Information Tribunal Appeal Number: EA/2008/0052
Information Commissioner's Ref: FS50156849

Heard at Field House, London, EC4
On 3, 4 and 12 March 2009

Decision Promulgated
On 5 May 2009

BEFORE

CHAIRMAN

ANNABEL PILLING

AND

LAY MEMBERS

ROGER CREEDON
DAVID WILKINSON

Between

SECRETARY OF STATE FOR TRANSPORT

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Representation:

For the Appellant: ELEANOR GREY
For the Respondent: TIMOTHY PITT-PAYNE

Decision

The Tribunal allows the appeal and substitutes the following Decision Notice.

SUBSTITUTED DECISION NOTICE

Dated 5 May 2009

Public authority: SECRETARY OF STATE FOR TRANSPORT

Address of Public authority: Department of Transport, Zone 1/28, Greater Minster House, 76 Marsham Street, London, SW1P 4DR

The Substituted Decision

For the reasons set out in the Tribunal's determination, the exceptions under Regulation 12(4)(d) and 12(4)(e) of the Environmental Information Regulations 2004 are engaged, and the public interest in maintaining these exceptions outweighs the public interest in disclosure.

Action Required

The public authority need not disclose to the Requestor the Draft Report.

Dated this 5 May 2009

Signed:

Deputy Chairman, Information Tribunal

Reasons for Decision

Introduction

1. This is an Appeal by the Secretary of State for Transport against a Decision Notice issued by the Information Commissioner (the 'Commissioner') dated 29 May 2008.

2. The Decision Notice relates to a request for information made to the Appellant under the Freedom of Information Act 2000 (the 'FOIA'). The Appellant had withheld the information on the basis that it was exempt from disclosure, relying on the exemptions in section 35(1)(a) or, in the alternative, sections 36(2)(b) or (c) of FOIA and, in respect of some of the information which amounted to environmental information, under exception 12(4)(e) of the Environmental Information Regulations 2004 (the 'EIR') . In correspondence with the Commissioner the Appellant subsequently argued that additional exceptions in Regulation 12 of EIR also applied.

3. The Commissioner concluded that the whole of the disputed information amounted to environmental information, that the Appellant was in error in its application of the exceptions claimed, and required the disclosure of the disputed information. The Commissioner also found that the Appellant had not met the requirements of regulation 14 of EIR but that was not an issue in this appeal.

Background

4. In March 2005, Sir Rod Eddington was jointly commissioned by the Chancellor of the Exchequer and the Secretary of State for Transport to examine the long-term links between transport and the UK's economic productivity, growth and stability, within the context of the Government's broader committment to sustainable development. The Study was publicly announced in the 2005 Budget.

5. A Draft Report, which is the disputed information in this Appeal, was submitted to both the Chancellor and the Secretary of State for Transport in June 2006. The final version (the 'Study') was published as *Transport's role in sustaining UK's Productivity and Competitiveness: The Case for Action* on 1 December 2006 to accompany the 2006 Pre-Budget Report and is available on the Department for Transport website, along with three supporting volumes of research annexes.[1]

<u>The request for information</u>

6. By letter dated 13 December 2006, a request for information under the FOIA was made to the Appellant by Chris Grayling MP, then Shadow Secretary of State for Transport (the 'Requestor').

7. He requested, inter alia, that the Appellant provide him with a "copy of the first draft of the report prepared by Sir Rod Eddington." He added that there was a "clear public interest in seeing Sir Rod's initial recommendations and as his report is an external one, the publication of the draft will not compromise internal policy discussions".

8. The Appellant responded by letter dated 19 January 2007. It confirmed that it did hold a copy of the first draft of Sir Rod Eddington's Study, which had been submitted to it in June 2006. However, it stated that it believed that it was exempt from disclosure under section 35(1)(a) of the FOIA (formulation of government policy). It also informed the Requestor that insofar as section 35(1)(a) was not applicable, it believed that section 36(2)(b) or (c) of the FOIA (prejudice to effective conduct of public affairs) applied and set out the details of the public interest test it carried out.

9. The Appellant also relied on section 12 of the FOIA in relation to some sections of the draft report, stating that it believed that,

[1] http://www.dft.gov.uk/about/strategy/transportstrategy/eddingtonstudy/

> "…a detailed manual comparison of the first draft and the final published report, to ascertain which pieces of the background factual information were omitted from the final report and extract this information, would exceed the cost limit."

10. The Appellant also informed the Requestor that it believed that the draft report contained some environmental information as defined in the EIR. It informed the Requestor that it believed that the exception contained in Regulation 12(4)(e) (internal communications) applied to this information and that the public interest lay in maintaining the exception.

11. By letter dated 21 February 2007 the Requestor asked for an internal review of the decision to withhold the Draft Report. He submitted that this was an independent report submitted to the Government and therefore should not have been subject to any amendments.

12. The Appellant responded by an undated letter maintaining that sections 35 or 36 of the FOIA applied and therefore that the information would not be disclosed. No mention was made of the EIR.

The complaint to the Information Commissioner

13. The Requestor complained to the Commissioner by letter dated 3 April 2007 asking the Commissioner to consider whether the Appellant's decision to withhold the Draft Report was correct.

14. The Commissioner also considered some procedural aspects of the case.

15. Owing to the volume of cases before the Commissioner, no complaints officer was appointed to deal with this matter until 21 November 2007 although the Requestor was kept informed of the position.

16. During the course of the investigation, the Commissioner informed the Appellant that he believed that the entire Draft Report fell under the definition of environmental information. He asked the Appellant

whether it wished to make any further submissions regarding the application of Regulation 12(4)(e) to the Draft Report. He also asked for further details of how it had carried out the public interest test. Finally, he asked the Appellant to provide further arguments if it wished to apply any of the other exceptions in the EIR. He asked the Appellant to respond within 20 working days.

17. The Appellant had to be reminded of the Commissioner's power to issue an Information Notice before it provided a response.

18. The Appellant argued that whilst the Draft Report did contain some environmental information, it did not accept that the entire Draft Report should be considered as such. In regard to the information which it believed to be environmental, it informed the Commssioner that it believed this information was exempt under Regulations 4(1)(a), 12(4)(d) and 12(4)(e). In regard to the information which it believed was not environmental, it informed the Commissioner that it believed that this information was exempt under sections 21, 22 and 35(1)(a) or, in the alternative, 36(2)(b) or (c) of the FOIA. It provided further submissions to support its arguments.

19. A Decision Notice was issued on 29 May 2008. In summary, the Commissioner concluded that:

    (i) The entire Draft Report constituted environmental information within the meaning of Regulation 2(1)(c) of the EIR;

    (ii) Regulation 4(1)(a) of the EIR does not provide a basis for withholding information;

    (iii) The Draft Report did not fall within the exception in Regulation 12(4)(d) of the EIR. Where a final version of the requested information existed the material in the Draft Report was completed material;

(iv) The Draft Report did not fall within the exception in Regulation 12(4)(e) of the EIR. The Commissioner concluded that Sir Rod Eddington was an external independent advisor and that the exception in Regulation 12(4)(e) applies only to communications between members of staff within a public authority or between government departments.

20. The Commissioner therefore concluded that the Appellant had not dealt with the request for information in accordance with the following requirements of the EIR:

    (i) Regulation 5(1) – in that it failed to make available the environmental information requested, to which the Requestor was entitled in accordance with the EIR, because it had incorrectly cited Regulations 12(4)(d) and 12(4)(e).

