



**Appeal number: EA/2016/ 0278
EA/2017/0001**

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

DEPARTMENT FOR TRANSPORT

Appellant

- and -

THE INFORMATION COMMISSIONER

Respondent

**TRIBUNAL: JUDGE ALISON MCKENNA
Ms ROSALIND TATAM
Ms ANNE CHAFER**

**Sitting in public at Fleetbank House, London on 20 and 21 April 2017.
Andrew Sharland, counsel, appeared for the Appellant.
Robin Hopkins, counsel, appeared for the Respondent**

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DECISION

1. The appeal is allowed in part.
2. The Decision Notices, which contain errors of law, are both varied so that the Department for Transport is to disclose the information requested, redacted as agreed between the parties, and described at paragraph 67 below.

REASONS

Background to Appeal

3. This consolidated appeal concerns two Decision Notices issued by the Information Commissioner: FS50610151 dated 24 October 2016 (EA/2016/0278) and FER0641545 dated 8 December 2016 (EA/2017/0001).
4. The Decision Notices concerned two separate information requests, made on 4 October 2015 and 19 January 2016 respectively. Both requests were directed to the Department for Transport (“the Department”) and concerned information contained in six “Project Assurance Reviews” (“PARs”) prepared by the Government’s Major Projects Authority - now the Infrastructure and Projects Authority - about the High Speed 2 Rail Project (“HS2”) between 2013 and 2015. Neither of the original requesters was joined as a party to this appeal.
5. HS2 is the proposed Y-shaped high speed rail network linking London, the West Midlands and the North of England. It has a budget of over £55 billion. The PARs are reports on the state of readiness of the HS2 Project, and provide a periodic independent review of matters relating to the internal planning and management of it for the benefit of the Senior Responsible Office (“SRO”) and other major stakeholders such as the Treasury. Three PARs from 2011 and 2012 have been disclosed by the Department but the circumstances of these earlier disclosures were disputed by the parties.
6. The Department is the relevant public authority for the purposes of the Freedom of Information Act 2000 (“FOIA”) and/or the Environmental Information Regulations 2004 (“EIRs”). The Department responded to both requests as follows: the information in the PARs is not environmental information and the applicable regime is FOIA; the information is exempt from disclosure under s. 35 (1) (a) FOIA as it related to the formulation or development of government policy and the public interest favoured maintaining that exemption. These responses were upheld on internal review so the requesters complained to the Information Commissioner.
7. The Decision Notices held, in summary, that the information in each of the PARs constituted “environmental information” and that, whilst regulation 12 (5) (d) was found to be engaged, it was concluded that the public interest favoured disclosure, except in relation to the PARs dated closest in time to the requests. The Decision Notices rejected the Department’s assertion that FOIA was the applicable regime and

its reliance in the alternative on the exceptions under regulations 12 (4) (e) and 12 (4) (d).

8. The Information Commissioner decided in her first Decision Notice that the three earliest of the six requested PARs should be disclosed but that the three more recent PARs had been correctly withheld. In her second Decision Notice, she concluded that all four requested PARs should be disclosed. This had the effect that one of the PARs which had been withheld by the first Decision Notice was required to be disclosed by the second Decision Notice, for reasons concerned with the effluxion of time between the date of the PAR and the date of the request.

9. The Department's primary position in making this appeal was that the Decision Notices were both erroneous and that all six PARs should have been withheld from disclosure. Its secondary position (in the alternative) was that the Decision Notices were erroneous but that if the PARs are to be disclosed they should be redacted prior to disclosure. The Information Commissioner resisted the appeal. We consider both parties' detailed arguments further below.

Appeal to the Tribunal

10. The Department's Notices of Appeal dated 21 November 2016 and 5 January 2017 were later amended on 29 March 2017 with the permission of the Tribunal. The amended Grounds of Appeal were, in summary, that:

- (i) The Decision Notices had adopted an impermissibly over-expansive definition of "environmental information";
- (ii) If the Information Commissioner had analysed the content of the PARs, she would have concluded that they concerned the status and readiness of the Project and were not about the construction of HS2 or its environmental impact. The applicable regime was therefore FOIA;
- (iii) A Department for Transport Minister had (on 14 March 2017 i.e. after the publication of the Decision Notices) confirmed his opinion that disclosure of all the disputed information would prejudice the effective conduct of public affairs under s. 36 (2) (b) (i) and (ii) and under (c) that disclosure would seriously affect the quality of future PARs and the appetite of SROs to commission future PARs. The PAR process is predicated on confidentiality, if the reports were disclosed this would undermine the PAR process, contrary to the public interest;
- (iv) Further and in the alternative, some of the information is exempt under s. 35 (1) (a) FOIA ("formulation of Government policy") and the public interest favours maintaining the exemption;
- (v) Further and in the alternative, some of the information is exempt pursuant to s. 43 (2) FOIA ("commercial interests") and the public interest favours maintaining the exemption;

