First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2020/0231 (V)

Heard remotely by CVP
On 26 April 2021 and 15 June 2021
Panel Deliberations on 7 July 2021
Representation:
Appellant: Tom Tabori (Counsel)
First Respondent: Ben Mitchell (Counsel)
Second Respondent: John Goss (Counsel)

Before

JUDGE BUCKLEY
AIMÉE GASSTON
JOHN RANDALL

Between

COMMITTEE ON CLIMATE CHANGE

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

ANDREW MONTFORD

Second Respondent

MODE OF HEARING

This hearing was held by CVP (remote video hearing) which has been consented to by the parties. The form of remote hearing was 'V'. A face to face hearing was not held because it was not practicable, and all the issues could be determined in a remote hearing.

DECISION

1. For the reasons set out below the Tribunal dismisses the appeal on the grounds that the public authority was not entitled to withhold the information under regulation 12(4)(b), 12(4)(d) or 12(4)(e) of the Environmental Information Regulations 2004 (EIR).

2. The public authority shall disclose the requested information within 35 days of the date of promulgation.

REASONS

Procedural background

1. By order dated 23 April 2021 the CCC were granted permission to amend their grounds of appeal to add ground 3, raising a further exception (regulation 12(4)(e) (internal communications).

Introduction

2. This is an appeal against decision notice FER0876099 of 24 June 2020 in which the Commissioner decided that the Committee on Climate Change ('the CCC') was not entitled to rely on regulation 12(4)(b) of the EIR to refuse the request.

The CCC, the Net Zero Report ('NZR') and the Sixth Carbon Budget ('SCB')

3. The following factual background is set out in the statement of Mike Hemsley, Team Leader for Carbon Budgets at the CCC:

> The Appellant
>
> 6. The CCC is an independent, statutory body established under the Climate Change Act 2008 ("the Act"). Its purpose is to advise the UK and devolved governments on emissions budgets and targets, and to report to Parliament on progress made in reducing greenhouse gas emissions and preparing for and adapting to the impacts of climate change.
>
> 7. As at October 2020, the CCC employed 36 staff spread over three teams: Mitigation, Adaptation and Corporate. The Mitigation team, which is responsible for preparing the NZR and Sixth Carbon Budget ("SCB") reports, has 23 staff members. This number includes four temporary members of staff employed in order to manage the significant additional work pressures of the NZR and SCB. The team has been operating at full capacity to deliver its statutory work programme, which includes the SCB.

8. In the course of its work on the NZR the CCC worked with expert analysts at the Department for Business, Energy, Innovation and Science ("BEIS") for quality assurance purposes. The CCC also received and took into account the advice of three expert Advisory Groups in preparing the report: the International Advisory Group (advising on the international context for climate action); the Costs and Benefits Advisory Group (assessing the CCC's methodology for estimating the costs and benefits of the UK's Net Zero target); and the UK Net-Zero Advisory Group (advising on the feasibility of a transition to Net Zero for the UK). The memberships of the Advisory Groups are published on page 3 of the NZR.

The Sixth Carbon Budget and the Net Zero Report

9. The NZR was produced at the request (by letter dated 15 October 2018) of the Governments of the UK, Scotland and Wales. The Governments requested an update to the CCC's advice on UK climate action given in October 2018, following the agreement concluded at the 21st Conference of the United Nations Framework Convention on Climate Change ("Paris Agreement"). In particular, advice was requested as to the appropriate target emissions reduction for 2050, pursuant to section 7 of the Act. In particular, the letter states: "This advice will inform consideration of the UK's long term targets, and should include options for the date by which the UK should achieve a) a net zero greenhouse gas target and/or b) a net zero carbon target in order to contribute to the global ambitions set out in the Paris Agreement, including whether now is the right time for the UK to set such a target."

10. Accordingly, the NZR advises on the levels of reductions in greenhouse gas emissions required for the UK to contribute proportionally to achieving the internationally agreed targets for limiting global warming. The report suggests how such emissions levels may be achieved and analyses the costs and benefits. In order to do this, the report divides the economy into nine sectors and considers each in turn. The report recommended the UK should aim for net-zero greenhouse gas emissions by 2050 (i.e. a 100% reduction on 1990 levels). The report indicated this target could be met at an annual resource cost of up to 1-2% of GDP in 2050 – the report did not estimate costs between now and 2050. The 2050 cost was the same cost as the previous expectation for an 80% reduction from 1990 levels, which also suggested costs between 2015 and 2035 would be 1-2% of GDP. Falling technology costs such as batteries and renewable electricity, has meant that the cost of meeting a 100% reduction target is the same cost as meeting the UK's previous 80% target, when we previously assessed it.

11. The UK Government accepted the CCC's advice in the NZR and amended the emissions target for 2050 by way of the Climate Change Act 2008 (2050 Target Amendment) Order 2019 (S.I. 2019/1056), articles. 1 and 2.

…

14. The Sixth Carbon Budget ("SCB") was published on 9 December 2020 pursuant to the CCC's statutory duty to set and publish advice on setting carbon budgets under section 34 of the Act.2 Carbon budgets are set regularly for successive periods of five years, and it is the CCC's duty to advise in each case. The SCB advises in relation to the UK's carbon budget for the years 2033-2037 inclusive and, as part of this, sets out a pathway that illustrates how emissions, energy use and energy production and costs would change for each year from today ("pathway analysis") towards meeting the UK's net zero emissions target in 2050.

15. The SCB, on which the CCC began work immediately following the publication of the NZR, is the first carbon budget advice to be prepared with a view to meeting the net zero target recommended by the NZR. Whilst the NZR produced a

"snapshot" as at 2050 of the emissions level required to meet the net-zero target and the resulting cost, the SCB calculates and presents findings as to required emissions levels and costs in respect of the years from 2020 up to and including 2050. Accordingly, whilst the principles, methodology and conclusion of the SCB's analysis are consistent with those of the NZR, the SCB benefits from a more detailed and precise pathways analysis and updated data, including for the year 2050. The SCB's conclusion is closely aligned to the NZR's: the latter finds the cost of net-zero in 2050 would be "1-2% of GDP", and the former that this cost will be "under 1%".

Request, response, decision notice and appeal

Background to the Request

4. This request follows a short series of correspondence between Mr. Montford and the CCC following the publication of the NZR.

5. On 13 June 2019 Mr. Montford wrote to the CCC:

> Your recent report on net zero gave the cost as 1-2% of GDP in 2050. I would like a copy of the underlying financial model for this figure so I can understand how it was derived.

6. The CCC signposted Mr. Montford to information in the report and technical report available online and Mr. Montford replied on 13 June 2019:

> I have seen these documents already, but I was looking for the actual calculations rather than a report on what the calculations say.
> e.g. you say the cost is 1.3% of 2050 GDP, but that is the sum of some resource costs divided by a GDP figure. What are those values? And what are the components of the resource cost sum?

7. The CCC signposted Mr. Montford to the advice report and further figures available in 'Net-Zero Exhibits' on the CCC website. Mr. Montford replied on 14 June 2019:

> This is still not really what I'm looking for. The spreadsheet exhibit 7.2 doesn't explain where (for example) – 2.4 billion pounds comes from. I have searched the Advice and the Technical reports for a figure of 2.4 and it is not mentioned anywhere. Where does it come from?

8. The CCC referred Mr. Montford to various sections of the advice report and individual sectors in the technical report. Mr. Montford replied on 14 June 2019:

> There seems to be some confusion here. I'm asking for *calculations*. Where is the *calculation* of the 2.4 billion figure? It's clearly not in the reports (Table 7.3 does not contain the figure 2.4!)

9. On 11 July 2019 the CCC provided a formal response to Mr. Montford's request for information (as made in the series of emails set out above) attaching the 'Net-Zero costs dataset' which, the CCC stated, 'includes the underlying

calculations which underpin the 2050 cost estimates of the scenarios in our *Net Zero* report'. Mr. Montford replied on 16 July 2019:

> Thanks for your recent response, which was very helpful in breaking the overall cost element into its components. However, it still doesn't help me understand how the figures have been derived. For example, in the explanatory notes to the spreadsheet, it says "The marginal abatement costs are estimated by adding up the capital and operating costs over the lifetime of the measure and subtracting the capital and operating costs of technologies and behaviours in a world without climate action, and spreading this difference in costs across the emissions savings over the lifetime of the measure."
> I would like to understand the values for the capital and operating costs and also the lifetimes in each component line of the database spreadsheet. Please could you send the further spreadsheets and/or papers to allow me to do this.

10. In a blog post entitled 'Making up the evidence?' Mr. Montford referred to the exchange with the CCC above and highlighted that the dataset still did not provide sufficient information for him to see and understand the calculations. He also stated that he had noticed 'a rather amusing feature of the spreadsheet' namely that the file properties of the 'Net-Zero costs dataset' showed that it had been created on 19 June 2019:

> According to this, this dataset was only created on 19 June, the very day that Tom had re-emerged to tell me that the CCC was 'working on ' a response. That's fully six weeks after the publication of the Net Zero report. It looks as if the dataset was prepared *just for me.* It's very kind of them, but what, then, had the CCC been using prior to the report's publication?

11. On 18 July 2109 Mr. Montford wrote to the CCC again:

> Just to clarify a little. It occurs to me that the Net Zero Dataset you sent in your response to my earlier FOI may have been an extract from a larger spreadsheet. If so, then I would like the whole of the spreadsheet, unaltered from its original state.

12. On 15 August 2019 the CCC provided a formal response to Mr. Montford's requests for information dated 16 and 18 July 2019. The CCC stated that much of the information could be found in its published reports. Further, it stated:

> In response to your specific request of 18 July – the Net Zero costs dataset is not an extract from a larger spreadsheet. It was compiled from a large number of models and spreadsheets covering the various sectors of the economy. For each sector, we consider the abatement measures for that sector/sub-sector (equivalent to those included in the Net Zero costs dataset) and build a summary of total emissions abatement and total costs. We then gather together the economy-wide emissions abatement and costs. We recently collated data in the Net Zero costs dataset to make it easier to visualise and understand final cost calculations.
>
> However, the data does not contain the information requested in your communication of 16 July (capital costs, operating costs and lifetimes of each component line in the Net Zero costs dataset). This information is obtained from multiple models. For example – 12 different spreadsheets feed into our assessment of the surface transport sector (1 for cars, vans and motorcycles which in turn has 5 models feed into it; 1 for HGVs which in turn has 3 models feed into it; 1 for buses and coaches; 1 for rail; 1 for urea and 1 for aircraft support vehicles). Similarly, multiple different information sources feed into each of the other sectors.

13. The CCC estimated that it would take more than 10 working days to extract and compile the information requested and refused the request under regulation 12(4)(b) EIR. The CCC set out its conclusions on the public interest balance. The CCC indicated that if Mr. Montford were able to narrow down his request they would be more able to assist.

14. Mr. Montford replied on 23 August 2019 with the request that is the subject of this appeal.

The Request

15. This appeal concerns the following request made by Mr. Montford to the CCC on 23 August 2019:

> Please could you send:
> (a) the 12 spreadsheets you describe for the road transport sector.
> (b) The equivalent spreadsheets for the power sector and the housing sector.
>
> To be clear, I do not require any information to be extracted. I'd like the spreadsheets "as is". This should therefore only take a few minutes of your time.

Response

16. The CCC replied by on 23 September 2019. It refused the request on the basis of regulation 12(4)(d) (material in the course of completion) and 12(4)(b) (cost of compliance).

17. In relation to regulation 12(4)(d) the CCC stated that the request related to working spreadsheets and models which they were currently using to develop their advice on the sixth carbon budget due in 2020.