    (ii) Regulation 14 - in that it did not issue a refusal notice under the EIR for the parts of the Draft Report that it did not consider to be environmental.

21. The Commissioner required the Appellant to disclose a copy of the Draft Report to the Requestor to ensure compliance with the EIR.

<u>The Appeal to the Tribunal</u>

22. By Notice of Appeal dated 26 June 2008 the Appellant appeals against the Commissioner's decision on the following Grounds:

    (1) In concluding that it was not engaged, the Commissioner had misconstrued Regulation 12(4)(d) of the EIR; and

    (2) The Commissioner was wrong to conclude that the exception under Regulation 12 (4)(e) of the EIR was not engaged and had

adopted too narrow a construction of the concept of "internal communications".

23. The Appellant does not appeal against the Commissioner's decision that the entire Draft Report fell within the definition of environmental information and accepts that the EIR apply in this case.

24. The Commissioner served a Reply in which it was maintained that neither exception was engaged and therefore the decision requiring the disclosure of the Draft Report should stand.

25. The Appellant applied to amend the Grounds of Appeal on 6 February 2009, a few weeks prior to the substantive hearing. The proposed amendment amounted to the late claiming of an exception under Regulation 12(5)(d) of the EIR as an alternative. The Tribunal refused the application.

26. The Appeal was determined at an oral hearing on 3 and 4 March 2009, and a further session to deliberate on 12 March 2009. The Tribunal was provided with Open and Closed bundles of material[2], and a bundle of authorities which was provided on the first day of the hearing.

27. In addition, the Tribunal was provided with a copy of the Draft Report.

28. Although we may not refer to every document in this Decision, we have considered all the material placed before us.

<u>FOIA OR EIR</u>

29. If the information requested is environmental information for the purposes of the EIR, it is exempt information under section 39 of FOIA and the public authority is obliged to deal with the request under the EIR.

[2] Including Open and Closed versions of three witness statements.

30. The EIR implements Council Directive 2003/4/EC on public access to environmental information.

31. "Environmental information" is defined in Regulation 2(1) as having the same meaning as in the Directive, namely any information on-

> *"(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among those elements;*
>
> *(b) factors, such as substances, energy, noise, radiation or waste, including radioactive 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) as well as measures or activities designed to protect those elements;*
>
> *(d) reports on the implementation of environmental legislation;*
>
> *(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and*
>
> *(f) the state of human health and safety, including contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment*

referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c).

32. The Appellant did not appeal the Commissioner's decision that EIR applied in this case and no evidence was presented to us on this point. We accept that the information requested falls within the definition in Regulation 2(1)(c) and therefore agree that this matter should be dealt with under the EIR.

33. Regulation 5(1) EIR creates a duty on public authorities to make environmental information available upon request.

34. Regulation 12(1) (2) and (4) EIR provides:

"(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.

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

……

(4) For the purposes of paragraph (1) (a), a public authority may refuse to disclose information to the extent that

(a) it does not hold that information when an applicant's request is received;

(b) the request for information is manifestly unreasonable;

(c) the request for information is formulated in too general a manner and the public authority has complied with Regulation 9;

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

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

35. Even if one of these "exceptions" applies, the information must still be disclosed unless "in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information". This must be assessed having regard to the overriding presumption in favour of disclosure. The result is that the threshold to justify non-disclosure is a high one.

36. By Regulation 18(1) EIR, the enforcement and appeals provisions of FOIA apply for the purposes of the EIR, (subject to the amendments of such provisions as set out in the EIR).

The Powers of the Tribunal

37. The Tribunal's powers in relation to appeals are set out in section 58 of FOIA, 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.*
>
> *On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.*

38. The starting point for the Tribunal is the Decision Notice of the Commissioner but the Tribunal also receives evidence, which is not limited to the material that was before the Commissioner. The Tribunal, having considered the evidence (and it is not bound by strict rules of evidence), may make different findings of fact from the Commissioner and consider the Decision Notice is not in accordance with the law because of those different facts. Nevertheless, if the facts are not in dispute, the Tribunal must consider whether the applicable statutory framework has been applied correctly. If the facts are decided differently by the Tribunal, or the Tribunal comes to a different conclusion based on the same facts, that will involve a finding that the Decision Notice was not in accordance with the law.

39. The question of whether the Appellant was entitled to refuse to disclose the information on the basis of the exception to the duty to disclose environmental information contained in either, or both, Regulation 12(4)(d) and (e) is a question of law based upon the analysis of the facts. This is not a case where the Commissioner was required to exercise his discretion.

<u>The questions for the Tribunal</u>

40. The Tribunal has concluded that the relevant issues in this Appeal are as follows:

    a) Is the exception under Regulation 12(4) (d) engaged?

    b) Is the exception under Regulation 12(4) (e) engaged?

c) In either case, in all the circumstances of the case does the public interest in maintaining the exception outweigh the public interest in disclosing the information?

41. Because the Commissioner concluded that neither exception was engaged he did not go on to consider the public interest. If the Tribunal concludes that either or both exceptions were engaged, either the matter can be remitted to the Commissioner to consider the public interest test or the Tribunal can consider where the public interest lies following submissions from the parties. In this case both parties invited the Tribunal to go on and consider the application of the public interest test rather than remit the matter to the Commissioner for his decision. We agree that this is the most appropriate course to follow, taking into account interests of expediency and public resources.

Evidence

42. We received written and oral evidence from three witnesses: from Sir Rod Eddington[3], Simon Webb and Tracey Waltho. They all gave evidence during both Open and Closed sessions. In this Decision we have not needed to refer directly to any evidence that was given during a Closed session although we did take it into account.

43. Sir Rod explained that he had been approached by the Chancellor and the Secretary of State for Transport and asked if he would like to do a piece of work looking at the UK's transport and links to productivity and growth. The only terms of reference he was given were contained in the brief statement made by the Chancellor in his budget speech on 15 March 2005:

> *"The Secretary of State for Transport and the Chancellor have asked Rod Eddington, outgoing Chief Executive of British*

1. [3] Via video-link; he was in Tokyo at the time of the hearing. Technical problems meant that although Sir Rod could see us, we could only hear him.

Airways PLC, to work with the Department for Transport and HM Treasury to advise on the long-term impact of transport decisions on the UK's productivity, stability and growth."

44. He did not sign a contract nor was he to be financially remunerated, although he regarded the nature of the expert advice and consulting work he carried out could quite properly have attracted a fee. The decision whether to publish any of his work would be determined "further down the line", at the discretion of Ministers.

45. Once he had retired from British Airways, Sir Rod was based at the Department for Transport at Great Minster House; he had a designated office and used business cards showing his contact details there that bore the logos of the Department for Transport and HM Treasury, as he was jointly commissioned by them both. He worked with a team of civil servants, supported by a Steering Group made up of senior civil servants from the Department for Transport and HM Treasury and a team of Academic Friends who Sir Rod told us "acted as a sounding board for his ideas and offered guidance as to how to proceed". The costs of the study were met by the Departments from their budgets. As Sir Rod had been engaged to advise Ministers neutrally on policy options, one of the key resources to the team was the contribution of external stakeholders. The team and Sir Rod spoke with hundreds of people across the country and "as an expert team with considerable freedom given to us by ministers, we were able to freely consider, analyse the issues and consider the evidence. It was critical that there was space to be able to consider the full range of options without being constrained by existing departmental policy so as to prepare a study that would be of most benefit to the Treasury and the Department for Transport."