- (vi) If the PARs are “environmental information” then they engage the exceptions in regulations 12 (4) (d) (“material in the course of completion”) and (e) (“internal communications”) and 12 (5) (d) (“confidentiality”) and (e) (“commercial information”) and the public interest favours maintaining the exceptions;
- (vii) The Decision Notices were wrong to conclude that Regulation 12 (4) (e) was not engaged where PARs had been shared with HS2 Ltd, as it is a company wholly-owned by the Government so that communications between it and the Department should be viewed as “internal communications”;

11. The Information Commissioner’s Responses dated 13 January and 10 February 2017 maintained her analysis as set out in the Decision Notices. Her final position, after considering the amended Grounds of Appeal and having heard the evidence and submissions, was communicated to the Tribunal in Mr Hopkins’ closing submissions.

12. The appeal was heard over two days. The Tribunal considered an agreed Open Bundle of evidence of some 300 pages and a Closed Bundle comprising the withheld PARs, their terms of reference and a closed witness statement. The hearing was conducted in open session so far as possible.

13. The Tribunal heard evidence from the Department’s witness Mr Prout in both open and closed session. He had sworn open and closed witness statements which stood as his evidence in chief. Mr Hopkins, on behalf of the IC, tested Mr Prout’s evidence in open and further in the closed session. The Tribunal also heard evidence in open session from Mr Martin John of the IPA, who had sworn an open witness statement which stood as his evidence in chief. His evidence was also tested by Mr Hopkins on behalf of the Information Commissioner. The Tribunal asked questions of both witnesses.

14. The closing submissions of the Department and the Information Commissioner were given in open session. The Tribunal is grateful to Mr Hopkins and Mr Sharland for their helpful written and oral submissions.

The Legal Framework

FOIA

15. The duty of a public authority to disclose requested information is set out in s.1 (1) of FOIA. The exemptions to this duty are referred to in section 2 (2) as follows:

“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.”

16. S. 39(1) FOIA provides that information is exempt information for the purposes of FOIA if the public authority is required to disclose it under the Environmental Information Regulations or would be required to disclose it but for any exemption contained in the Regulations. It follows that if information is properly described as “environmental information” then the public authority cannot deal with it under FOIA.

17. The FOIA exemptions relied upon by the Department in this case are: s. 36 (2) (b) (i) and (ii) and (c) and, in the alternative, s. 35 (1) (a) and s. 43 (2). These are so-called qualified exemptions falling under s.2 (2) (b) so involving a public interest balancing exercise.

18. S. 40 (2) FOIA, where engaged, provides an absolute exemption falling under s. 2 (2) (a) in respect of the personal data of third parties. Regulation 13 EIRs has similar effect. There was no dispute between the Department and the Information Commissioner as to the need to redact certain personal data (comprising the names of junior officials) in the event of disclosure of the requested information.

19. The relevant parts of s.36 FOIA for the purposes of this Decision are as follows:

(2) Information to which this exemption applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

(a) ...

(b) would, or would be likely to, inhibit –

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely to prejudice, the effective conduct of public affairs.

20. S.35 (1) (a) FOIA provides as follows:

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

(a) The formulation or development of government policy”.

21. Section 43(2) FOIA provides that:

“(2) information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

EIRs

22. The EIRs define “environmental information” as follows:

“..any information in written...form on –

(a) The state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites...

(b) Factors such as substances, energy, noise, radiation or waste...emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) Measures (including administrative measures) such as policies, legislation, plans, programmes, environmental agreements and activities affecting or likely to affect the elements and factors referred to in (a) and (b) ...

(d) ...

(e) Cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) ...”

23. The EIRs set out exceptions to the duty to disclose environmental information as follows:

“12 (1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if–

(a) an exception to disclosure applies under paragraphs (4) or (5); and

(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

12 (2) A public authority shall apply a presumption in favour of disclosure.”

24. The categories of EIR exceptions relied upon by the Department in this case are: regulations 12 (4) (d), 12 (4) (e), 12 (5) (d), and 12 (5) (e).