18. In relation to regulation 12(4)(b) the CCC stated that separating out the elements of the spreadsheet that relate to the ongoing sixth carbon budget work would represent a significant burden on CCC time. Additionally detailed guidance would have to be produced for the spreadsheets to usefully inform public debate rather than mislead or cause confusion, resulting in an unreasonable diversion of resources. The CCC is a small organisation of around 30 staff and this would put the delivery of its core service at risk.

19. Finally the CCC stated that the public interest balance favoured maintaining the exception. Releasing spreadsheets which include material in the course of completion would cause confusion and distract public debate. The substantial amount of related information already made available on the amount of CCC staff time and resource dedicated to Mr Montford's recent requests strengthens the public interest in refusing the request.

20. Mr. Montford requested an internal review on 24 September 2019 on the basis that (1) the material was not in the course of completion because the calculations have been completed and the results published and (2) a request for a handful of spreadsheets is not unreasonable.

21. The CCC upheld its decision on 23 October 2019. It stated that the relevant exception was reg 12(4)(b), because the request was for completed calculations which fed into estimates published by the CCC in its net zero advice to the Government. The CCC stated that:

> The requested information is held in spreadsheets which were and are being used to develop advice on the sixth carbon budget, due in 2020, and so also contain data relating to the development of that advice. The issue, therefore, is the resource costs – subject also to the public interest test – to isolate the data as it relates to the requested calculations.
>
> Having reviewed the significant number of spreadsheets containing the data, which themselves contain many separate tabs – I find that separating out the required information would represent a significant burden on CCC resources. I agree that the public interest test justifies the need to separate out the net zero related information, rather than providing the spreadsheets as they stand, and that maintaining the exception outweighs the public interest in disclosure.

22. Mr. Montford referred the matter to the Commissioner.

Decision Notice

23. In her decision notice dated 24 June 2020 the Commissioner decided that the information requested was environmental and fell to be considered under the EIR. The Commissioner noted that Mr. Montford was requesting a number of spreadsheets in their entirety. The evidence provided by the CCC in relation to 12(4)(b) related only to the time it would take to extract and compile information from the spreadsheets. The Commissioner found that the evidence did not support the view that disclosing the spreadsheets in their entirety would be manifestly unreasonable in terms of time and of the diversion of staff away from the CCC's functions.

24. Accordingly, the Commissioner was not persuaded that the CCC had demonstrated that disclosing the requested information would take such a lengthy amount of time, or create such a burden, as for the requests to be considered manifestly unreasonable. She concluded that regulation 12(4)(b) was not engaged. The Commissioner ordered the CCC to make a fresh response which did not rely on regulation 12(4)(b).

Notice of Appeal

Amended Grounds of Appeal

25. The CCC's notice of appeal dated 22 July 2020 appealed against the Commissioner's decision notice on the following grounds (ground 3 being added in amended grounds of appeal dated 4 March 2021):

25.1. Regulation 12(4)(d) (unfinished documents or incomplete data) entitles the CCC to refuse to disclose the requested spreadsheets. This exception was not relied on from the point of the internal review or in response to the Commissioner.
25.2. Regulation 12(4)(b) (manifestly unreasonable) entitles the CCC to refuse to disclose the requested spreadsheets. This exception was relied on when refusing the request and in response to the Commissioner.
25.3. Regulation 12(4)(e) (internal communications) entitles the CCC to refuse to disclose the spreadsheets. This exception was not relied on when refusing the request or in response to the Commissioner.

Ground 1 – regulation 12(4)(d) (unfinished documents or incomplete data)

26. The spreadsheets used to calculate the costs of implementing Net-Zero are live documents. They are being used and updated on a daily basis by analysts to produce advice to UK government on the Sixth Carbon Budget due to be published in December 2020. Whilst the spreadsheets include the data used to calculate the costs of implementing a Net-Zero target, they also include updated data relevant to the unpublished SCB advice. The exception is accordingly engaged.

27. The public interest in maintaining the exception outweighs the public interest in disclosing the information. Disclosure would give a misleading or inaccurate impression. It would be difficult or require a disproportionate effort to correct this impression or provide an explanation.

28. The data as it stood at the date of the NZR is held in working documents which are continually updated and server back ups are held for six weeks. Restoring an informational picture and then conducting the task of explaining would take 25-30 hours.

29. Following disclosure it is highly likely that the CCC would have to answer a large volume of queries to the point where it would hinder the CCC from completing the work of which the unfinished information is a part, with the publication date for the Carbon budget already deferred to December 2020 due to dealing with Mr. Montford's request.

30. Disclosure would shift debate from the substantive environmental issue to perceived deficiencies in the information or the differences between a draft and a final version. There is a real risk that public debate would be distracted and therefore seriously impact on the public authority's resources.

31. The CCC has already published extensive information showing the analysis giving rise to the Net Zero Report and disclosure does not substantially contribute to the public debate.

32. The CCC is close to publishing its next carbon budget which will revise the estimates and analysis in the Net Zero Report. The December 2020 version of the CCC's spreadsheets was approaching and would be disclosable. In the light of Mr. Montford's requests the spreadsheets will be finalised in such a way that they may be intelligible to interested persons.

Ground 2 – regulation 12(4)(b) (manifestly unreasonable)

33. The time taken to produce accompanying guidance presupposes a resource, cost and time burden and therefore relates to the application of reg 12(4)(b).

34. The Commissioner was wrong to conclude at para 35 that the evidence provided by the CCC only related to the time it would take to extract and compile data.

35. The CCC also provided evidence on the cost burden of producing guidance on the raw data: "*Producing this guidance for over 50 different spreadsheets, and splitting out the relevant information, would be extremely time-consuming. We would expect this task to take at least the same amount of time as extracting and compiling the relevant information (i.e. at least working 10 days, around 70-80 hours)*".

36. The Commissioner either overlooked evidence on the time it would take or refused to accept, without reasons, the evidence that accompanying guidance was necessary or that extraction and compilation was necessary.

37. There is no reference within the Decision Notice to the sampling exercises conducted and presented by the CCC.

38. The tribunal is invited to reach a different conclusion on the following basis:

Engagement

38.1. A single request can be manifestly unreasonable and the CCC does not allege that Mr. Montford's intentions were vexatious.
38.2. The burden of complying with the request would be great but the enlargement of materially relevant information minor, because extensive information is already available.
38.3. The CCC is a small organisation with 20 analysts working in this area and 36 staff in total.
38.4. It would not be possible to divert this level of resource without compromising the CCC's agreed work programme and ability to meet its statutory duties.

38.5. The CCC has provided carefully worked up time estimates based on sampling exercises.
38.6. The spreadsheets include a wide range of internal communications, exempt from disclosure under reg 12(4)(e).
38.7. Guidance would need to be produced to avoid the strong likelihood of misinterpretation. This is estimated to take at least 10-11 working days.

Public interest

38.8. The public interest in disclosure is lessened in this case because of the limited extent to which the content of the information will actually inform public debate because of the extent of publication and disclosure already made on the same subjects.
38.9. The general public interest in 'accountability for spending public money, the number of people affected and any reasonable suspicion of wrongdoing' (ICO guidance at 37) are not relevant to the spreadsheets.
38.10. The CCC is committed to change the format for similar spreadsheets in future to make it easier to disclose its calculations. Information requested by Mr. Montford will be published alongside the calculations used for the Sixth Carbon Budget advice in December 2020.

Ground 3 – regulation 12(4)(e) (internal communications)

Engagement

39. The spreadsheets are internal communications because they are saved on shared drives easily accessible to other analysts and several analysts are likely to have had input into them, to enable assumptions and workings to be checked as the modelling is developed.

Public Interest

40. The need for a safe space should carry significant weight in this case. Following the publication of the Net Zero Report, a space was still needed to state properly and explain its key points to the government. Following substantial engagement with the government the Net Zero target was enacted in legislation on 27 June 2019. The engagement continued in the following months. The post-publication quality assurance process reflects this post-publication, continued internal deliberation.

41. The weight of interest in disclosure is slight as disclosure will not significantly inform public debate because the spreadsheets are inscrutable or actively misleading and great detail has already been published.

The ICO's response dated 16 September 2020

42. In summary, the Commissioner submits that CCC has not provided sufficient information or explanation to justify either of the exceptions upon which it seeks to rely.

43. In relation to reg 12(4)(d) the CCC's arguments would at most enable it to withhold part of the information at issue. There is no conceivable basis on which this exception could enable it to withhold all the information.

44. In relation to reg 12(4)(b) the Commissioner does not consider it necessary to provide an explanation of the data or sufficient to render the request manifestly unreasonable. If it were necessary it would not be sufficient to override the presumption in favour of disclosure.

Material in the course of completion (regulation 12(4)(d))

45. The CCC will need to provide copies or samples of the requested information and explain on the basis of this why it considers the exception is engaged.

46. To the extent that the information was used in the Net Zero Report it was necessarily complete at that time and for that purpose. The exception may be applicable to further information in the same spreadsheets that was not used in the Net Zero Report and is incomplete.

47. The Commissioner accepts that the public interest is partly satisfied by the volume of related information already put and to be put in the public domain. The Commissioner recognises that the danger of misleading the public with incomplete information is a matter affecting the public interest, but it is not possible without seeing copies of the information and accompanying arguments from the CCC to assess the degree to which this is a realistic risk.

48. Weighing against this is the clear public interest in information relating to climate change being in the public domain. The CCC has not provided sufficient information to establish that the public interest favours withholding the information.

49. The Commissioner notes that the CCC should have preserved a version of the spreadsheets used for the Net Zero Report on the date of the request, and should not have continually overwritten the spreadsheets since then.

Manifestly unreasonable request (regulation 12(4)(b))

50. The request is for the spreadsheets not for particular pieces of data within them. It would not be a time consuming exercise to identity the relevant spreadsheets and send them to Mr. Montford.

51. There are only two matters in which there are potential for time to be spent: providing context and explanation and removing incomplete information relating to the SCB.

52. The spreadsheets are raw data and it does not follow that any explanation beyond setting out that it is raw data would be necessary when disclosing such data.

53. For the CCC to rely on the existence of further information coved by regulation 12(4)(d) that was not used in the Net Zero report to withhold the entirety of the spreadsheets, it would need to demonstrate:

    (1) that the exception was engaged in relation that information;
    (2) that the public interest test favours withholding that information;
    (3) that the time and resources required to remove or redact this information would be manifestly unreasonable such that regulation 12(4)(b) would be engaged in respect of the entirety of the information;
    (4) and that the public interest favours withholding all the information in the light of the time and resources it would take to redact or remove the incomplete further information.

54. If the CCC were to establish (1) and (2) but not (3) and (4) then it should disclose the spreadsheets but would be entitled to remove or redact the further incomplete information.

Mr. Montford's response dated 15 October 2020

Ground 1: Regulation 12(4)(d) – incomplete data

Engagement

55. Regulation 12(4)(d) concerns the state of completion of the data, not the task for which the data is being compiled. The fact that the data is being used and updated on a daily basis by analysts to produce advice to the government on the Sixth Carbon Budget does not indicate that the exception is engaged. It may be subject to change as in any 'live document' but is not unfinished or incomplete.

56. At its highest the CCC's argument may be that there is other data in the spreadsheet which is incomplete, but this does not affect the status of the information which Mr. Montford wants and which was used to calculate the 1-2% GDP figure.

Public interest

57. The CCC recommended the net zero emissions target because it was necessary, feasible and cost-effective. It was cost-effective on the basis that falls in the cost

of key technologies permit net-zero within the same costs that were accepted as the likely costs by Parliament in 2008 when it legislated the present 2050 target of 1-2% GDP. Mr. Montford wishes to examine CCC's calculations in order to understand if there are proper foundations for this statement.

