confidentiality of internal communications of this kind, so that Government will not be inhibited in seeking and being given frank legal advice.

59. The Commissioner's Decision Notice stated that publication of some of the exchanges would disclose the differing views of individual Ministers. While not spelled out expressly, we understand that the Commissioner had in mind the importance of not undermining the principle of collective Cabinet responsibility (discussed in *Cabinet Office v IC and Aitchison* [2013] UKUT 526 (AAC) at [81]-[82]). On behalf of the Department Mr Dunlop also argues that there is a public interest in not disclosing whether there were or were not differences between Ministers. Mr Ames contended that this factor should be of little weight in regard to a topic where some Ministers had spoken out and made their individual views known.

60. We do not find it necessary to reach a conclusion on Mr Ames' contention concerning Cabinet responsibility because in any event we find this factor (ie, the importance of not

undermining the principle of collective Cabinet responsibility) unimpressive on the facts of this particular case. In so far as inferences could be drawn from the disputed information about the views of individual ministers, this could be dealt with by short redactions. Our assessment is that the argument concerning collective Cabinet responsibility does not affect the bulk of the disputed information.

61. The Commissioner and the Department also rely on arguments about the need for a 'safe space' for policy-making, and about a 'chilling effect' on the conduct of future Government business if communications such as those comprised in the disputed information were disclosed to the public. Our attention was drawn to the trenchant discussion of arguments of these kinds in *Department of Health v IC and Lewis* [2015] UKUT 159 (AAC) at [16]-[37], especially [26]-[31]. This discussion was in the context of FOIA, but Mr Hopkins submitted, without challenge from the other parties, that to a large extent it was applicable to EIR also; we proceed on that basis.
62. Mr Ames criticised the Commissioner's reasoning on the public interest balance. Mr Hopkins expressly conceded that it was 'light'. We would go further. The Commissioner stated in paragraph 24 of his Decision Notice:

Government policy needs to be thoroughly evaluated before it can be properly implemented and this can only happen when all parties have the confidence that there is no risk that those exchanges will be disclosed prematurely.

63. This statement cannot be supported, and in our view is plainly wrong. For there to be 'no risk' of disclosure, FOIA and EIR would have to be repealed.
64. The 'safe space' argument rests on the proposition that the setting up of the ToR for the Airports Commission was part of a larger project of formulating Government aviation policy, which was unfinished at the time the request was dealt with. The argument is that, if the disputed information had been released in response to the information request, this would have caused distraction at the time and, depending on future developments, could have introduced difficulties in the later stages of airport policy formulation. We consider there is something in this argument, though not very much. The setting up of the ToR for the Airports Commission was indeed part of a larger project of formulating Government aviation policy⁴, which remains unfinished even at the time of writing the present decision, since the Government has not yet made an announcement on whether there should be a third runway at Heathrow or additional capacity elsewhere. We can envisage some distraction or difficulty resulting from disclosure of perhaps two or three short passages in the particular disputed information.

⁴ We are aware of the superficial conflict between this statement and our conclusion that reg 12(4)(d) was not engaged. There is no true conflict, because our conclusion that reg 12(4)(d) was not engaged is driven by its particular wording.

65. As regards the Department's contention that there would be a chilling effect, the First-tier Tribunal, and its predecessor the Information Tribunal, has seldom been convinced by such contentions. In that respect, the members of the present panel are no exception. The recent remarks of Charles J in *Department of Health* [2015] provide further justification for caution in accepting such allegations. But this does not mean that arguments about a likely chilling effect may not prove persuasive in the circumstances of a particular case.

66. Here, the Department's submission is:

... disclosure would have created a chilling effect on the willingness and ability of officials to communicate in writing. That would be contrary to the public interest as it is often quicker and more efficient for officials to communicate in writing.⁵

67. As we understand it, this submission rests on the particular nature and contents of the disputed information.

68. In oral argument Mr Ames urged us to consider the real world, not the theoretical world raised by the Respondents: officials already omit to write things down. The Department's letter of 7 August 2015 to the Information Commissioner stated:

... based on discussions with those officials who were involved in the formation of the Commission, it became clear that the decisions and discussions leading to the formation of the Commission and the announcement on the 7 September were conducted primarily by telephone. The Department holds no record of any minutes of these telephone calls.