25. Regulation 12 (4) (d) and (e) EIRs provides that:

“for the purposes of paragraph 1 (a) a public authority may refuse to disclose information to the extent that –

...

(d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data;

(e) the request involves the disclosure of internal communications”.

26. Regulation 12 (5) (d) and (e) provide that:

“(5) for the purposes of paragraph 1 (a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

...

(d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.”

Powers of the Tribunal

27. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA (as applied by regulation 18 EIRs where relevant), as follows:

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

(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.”

28. We remind ourselves that the burden of proof in satisfying the Tribunal that the Commissioner’s decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant.

Evidence

29. David Prout is a Senior Civil Servant at the Department for Transport and since January 2013 has been Director General of the High Speed Rail Group with Senior Responsible Owner (“SRO”) responsibilities for the High Speed Rail Project.

30. Mr Prout’s open witness statement provided background information on the HS2 Project, an explanation of the PAR process and a summary of each of the six PARs

which comprise the disputed information. He also set out the Department's case for withholding the PARs.

31. Mr Prout's evidence about the PAR process was that it provides independent assurance for the government's major infrastructure projects and transformation programmes and is commonly used to support HM Treasury approval points. He described the PAR process as typically taking only one week, during which the PAR team will interview HS2 team members and stakeholders to assess the project's delivery confidence against traffic lights of red, amber and green. The project team members speak to the PAR team in the expectation of confidence and their comments are not generally attributed. The PAR team presents a report to the SRO at the end of the week, containing advice and recommendations. Mr Prout explained the value of the real-time process and said that he had never asked for a significant re-writing of a PAR. He thought that a more guarded approach would be needed if PARs were to be published routinely and shortly after being produced. He thought that, if published, PARs would be commissioned later in the process and only where a positive outcome would be revealed.

32. Mr Prout explained that the scope of a PAR review is determined in advance following discussions with the SRO. The content would vary depending on the stage of the project and the need for any approvals. He said that the PARs to date had been concerned with governance, planning, management and financial management and they did not contain information which related to the environment.

33. Mr Prout explained the value of the PAR process to him as SRO and the change of culture that the disclosure of PARs "*regularly or shortly after completion*" would bring about. He stated that "*As an SRO I would be reluctant to commission further PARs if I knew they would be routinely published and in my view so would my ministers. The Department's view is that premature disclosure of the information contained in the reports would not be in the public interest because it would tend to deter the commissioning of such reviews in the first place*".¹

34. Mr Prout was asked about the process for commissioning PARs. He said it was generally a collaborative decision, made at the point where he as SRO felt that a PAR would be useful, although sometimes the timing was determined by the need to provide assurance to stakeholders such as the Major Projects Review Group. He would not commission a PAR at a critical moment in case it delayed an investment decision. He did not currently involve the Secretary of State in a decision to commission a PAR but said that he would have to do so if PARs were going to be made public.

35. With regard to the Department's secondary case for the release of the requested PARs in a redacted form, Mr Prout's evidence was that, as at the time of the information requests, certain information about the policy options being considered was not in the public domain. He accepted that there was a legitimate public interest in the disclosure of information about HS2 and pointed to the systematic release of

¹ Paragraphs 70 & 71, open witness statement.

information about it over time, in addition to the National Audit Office and Public Accounts Committee Reports. However, his evidence was that the public interest favoured maintaining the exemption or exception which allowed the Government to assess various policy options in a safe space and to disclose information in a planned, comprehensive and structured way, avoiding misinterpretation and misunderstanding. With regard to the commercially sensitive information, his evidence was that the public interest favoured withholding information which was revelatory of the Government's assessment of the need for financial contingency, its ability to generate efficiency savings and its assumptions about inflation. Disclosure would be likely to inflate the contract price by allowing bidders to frame their bids less competitively.

36. In his closed evidence, Mr Prout gave a commentary on the contents of each withheld PAR. He explained in detail the reason for the timing of each of the PARs, the flexibility or otherwise which had existed to delay the commissioning of each PAR and the potential significance to potential bidders for contracts of the financial data it was sought to redact.

37. Mr Prout also gave one answer in the closed session which the Tribunal considered should have been given in open session, so we record it here. When asked what were the alternatives to commissioning a PAR, he stated that there are rigorous internal processes for justifying investment decisions, including his own frequent attendances before the Investment Committee, and the involvement of the Procurement Advisory Board.