46. The Steering Group and Academic Friends were fully consulted on the practicalities of the ideas raised by stakeholders and the ideas that were being developed by the team; meetings with the Steering Group took place every 3 or 4 weeks and with the Academic Friends around

every 6 weeks. Sir Rod told us that "This engagement had to be wholly open and frank since I needed honest feedback to inform my own thinking. My work was intended to be a driver for policy transport development and my recommendations would have served little practical purpose if they were not workable."

47. In answer to questions on behalf of the Commissioner, Sir Rod agreed that he had been brought in for the purposes of the exercise because of his experience and expertise but also because of his independence. This was supplemented and complemented by the skills and expertise of the team of civil servants brought together to work with him. He viewed himself as the head of a team of civil servants even though he was not a civil servant himself.

48. The approach taken by Sir Rod to the Study itself was heavily evidence driven. In order to analyse the large amounts of data involved, individual members of the team were tasked with particular areas of work, their evidential analysis then presented to Sir Rod for him to advise upon and give his views. The final views and recommendations contained within the Study, whilst based on the rigorous evidential analysis conducted by the team, are his own.

49. Although not referred to in his witness statement, Sir Rod told the Tribunal that the initiative to prepare a Draft Report to give to Ministers in June 2006 as part of their "Summer Reading" did not come from him but from the Steering Group. This was confirmed by Simon Webb a member of that Group. This Draft Report consisted of two parts; a 32-page "Preliminary Findings", prepared by the team under the supervision of Tracey Waltho and approved by Sir Rod, and a much longer background report again prepared by Tracey Waltho and submitted to Ministers by her directly. The background report was described by Sir Rod as "crucial in understanding the Preliminary Findings as it showed what evidence the early findings of the Study were based on and what evidence was yet to be collected. The conclusions reached in the Preliminary Findings were not definitive and

the background report would have shown why they could only be considered draft conclusions".

50. Sir Rod felt that it was important to give Ministers an indication at this stage of the emerging conclusions, but the Draft Report was incomplete as there were still important topics to explore in more detail, data to collect, check, refine and collate and further work to be done on the ordering and presentation of the overall analysis. Sir Rod described the draft as having "many gaps and was very preliminary". Nonetheless Sir Rod felt that it was important to provide Ministers with an update as a "process of reciprocal communication was essential at this stage."

51. In exploring what was meant by "reciprocal communication", Sir Rod agreed with counsel for the Commissioner that it would give Ministers an opportunity to express their views on work in progress and in particular to indicate if he were pursuing any avenues that were, in their judgement, politically impracticable or not relevant. He did stress, however, that while he would reflect carefully on Ministers' views before finalising his report no-one would have deterred him from including argument and analysis that was, in his own judgement, relevant to his conclusions. This process of reciprocal communication was also referred to by others as an iterative process or an opportunity to give "feedback".

52. Sir Rod regarded the Draft Report as an internal document, not for public discussion or consultation, but to provide the Ministers who had commissioned the Study with an update on the work to date.

53. We heard evidence from Simon Webb, a former Director General in the Department for Transport. He had provided details of policy making methodology in his witness statement. With regard to the Study by Sir Rod, he explained that he facilitated the setting up of the team with his counterpart from the Treasury. This involved agreeing how it would be funded, staffing the civil service team together with his counterpart in

HM Treasury, finding suitable office space within the Department for Transport and liaising with Sir Rod as to what his needs may be during the study. He also ensured the flow of funds to meet the costs of the Study which had not been given a designated budget in advance. The study eventually cost some £1.3million.

54. Simon Webb's evidence was that it was agreed with Sir Rod that he would be given considerable freedom and independence to address the task he had been given so that he could bring both a fresh perspective and expertise gained from years of experience in the transport sector. However, he did concede that to ensure that the study was "useful and influential it needed to operate within the Departmental machine in particular so as to take account of changes in other policies over the 1 ½ years it was underway." To that end, he described the role of the Steering Group, of which he was a member, to act as the conduit between the team and the Department and as a sounding board for the developing ideas of the team; testing whether all ideas were feasible, both politically and financially, and coherent with the other policies of the Department. He had discussions with the Secretary of State as to how the study was progressing and through "this iterative approach it could be ensured that the study was focussing on the areas of interest to the Minister and was aiming to answer the questions that the Minister wanted answering."

55. He explained that he saw Sir Rod's work as being that of an internal working group and that the Draft Report was therefore an "internal communication". Providing it to Ministers would provide an opportunity for feedback which may have improved the quality of the final report; the team already knew some of the gaps that had to be filled and they wanted to know if Ministers saw any others. It was also good departmental practice to provide lengthy documents such as these for "summer reading" as Ministers are particularly busy in the early autumn.

56. With regard to the Draft Report itself, Mr Webb explained that its purpose was to bring out emerging ideas and he described the practice of “place holding” whereby an indication would be given of where there were particular gaps that still needed to be filled to bring the report into a final state.

57. Ministers provided feedback on the incomplete document to Mr Webb and in turn these messages were passed on to the team.

58. We heard from Tracy Waltho, a senior civil servant with the Department for Transport who had been joint team leader of the group of civil servants that worked for Sir Rod.

59. Very soon after the official announcement of the Study, she met Sir Rod and senior officials from both the Department for Transport and HM Treasury to discuss some early ideas as to how the Study would be carried out and what sort of team would be needed. She described that it was agreed with Sir Rod that she and her joint team leader from the Treasury would have a considerable degree of autonomy in suggesting areas for the Study to explore, delivering the agreed work programme and undertaking the day to day management of the team.

60. One of their early tasks was to put together proposals for the areas the work would focus on and, as these were developed, they were presented to the Steering Group and agreed by Sir Rod. They also assigned work programmes to individual members of the team who were given responsibility for their discrete areas. No formal schedule of delivery had been agreed with Sir Rod and it was Tracey Waltho and her joint team leader who set that up. The team leaders, in effect, ran and managed the Study but the ultimate decisions were Sir Rod’s, taking into account the views of the team and the Steering Group.

61. She explained that both Minsters “and Sir Rod were keen that they be given an update on the progress that had been made”. The Draft Report was the first attempt to pull together all the thinking in different areas, and this provided an opportunity to check that the conclusions

that were being reached across different areas were mutually consistent and that the overall analysis was coherent. The Preliminary Findings document was prepared in consultation with and approved by Sir Rod but the final approval for the background report that also went to Ministers came from her alone.

62. Before us, the focus of questioning was mainly on the genesis and content of the Draft Report and the final Report or Study. The majority of her evidence was given during Closed sessions and involved an illustrative but not exhaustive comparison between the five "headline" recommendations included in the Preliminary Findings part of the Draft Report and the five recommendations as they finally appeared in the published Study, as well as the differences between the two in terms of format, themes explored and language used. The "place holding" that had been described by Mr Webb was also explored in more detail, for example the accuracy of data to be checked, further information to be added or references included.