69. The implication of Mr Ames' argument is that any chilling effect has already occurred as a result of previous disclosures, and disclosure of the present information would not have an additional impact.

70. The chilling effect argument is also countered by the observation made by Charles J in *Department of Health* [2015] at [27]-[28] that any properly informed official already knows that information held by a public authority, where subject to a qualified exemption under FOIA, is at risk of disclosure in the public interest. (The same must apply to information subject to a qualified exception under EIR.) As Charles J said, 'The argument cannot be founded on an expectation that the relevant communications will not be ... disclosed.'

71. We fully accept this. However, in our view this does not necessarily prevent an acceptable argument being founded on (1) a qualified expectation, that confidential or sensitive internal Government communications will be protected unless there are sufficiently weighty reasons which outweigh the protection, together with (2) a reasonable case that disclosure of the particular disputed information would have a negative influence on the efficiency of officials' future conduct.

⁵ Paragraph 40 of Mr Dunlop's submissions dated 9 May 2016.

72. In this particular case we are persuaded that the Department's argument has a modest degree of merit. The disputed information consists of emails evidently written under time pressure and without consideration of how the wording might be read by outsiders, as opposed to colleagues who will respond very quickly with queries, or who will if necessary pick up the telephone or arrange a meeting to iron out ambiguities or misunderstandings resulting from hasty wordings. Despite what might be inferred from the Department's letter of 7 August 2015 to the Information Commissioner in regard to use of the telephone, the present case shows, and the Tribunal is in any event aware, that such emails remain commonplace in Government, as a useful tool for getting Government business done quickly and efficiently. The use of quick emails between colleagues allows a person to send a speedy message as soon as is convenient, with copies to others who need to see it, without needing to laboriously craft the wording, and without needing to find times when relevant participants are free to receive it or to speak and respond on the telephone, while also creating an easily accessible record for officials' use without the need to transcribe or summarise conversations. In our judgment the disclosure of the emails contained in the disputed information in the present case, in response to Mr Ames' request, would have caused embarrassment and difficulty by reason of hasty, ambiguous and unclear wordings, which would have required resources to be committed to giving public explanations of them, and consequently would also have had a material adverse impact on officials' use of email for similar kinds of urgent Government business in future. In our view greater use of the telephone, and reduced use of quick emails, or the taking of greater time and care over the drafting of emails, would be somewhat less efficient for the conduct of Government business of the kind being transacted in the disputed information. If emails of the kind which we see in this case are too readily disclosed in circumstances where the benefit to the public of seeing the emails is minimal, in our view this will tend to promote greater use of the telephone in future, or else more time to be taken over the drafting of emails, in circumstances where use of quick emails would be more efficient.

The public interest balance: conclusion

73. The public interest test falls to be applied as at the time when the request was made and dealt with, including, in our view, the time of the Department's internal review.⁶
74. It will be seen from the above discussion that the weight which we attribute to the public interest factors on each side of the balance is limited. This is not a case involving weighty factors on one or both sides. It is more like weighing a shrew against a mouse. But in our judgment, based on the above analysis, the factors favouring the maintenance of the exception have more weight than those favouring disclosure.

⁶ See *All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner and Ministry of Defence* [2011] UKUT 0153 (AAC) at [9](iii) and [40], and *Cabinet Office v IC and Aitchison* [2013] UKUT 0526 (AAC) at [15]; *pace Amin v IC and Department of Energy and Climate Change* [2015] UKUT 527 AAC, at [85].

75. In reaching this conclusion we are influenced by the chilling effect, in the limited sense in which we have explained its operation here. But for this factor, bearing in mind the presumption in favour of disclosure (EIR reg 12(2)) and the EIR's encouragement where reasonably possible to sever information in order to make it disclosable (reg 12(11)), it might have been appropriate to order disclosure subject to a few short redactions.

Result

76. Mr Ames' appeal is therefore dismissed.

77. We would add that we have not found it necessary, in order to explain our reasons, to discuss the details of the disputed information in a confidential annex to our decision. In our view no such annex is required in this case.

Signed on original

/s/ Andrew Bartlett QC, Tribunal Judge

15 July 2016