38. Martin John is the Deputy Director of the Public Services Operations Team at the Infrastructure and Projects Authority ("IPA"). He explained that the IPA sits across the Cabinet Office and HM Treasury and works with Government Departments to provide assurance, support and engagement in order to maximise success in delivery. Although each PAR is different, his evidence was that they shared the common feature of an assurance of confidentiality to all participants. Mr John shared Mr Prout's view that the PARs with which we are concerned did not constitute environmental information. He explained that, whilst it would be possible to prepare a PAR which was intended for publication, a decision about this would have to be taken at an early stage so that the PAR could be prepared differently. Such a PAR would involve a longer process, a system for fact-checking, review by external stakeholders and the risk of embroiling the PAR team in the wider politics of the project. He concluded that IPA policy was for PARs not to be published, as this would undermine an effective system of assurance which was in the public interest.

39. In cross examination, Mr John explained that he feared that civil servants interviewed by the PAR team would not be so forthcoming if the reports were to be published. He explained that whilst it would not be realistic for a SRO to say that s/he wanted no PARs commissioned due to the fear of publication, PARs were not a legal requirement and it was likely there would be fewer PARs if they were disclosed.

Submissions

40. The Department and the Information Commissioner disagreed as to whether the applicable regime in this appeal was FOIA or EIRs. The Information Commissioner maintained her view that the disputed information falls within limb (c) of the definition of “environment information” in regulation 2 (1) EIRs (see paragraph 22 above), adopting a broad and inclusive definition of that term. If correct, this has the effect of requiring the Department to consider the requests under EIRs and not under FOIA.

41. Following the Upper Tribunal’s Decision in *The Department for Energy and Climate Change v Information Commissioner and H* [2015] UKUT 0671 (AAC) (“*Henney*”), the Information Commissioner urged the Tribunal to take the approach of looking beyond the precise issue with which the disputed information was concerned so as to take into account the “bigger picture”. This approach acknowledges that HS2 will have a very substantial impact on the environment and regards the PARs as containing information “on” HS2 because the information they contain is integral to the successful delivery of the HS2 project.

42. The Department’s submission on this ground was that the Information Commissioner’s approach had involved an impermissibly broad definition of “environmental information” so as to include information which does not concern the environment. Mr Sharland submitted that the Information Commissioner’s approach to the PARs (and the Upper Tribunal’s approach in *Henney*) was inconsistent with the CJEU’s November 2016 decision in *EC v Stichting Greenpeace Nederland and Pesticide Action Network Europe C-673/13 P* and that, on their flawed analysis, any information relating to HS2 would be environmental information regardless of its content. It was submitted that the Information Commissioner should have analysed the information contained in the PARs rather than relying on its connection to the HS2 project.

43. By the time of the hearing, the parties’ respective positions as to the applicable exceptions or exemptions were as follows. The Department’s primary position was that the applicable regime was FOIA and that all of the information in the six PARs should be withheld from disclosure because (i) their disclosure would have a chilling effect on input into future PARs (s. 36 (2) (b) (i) and (ii) FOIA) and (ii) it would deter the commissioning of future PARs (s. 36 (2) (b) (c) FOIA). The public interest was said to favour the maintenance and integrity of the PAR process.

44. If the applicable regime were found to be the EIRs, then the Department’s primary position was that all the information in the PARs was excepted from disclosure in reliance upon the exceptions for (i) internal communications (Regulation 12 (4) (e) EIRs); (ii) information prejudicial to commercial interests (Regulation 12 (5) (e) EIRs); (iii) material still in the course of completion (Regulation 12 (4) (d) EIRs; and confidentiality (Regulation 12 (5) (d) EIRs).

45. The Information Commissioner accepted that all the information in the PARs had been provided during a confidential process. She took the view that the internal

communications exception was not engaged by information that had been shared with HS2 Ltd as it had thereby lost the necessary “internal” quality. She had found in the Decision Notice that Regulation 12 (4) (d) was not engaged by the information in the PARs, but agreed to consider further the Department’s revised case, to the effect that it was engaged by some of the information in the PARs which related to a decision-making process which was still in the course of completion, rather than a reliance on the unfinished nature of the reports themselves. She recognised the importance of a “safe space” for decision-making but was concerned to apply the language of the exception correctly.

46. The Department’s secondary position was that, if the primary argument was unsuccessful, then the PARs should be released in a redacted form only, to protect from disclosure (i) some of the information contained in the PARs, the disclosure of which would be prejudicial to commercial interests (Regulation 12 (5) (e) EIRs) and (ii) the need to preserve a “safe space” for on-going decision-making (Regulation 12 (4) (d) EIRs).