63. As the majority of her evidence was given during a Closed session we have not included a detailed analysis in this Decision. However, we note here that her evidence was most helpful in allowing the Tribunal to conclude that the headline recommendations of the Draft Report were carried through without any substantive change into the final published Study.

64. Ms Waltho considered that if the Draft Report were to have been published at around the same time as the final Study, it would have to have been accompanied by a detailed statement commenting on any differences between them. This would not be a costless exercise.

65. One member of the Tribunal asked for confirmation that the document referred to at the foot of the table that precedes the table of contents in the full published Study was in fact the "Executive Summary" that one would expect to be published simultaneously with a Study of this

importance and length. This[4] was provided to us, and the Commissioner, at the end of the evidence and is, in effect, the final version of what had been the Preliminary Findings. It was unfortunate that this had not been provided earlier as it was germane to the issues that had been explored on behalf of the Commissioner.

Is the exception under Regulation 12(4)(d) engaged?

66. The question for the Tribunal is whether the request relates to material which is still in course of completion, to unfinished documents or to incomplete data.

67. The Appellant submits that there are three separate limbs within Regulation 12(4)(d) and that the exception is engaged because the Draft Report clearly constituted an unfinished document at the time of the request and still remains so following the publication of a final version.

68. We were taken through the Commission's Proposal for the Directive (COM(2000) 402 final) to illustrate the logic of providing for this exception. It was agreed that there is a policy need to offer protection to unfinished documents, as part of the process of protecting the "thinking space" for government and other public authorities. The Appellant submits that the need to protect that space does not end when a final version of a draft document has been produced; it is key to acknowledge that the protection continues, but that protection is subject to the balance of the public interest in each case.

69. The Appellant argues that the second limb of the exception at Regulation 12(4) (d) must be given a separate meaning. If "unfinished documents" were to mean only documents which had not been completed, at the date of the request, the two words would be otiose as the phrase "material which is still in the course of completion" would be

[4] A 62 page document entitled "The case for action: Sir Rod Eddington's advice to Government." This can be found on the Department for Transport web page given in footnote 1 above – it comes under the heading "Summary Report".

wholly sufficient. The words “unfinished documents” must add something to the phrase “material which is still in the course of completion” and that purpose would be met, the Appellant submits, if it refers to material which, although unfinished, is not in the course of completion at the time of the request, such as an earlier draft.

70. We were also taken through the English version of Directive 2003/4/EC. Article 4(1) (d) states that the exception applies to “material in the course of completion or unfinished documents or data”. The Appellant submits that the use of the word “or” makes it plain that the words “unfinished documents” carry a different meaning from the words “material in the course of completion”. There had been development and broadening of the scope of the exception compared with earlier draft Commission proposals and the Appellant submits that this expansion is significant.

71. We were referred also to paragraph 20 of the Preamble to the Directive, which states that public authorities should seek to guarantee that when environmental information is complied by them or on their behalf, the information is “accurate”. This aim is also supported by Article 8 of the Directive which makes it clear that, so far as is possible, any information that is compiled by or on behalf of Member States should be up to date, accurate and comparable.

72. The Appellant submits that as a draft will not necessarily contain information whose accuracy can be guaranteed, Paragraph 20 and Article 8 sit ill with an obligation to disclose a draft and are more compatible with disclosure of such documents being subject to the public interest test.

73. The Commissioner had relied on Regulation 14(4) EIR as providing a further reason why the Draft Report could not fall within the exception at Regulation 12(4) (d). Regulation 14(4) EIR requires that the public authority “shall also specify, if known to the public authority, the name of any other public authority preparing the information and the

estimated time in which the information will be finished or completed". The Appellant submits that it is plain that the first part of the requirements of Regulation 14(4) will not be applicable or could not be complied with in all cases: "the name of any other public authority preparing the information" will only be relevant in a case where there is another public authority doing so and that, therefore, it is logical to read both the provisions of Regulation 14(4) as requirements to be satisfied "if applicable" or "if known" – whether dealing with the involvement of another public authority or the date at which unfinished work might be finished.

74. This, the Appellant submits, is consistent with the corresponding provision in the Directive. Article 4(1) provides: "Where a request is refused on the basis that it concerns material in the course of completion, the public authority shall state the name of the authority preparing the material and the estimated time for completion." The Appellant submits that this contemplates that the "caveat" or additional duties apply only when the request concerns material in the course of completion, that is, the material which is still under active review, as opposed to "unfinished documents or data", and that Regulation 14(4) should be interpreted consistently with this provision.

75. The Commissioner submits that, because at the time of the request a final version of the Report had been completed, the request related to material which had now been completed.

76. Having regard to paragraph 16 of the Preamble and Article 4(2) of the Directive, the Commissioner argues that the grounds under which a request for environmental information may be refused should be interpreted restrictively. He submits that these points cannot be collapsed into a matter to be taken into account when assessing the public interest on disclosure, but that the grounds themselves must be interpreted restrictively.

77. The Commissioner submits that the purpose of the exception is to protect information from disclosure while it is still in the course of completion. In a case such as this, where the work of preparing the relevant material has been completed, the rationale for the exception no longer operates and the Commissioner submits that, therefore, the exception is no longer applicable.

78. The Commissioner considers that, had the request been made before the final version had been published, the draft would have fallen within this exception as the draft would have been material in the course of completion.

79. The Appellant argues that if the Commissioner's narrow approach to this, and to Regulation 12(4) (e) is endorsed, it would mean that government would be required to disclose routinely any draft report prepared by similar experts from outside the civil service where they contain information covered by the EIR. That would mean that it would not be possible to assess whether or not release of the information was in the public interest. The Appellant submits that such a situation would stand in stark contrast to the status of draft reports or documents under FOIA, where in cases comparable to the present case the exemptions contained in sections 35 and/or 36 would generally be accepted to be engaged; and as a result it would be possible to consider whether or not the public interest favoured release or not. Such a contrast is highly undesirable, and is not required by the language of the Regulations."

80. If the Commissioner's argument is correct, no draft of any document could ever fall within the exception in Regulation 12(4) (d) once there was a final version. In our opinion this would be an unfortunate conclusion as it would mean that such drafts could not be subjected to the public interest balancing exercise.

81. The Commissioner concluded that the request related to material which had now been completed. While we recognise that he had to interpret

the exemptions restrictively we disagree with that conclusion. The request was for the first draft of the report prepared by Sir Rod Eddington. The request therefore related to the Draft Report and not to the final version. The fact that the Draft Report itself related to another document does not change that position. Its status does not change simply because a final version exists. We consider that the Commissioner's argument on this point is unsustainable.

82. One member of the Tribunal considered that the words "unfinished document" were there to cover documents that had been abandoned before completion. These could never fall into the definition of "in the course of completion" as there was no further work to be done. However, the opinion of the majority and, ultimately our unanimous conclusion, is that the Draft Report is, by its very name and giving the words their logical meaning, an unfinished document.

83. We therefore prefer and accept the submissions of the Appellant and conclude that the exception in Regulation 12(4) (d) is engaged.

Is the exception under Regulation 12(4)(e) engaged?

84. Whether the Draft Report amounted to an internal communication such that the exception under Regulation 12(4) (e) is engaged is a question of fact and law.