58. The New Zealand Government has put the cost at 16% of GDP annually. There is an overwhelming public interest, on account of the enormous sums of money involved, in understanding the calculations which gave rise to the headline figure and why the CCC believes the project will be so much cheaper in the UK.

59. The public interest in increasing public awareness and understanding and the promotion of transparency weighs especially heavily in respect of an environmental matter of such consequence.

60. The CCC makes no arguments relying on a safe space for decision making or a chilling effect on the quality of advice.

61. Without seeing the data, there is no way of assessing the extent to which it would be misleading or distract public debate. It is of concern that the calculation of a figure as important of this would have the potential to be misleading.

62. The requested information is not a draft document.

63. The CCC questions the value of 'historical' spreadsheets. Where they have been used to justify a recommendation of substantial changes, there is a clear public interest in the basis for that recommendation being interrogated.

64. The information already in the public domain does not demonstrate the calculation of the 1-2% figure. With none of the mathematical formulae and only a limited subset of the input assumptions in the public domain, it is impossible to validate the figure.

Ground 2: Regulation 12(4)(b) – manifestly unreasonable

Engagement

Provision of Guidance

65. There is no request or requirement for the CCC to provide guidance to accompany the information. The right of access under EIR only applies to information held by the public authority. The CCC should not be permitted to take into account the time it would spend creating new information and preparing that new information for release.

66. It is very unlikely that the CCC does not hold a record of the way that the 1-2% figure was calculated other than in a spreadsheet which also now contains information relating to the Sixth Carbon Budget. It is incredible that the CCC does not hold a version of the spreadsheet as it was at the time of publication of the Net Zero Report. The Tribunal is invited to exercise its power to review the adequacy of the search for the information.

Separating the information

67. Mr. Montford questions whether the requested information is really only held in a spreadsheet which now also contained information relating to the SCB. If a version of the document which was used at the time of the publication of the Net Zero report can be recovered and released, all the CCC's arguments about separating out newly entered information fall away.

68. The time spent in removing any exempt information from the information to be released may not be taken into account when considering whether the request is manifestly unreasonable.

69. The Commissioner's guidance on Manifestly Unreasonable Requests is wrong at para 26 where it states that the cost of considering if information is exempt can be taken into account under regulation 12(4)(b):

    69.1. There is no authority for this proposition;
    69.2. It frustrates the operation of regulation 12(11);
    69.3. There can be no reasoned basis for reading across the cost limit from s 12 of the Freedom of Information Act 2000 (FOIA) and not the restrictions as to what may be counted in reaching that limit;
    69.4. It is inconsistent with Parliament's intention for a public authority's ability to hide behind reasons of cost to be greater under the EIR than under FOIA;
    69.5. The reason of principle for reading s 12 in this way applies equally to reg 12(4)(b). A public authority is not obliged to rely on an exception and should not be permitted to count the time spent considering other exceptions and applying redactions;
    69.6. Applying reg 12(4)(b) in a way that mirrors s 12 FOIA is likely to be the correct interpretation;
    69.7. A requestor has no control over how a public authority holds its information – it is the CCC's systems not the nature of the request that makes it complicated;
    69.8. A public authority should not benefit from the unreasonable act of not retaining a copy of the calculations used;
    69.9. The Implementation Guide comments that 'volume and complexity alone do not make a request 'manifestly unreasonable'. Accordingly it is inherently unlikely that time separating the information can be taken into account as a reason to defeat the request.

Public interest

70. The CCC may only rely on arguments relevant to the exception i.e. the public interest in the use of public funds and time of public servants. The amount of money which be spent in fulfilling the request pales in comparison to the purpose of the request which is to allow the public to understand how 1-2% of GDP is to be spent.

Presumption of disclosure

71. The presumption is sufficient in this case to defeat any claim that compliance is manifestly unreasonable, particularly because the arguments raised by the CCC are technical attempts to defeat the obligation to release the information and the only reason it is able to make those arguments is because it has chosen to hold the requested information in a live spreadsheet.

The CCC's reply dated 17 December 2020

Ground 1: 12(4)(d) Material which is still in the course of completion, unfinished documents or incomplete data

Applicability of the exception

72. The Commissioner submits that, irrespective of the spreadsheet's continued use for the SCB, to the extent that the information was used in the Net Zero report it was necessarily complete at that time and for that purpose. This does not take into account the further work done on the NZR spreadsheets after the publication of the NZR and their ongoing function in addition to their subsequent role in preparation for the SCB. Further it presumes the existence of a disclosable 'snapshot' which may not exist in many cases and cannot be recovered from servers despite concerted effort.

73. The data when published in a final report is final viz a viz that report, but the document from which the data was extracted is not thereby rendered 'final'.

74. The fact that there is further information in the same spreadsheets that was to be used in the SCB advice which is incomplete forms part of the reason why reg 12(4)(d) is engaged.

75. The spreadsheets are not finalised preliminary documents but more akin to incomplete drafts. The spreadsheet workbooks are 'thinking space' that should be protected by reg 12(4)(d). The prevalence of internal communications within the spreadsheets reflects this. The legislative purpose is to offer protection to unfinished documents as part of the process of protecting the 'thinking space'.

76. The CCC accepts that ref 12(4)(d) concerns the state of completion of the data not the task for which the data is being compiled. The CCC does not rely on the unfinished SCB 'task' but the unfinished material within the spreadsheets being worked on in preparation of the SCB.

77. In relation to the footnote to 19-011 of Coppell, regulation 12(9) concerns exceptions on which the CCC does not rely, and 'to the extent that' was part of the legislative language before the UT in **Manisty,** Coppell's source for the principles to which the footnote relates.

78. The CCC accepts that, in general, data that is being used or relied on is not incomplete, but the exception is not just about incomplete data, but also incomplete documents or materials. The Implementation Guide states that documents that are being actively worked on by the public authority and that will have more work done on it within some reasonable time frame are in the course of completion. A draft document is unfinished even if the final version has been produced. Even if there were identifiable spreadsheets saved to the point in time of the NZR's publication, their data would be complete viz a viz the NZR, but the spreadsheets would nonetheless be drafts.

79. The information requested was the whole spreadsheets for three of the nine sectors. That therefore spans the data which Mr Montford concedes may be incomplete. The exception includes information that merely relates to material that is in the course of completion.

Public interest

80. The CCC welcomes the Commissioner's statement that the public interest is partly satisfied by the volume of related information the CCC has already and will put in the public domain and that the danger of misleading the public with incomplete data is a matter affecting the public interest. The CCC accepts that weighing against this is the clear public interest in information relating to climate change being in the public domain.

81. The CCC hopes that the provision of copies of the spreadsheets along with the statements and schedules from two of its analysts will enable the Commissioner to assess the degree of risk of misleading the public.

82. Going forward the CCC will aim to preserve copies of spreadsheets for all major reports following receipt of a request.

83. Mr Montford's comparison with New Zealand is addressed by Mr Helmsley's statement at para 45.

84. The CCC agrees that in respect of an environmental matter of such consequence, the public interest in increasing public awareness and

understanding and the promotion of transparency and accountability must weigh especially heavily. That is why extensive disclosure has already been made and the CCC takes so seriously the danger of misleading information.

85. The CCC does rely on an equivalent to a 'safe space' argument. This principle underpins the protection for unfinished documents.

86. The spreadsheets were drafts in the way that a workbook where findings are set out before being arrayed in a report. The fact that a workbook is Excel and the final report is narrative does not lesson the continuum from draft to final. Thus even a snapshot of the spreadsheets at the date of the NZR would be constitute drafts and by definition be incomplete.

Ground 2: 12(4)(b) Manifestly unreasonable.

87. In relation to material not used in the NZR and which is incomplete, the CCC has now provided copies of the information and it shows that the reg 12(4)(d) exception is engaged. The public interest test favours withholding that unused material because its disclosure would show instances where, e.g., two separate approaches to calculating costs, one of which was not used, risking the public interpreting the unused calculations as having been the ones used in the NZR, leading to different conclusions and contradicting the published analysis.

88. The time and resources taken to locate, remove, redact or explain such information would be manifestly unreasonable such that the exception would be engaged in respect of the entirety of the information. In the light of the time and resources it would take, the public interest favours withholding all the information.

89. There are four 'mischiefs' identified within the spreadsheets tabulated in the CCC's evidence that risk misleading people into relying on the data inappropriately and misrepresenting the CCC's findings. The public interest does not support disclosure of information likely to mislead and damage, nor the CCC devoting resources trying to sift out unused material, material pertaining to the SCB not the NZR and internal communications.

90. Mr. Montford has confirmed that he seeks the historical items that are the spreadsheets as they existed at the time of the NZR, not solely their substantive findings and calculations which now stand finessed in the SCB. The value or serious purpose of the request is a relevant factor.

91. Forcing a thinly-resourced authority to devote those resources to restore the spreadsheets to the state in which they existed at the date of the NZR, whilst also necessarily locating and addressing the extensive dangerously misleading material, as well as that which would pre-empt the SCB and the internal communications, would be wholly inimical to the public interest.

92. If it would be manifestly unreasonable to disclose damagingly misleading information, then it cannot be impermissible to take into account the time that it would take to identify and prevent that damage. Disclosure without the mitigatory steps would strengthen the CCC's case on the manifest unreasonableness of disclosing it and therefore the CCC would not need to rely on the time and resources it would take to control these risks.

93. It is accepted that the cost of considering whether the material is exempt may not be taken in to account, but the time and cost of the process of restoring the spreadsheets to their state at the date of the NZR, plus identifying, clarifying the unused material and the complex interdependencies that are not signposted, and identifying and reacting the internal communications all fall within 'complying with the request'.

Legal framework

94. It is not disputed that the EIR is the appropriate regime, and accordingly we set out the legal framework only under the EIR.

Regulation 12

95. Regulation 12 EIR provides, insofar as relevant:

> (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-
> …
> (b) the request is manifestly unreasonable.
> …
> (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or
> (e) the request involves the disclosure of internal communications.

96. The following analysis is adopted, with only minor changes to the wording, from the Upper Tribunal decision in **Vesco v (1) Information Commissioner and (2) Government Legal Department [**2019] UKUT 247 (TCC)).

97. As the Court of Justice of the European Union ("CJEU") has said:

> The right to information means that the disclosure of information should be the general rule and that public authorities should be permitted to refuse a request for

> environmental information only in a few specific and clearly defined cases. The grounds for refusal should therefore be interpreted restrictively, in such a way that the public interest served by disclosure is weighed against the interest served by the refusal. **Office for Communications v Information Commissioner Case C-71/10** at paragraph 22.

98. This is why the EIR is deliberately different from the Freedom of Information Act 2000 ("FOIA") in that all exceptions are subject to a public interest test and there is a presumption in favour of disclosure.

99. The EIR do not contain an express obligation to interpret grounds for refusal in a restrictive way, but, given the obligation to interpret the EIR purposively in accordance with the Directive the overall result in practice ought to be the same: the grounds for refusal under the EIRs should be interpreted in a restrictive way taking into account for the particular case the public interest served by disclosure (**Vesco v (1) Information Commissioner and (2) Government Legal Department [**2019] UKUT 247 (TCC) at para 16).

100. This obligation to interpret the exceptions restrictively applies at the stage of determining whether or not the exception is engaged and is not simply reflected by the inclusion of a public interest balancing exercise in the EIR (see paras 29 and 30 of **Highways England Company Ltd v Information Commissioner v Manisty** [2019] AACR 17).