47. As the Department’s secondary case was put forward only after the close of the formal pleadings, the Information Commissioner quite properly reserved her position on it until she had heard the evidence and submissions. By the end of the hearing, the Information Commissioner’s position as set out by Mr Hopkins was that the Department’s secondary case was agreed. The parties remained of the view that the Tribunal should determine the dispute between them but we note that, as Mr Hopkins observed, had the Department’s secondary case been put forward earlier, it was unlikely there would have been a hearing.

48. The Information Commissioner’s final position, as noted above, was that she accepted the Department’s secondary case as to the need for redaction of certain information which engaged Regulations 12 (5) (e) and 12 (4) (d) EIRs and where it was in the public interest to maintain those exceptions.

49. Both counsel also made submissions on the question of “internal communications” as between the Department and HS2 Ltd. We refer to this issue below.

Conclusions

50. We are conscious that the leading Upper Tribunal authority on the question of determining the applicable regime, (also concerning a PAR and HS2)², is due to be heard by the Court of Appeal later this month. An application for this appeal to be stayed pending the handing down of the Court of Appeal’s judgment was refused by the Chamber President. Pursuant to his Directions of 8 February 2017, we have stated in our Conclusions below not only which regime we consider to be applicable but also whether the outcome of this appeal would, in our view, be different under the regime which we have found not to be applicable.

¹ *The Department for Energy and Climate Change v Information Commissioner and H* [2015] UKUT 0671 (AAC)

51. In relation to the amended Grounds of Appeal (i) and (ii), the Tribunal's conclusion is that the applicable regime in relation to the PARs is the EIRs. We follow the Upper Tribunal's reasoning in *The Department for Energy and Climate Change v Information Commissioner and H* [2015] UKUT 0671 (AAC) and take the view that there is a sufficiently close connection between the withheld information and the overall HS2 project for us to look beyond the precise issue with which the disputed information is concerned and to have regard to the "bigger picture" of which it forms a part.

52. We are satisfied that the HS2 project is a "measure" which affects or is likely to affect the elements and factors referred to in regulation 2 (1) EIRs. Whilst acknowledging the dangers of adopting an over-expansive definition of "environmental information", we regard the PARs in this appeal as each being integral to the machinery for delivering HS2, so that they are an indivisible aspect of the "bigger picture" of a measure which affects or is likely to affect the necessary elements and factors. We reject the Department's approach of characterising the information in the PARs as only tangentially connected to the environmental measure, and principally concerned with internal managerial matters.

53. We adopt the "bigger picture" approach to all six PARS, but we also note that one of the PARs dated July 2015 is concerned exclusively with delivery of HS2 in the Euston Station area only. We take the view that this particular PAR constitutes "environmental information" in its own right, so does not depend only on the "bigger picture" analysis.

54. In relation to this preliminary point, we discern no error of law in the Decision Notices and the appeal is dismissed. As we agree with the Information Commissioner that the applicable regime is the EIRs, we will consider the claimed EIR exceptions before considering whether, if we are wrong, the outcome would have been different under FOIA.

55. The Decision Notices had concluded that some of the PARs should be disclosed because (i) those that been shared with HS2 Ltd did not engage Regulation 12 (4) (e) EIRs ("internal communications"); (ii) Regulation 12 (5) (d) EIRs ("confidentiality") was engaged but the public interest favoured disclosure except where the PAR was too close in time to the date of the request; and (iii) Regulation 12 (4) (d) ("material still in the course of completion") was not engaged as the PARs were self-contained and had been completed at the date of the request. We agree with these conclusions but are satisfied that the Decision Notices were erroneous in failing to determine whether the exceptions relating to commercial information and personal data were engaged in relation to some of the information which the Department was directed to disclose. They also did not of course consider the Department's revised argument as to material in the course of completion, which emerged only after they were written. Our conclusion that the Decision Notices contained errors permits us to vary them.

56. By the end of the hearing, the parties were agreed that the PARs should be redacted if disclosed. The Tribunal considered the parties' draft redactions in green, which were agreed to apply to information falling under Regulation 12 (5) (e) EIRs

("commercial information"). The Tribunal also considered the parties' draft redactions in red which were agreed to apply to information falling under Regulation 12 (4) (d) ("material still in the course of completion").