85. The Appellant submits that it is accurate to describe the Study or its author as "embedded" in Whitehall and to accept the evidence of the witnesses as to the role of Sir Rod. Sir Rod described the Draft Report as, "my report. Civil servants were actively involved but at the end of the day it is my words and my conclusions." Simon Webb's evidence was that this was a cross departmental team with Sir Rod as the one external, independent member who was brought in to direct and lead a team otherwise made up of civil servants. The status of the team was that of an independently led internal working group rather than that of a wholly external body.

86. It is commonplace in modern government for the expertise of the central Civil Service to be supplemented by external advisors working under contract to a department. The Appellant submits, and it is accepted by the Commissioner, that work carried out under such a contract would amount to an "internal communication"[5].

87. The Appellant submits that there is no principled dividing line between the appointment of paid contractors and the situation in this case. Both concern "appointments" to supplement governments' ability to develop (here) policy, the need for a "thinking space is key in both cases and submissions to the commissioning departments represent an "internal" document; the submissions constitute private contributions to the process of policy development, or to the task for which the expert was commissioned."

88. The Appellant also relies on the facts that the source of the study, funding for the study, support for the study were all provided internally by civil servants and emphasis was placed on the nature of the contract. As already noted the decision on whether or not to publish rested with Ministers. Sir Rod did not have the final say over how the document should be handled. Ministers wanted a well respected, weighty outsider to come in and give good advice and in return they gave him the benefits of working within the civil service: a team, access to top officials through the Steering Group which meant access to senior politicians' thinking on what would be feasible, a significant budget that amongst other things allowed him the opportunity to consult widely with stakeholders, to commission research and generally to ensure that his study was fully evidence based. The Appellant argues that the evidence shows that for the period when he had communication with Ministers, that was assumed by all parties to be confidential and internal. This is supported by the fact that the Draft Report was only disclosed to a small group within Whitehall, and not,

[5] See for example, Stewart v The Information Commissioner (EA/2007/0137).

for example, to the Academic Friends who were playing a fundamental part in the process.

89. The Commissioner submits that although Sir Rod was assisted by full time civil servants, the Draft Report was, ultimately, his document for which he takes ownership. The "iterative process" or "reciprocal communication" with ministers amounted to no more than feedback and no-one was able to tell him what to cover in the final version.

90. The Commissioner argues that Sir Rod was not part of Westminster or Whitehall, but was independent from both and this was one of the main reasons given in evidence why he had been selected to carry out this piece of work. Although he was given the use of an office within a Government Department, he was in no sense a temporary civil servant: he worked on an unpaid basis, with no written contract or other written document governing his work. The Commissioner argues that all of these features of the relationship both preserved and reinforced his status as an external advisor with considerable autonomy.

91. However, the Commissioner concedes that in terms of drawing the boundaries of "internal communication", it is permissible to treat third parties who work under contract with Government departments as being "insiders", and hence treat their communications with Ministers or civil servants as being internal communications, but there is no justification in going further than this.

92. The Appellant submits that it would be an unprincipled distinction to regard the fact that Sir Rod was not subject to a formal contract or financially remunerated as being determinative of whether the exception is engaged or not.

93. We consider that it is artificial to put such a technical distinction in place.

94. We do not consider that it is possible, or desirable, to attempt to devise a standard test as to what amounts to internal or external

communication, for example, by reference to the nature of the communication or its audience. It will depend on the context and facts in each situation.

95. Looking at the facts of this case, we conclude that Sir Rod was firmly embedded within the civil service and it is accurate to describe him as "the head of a team of civil servants". He was commissioned to "work with" the Department for Transport and HMT and the two senior commissioning Ministers were willing to share their thinking with him to better enable him to produce a realistic report informed by their judgement of the political context. In short, Sir Rod was invited into what is referred to as the "thinking space" or "safe space" within which government Ministers and their advisers operate when policy options are still under discussion. In this way he had confidential access to Ministers' and senior civil servants' views on the economic and political feasibility of different potential policies and was able to take them into account in reaching his own independent expert conclusions. It appears to us that the Study was, in effect, run and managed by the senior civil servants appointed as team leaders, but that the Study's overall course and direction was set by Sir Rod who was responsible for its ultimate conclusions and recommendations. The Draft Report was prepared by Tracey Waltho. Sir Rod approved the shorter Preliminary Findings document and left Ms Waltho to submit to Ministers the longer background report that contained the evidence that underlay the Preliminary Findings.

96. The fact that circulation of the Draft Report was limited, is not of itself determinative of the question whether it amounted to an internal communication. In the context of this case, we regard it as additional support for our conclusion that this is an internal communication.

97. Nor is the fact that Sir Rod is "independent" determinative of that question. Lawyers and accountants working within the government machine do not lose their professional independence because they are insiders employed by government departments. In this case, Sir Rod

did not suspend or compromise his independence in the course of conducting his Study but rather agreed to exercise his independence inside the "safe space" within which policy analysis and formulation is carried on within the government machine.

98. We accept the submissions of the Appellant and conclude that the Draft Report did constitute an internal communication and therefore the exception in Regulation 12(4) (e) is engaged.

The Public Interest Test

99. As we conclude that both of the exceptions are engaged, we must now consider whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. Because this had not been considered by the Commissioner, we have to approach the issue fresh rather than having the benefit of carrying out the balancing exercise with regard to public interest factors that had been identified already, although we did have the benefit of hearing argument from senior counsel on both sides.

100. Regulation 12(2) EIR requires a public authority to apply a presumption in favour of disclosure.

101. Inevitably, there will be a significant passage of time between the initial request for information and the Tribunal's decision on an appeal under section 57 of FOIA. The passage of time can, of itself, often be an important factor in assessing the public interest. Having due regard to previous decisions of this Tribunal, we agree with the parties that the relevant date for the application of the public interest test is in or around January 2007.

102. As more than one exception is engaged, we must consider whether the aggregate, or cumulative, public interest in maintaining those exceptions outweighs the public interest in disclosure[6].

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[6] *Office of Communications v The Information Commissioner* [2009] EWCA Civ 90

103. In this case, that approach does not cause any difficulties or result in there being a number of different public interest factors in favour of maintaining each exception; the same public interest factors apply to both Regulation 12(4)(d) and (e). It was not argued that the fact that more than one exception is engaged is, in itself, a public interest factor in favour of maintaining the exceptions. We are satisfied that this is the correct approach.

104. In considering the public interest in favour of maintaining the exception, or the potential adverse effects of disclosure, the Commissioner identified two kinds of adverse effect that may be material and that appeared to be in issue. One is any adverse effect in relation to the specific area of policy-making or decision-making with which the disputed information is concerned; in this case, transport policy. The second is any general and indirect adverse effect in relation to future decision-making.

105. Both parties referred to the considerable body of authority in this Tribunal and in the High Court[7] in relation to this kind of argument as it arises under sections 35[8] and 36[9] of FOIA which they submit is relevant in this case also. While we are not bound by decisions of differently constituted Panels of this Tribunal, we accept the following general points as identified by the Commissioner as having relevance to the present case.