Regulation 12 (4)(b)

101. A three stage test applies, on the wording of Regulation 12:
1. Is the request manifestly unreasonable? (Regulation 12(1)(a))
2. If so, does the public interest in maintaining the exception outweigh the public interest in disclosing the information, in all the circumstances of the case? (Regulation 12(1)(b))
3. Does the presumption in favour of disclosure mean that the information should be disclosed? (Regulation 12(2))

102. Under the first stage we must decide if the request is manifestly unreasonable. Unlike under s 12 FOIA there is no 'cut off' once the appropriate cost limit has been exceeded. However, the Upper Tribunal in **Craven v Information Commissioner and Department for Energy and Climate Change** [2012] UKUT held that the costs of complying with "an extremely burdensome request" could be the basis for concluding that a request to which the EIR applied, or might apply, was manifestly unreasonable under that regime, (para. 25, approved of by the Court of Appeal in para 29 and 83 of the Court of Appeal's decision in **Craven/Dransfield v Information Commissioner** [2015] 1 WLR 5316.

103. Authorities on "vexatiousness" under Section 14 of FOIA may be of assistance at this stage, because the tests for vexatiousness and manifest

unreasonableness are similar (**Craven**). The hurdle of satisfying the test is a high one.

104. In considering manifest unreasonableness, it may be helpful to consider factors set out by the Upper Tribunal in **Dransfield v Information Commissioner and Devon County Council** [2012] UKUT 440 at paragraph 28. These are:
1) the burden (on the public authority and its staff), since one aim of the provision is to protect the resources of the public authority being squandered;
(2) the motive of the applicant - although no reason has to be given for the request, it has been found that motive may be relevant: for example a malicious motive may point to vexatiousness, but the absence of a malicious motive does not point to a request not being vexatious;
(3) the value or serious purpose of the request;
(4) the harassment or distress of staff.

105. This is not an exhaustive checklist, and other factors that may be relevant are previous requests (including number, subject matter, breadth and pattern), whether they were to the same or a different body, the time lapse since the previous requests, and whether matters may have changed during that time. If, after applying the first stage of the test, the conclusion is that the request is not manifestly unreasonable, then the information requested should be disclosed (assuming no other exemptions apply).

106. The Commissioner's guidance on manifestly unreasonable requests also highlights factors which we consider to be relevant:

> 19. In assessing whether the cost or burden of dealing with a request is "too great", public authorities will need to consider the proportionality of the burden or costs involved and decide whether they are clearly or obviously unreasonable.
> 20. This will mean taking into account all the circumstances of the case including:
> • the nature of the request and any wider value in the requested information being made publicly available;
> • the importance of any underlying issue to which the request relates, and the extent to which responding to the request would illuminate that issue;
> • the size of the public authority and the resources available to it, including the extent to which the public authority would be distracted from delivering other services; and
> • the context in which the request is made, which may include the burden of responding to other requests on the same subject from the same requester.
> 21. It should be noted that public authorities may be required to accept a greater burden in providing environmental information than other information.

107. If it has been established that a request falling under the EIRs is manifestly unreasonable within Regulation 12(4)(b), that of itself is not a basis for refusing the request. We must then go on to the second stage, and apply the public

interest test in Regulation 12(1)(b). Application of this test may result in an obligation to disclose, even if a request is manifestly unreasonable.

108. The starting point for the public interest test is the content of the information in question, and it is relevant to consider what specific harm might result from the disclosure (**Export Credits Guarantee Department v Friends of the Earth** [2008] EWHC 638 paragraphs 26-28). The public interest (or various interests) in disclosing and in withholding the information should be identified; these are "the values, policies and so on that give the public interests their significance" (**O'Hanlon v Information Commissioner** [2019] UKUT 34 at paragraph 15). "Which factors are relevant to determining what is in the public interest in any given case are usually wide and various", and will be informed by the statutory context (**Willow v Information Commissioner and the Ministry of Justice** [2018] AACR 7 paragraph 48)

109. The statutory context includes the backdrop of the Directive and Aarhus discussed above, and the policy behind recovery of environmental information. Once the public interests in disclosing and withholding the information have been identified, then a balancing exercise must be carried out. If the public interest in disclosing is stronger than the public interest in withholding the information, then the information should be disclosed.

110. If application of the first two stages has not resulted in disclosure, we must go on to consider the presumption in favour of disclosure under Regulation 12(2) of the EIRs. It was "common ground" in the case of *Export Credits Guarantee Department v Friends of the Earth* [2008] Env LR 40 at paragraph 24 that the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations.

Regulation 12(4)(d) – material in the course of completion, unfinished documents or incomplete data

111. In accordance with **Highways England Company Ltd v Information Commissioner v Manisty** [2019] AACR 17 the exception can be engaged if the information requested relates to material in the course of completion. It is not limited to circumstances where the information requested is in the course of completion.

112. At paragraph 31 the the Upper Tribunal states:

> 31. It is not engaged when a piece of work may fairly be said to be complete in itself. 'Piece of work' is a deliberately vague expression that can accommodate the various circumstances in which the exception has to be considered. In this case, I would loosely apply that description to the Stage 3 Report and work on it. The piece of work may form part of further work that is still in the course of preparation, but it does not itself require further development. One factor that may help in applying this approach in some cases is whether there has been a natural break in the private thinking that the public authority is undertaking. Is it moving from one

stage of a project to another? Another factor may be whether the authority is ready to go public about progress so far. The fact that the project, exercise or process is continuing may also be relevant, although this is probably always going to be a feature when a public authority is relying on this exception. Everything depends on the circumstances. That is why it would be inappropriate in a decision to provide a detailed critique of everything said in the Implementation Guide. Cases like those referred to in the Guide will have to be dealt with on their own terms when they arise.

113. Reg 12(11) provides:

> Nothing in these Regulations shall authorise a refusal to make available any environmental information contained in or otherwise held with other information which is withheld by virtue of these Regulations unless it is not reasonably capable of being separated from the other information for the purpose of making available that information.

114. Recital 17 of the Directive states:

> Public authorities should make environmental information available in part where it is possible to separate out any information falling within the scope of the exceptions from the rest of the information requested.

115. Article 4.4 of the Directive states

> Environmental information held by or for public authorities which has been requested by an applicant shall be made available in part where it is possible to separate out any information falling within the scope of paragraphs 1(d) and (e) or 2 from the rest of the information requested.

116. Article 4.6 of the Aarhus Convention states:

> if information exempted from disclosure under paragraphs 3(c) and 4 above can be separated out without prejudice to the confidentiality of the information exempted, public authorities make available the remainder of the environmental information that has been requested.

117. The Implementation Guide at p92 states:

> Once a public authority determines that certain information is confidential in accordance with one of the exceptions, this does not mean that the entire requested document may be refused. Under the Convention, public authorities must make the non-confidential portion of the information available. In practice, this usually means that a public authority marks out or deletes the information to be withheld.

Regulation 12(4)(e) – Internal Communications

118. We adopt the following principles from the ICO Guidance:

118.1. The concept of 'internal communications' is broad, but will be limited in practice by the public interest test;
118.2. A communication sent outside the public authority will not generally constitute internal communications;

118.3. Public interest arguments should be focussed on the public authority's thinking space.

The role of the Tribunal

119. The Tribunal's remit is governed by s.58 FOIA. This requires the Tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether she should have exercised it differently. The Tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Evidence

120. In the open sessions we heard evidence and read statements on behalf of the CCC from Mike Helmsley, Team Leader for Carbon Budgets and Ewa Kmietowicz, Team Leader for Transport and Land use mitigation. We heard evidence and read a statement from Mr Montford.

121. In a short closed session, during which neither Mr. Montford nor Mr. Goss were present, we heard evidence from Mike Hemsley who was questioned by Mr. Tabori and Mr. Mitchell. An agreed gist has been prepared and it is annexed to this decision.

122. We also took account of an open and a closed bundle of documents, and various supplementary documents which had been produced by the parties.

Issues

123. The agreed list of issues for us to determine are:

1. What is the correct interpretation of the request?

2. Did the CCC hold information within the scope of that request at the time it was made? Does the CCC currently hold that information?

3. Ground 1 (reg 12(4)(d)) a. Does the exception apply? b. If so, does the public interest in maintaining the exception outweigh the public interest in disclosing the information?

4. Ground 2 (reg 12(4)(b)) a. Was the Decision Notice not in accordance with the law? b. Does the exception apply? c. If so, does the public interest in maintaining the exception outweigh the public interest in disclosing the information?

5. Ground 3 (reg 12(4)(e)) a. Does the exception apply? b. If so, does the public interest in maintaining the exception outweigh the public interest in disclosing the information?

6. Does the cumulative weight of the public interest in maintaining the exceptions outweigh the public interest in disclosure?

Submissions

The CCC's submissions, including oral submissions and amended skeleton argument dated 22 April 2021

124. In summary the CCC's submissions are that the discretion exercised by the Commissioner should have been exercised differently because:
    124.1. There are just 5 spreadsheets where the CCC holds a version that is a snapshot of the spreadsheet as at the date of the NZR and containing the same figures that fed into it. Save for these, reg 12(4)(a) applies and the information is not held;
    124.2. In the alternative the 29 requested spreadsheets are held because a broader interpretation of the request as seeking a general understanding only should be adopted;
    124.3. The CCC is entitled to refuse the request under reg 12(1) on the grounds that:
    124.3.1. All but one of the spreadsheets contain unfinished material;
    124.3.2. Disclosure would be manifestly unreasonable;
    124.3.3. 20 of the spreadsheets constitute internal communications.

125. The CCC withdraws its appeal in relation to the spreadsheet entitled "Imperial College (2018) Heat decarbonisation modelling" because it was published on the CCC's website.

What is the correct interpretation of the request?

126. There are two possible interpretations of the request:
    126.1. The request sought disclosure of the spreadsheets in their original state at the point in time of the NZR ('the snapshot request');
    126.2. The request sought disclosure of the versions of each spreadsheet that, whilst not corresponding with the exact figures and calculations that fed into the NZR, most closely approximate the same ('the understanding request').

127. The CCC submits that the snapshot request is the correct interpretation because:
    127.1. It is supported on the face of the request which stipulates 'I'd like the spreadsheets "as is"';
    127.2. It is confirmed by the request on 18 July 2019 which asks for 'the whole of the spreadsheet, unaltered from its original state' and the request for

an internal review dated 24 September 2019 which states that 'the calculations have been completed and the results published';

127.3. The first requests were more for a general understanding but after receiving the dataset Mr. Montford set his sights away from the substantive information and on the spreadsheets themselves;

127.4. The terms of the request limit the duty to disclose;

127.5. The 'understanding request' can only be a request for the actual spreadsheets that underlie and fed into the NZR – a request for a general understanding would be satisfied by the information already publicly available. At that level of granularity the 29 spreadsheets identified as the closest match do not provide the understanding sought because the identifications are imperfect and fallible.

Did the CCC hold information withing the scope of the request at the time it was made? Does the CCC currently hold that information?

128. 5 of the 29 spreadsheets are 'snapshots'. It would take an estimated 49-95 hours to confirm whether further snapshots are held. Regulation 12(4)(a) applies to the 24 snapshots for which no snapshot it held. On the 'understanding interpretation' all 29 spreadsheets were held at the date of the refusal.

129. The reasons for the absence of 'snapshot' versions are only of relevance to the question of whether the information is held or not.

Is any of the withheld information covered by the exception in reg 12(4)(d)

Principles

130. Mr. Tabori set out 4 propositions on the correct approach to reg 12(4)(d).

131. First, the purpose being reg 12(4)(d) is to protect the necessary space to think in private (Commission proposal for the Directive).

132. Second, it is only 'material which is still in the course of completion' which is confined to information that is incomplete at the time of the request. Drafts are still 'unfinished documents' even if the final version of the document has been published and the draft is no longer 'in the course of completion'.

133. Third, the restrictive approach to the application of the exception applies only at the stage of the public interest test.

134. Fourth, even where only a portion of the requested information contains incomplete data, the rest 'relates to' it and therefore likewise engages the exception.