57. The Tribunal concludes that the exceptions referred to above are engaged by the information which has been highlighted in green and red in the draft redactions. We considered the public interest arguments for and against maintaining these exceptions and concluded that it favoured maintaining them. Whilst recognising the legitimate public interest in information about HS2 and the presumption of disclosure, we concluded that, in relation to the information accepted to be commercial and confidential, Mr Prout's evidence that disclosure would be likely to affect adversely the Department's legitimate economic interest in managing the cost of the project was persuasive of the public interest in maintaining the exception. As noted above, this was agreed by the Information Commissioner.

58. With regard to the information still in the course of completion, we accepted the Department's case, as given by Mr Prout, that some of the information in the PARs concerned policy options which had not, at the time of the requests, been finalised. We concluded that the balance of public interest favoured the maintenance of the exception in these circumstances. As noted above, this was agreed by the Information Commissioner. We have accordingly directed redaction in this regard.

The Alternative View: FOIA

59. As set out above, we have concluded that the applicable regime is the EIRs. However, if we are wrong about that then the Department's primary case under s. 36 FOIA (amended Ground of Appeal (iii)) falls to be considered. The Information Commissioner did not dispute that the opinion obtained for the purposes of s. 36 FOIA was reasonable.

60. In ordinary circumstances, considerable weight would be attached to the reasonable opinion of the qualified person given under s. 36 (b) (i) (ii) and (c). This is especially forcefully expressed in this case, where the opinion was that disclosure "would" rather than "would be likely to" inhibit the provision of advice or otherwise prejudice the effective conduct of public affairs.

61. We have considered the submission presented to the Minister in seeking his opinion and Mr Prout's evidence about this process, referred to above. We concluded that the Department's case under both limbs of s. 36 FOIA was predicated on a generalised concern about the routine, premature release of PARs generally, and not sufficiently focussed on a specific concern about the disclosure of the contents of these particular PARs. Both Mr Prout's and Mr John's evidence failed, in our view, to demonstrate the particular harm which "would" arise from the disclosure of the information contained in these PARs and we were not satisfied on the basis of that evidence that the s. 36 exemptions claimed were engaged in this appeal. We viewed their evidence as directed towards the harm arising from disclosure of PARs as a class of document, rather than the harm arising from disclosure of the contents of these particular PARs.

62. The Department's secondary case under FOIA (amended Grounds of Appeal (iv) and (v)) was that some of the information requested was exempt under s. 35 (1) (a) FOIA ("formulation of Government policy") and the public interest favours maintaining that exemption and that some of the information requested is exempt pursuant to s. 43 (2) FOIA ("commercial interests") and the public interest favours maintaining that exemption. Our conclusion on these Grounds of Appeal is that the exemptions claimed were engaged only by the information which the parties agreed should be redacted and that the public interest factors were similar to those considered above under the EIRs.

63. We conclude that if we had considered the Department's secondary case under FOIA, it would have resulted in the same outcome as the one we have reached under the EIRs i.e. the disclosure of the disputed information with redactions. The presumption of disclosure under the EIRs did not in this case lead us to a different outcome to the one we would have reached under FOIA.

Personal Data

64. As noted above, the parties agreed that certain redactions should be made to protect the personal data of third parties. For this reason, the Tribunal approves the draft redactions shaded blue (subject to the further amendment outlined in the e mail from the Department's lawyer to the Tribunal dated 21 April 2017). The Decision Notices were erroneous in not requiring such redactions and so the appeal is allowed in this respect. The Decision Notices are hereby varied accordingly.

Other Matters

65. As our conclusions under the EIRs above are determinative of this appeal, we do not need to reach formal conclusions on the other EIR exceptions raised by the Department. We acknowledge Mr Sharland's submission that it would be helpful for us to offer a view on amended Ground (vii) as to whether information shared between the Department and HS2 Limited may properly be regarded as "internal communications". However, we did not have the benefit of full evidence and argument on this point in this appeal and, even if we did express an opinion, we note that it would not preclude a differently constituted First-tier Tribunal from taking a contrary view. In the circumstances, we have decided to express no view on that issue.

The Decision Notices

66. For the above reasons the appeal is upheld in part and the Decision Notices are varied as set out at paragraph 2 above.

67. The steps to be taken by the Department are that the requested information is to be disclosed to the original requesters, subject to the following redactions:

- (i) Redaction of the information shaded in blue, (subject to the agreed amendments referred to at paragraph 64 above) - (personal data);

- (ii) Redaction of the information shaded in green - (commercial information);
- (iii) Redaction of the information shaded in red - (material in the course of completion).

(Signed)

ALISON MCKENNA

DATE: 18 May 2017

PRINCIPAL JUDGE

DATE PROMULGATED: 19 May 2017