(1) The task of the Tribunal is to assess all the factors both in favour of disclosure and in favour of maintaining the individual exemption (or exception in the case of the EIR). If the factors are equally balanced, the information must be disclosed. If the public interest in maintaining the exemption outweighs

[7] In particular, _Department for Education and Skills v The Information Commissioner_ (EA/2006/0006), _Department for Work and Pensions v The Information Commissioner_ (EA/2006/0040) and _Office of Government Commerce v The Information Commissioner_ [2008] EWHC 774 (Admin)

[8] Formulation of government policy

[9] Prejudice to effective conduct of public affairs

the public interest in disclosure, then there is no obligation to disclose. Each case must be considered on its own facts. The question is always, what is the balance of public interest in relation to the disclosure of the disputed information itself rather than in relation to some class of information of which the disputed information is an example. So here, the question is not: what is the balance of public interest in relation to preliminary drafts of published reports? The question is: what is the balance of public interest in relation to this particular draft report at or around the time when the request was made?

(2) There is an assumption built in to the 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. The EIR, unlike FOIA, incorporates an express presumption in favour of disclosure (Regulation 12(2)).

(3) Considerations such as openness, transparency, accountability and contribution to public debate are regularly relied on in support of a public interest in disclosure. This does not in any way diminish their importance as these considerations are central to the operation of both FOIA and the EIR and are likely to be relevant in every case where the public interest test is applied. However, the weight to be given to these considerations will vary in each case, depending on such considerations as the content of the disputed information.

(4) In relation to both section 35(1)(a) and the exceptions in the EIR, the mere fact that the exemption, or

exception, is engaged will not in itself mean that there is a public interest, or a public interest of some specific weight, in maintaining the exemption, or exception.

(5) Any direct or future harm that will result from the disclosure of the disputed information is relevant in the assessment of the public interest. However, such harm must always be assessed by reference to the content of the particular information in question, and the specific consequences of its disclosure. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case.

(6) In relation to any argument that disclosure will have an adverse effect on the policy-making process, the timing of the disclosure is key. It is submitted that this principle applies whether the adverse effect relied upon is specific, or indirect and general.

Factors in favour of maintaining the exception

106. The Appellant identified a number of factors, falling into two categories; the long-term consequences of release, insofar as a decision to this effect will create an expectation that similar draft reports should in future be treated in the same way, and the more immediate consequences of release in this case if disclosure had taken place in or around January 2007.

107. We have attempted to identify the individual factors as they were presented to us in submissions.

Protection of what is referred to as the "thinking" or "safe" space.

108. The Appellant submits that it is in the public interest that the government can use distinguished 'outside' experts in developing policy and that the process of reciprocal communication described in paragraph 52 is able to take place.

109. The risk, should drafts of the nature of the disputed information be thought likely to be released, is that either they will not be produced at all or 'outside' experts will be deterred from making their services available to the government.

110. In dealing with the latter point, that there would be a shrinking pool of candidates for similar appointments, the Appellant relies on the evidence of Simon Webb. In cross-examination he talked about the "deterrent" effect of having to defend and debate not merely the final and published outcome of work, but drafts as well. Although conceding that it is impossible to predict how each and every potential appointee would react to such a prospect, the Appellant submits that it seems probable that the pool of those who would be willing to perform such tasks would be diminished, especially as not everyone whose appointment may be in the public interest will be used to the 'rough and tumble' of political debate; such a diminution is not in the public interest and debating drafts as well as the final report will intensify the pressure upon anyone who conducts this sort of work.

111. Simon Webb also referred to the statements of Paul Britton and Lord Turnbull that had been relied on before the Tribunal in the *Department for Education and Skills v The Information Commissioner* (EA/2006/0006) ('*DfES*'). Our attention was drawn to their exposition of the context and need for Ministers and their civil servants to create a "thinking space" for policy formation within government and the risks of disclosure of policy material for good decision making.

112. We do not consider that it was appropriate to rely on the contents of these statements in the context of this case and particularly

in light of the decision reached in *DfES.* We were surprised that the witness gave us no explanation of exactly how he thought we should interpret the statements in the light of that decision. More fundamentally, although we are not bound by strict rules of evidence, we would be reluctant to accept evidence contained in another person's witness statement who is not before the Tribunal and cannot be questioned.

113. The Commissioner submits that it would be a certain type of person whom Ministers would seek to commission to take on this sort of work and that type of person would be well able to stand by their conclusions and recommendations, face criticism, allegations and cross-examination by the media. He continues that it is "implausible" to say that a person would be willing to take on all that but be deterred by the risk of the publication of a draft document.

114. The Appellant invites us to differentiate between civil servants and people from other backgrounds not necessarily exposed to the "hurly-burly" of political life. It is also submitted that it is not possible to calculate or evidence the deterrence in terms of a reduction of candidates; this is the first time the issue of draft reports prepared by outside experts has been considered and it is still "early days" for working out the effects of FOIA and EIR.

115. We agree that the position is not so clear cut as previous decisions have related to senior civil servants. We also accept the example given in evidence by Simon Webb that there may be some academics who might be unfamiliar with the political processes and that some areas may be more sensitive than others. However, we consider that the type of person who would be asked and who would be willing to accept Ministerial invitations to act as an independent advisor to the government would have the ability to carry out the task with the requisite thoroughness and robustness.

116. For these reasons, therefore, we give very little weight to this factor in favour of maintaining the exception.

117. The Appellant submits that even if the appointments process survives without damage, any individuals who did offer their services would be likely to avoid circulating emerging ideas, and would either not present emerging conclusions in writing, or be more likely to wait until a draft report was considered to be reasonably complete and robust enough to survive challenge, before circulating it for comment and discussion. This would reduce the opportunities for such individuals to discuss their thinking within government, which, the Appellant submits, would be detrimental to good administration.

118. In fact, in evidence before us, Sir Rod did not go so far as to say that he would have refused to take the role on, but he did say that he would not have prepared the Draft Report but rather would have orally presented the work so far if he had been aware that the Draft Report would be made public.

119. We agree that early engagement at a ministerial level is an important part of the process of developing a workable set of policy proposals. In this case, Sir Rod was given free space to look carefully at all the issues without constraint, that is, the opportunity to formulate new policy without having to adhere to the constraints of existing Departmental policies. The Appellant argues that an author may feel unable to produce a draft which advocates new thinking or puts forward controversial or contentious solutions which are still under discussion because their ideas would be subject to public scrutiny at all stages of their development and that the government therefore could be deprived from receiving the best possible advice.

120. We do not consider that an oral presentation as suggested by Sir Rod would have been satisfactory or even practicable as he would have been unable to provide the detailed background evidence. The witnesses laid emphasis on the value of having the material in written

form for ministers, giving them a chance to engage with the detail and substance (described as 'summer reading') which could not be achieved by an oral presentation as suggested by Sir Rod. In any event, we consider that any oral presentation would be supported inevitably by written documents of some variety – whether PowerPoint slides, a handout document, or speaker's notes and therefore that information could also be the subject of a request under FOIA.

121. By the time the Draft Report was prepared, there was a good idea of where the recommendations were going and a clear sense of the supporting reasons that could be adduced for them based on the evidence that had already been brought together. Although it is described as the emerging preliminary findings, we consider that Sir Rod and his team would have let it go forward to Ministers only if they were confident that it was sufficiently well developed and convincing enough to be subjected to challenge and questioning by Ministers at that stage. On the evidence, we are of the opinion that the key findings identified are all reflected in the published Study. In judging the likely consequences of disclosure on the conduct of external advisors such as Sir Rod in the future, the Commissioner accepts that the point made about civil servants in *DfES,* that we are entitled to expect of them the courage and independence that has been the hallmark of civil servants since the Northcote-Trevelyan reforms, cannot be made in the same way. However, where an external advisor is prepared to put his own reputation on the line, we are sure that he would do everything he could to make sure that any circulated Report is as good as it can be, as useful as it can be and full as it can be. We agree with the Commissioner that it is implausible to say that the prospect of publication would deter such an individual from acting in this thorough way.