Is the exception engaged?

135. Reg 12(4)(d) is engaged in two ways:
135.1. The presence within the spreadsheets of draft and unused material.
135.2. The spreadsheets themselves constitute draft versions of the NZR and its accompaniments such as the costs dataset, itself a spreadsheet.

Draft and unused material

136. Ms Kmietowicz' evidence in para 12 of her second statement states that it is typical for spreadsheets to contain draft and unused material. Analysts do not automatically delete calculations or figures that may have originally been thought to be useful but do not form part of the final analysis. Draft calculations may also be present alongside the final calculation.

137. Furthermore, many of the spreadsheets contain models with parameters that it is possible to vary. Any figures or outputs relating to parameters that were not used for the NZR are therefore draft and unused. Mr. Hemsley addresses the issues in para 25(c) and in row 2 of closed exhibit MH2.

138. Column E of the exhibit to Ms Kmietowicz' second statement shows that this is a feature of all but one of the spreadsheets in the table. In all but two cases it occupies 1/3 – 2/3 of the spreadsheet.

139. Even if the spreadsheets were 'finished' viz a viz the NZR this does not mean that the draft, finished and unused material therein is also thereby finished. Some of the unused draft material was then used and developed in the post-NZR spreadsheets so it was also material 'in the course of completion' even if the NZR spreadsheets are held to be finished.

The spreadsheets themselves constitute draft versions of the NZR etc.

140. Each of the saved spreadsheets are drafts of the NZR and the attendant Technical Report and Costs Dataset spreadsheet and so fall within the scope of the exception for 'material still in the course of completion' and 'unfinished documents'. If a draft iteration of the NZR would straightforwardly be a draft version of the NZR, the even more anterior version of the content cannot be 'final'. The annotations and communications by analysts support this.

141. The spreadsheets are not raw data, they contain complex internal and inter-spreadsheet calculations which are part of the drafting process. The presence of draft and unused material supports this. The Commissioner's argument that the exception is engaged because the NZR is complete is no answer if they are draft documents.

The public interest balance in reg 12(4)(d)

142. The CCC relies on the following:

142.1. The extent of information already in the public domain
142.2. The information cannot substantially contribute to public debate. They are of limited utility in understanding the NZR and positively misleading. There is a real risk of distracting public debate.
142.3. Mr. Montford's blog post shows that he will publicise his incorrect readings.
142.4. A request could be made for specific figures underling a particular facet of the NZR.
142.5. It would be very difficult to place the information in context and for the CCC to counteract any confusion.
142.6. The SCB was in preparation at the time of the request and may have provided better answers.
142.7. Other outside bodies reached the same or similar conclusions.

Ground 2 – manifestly unreasonable request

143. The decision notice is not in accordance with the law because the Commissioner stated at para 35 and 38 that the evidence only covered the time taken to extract and compile the data which is incorrect.

144. The Commissioner wrongly discounted the time taken to provide reasonable clarification. This is relevant to the time it would take to deal with the request. Under reg 5(4) the information shall be up to date and accurate. Supplying a document containing out of date and inaccurate information is antithetical to this obligation. The Commissioner's guidance on reg 12(4)(d), which refers repeatedly to the role of putting information in context and providing explanation, should be read together with the guidance on manifestly unreasonable requests.

145. The substantive aim of the direction as set out in the first recital of greater awareness of environmental matters would be frustrated by the dissemination of misleading information.

146. Under regulation 6, public authorities should make environmental information available in the form requested by the applicant unless it is reasonable to make the information available in another form. This might include a form where misleading material is highlighted, so a reader recognises that a figure is not contradictory but simply a draft and unused alternative.

147. This is clearly part of compliance with the request. The cost of 'dealing with' the request is encompassed (see ICO guidance on 12(4)(b)), and so is the cost of considering if information is exempt. The Aarhus Implementation Guide points the same way.

*The first stage in **Vesco***

148. The value of the requested information being made public was minimal and it would not illuminate the issue.

149. The CCC calculated that it would take approximately 324 hours of staff time to

(i) identify then redact material subject to other exceptions whilst ensuring the remaining spreadsheets and workings remain coherent;
(ii) identify then highlight misleading material including quality assurance changes, material that would pre-empt the SCB, complex interdependencies and individual instances of draft and unused material.

150. The skeleton argument on behalf of Mr. Montford makes clear that he only wants the information that is final – the complete calculations contained in the spreadsheets. The CCC is required to make the information available in part under recital 18 and reg 12(11) where it is reasonably possible to separate out. There is no question that the time involved in doing so is relevant to the cost of complying.

151. It would take an estimated additional 49-95 hours to confirm the 'closest version' spreadsheets are those that fed into the NZR.

152. This far exceeds the s 12 FOIA threshold.

153. The CCC is a small organisation with just 20 analysts in this area. At the time of the request a number of staff were engaged on other projects. Answering the request would have diverted attention from core outputs.

The second stage in ***Vesco***

154. The issues in the first stage are relevant. On the facts of this request disclosure threatens to damage the quality of information in the public domain by skewing it with incomplete information from versions that do not correlate with the NZR and because of the draft, unused or changed content.

155. The inevitable claims of inconsistency will be damaging for the cause of greater public awareness and understanding of environmental matters, a free exchange of views and more effective public participation in environmental decision making and further resources of this small but crucial public body will be consumed counteracting the misled claims and potentially undermining the country's effort to reduce emissions.

The third stage in ***Vesco***

156. The presumption is rebutted by the particular nature of the CCC's work and the fact that work to solve the climate emergency is in line with the ultimate aim of the Directive.

Ground 3 – internal communications

157. Reg 12(4)(e) applies in relation to individual instances within the spreadsheets and in relation to the spreadsheets as a whole. The former is relied on under reg 12(4)(b) because it would have to be found and redacted and not as grounds justifying non-disclosure of the whole spreadsheets. As to the latter all but 9 of the spreadsheets should be held to be internal communications:

> 14. The concept of a communication is broad and will encompass any information someone intends to communicate to others, or even places on file (including saving it on an electronic filing system) where others may consult it." (ICO Guidance on reg 12(4)(e)

158. While the spreadsheets incorporate information obtained from external sources this does not deprive them of internal communication status. Only 9 of the 29 spreadsheets were shared outside the CCC or produced by third parties.

159. In respect to the public interest, in all the circumstances of the case, and for reasons advanced on Grounds 1 and 2, the CCC submits that the public interest in maintaining the clearly applicable reg 12(4)(e) exception outweighs the public interest in disclosing the information, and the presumption in favour of disclosure is rebutted.

Personal data

160. This too is not an exception providing grounds on which the disclosure might be refused in toto.

Aggregation of public interest factors

161. The CCC invites the tribunal to find that the cumulative weight of the exceptions engaged outweighs the interest in disclosure.

The Commissioner's submissions, including oral submissions and skeleton argument dated 17 February 2021

Summary

162. The 'snapshot request' is the correct interpretation. If this is correct very little is held *now* and as a proportionate regulator the Commissioner considers it would be disproportionate to order the remaining spreadsheets to be disclosed.

163. There is at least a reasonable argument that the information should be withheld on the manifestly unreasonable exception on the basis of the time it would have

taken to find the correct spreadsheets and the fact that the other exceptions are in play.

The interpretation of the request

164. Based on the way the correspondence evolved the Commissioner considers it reasonable to understand the request as a request for the spreadsheets as used in the NZR.

What information is held by the CCC – at the time of the request and now

165. The relevant legal question is what was held at the time of the request. The question of what is held now goes to whether the discretion to order disclosure should be exercised.

166. At the time of the request it is 'quite likely' that the CCC held all the information requested. Now it only holds 5 'snapshot' spreadsheets.

167. It would take several days of work to identify what was held and the Commissioner would make no order in relation to the outstanding spreadsheets on the grounds that it would not be proportionate to order those steps to be taken. The CCC should have saved the requested information at the date of the request.

Material in the course of completion – reg 12(4)(d)

168. The suggestion that the spreadsheets are drafts of the NZR cannot be right. The NZR refers to the spreadsheets as an authority.

169. The spreadsheets are not just repositories of raw data, they are models, analyses and calculations.

170. Ground 1 is misconceived to the extent that it relates to the information used in the NZR. The spreadsheets contained information that was used for a particular purpose which is now complete. The request was for that information. Whether the same information will be used for further purposes, and/or has since been updated is irrelevant.

171. Alternative versions of calculations not used in the NZR are *potentially* material in course of completion. The CCC has not identified every example but have, in effect, said that it could apply and it would need to take the time to consider if it applied. The CCC accepts that that time can be counted towards the burden under the manifestly unreasonable exception.

172. In relation to additional information for other projects such as the SCB, the Commissioner accepts that it *could* be within the scope of reg 12(4)(d) because

it may be incomplete. The CCC has not gone through the steps to identify if it is incomplete, but there is something to think about and therefore the time taken is relevant to the manifestly unreasonable exception.

173. Disclosure of the requested information would necessitate disclosure of the additional information as they are interwoven within the same documents. The alternative would be to redact it or withhold the entirety of the information.

Public interest

174. This necessitates consideration of whether it would be harmful to the public interest because of the risk of misleading the public or creating an inaccurate impression.

Ground 2 – manifestly unreasonable reg 12(4)(b)

175. There are three points at which the CCC could potentially spend time responding to the request:
    175.1. Difficulties identifying the correct spreadsheets;
    175.2. Providing context and explanation to accompany this information;
    175.3. Removing information to which the other exceptions apply.

Difficulties identifying the correct spreadsheets

176. The relevant questioned is whether it would have been difficult to identify the correct spreadsheets at the time of the request, shortly after publication of the NZR.

177. The estimates given in evidence are huge but the Commissioner is not satisfied that this would have been the case at the time of the request. The evidence was that there would have been some changes, but not wholesale changes.

Providing context and explanation

178. Even if desirable, this does not form part of the burden of responding to the request. The CCC could respond fully without providing explanations.

Removing information to which other exceptions apply

179. Regulation 12(11) indicates that a public authority cannot use an exception to withhold interwoven information to which the exception does not apply, but this is subject to a reasonableness limit. Reg 12(4)(b) serves an analogous function to two FOIA exemptions: s 14(1) (vexatiousness) and s 12 (cost of compliance). The formal limits on how FOIA divides consideration of different factors between two different exemptions is unimportant. Accordingly, reg 12(14)(b) is capable, in principle, of being engaged by the burden of separating the disclosable information from the excepted information.

180. The estimate is likely to be an overestimate. It includes information which the CCC is not entitled to redact.

181. Miss Kmietowicz estimated that it would take 324 hours. There is likely to be a reasonable amount of time to consider whether the exceptions apply, and, if necessary, to make redactions. Even assuming that this is a substantial overestimate looked at in the context of the FOIA limit of 18 hours, there is a reasonable argument that would make the request manifestly unreasonable.

Public interest balance – manifestly unreasonable

182. The time taken to explain is relevant to whether or not it would serve a public function. The spreadsheets are not garbled data but not crystal clear. The witnesses thought that someone would need some guidance through it, partly because it is inherently complicated, which does not weigh heavily against disclosure, and partly because the way it is laid out makes it difficult to follow which weighs against disclosure. Without explanation there is a hole in the public interest and this needs to be weighed in the balance.

Internal communications – reg 12(40(e)

183. The Commissioner accepts that the information the CCC identifies in the closed schedule as internal communications would engage re 12(4)(e). The spreadsheets themselves that were not shared externally could be internal communications. Based on the limited sample provided she would consider that the public interest favoured disclosure.

Personal data

184. The redaction of personal data for individuals below the equivalent rank of a senior civil servant ought to be redacted. The Commissioner does not consider this to be particularly burdensome.

Mr Montford's submissions including oral submissions and amended skeleton argument dated 7 April 2021

The importance of the appeal

185. Without disclosure of the information, there is no way for him and the wider public to interrogate the data and calculations underpinning the conclusions in the NZR. Mr. Montford believes that Net Zero is probably the most important public policy decision for decades. The CCC says the cost 'will rise to around 1-2% of GDP by 2050 which might put the cost at little more than £0.5 trillion. Mr. Montford's view is that the CCC's figure is extraordinarily low, and if higher estimates are correct then the project will be extremely damaging or disastrous, particularly for the poor.

186. If the CCC sidesteps submitting its calculations to public scrutiny on the basis that they are contained in spreadsheets which also contained information which was to be used in future work, this would be contrary to the fundamental purpose and principles of the Aarhus Convention, the Directive and the EIR.

187. The SCB does not include the same calculations and the appeal is concerned with the public interest at the date of refusal.

188. Although the CCC has disclosed other data it has not disclosed the raw data which would allow a person such as Mr. Montford to verify its calculations. The CCC has not enabled effective participation by the public in environmental decision-making as required by the Directive.

The interpretation of the request

189. The correspondence would have left the CCC in no doubt that Mr. Montford wanted whatever documents would enable him to understand the calculations in the NZR. The proper interpretation is the 'understanding request'.

Ground 1 – reg 12(4)(d) – incomplete data

190. The spreadsheets are 'data'. They are final viz a viz the NZR. The information cannot be categorised as 'incomplete data'. A draft of the written NZR may be an unfinished document but a spreadsheet is clearly data. They are not 'drafts' in the usual sense of the word.

191. If the CCC is right, a 'working document' would never be disclosable because it would never be completed.

192. The CCC's approach is contrary to article 17 of the recital to the Directive. It would allow an entire spreadsheet of data to be withheld where a single row remained 'work in progress'. Under reg 12(11) and recital 17 where possible material should be disaggregated.

Ground 2 – reg 12(4)(b) – manifestly unreasonable

193. The burden of producing guidance should not properly be taken into account. Where the burden arises out of unreasonable behaviour by the respondent it cannot be taken into account.

194. The cost of considering the application of an exemption, or of separating exempt information may not be taken into account.

195. Where there are two possible bases for calculating costs and where only one was used in the NZR, this would militate in favour of disclosure and not against it.

196. The request was made six weeks after the date of publication of the NZR. Given that the CCC says that it retains backups for six weeks, it is unlikely that all the data used in the NZR had already been overwritten at the date of publication of the report.

Ground 3 – reg 12(4)(e) – internal communications

197. Regulation 12(4)(e) is not engaged. The word communications is strained impossibly if applied to spreadsheets intended for publication in the CCC's reports. Mr. Montford wishes to understand the data which was taken into account. It is difficult to see how those figures could be communications. Comments on the face of the spreadsheet would not render the whole spreadsheet a communication. They contain internal communications rather than are internal communications. Redaction of any comments would be sufficient to withhold any internal communications from disclosure. The fact that more than one person has access to a spreadsheet on a shared drive does not render it a communication.

198. The CCC is relying on a 'safe space' argument. If the public interest does not disappear on publication it becomes very heavily diluted.

Public interest balance

199. The public interest should be looked at in relation to each exception because the public interest depends on the interests the specific exception is intended to protect.

200. This is about one of the most significant public policy decisions in our lifetime. Taking into account the likely costs and impact as set out in the NZR this weighs heavily in favour of disclosure.

201. Other material in the public domain is conclusions and assumptions rather than underlying calculations. It is inimical to the underlying purpose of the EIR to allow the CCC to withhold the information on the grounds that it is too complex and that the public will just have to take their word for it being correct.

202. Someone with appropriate training and understanding and the ability to address the calculations would be able to meaningfully derive useful information from it. Ms Kmietowicz said that assistance would be needed to, for example, identify where certain data came from which is not the most complicated aspect of what the analysis is likely to involve.

203. The assertion that there are other means to access the data is not borne out by the evidence.

204. The fact that the burden is to a large extent of the CCC's own making, should weigh very heavily in the scale.

205. Mr. Montford agrees that it is appropriate to consider the public interest in maintaining the engaged exceptions on a cumulative basis, but submits that:

205.1. This does not permit public interest considerations that are not relevant to the engaged exceptions to be taken into account;
205.2. If the exceptions substantially overlap there is unlikely to be any difference;
205.3. The fact that more than one exception is engaged is not in itself a public interest factor.

Discussion and conclusions

The scope of the request

206. **Manisty** deals with the scope of the request, in the context of reg 12(4)(d) at para 22 as follows:

> The exception is only engaged if there has been a request. That must mean a request for environmental information as defined in regulation 2(1). That is all that a public authority is required to make available under regulation 5(1). The request may ask for specific documents and the authority may comply with its duty by providing those documents, but it is strictly the information in the documents that is the subject of the request and the duty.

207. While it is true that the first emails were more focussed on a general understanding and that Mr. Montford then set his sights on the spreadsheets themselves, it is clear that he seeks these in order to enable him to understand how the 1-2% figure was derived.

208. For example, he states in his email dated 16 July 2019, '… it still does not help me understand how the figures have been derived…. I would like to understand values for the capital and operating costs and also the lifetimes in each component line of the database spreadsheet. Please could you send the further spreadsheets and/or papers to allow me to do this.'

209. His request focussed on the specific spreadsheets because the CCC tells him on 15 August 2019 that the information he requested in his communication of 16 July 2019 is 'obtained from multiple models. For example – 12 different spreadsheets feed into our assessment of the surface transport sector'.

210. The CCC refused to 'extract and compile' the information requested on the basis that it would take more than 10 working days. As a result, Mr. Montford

narrowed his request to ask for those 12 spreadsheets plus the equivalent for the power sector and the housing sector.

211. Looked at in the light of the previous correspondence it is clear that the phrase 'as is' is included so that the CCC know that they are not required to spend more than 10 days extracting and compiling the information and can simply send him the spreadsheets. It is not reasonable to interpret the request as limited to the exact version that existed at the date that the NZR was published, so that any slight amendments (i.e. updates or clarifications) made since that date would mean that the spreadsheets were not held at the date of the request.

212. We find that the 'understanding request' is the correct interpretation, but we note that it is a request for information not a request for a particular version of a document.

213. Looking at the request in the context of the series of correspondence set out in the introduction above, we find that, objectively construed, it is a request for the information contained in whatever versions of the spreadsheets were available at the time of the request that Mr. Montford could use to understand the cost estimate of 1-2% used in the Net Zero Report, provided those versions were fundamentally the same as those used for the Net Zero Report.

214. Although the request in this appeal asks for specific documents (the specified spreadsheets), and the CCC may comply with its duty by providing those documents, it is strictly the information in the documents that is the subject of the request and the duty. Because of the phrasing in the request ('I do not require any information to be extracted' and 'I'd like the spreadsheets "as is") we find that the request is for <u>all</u> the information contained in the spreadsheets, not just that information which would enable him to understand the NZR figures.

215. Accordingly, we find that at the date of the request the CCC held 29 spreadsheets falling within the scope of the request.

Material in the course of completion – reg 12(4)(d)

A restrictive approach

216. Mr. Tabori submitted that interpreting the exceptions restrictively is done via the public interest balance, and is not relevant to the question of whether or not an exception is engaged.

217. We disagree. In paragraphs 29 and 30 of **<u>Manisty</u>** the Upper Tribunal, whose decisions we are bound to follow, states quite clearly that the restrictive approach applies at the stage of determining whether or not an exception is

engaged, as opposed to where the balance of public interest lies. The Upper Tribunal stated:

> 30. The exception must, nevertheless, be applied restrictively. It must not be engaged so widely as to be incompatible with the restrictive approach required by EU law. But it must not be engaged so narrowly that it defeats its purpose of allowing public authorities to think in private.

218. In any event, our decision does not turn on this and adopting the approach suggested by Mr. Tabori would have made no difference to the outcome of our deliberations.

Is the exception engaged?

219. This is argued by the CCC on two alternative bases. First that the spreadsheets are 'drafts' of the NZR and its accompanying documents. Second the fact that the spreadsheets contain some information that falls within the exception means that the exception is engaged in relation to the whole of the spreadsheets.

Are the spreadsheets 'unfinished documents'?

220. Although the parties addressed us on whether the spreadsheets were 'drafts' the question is whether the spreadsheets are 'unfinished documents' or otherwise within ref 12(4)(d). The ICO guidance on reg 12(4)(d) states at para 10 that draft documents will engage the exception because a draft of a document is by its nature an unfinished form of a document. A draft version of a document is still an unfinished document, even if the final version of the document has been produced.

221. We reject the argument by the CCC that the spreadsheets are 'effectively' draft versions of the calculations and analysis finally published in report form and published dataset form. The spreadsheets are qualitatively different to the report and the datasets and to the draft iterations of those documents. They are not unfinished forms of those later documents.

222. The move from the spreadsheets to the report and the dataset is not equivalent to setting out, in narrative form, findings originally set out in an Excel workbook. The spreadsheets contain material that formed the basis of those later documents, they are not an earlier 'version', albeit in a different format, of that report or dataset. They are sources relied on by those later documents, not draft versions of those later documents. A draft version of a document is, by definition, 'unfinished' even if the related report is finished. A document which contributed to the preparation of a report, and so could be considered part of the drafting process is not, by definition, unfinished.

223. Further we do not accept that the spreadsheets as a whole can be classed as 'unfinished documents' simply because they are 'working documents' in the

sense that analysts might, after the publication of the NZR, work on some of the calculations for other purposes. We do not accept that material which was final viz a viz the NZR and then later worked on, for the SCB or otherwise, would have been 'still in the course of completion', 'unfinished documents' or 'incomplete data' at the date of the request.

If some of the request relates to material within reg 12(4)(d) does all of the request fall within 12(4)(d)?

224. Mr. Tabori relies on Coppell, *Information Rights Volume 1 – Commentary,* at 19-011:

> as with the internal communications exception whereas the unit of exception is usually 'information' to the extent that disclosure would adversely affect any of the identified matters, the unit of exception in relation to this exception appears to be all information covered by the terms of the request.

225. The footnote to this quotation states 'it is not clear whether the words 'to the extent that' and EIR reg 12(9) will be sufficient to displace this interpretation.'

226. We do not agree with the CCC that **Manisty** is Coppell's source for this. It is not cited by him as the authority for the proposition and we have not been referred to any paragraphs in **Manisty** which support this assertion. We do not understand Coppell's reference to reg 12(9), which does not apply to the 12(4)(d) exception, which is the section to which that part of commentary relates.

227. In any event in our view the use of the words 'to the extent that' do displace this interpretation. The natural meaning of the wording in the section is, in our view, that the information can only be withheld *to the extent that* the request relates to material in the course of completion. If the request includes some information that neither is nor relates to material in the course of completion and some information that is or relates to material in the course of completion we find that a public authority is only entitled to withhold the latter. There is nothing in **Manisty** which is inconsistent with this approach.

228. Further, under para 4.4 of the Directive there is an obligation to disclose the part of the information which does not fall within the scope of paragraph 1(d) (material in the course of completion) which is reflected in reg 12(11). Para 4.4 reads:

> Environmental information held by or for public authorities which has been requested by an applicant shall be made available in part where it is possible to separate out any information falling within the scope of paragraphs 1(d) and (e) or 2 from the rest of the information requested.

229. If it is right that the unit of exception is all information falling within the request, para 4.4 would make no sense and would have no effect. There would

no possibility of 'any information falling within the scope' of paragraph 1(d) and 'the rest of the information requested'. Accordingly, the scope of paragraph 1(d) and therefore the scope of reg 12(4)(d) cannot be all information falling within the request.