122. The Draft Report was put into written form by civil servants and then submitted to ministers by civil servants. It was the decision of Simon Webb to prepare a draft for Ministers. He told us that, in the

absence of any decisions from the Commissioner or the Tribunal, it had been assumed that such information would not be liable to disclosure under FOIA. We consider that civil servants should have been alert to the fact that there would be a risk of subsequent disclosure under the FOI legislation. The fact that a public authority acted under a misapprehension as to how the legislation operated does not amount to a public interest factor in favour of maintaining the exception.

123. Although it is a Draft Report and had not been compiled with a view to publication itself, we must bear in mind that there is a difference between documents coming into the public domain because they are intended for publication and those disclosed under FIOA or EIR. The Commissioner argues that a public authority cannot say that it will only publish that which has been prepared for publication otherwise the purpose of having FOI laws would be negated. The fact that a document was not drafted with future publication in mind does not amount to a factor in favour of maintaining the exception and withholding it from disclosure.

124. The Commissioner submits that it is not a realistic scenario that someone would accept a brief like this, aware that any report generated could be published and open to public scrutiny, but when told the draft would be disclosed at or about the same time would then be put off. Simon Webb disagreed with this and gave an example of medical articles being peer reviewed before publication. With respect, we do not consider that this was the most appropriate analogy with the way in which Sir Rod was operating in relation to this Study.

125. In line with our conclusion about the possible deterrent effect on those acting as ‘outside’ advisers, we consider that those who accepted the invitation from Ministers and prepared the work should be able to justify and defend their own recommendations and we do not see that such a person would be deterred from producing a draft document exploring radical options just because it might be disclosed to the public at some point in the future. Further, we consider that

anyone undertaking such a role must assume all their dealings with a public authority will be open to scrutiny and possible requests under the FOI legislation.

126. For these reasons, therefore, we give very little weight to this factor in favour of maintaining the exception.

Distraction from debating real issues

127. The Study was published on 1 December 2006 and the request for the Draft Report was made on 13 December 2006. The Appellant submits that had the Draft Report been released on or about that date, the likely consequence is that attention would have been diverted from discussion of the important recommendations of the Study into debate on any differences between the draft and the final report and the reasons for them. There is some evidence for this in the statement made by the requestor in seeking an internal review of the initial decision 'that this was an independent report submitted to the Government and therefore should not have been subject to any amendments'.

128. The Study was a detailed and weighty report ranging across wide areas of policy. It contained important and controversial recommendations, for example, setting three strategic economic priorities for transport policies and changes to the planning regime including the introduction of a new Independent Planning Commission. These led to rapid action within government with the Department for Transport reorganised in accordance with the three strategic priorities and new planning legislation introduced.

129. Sir Rod gave evidence that publication of the Draft Report would have created "a substantial diversion" from the public debate on the substantive issues raised by the Study. Although there were explanations for any differences between the two, a debate on that – and in particular any suggestion of improper pressure being placed on him by Ministers - would have been an unnecessary distraction from

debating the real transport policy issues. This suggestion was mainly dealt with during Closed sessions but it is clear that this issue was in the public domain. We heard evidence that there had been rigorous cross-examination of Sir Rod by the press, in particular suggesting (with regard to considering high speed rail) that the Study did not reflect his recommendations or that pressure had been placed on him to come to the conclusions he did. Sir Rod strongly and publicly defended the Study as representing his views on the issues it tackled.

130. The witnesses Simon Webb and Tracey Waltho referred to the implications on distracting from the implementation of the recommendations and on the allocation of resources if the debate was diverted into a comparison between the Draft Report and the Study. We consider that it is part of the nature of the business that there will always be pressure on resources and this would, in itself, not be strong factor in favour of maintaining the exception.

131. The Commissioner submits that the evidence we heard as to the comparison between the Draft Report and the Study is highly relevant when thinking about the consequences of disclosure and considering whether it would derail the debate or cause a distraction as the differences are, in effect, minimal and explicable. He disagrees that disclosure of the Draft would have had any significant impact on diverting the public debate from the central policy issues or on the timely implementation of the recommendations of the Study.

132. We agree with the Appellant that the significance and effect of the recommendations of the final report should have been the focus of any public debate and disclosure of the Draft Report at around that time would have had the inevitable effect of distracting from that.

133. We are satisfied that disclosure of the Draft Report at around the time when the Study was published and its findings were still a matter of considerable public interest would have caused a significant distraction. Even without the disclosure of the Draft Report, there had

been a certain amount of diversion. We heard evidence that in press conferences Sir Rod had to deny allegations of undue pressure being put upon him and had to confirm that the recommendations were really his own. If there had been evidence of some improper pressure having been exerted on Sir Rod that would, in our opinion, have been an important factor favouring disclosure but there is no such evidence or any suggestion of such evidence before us.

134. We consider this to be not only the one factor that carries any weight but also carrying significant weight. We must consider the public interest balance at the relevant time, in this case in or around January 2007. There has now been sufficient time passed that if we were considering where the balance lay now, this factor would carry little or no weight at all.

Cost of dealing with questions about any differences

135. In her evidence, Tracey Waltho made number of references to cost of preparing responses and explanations about any differences between the two reports. This was not advanced as a discrete factor in favour of maintaining the exception by the Appellant, but we consider it appropriate to comment that we found this to be a very weak argument. It is clear from the contents of the Draft Report, by its very definition and through the practice of "place holding", that further information was to be added and changes would inevitably be made. There will almost always be differences between a draft and a final version of any document: why else call a version a draft? We also consider that it is likely that there would be further questions following from any disclosure under FOIA or the EIR. This can never amount to a reason to refuse disclosure or a factor favouring maintaining an exemption or exception.

Accuracy of data not verified

136. Tracey Waltho also raised the fact that the accuracy of the data contained in the Draft Report had not been verified and she referred to

the requirement under EIR for a public authority to seek to guarantee that environmental information is accurate. Again this was not advanced by the Appellant as factor in favour of maintaining the exception and we consider this another very weak argument. There are clear and explicit warnings in the Draft Report to that effect and therefore this factor carries no weight.

Factors in favour of disclosure

137. The Appellant submits that there is little or no distinct public interest, over and above the general public interest in disclosure, in disclosing the draft of a report that is already in the public domain.

138. Further, the Appellant submits the factors relied upon by the Commissioner are very general public interest considerations and are only relevant in this case at a high level of abstraction.

139. We have already indicated that we agree with the Commissioner's submission that although factors such as openness, transparency, accountability, broadening policy input and contribution to public debate are regularly relied on in support of a public interest in disclosure, this does not in any way diminish their importance. However, these factors must be considered in a fact sensitive way; for the factor to bear any material weight it must draw some relevance from the facts of the case and not just in general terms.

Formation of policy/good governance, Informing public of role played by external advisors and how they function within Government

140. The Commissioner submits that there is a significant public interest in disclosure of the Draft Report; the Study is a very important contribution to the formation of policy on an important subject, its production was a major exercise, involving a team of up to 12 civil servants working full time for over a year and about £1.3 million was spent on its preparation.