230. We do not accept that the whole of the request in this case 'relates to material in the course of completion' for the reasons set out below.

231. For completeness, we find that any part of the request which was for information which is not 'still in the course of completion', does not necessarily 'relate to' material which in still in the course of completion merely because other parts of the request relate to material still in the course of completion (for the reasons set out above) nor merely because the information covered in that part of the request is contained in the same document.

232. In any event, as we have concluded below that we are not satisfied that any of the request engages the exception, this has not affected our conclusions on reg 12(4)(d).

Does any of part of the request engage the exception?

233. The CCC argue that the spreadsheets contain 'draft and unused material'.

234. We do not accept that material falls within reg 12(4)(d) (it is still in the course of completion, an unfinished document or incomplete data) simply because it is 'unused'. We do not accept that where there are two separate approaches to to calculating costs set out in the spreadsheet, one of which was not ultimately adopted, the 'unused' method is incomplete or unfinished or in the course of completion.

235. The 'large segments of data' described in para 12 of Ms Kmietowicz' second statement that were not used in the final analysis would not therefore fall within the exception: they are not incomplete, unfinished or in the course of completion.

236. Nor do they relate to material that is incomplete, unfinished or in the course of completion. They relate to the NZR which was complete at the date of the request.

237. Even if the unused material was later used and developed in the post-NZR spreadsheets we do not accept that it this makes it material 'in the course of completion' at the date of the request. Ms Kmietowicz' evidence was that although there were likely to be 'some' changes between the publication of the NZR and the date of request, she agreed that this would be likely to be 'updates or clarifications'.

238. This is not sufficient for us to find that it was material 'in the course of completion' at the date of the request.

239. We do not accept that the fact that there are models with parameters that it is possible to vary means that any figures relating to parameters that were not used for the NZR are 'therefore draft and unused' nor that they fall within reg 12(4)(d). They may be unused, but we are not satisfied that they are either 'still in the course of completion', 'unfinished documents' or 'incomplete data', nor that they relate to such material: the NZR was published at the date of the request.

240. Ms Kmietowicz' second statement at para 12 states that 'draft calculations' 'may also be present' alongside the final calculations. To the extent that it means 'unused calculations' we find that it is not covered by reg 12(4)(d) – see above.

241. In theory 'draft calculations' might fall within reg 12(4)(d) depending on what is meant by a draft calculation. If it means that the calculation was, for example, incomplete or unfinished, it would fall within reg 12(4)(d). She does not refer to incomplete or unfinished calculations in her statements. The table attached to her statement does not identify any specific examples of any draft calculations (other than unused calculations) and the column is simply headed 'draft and unused material'. The closed exhibits do not identify any specific examples of 'draft calculations' other than unused calculations or models with parameters that it is possible to vary.

242. Although Ms. Kmietowicz stated in evidence that there was 'likely' to be both incomplete material and material that is finished but they decided not to use it, there are no examples highlighted in either closed or open evidence of incomplete rather than unused calculations. We are not persuaded that the exception is engaged on this basis.

243. As stated above, we do not accept that material which was final viz a viz the NZR (whether ultimately used or unused) and then later worked on, for the SCB or otherwise, would have been 'still in the course of completion', 'unfinished documents' or 'incomplete data' at the date of the request. For example, we do not accept that sample A in the closed schedule would fall within the scope of the exception.

244. We do not accept that there is likely to be in the spreadsheets any *additional* material at the date of the request which has not been part of the preparatory work for the NZR (the preparatory work would include material that was considered but ultimately unused) and which, at the date of the request, was being worked on for the purposes of the SCB. If there was, we accept that this would be or would relate to material in the course of completion. In para 14 of her second statement Ms Kmietovicz states that in the surface transport and

residential buildings sector no added SCB material is thought to be present. Further, she states that the analysis for the energy sector started from scratch for the SCB so no additional material is thought to be present in the NZR spreadsheets. On this basis we are not satisfied that there is any additional SCB material in the requested spreadsheets and the exception is not engaged on this basis.

245. Based on our conclusions above we find that reg 12(4)(d) is not engaged.

246. In case we are wrong to conclude that reg 12(4)(d) is not engaged, in particular in relation to the presence of 'draft and unused' material, we have gone on to consider the public interest balance.

Public interest balance under reg 12(4)(d)

The public interest in disclosure

247. We find that there is an extremely strong public interest in enabling scrutiny of the data, models and calculations which underpin the CCC's conclusion that the a net-zero target could be met at an annual resource cost of up to 1-2% of GDP to 2050 (see p 12 of the NZR).

248. This is a very significant sum of public money. It has an impact on everyone in the country. Further the NZR recommendations led to almost immediate legislative change to enact the net zero target which will have significant impact on almost every area of the lives of everyone in the United Kingdom over the next 30 years.

249. The evidence before shows that the comparison with the 17% figure in New Zealand is not apt. However, it is clear to the tribunal that any errors in the calculations that led to the CCC's conclusions, which, in turn, led to the legislative change, have the potential to have a very significant impact on the lives and finances of large numbers of people, on the spending of large sums of public money and on the policies of the UK government over the next 30 years.

250. We accept that the public interest in disclosure is partly satisfied by the volume of information which has and will be published by the CCC as set out in the CCC evidence. However, we find that the information in the public domain does not include all the underlying calculations and data.

251. This is clear from the letter from the CCC dated 15 August:

> …the data does not contain the information requested in your communication of 16 July (capital costs, operating costs and lifetimes of each component line in the Net Zero costs dataset). This information is obtained from multiple models. For example – 12 different spreadsheets feed into our assessment of the surface transport sector (1 for cars, vans and

motorcycles which in turn has 5 models feed into it; 1 for HGVs which in turn has 3 models feed into it; 1 for buses and coaches; 1 for rail; 1 for urea and 1 for aircraft support vehicles).

252. While a request could be made for the specific figures underlying a particular facet of the NZR this would not provide all the underlying figures to enable the overall conclusion re 1-2% of GDP to be scrutinised.

253. We accept that some of the information requested may have been more clearly set out in the SCB which was in preparation at the time of the request, and this, again, would partly satisfy the public interest in disclosure albeit that it would not be available until a later date. Again, according to Mr. Hemsley, not all the underlying data at the level of granularity contained in the spreadsheets will be provided in or with the SCB.

254. We take account of the fact that the spreadsheets were not designed to be made public or to be understood by the public. It is possible that they may present a misleading picture, in particular to those without the necessary expertise. This reduces the value of the information in informing public debate compared to, for example, a clearly set out explanation of the calculations used.

255. We accept that there is a risk that information already in the public domain might be 'skewed' by the release of information which does not necessarily correlate with the NZR. We accept that the presence of calculations that were not used in the NZR creates a danger of misleading the public in that it might contribute to misunderstanding and that there is a risk that public debate may be distracted.

256. However, we also find that this weighs in favour of disclosure: the fact that there was a choice between two calculations and that the alternative unused calculation is available is likely to contribute positively to public debate: whether or not an alternative calculation should have been adopted is a legitimate and valuable part of scrutiny.

257. We accept that the fact that the information is complex, and presented in a complex way, with multiple interdependencies, may reduce the public interest in disclosure. Ms Kmietowicz' evidence was that you would need particular skills and background to be able to understand it, primarily because of the subject matter - it is inherently a complex topic which needs complex models - rather than because of the way in which the spreadsheets are set out and labelled. She stated that someone with a PhD in economic modelling could understand it 'with help from someone who is familiar with it', who could 'answer any questions' and direct them where they need to look for certain information.

258. We accept that this makes it of very limited use to the average reader. This decreases its value in contributing to the public debate and decreases the public interest in disclosing the information. However, we find that someone with

expertise in this area would be able to interrogate the figures using the spreadsheets, albeit that they might benefit from assistance if they had questions or needed to find particular information. The fact that, without this assistance, there are likely to be figures that they cannot locate, or parts that they cannot understand, again, may decrease the public interest in disclosing the information.

259. Nevertheless, we find there is a very substantial public interest in disclosure of information that has the potential to facilitate expert, independent scrutiny of the conclusions reached by CCC on a matter of great significance to the public at large. Moreover, we note that the information in question comprises data on emissions.

260. We accept that there has been some independent scrutiny of the CCC's methodology and key assumptions, which reduces the public interest in disclosure. However, from Mr. Hemsley's evidence we conclude that there has been no independent scrutiny at this level of granularity – nobody apart from the analysts at the CCC has interrogated the spreadsheets.

261. The fact that the CCC has been unable, now, to locate the versions used in the NZR, and that therefore they may not correlate with the NZR for that reason also, is not relevant to the public interest balance. The evidence was that at the date of the request only minor changes ('updates or clarifications') would have been made and therefore we find it would have been possible to locate the correlating spreadsheets, albeit with minor changes, at the date of the request.

The public interest in maintaining the exception

262. We accept that there is a need for a 'safe space' for public bodies, particularly in relation to something as significant as NZR. At the date of the request the NZR had been published, the government had accepted its recommendations and legislation had already been passed amending the Climate Change Act 2008 to introduce a target of a 100% reduction. Although the need for a safe space does not disappear once a process is effectively complete, we find that the need for a safe space had substantially diminished once the NZR had been published and the legislation enacted. The CCC has not put forward a 'chilling effect' argument, and considering the nature of the information to which this exception is said to apply, it was right not to do so.

263. We accept that the 'draft and unused' material has the potential to create a misleading impression, because on the evidence, it is likely not to be clear even to an expert which models or assumptions or calculations were ultimately used and which were not. We accept that this risk carries significant weight in this particular case because the CCC's evidence highlighting the items that did not go in to the final report or other matters that carried the risk of incorrect conclusions being drawn would require a large amount of effort. Having said

this, we consider that some of the risk could be mitigated by a more general disclaimer along the lines that the spreadsheet contains content that did not ultimately feed into the NZR but which is not clearly distinguishable from the rest.

264. Further, if this work was not carried out, we accept that the CCC is likely to have to spend a significant amount of time dealing with queries about the spreadsheets. This is likely to distract the CCC's limited resources from other important work

Conclusion on the public interest

265. Even though we have recorded a number of matters that reduce the public interest in this case, and even though the risk of creating a misleading impression weighs heavily in the public interest balance, taking into account the extreme importance of this particular recommendation, and the lack of any other scrutiny at this level, we would have found that the public interest favoured disclosure.

Regulation 12(4)(e) – internal communications

266. Reg 12(4)(e) is said to apply in two ways: in relation to individual instances of internal communications and in relation to the spreadsheets as a whole.

Individual instances

267. Although the CCC states that this is relevant to reg 12(4)b), on the basis of the time taken to redact those comments, it is of course only entitled to redact the comments if it is entitled to withhold them under reg 12(4)(e).

268. The comments are described in row 5 of the closed schedule. We accept that these comments would amount to internal communications. They are clearly notes made to assist other analysts working on the spreadsheets and we find the exception is engaged.

269. We have not seen all the comments, but we have seen the ones highlighted in row 5. They are not sensitive in content. Most appear to be explanatory comments in relation to the accompanying data or calculations. Taking into account the nature of the comments, the particular public interest in disclosure of these particular comments is that they would, in our view, on most occasions enhance the understanding of spreadsheets. Many of the public interest arguments on disclosure of the spreadsheets as a whole, set out above and below, also apply here.

270. Any safe space argument will be limited by the fact that the NZR had been published and legislation enacted at the date of the request (see above). We accept that the comments might not have been used in the final report, and that misunderstandings might arise if the remarks were later superseded and not used in the NZR.

271. Taking into account all the above, we do not accept that the public interest in disclosure of these comments, as a subset of the arguments set out in more detail under regulation 12(4)(d), is outweighed by the public interest in withholding those comments.