141. He submits that disclosure of the Draft Report will assist in the understanding of the policy making process. Without it, there is nothing to inform as to how the wide terms of reference set in a single sentence in the March 2005 Budget Speech emerged 21 months later in the form of a substantial published Study. He submits that the June 2006 Draft Report would give insight into the developmental process by, for example, illustrating how the report was shaped, drawing strands together, working out where gaps were, seeing further evidence being added or road tested before the final version was published.

142. The witnesses each regarded the Draft Report as amounting to little more than a "snapshot" of the thinking of the team at that time and the Appellant submits that its disclosure would not significantly add to the public knowledge of how work such as this is progressed.

143. The Commissioner prefers the term "milestone" as opposed to "snapshot". He submits that it was not as though someone came into the office and requested everything on the Eddington Study which was then gathered together in a haphazard way. This was the point at which everything was drawn together and was an opportunity for ministers to see the preliminary findings and proposals.

144. We see no practical distinction between the terms in the circumstances of this case. The Draft Report shows nothing more about the "journey" from the announcement in the Budget Speech to the publication of the Study than that the emerging findings and the supporting evidence for them were presented at that time and in that form to Ministers. It does not provide any additional insight into all the work underpinning the report or into the policy-making process, and in particular the working relationship between the independent expert and the commissioning Ministers encapsulated by the term "reciprocal communication". It would not reassure as to the thoroughness and appropriateness of the work undertaken. In our opinion while there is a public interest in understanding the process of how a Study such as

this is reached, this would not be met by disclosure of the Draft Report. We think that in this case the Department sought to extend public understanding through the publication of the research papers that accompanied the Study.

145. Disclosure of the Draft Report would do no more than inform the public that it was produced by Sir Rod and his team and showed Ministers what the position was in the summer of 2006, 6 months prior to the Study being published.

No improper pressure put on Sir Rod

146. The Commissioner submits that disclosure of the Draft Report would be evidence that no improper pressure was put on Sir Rod.

147. This issue was raised in evidence, but was also referred to in the request for an internal review. Although the motive of the Requester is not relevant to our considerations, we consider that we are entitled to look at what purposes would be achieved by disclosure.

148. If there had been evidence of some improper pressure on Sir Rod, or if such an inference could properly be drawn, that would in our opinion have been an important, if not overwhelming, factor favouring disclosure, but there is none.

149. We do not consider that the reverse is the case; the fact that disclosure of the Draft Report might have silenced critics by disproving any suggestion of improper pressure does not automatically amount to a factor in favour of disclosure. There are other, more appropriate ways, of answering allegations, as Sir Rod had done, than disclosing a document that might otherwise not be subject to disclosure.

Helping public understand the process by which the Study was reached.

150. As stated above, the Commissioner submits that publication of the Draft Report will considerably assist in public understanding of the process between the single sentence terms of reference given in the

Budget Speech and the publication of the Study. In particular it would assist the public in understanding the "reciprocal communication" process.

151. Sir Rod told us that his concern was not about disclosure of the fact that his preliminary findings had been shared with ministers, which he concedes is an important part of the process, but that disclosure of an incomplete draft may mislead.

152. The Appellant submits that, in fact, even close scrutiny of the Draft Report would not give any insight into the interaction with ministers other than confirming that Sir Rod and his team showed the commissioning Ministers what their position was in the summer of 2006, six months prior to the Study being published.

153. Again, we consider that there are more effective ways to inform the public than disclosing this draft. Disclosure of the draft would not provide any additional insight into the process that is not apparent from the Study itself (for example by references to research papers, and the role played by the Academic Friends) other than to show that a draft was prepared and circulated to Ministers in the summer of 2006. It is to be expected that preliminary drafts and other working papers would be prepared when undertaking a Study of this size; disclosure of this Draft Report would not add anything to the understanding of the process, it would not explain the relationship between an independent external advisor and government or explain where it sits in the process of a development study.

154. The Commissioner submits that disclosure would demonstrate what is meant in practice by the term "reciprocal communication" between Sir Rod and Ministers. We disagree with that submission. There is no evidence of any reciprocal communication and our attention was not drawn to anything within the Study, which, if read with the draft, would provide this demonstration. Again we consider that disclosure of the draft would not show much more than the author of

the Study submitted his preliminary findings to Ministers so that, inter alia, they could comment on them if they wished.

Where does the balance lie?

155. Having examined each in turn, we do not consider that the factors favouring disclosure carry any great weight when applied to the Draft Report at the relevant time. The arguments put forward in relation to these factors are served by disclosure of the "Executive Summary", the Study, the published research, stakeholder consultations, and the debates in public.

156. The presumption under the EIR is in favour of disclosure. Information must be disclosed unless it falls into one or more of the exceptions **and** if the public interest in maintaining that exception outweighs the public interest in disclosure.

157. Therefore, even though we consider that the factors favouring disclosure do not carry any significant weight in this case, the information must be disclosed unless we consider that the factors in favour of maintaining the exception are greater.

158. In assessing the factors in favour of maintaining the exception, we found only one factor to carry any weight at the relevant time, that is, the distraction of the debate.

159. We consider that disclosure would not just have distracted the debate but would have had a detrimental effect on the debate, contrary to the public interest. We are satisfied that given the importance of the issues raised in the Study the diversion of attention to any differences between the Draft and the Study is a significant factor.

160. In assessing the public interest, we therefore have concluded that, at the relevant time, the public interest in maintaining the exceptions outweighed the public interest in favour of disclosure.

Conclusion and remedy

161. We consider that the original request and complaint to the Commissioner should have been dealt with under the EIR and not FOIA.

162. For the reasons set out above, we conclude that the Commissioner was wrong to decide that the exception contained in Regulation 12(4) (d) was not engaged. Having concluded that it was engaged, we have considered the application of the public interest test and conclude that, at the relevant time, the public interest in maintaining the exception outweighed the public interest in disclosure.

163. Our decision about Regulation 12(4) (d) was a difficult one for us as it amounted to question of statutory interpretation and we were invited to come to very different conclusions by able and experienced counsel. If we are wrong in reaching the conclusion we do regarding the applicability of Regulation 12(4) (d), our overall decision would not be affected in light of our decision regarding Regulation 12(4) (e).

164. We also conclude that the Commissioner was wrong to decide that the exception contained in Regulation 12(4) (e) was not engaged. Having decided that it was engaged, we have considered the application of the public interest test and conclude that, at the relevant time, the public interest in maintaining the exception outweighed the public interest in disclosure.

165. We therefore conclude that the Commissioner was wrong to decide that neither exception was engaged. As both exceptions are engaged and we conclude that the public interest in maintaining the exceptions at the relevant time outweighed the public interest in disclosure, the Appellant is not obliged to disclose the Draft Report to the Requestor.

166. However, it is incumbent on us to record that it is apparent from our reasoning that the public interest considerations were not

overwhelmingly in favour of maintaining the exceptions and the "tipping" factor, that disclosure at a time when the Study had been published very recently would have distracted from the debate of the real issues, would not necessarily be such an important, or indeed even a relevant factor, with the passage of time.

167. Our decision is unanimous.

Signed:

Annabel Pilling

Deputy Chairman

Date 5 May 2009