Spreadsheets as a whole

272. Given the nature of the spreadsheets and the fact that they are saved centrally and worked on by different analysts we accept that all bar 9 would fall within the scope of the exception.

273. Any safe space argument will be limited by the fact that the NZR, at least, had been published at the date of the request. We find that the public interest in withholding the spreadsheets as a whole on the basis that they are internal communications is limited and outweighed by the public interest in disclosure set out in detail below.

Is the request manifestly unreasonable?

The burden on the CCC

Identifying the correct spreadsheets

274. The fact that the CCC might have to spend a significant amount of time, now, to locate the versions in existence at the date of the request is not relevant. The evidence was that at the date of the request only minor changes ('updates or clarifications') would have been made and therefore we find it would have been possible within a reasonable period of time to locate the correlating spreadsheets, albeit with minor changes, at the date of the request.

275. Further, as the request was 6 weeks after publication of the NZR and the CCC keeps back ups for 6 weeks, it should have been very straightforward to obtain an earlier version if necessary.

Providing explanation/highlighting misleading information etc.

276. We agree with the Commissioner that this does not form part of the burden to be considered in this case when determining if a request is manifestly unreasonable.

277. In our view, there is nothing in the regulations or the case law that would prevent a tribunal, in an appropriate case, from taking into account any particular factor if, in the judgment of the tribunal, it was part of the burden of complying with or dealing with a request. There is no equivalent to the s 12 FOIA list of matters that can be taken into account.

278. However, we find that the steps proposed by the CCC do not, in this case, form part of that burden.

279. In line with authority we have to take account of any relevant factors. The Upper Tribunal in **Vesco** gives the examples of the amount of time likely to be required to comply with a request, and any prejudice on the public body's other duties of complying with the request.

280. We find that taking the steps put forward by the CCC including for example, providing an explanation, or highlighting any misleading information, is not required to comply with the request. It would amount to compliance to simply provide the spreadsheets without explanation, particularly as the request in this case is explicitly for the spreadsheets 'as is'.

281. The Commissioner's guidance, cited with approval in this aspect in **Craven v Information Commissioner and DECC** [2021] UKUT 442 (AAC) at para 25, uses the wording 'dealing with a request".

282. In our view, not everything that the CCC simply chooses to do in dealing with the request would form part of the burden of dealing with the request. We consider however that it would be appropriate to take account of steps that the CCC could reasonably be expected to have to take in order to deal with the request when deciding the burden.

283. We do not think that the CCC could reasonably be expected to have to take the steps it puts forward when the request in this appeal specifically asks for the spreadsheets 'as is'. They may, for example, *choose* to offer an explanation, and to highlight any misleading information to reduce the risk of misleading information being made public, but we find that they are not steps that the CCC could reasonably be expected to have to take in order to deal with the request.

284. The Commissioner's guidance on reg 12(4)(d) refers on a number of occasions to the relevance to the public interest test under reg 12(4)(d) of arguments by the public authority that disclosure would be misleading or would distract public debate. The Commissioner's general position is that public authorities 'should usually be able to provide an explanation' or that it would 'generally be possible' to minimise distraction. We do not accept that this guidance on how the public interest balance applies in relation to 12(4)(d) means that taking

the steps proposed by the CCC is, in this case, part of the burden of dealing with the request.

285. We do not accept that reg 5(4), which provides that information 'shall be up to date, accurate and comparable, so far as the public authority reasonably believes' puts any obligation on the CCC to provide guidance or explanation, or to highlight misleading information.

286. Mr. Tabori's relied also on reg 6(1) on the form or format of a request. First, we do not accept that providing guidance and highlighting and explaining misleading information amounts to merely 'making the information available in another form'. Second, if making the information available in a form different to that requested was going to take so long that the request would be refused under reg 12(4)(b) we do not accept that it would be reasonable.

287. We have considered the other points made by Mr. Tabori on this issue and none of them persuade us that the steps proposed by the CCC form part of the burden of dealing with the request in this case.

Identifying and redacting exempt material

288. We accept in principle that identifying and redacting exempt material can be taken account of under regulation 12(4)(b). It is not the precise equivalent of s 12 FOIA, because it is also a reflection of s 14. We do not think it is appropriate to read across this limitation from FOIA.

289. We have found that the exceptions in reg 12(4)(d) and (e) are either not engaged, or that the public interest favours disclosure.

290. The Commissioner argues that alternative versions of calculations not used in the NZR are potentially material in the course of completion. The Commissioner submits that the CCC has not identified every example but has, in effect, said it could apply and it would need to take time to consider if it applied. The Commissioner accepts that that time can be counted towards the burden under the manifestly unreasonable exception.

291. As set out above, we do not accept that the CCC is entitled to redact alternative versions of calculations even if they are correct that this falls within reg 12(4)(d). Even if there were some incomplete calculations, in our view the public interest in disclosure would outweigh the public interest in maintaining the exception. We do not accept that checking through each line of each spreadsheet just in case any incomplete calculations are included in relation to which the public interest would fall differently is something the CCC could reasonably be expected to have to do in order to deal with the request.

292. Further, in relation to additional information for other projects such as the SCB, the Commissioner accepts that this *could* be within the scope of reg 12(4)(d) because it may be incomplete. The CCC has not gone through the steps to identify if it is incomplete, but there is something to think about and therefore the time taken is relevant to the manifestly unreasonable exception.

293. On the basis of Ms Kmietowicz' evidence as to the likelihood of the presence of additional SCB information in the requested spreadsheets, and in the light of the fact that the request was only 6 weeks after the NZR at which point only minor changes ('updates or clarifications') had been made to the spreadsheets, we do not accept that checking through each spreadsheet just in case any such information was included is something the CCC could reasonably be expected to have to do to in order deal with the request.

294. Although we have taken the view the CCC is not entitled to withhold the type of internal communications that we have seen, we accept that is *possible* that there might be internal communications in the spreadsheets which do, because of their specific content, engage the exception and which it is not in the public interest to disclose, but again, we do not accept that checking through each line of each spreadsheet just in case any such information was included is something the CCC could reasonably be expected to have to do to deal with the request.

295. Looked at as a whole, we do not accept that the CCC could reasonably be expected to spend hundreds of hours checking the spreadsheets line by line for potentially exempt information in order to deal with the request.

296. We accept that, at the time of the request, the CCC could reasonably have been expected to have to undertake a broad review of the spreadsheets to see if any of these exceptions potentially applied, in order to deal with the request. This is not a method to which the CCC's sampling exercises or estimates are directed, and therefore we have to take a broad brush approach, but we accept that the time required would be substantial.

297. We accept that the CCC is entitled to redact personal data, but we agree with the Commissioner that this is unlikely to be a substantial burden.

Dealing with queries

298. We accept that the sending out the spreadsheets at the time of the request without taking the steps proposed by the CCC would have been likely to lead to a certain volume of public queries. We expect this to be limited to some extent, on the basis of CCC's evidence, because only people with a certain degree of expertise would be able to identify where there needs to be clarification. However, we accept that for a small organisation answering these

queries would have created a burden which would to some extent have distracted them from other work.

299. We accept that this is part of the burden of dealing with the request. It is something the CCC could reasonably be expected to have to do in order to deal with the request.

Overall burden

300. We do not accept that the CCC needs to spend the time that it has included in the estimates dealing with the request. Overall, the matters that we find form part of dealing with the request will, we accept, place a burden on a small organisation and will have an impact on its ability to provide other important services. Further we accept that, overall, the number of hours that the CCC has to spend dealing with the request is likely to substantially exceed the limits set out in s 12 FOIA.

Other factors

301. We accept that Mr. Montford, has a genuine purpose behind the request, and there is no suggestion of any harassment or distress to staff. Although there is a short series of similar requests, this properly forms no part of the CCC's case on manifest unreasonableness.

302. We have considered the nature of the request and the wider value of the requested information being made publicly available, and the extent to which the request would illuminate the underlying issue. This is also considered in more detail above and below in the public interest balance and we have taken those factors into account.

303. We accept that the issues raised by Mr Montford are matters of important public debate. We accept that there is a very strong public interest in the disclosure of information which can inform that debate, and which can cast light on the decision making processes of the Government, in particular in areas which have an impact on the environment and are therefore governed by the presumption of disclosure.

304. We have considered the value of the information requested above, in relation to the public interest balance under reg 12(4)(d) and the points that we make there apply equally here.

305. We have considered the burden on the CCC particularly in the light of the resources available to it, and the extent to which it would be distracted from delivering other services. We have considered the importance of the underlying issue and all the factors set out under re 12(4)(d) above which affect the extent to which the information would illuminate that issue. Taking all this

into account, we conclude that the burden on the CCC of dealing with the request is not disproportionate to the value of the information once disclosed.

306. We find that the request is not manifestly unreasonable.

If so, does the public interest in maintaining the exception outweigh the public interest in disclosing the information, in all the circumstances of the case? (Regulation 12(1)(b))

307. We do not need to go on to consider the public interest. However, given the very significant burden on the CCC, a different tribunal might have reached a different view and we have therefore gone on to consider what our conclusion would have been if we had concluded that the request was manifestly unreasonable.

308. The public interest in maintaining the exception lies primarily in the matters set out above. In particular is not in the public interest for significant resources to be diverted from other public work to answer a manifestly unreasonable request.

309. In relation to the public interest in disclosure, we accept that the issues raised by Mr Montford are matters of extreme public importance. More detail on our reasoning in support of this is set out under reg 12(4)(d) above. We accept that there is an extremely strong public interest in the disclosure of information which can inform that debate, and which can cast light on the decision making processes of the Government, in particular in areas which have an impact on the environment and are therefore governed by the presumption of disclosure.

310. We have considered the value of the information requested above in relation to reg 12(4)(d) and the fact that there are limits to the extent to which the information can illuminate the public debate. Those points apply equally here.

311. Taking the presumption of disclosure into account, we have balanced the specific public interest in this particular information and the general public interest in disclosure against the impact on the CCC's resources.

312. We have taken account of the burden of responding, and the fact that it requires the CCC to spend in excess of the amount of time that Parliament deemed appropriate when responding to a request for information which was not environmental, no matter how high the public interest in disclosure.

313. On these particular facts and taking all the matters set out above into account we find that the public interest favours disclosure. Even though we have recorded a number of matters that reduce the public interest in this case, and even though the very significant impact on the CCC's resources weighs heavily in the public interest balance, our view, taking into account the extreme

importance of this particular recommendation, and the lack of any other scrutiny at this level, is that the public interest favours disclosure.

Cumulative consideration of exceptions

314. The only exception that we found to be engaged is reg 12(4)(e) (internal communications). This issue does not therefore arise. We have considered whether, if we had concluded that reg 12(4)(a) was engaged, the cumulative consideration of the exceptions would have made a difference to our conclusion. We have decided that it would not, because of the overlap between the exceptions and the very strong public interest in disclosure in this case.

Disposal

315. For those reasons we dismiss the appeal.

316. The Commissioner suggested that it might be appropriate to make no order for disclosure of the information on the basis that it was disproportionate for the CCC to spend the time required to locate the correct versions of the spreadsheets.

317. We have considered this approach but have determined that we should not exercise our discretion to order that no steps be taken. If there is a difficulty in identifying the right versions of the spreadsheets then it is because the CCC failed to save a version at the date of the request. Given the extremely high public interest in disclosure, we do not think it is right that the information should not be disclosed because of this failure.

318. Further, given our interpretation of the scope of the request, the request is not for a specific 'version' of the spreadsheets, it is for the information contained in those spreadsheets and we consider that the CCC would be complying with that request by disclosing the 'closest match' versions that they have already identified.

Signed Sophie Buckley

Judge of the First-tier Tribunal
Date of Decision: 3 August 2021