IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2011/0300
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:
The Information Commissioner's Decision Notice No: FS50359263
Dated: 21 November 2011

Appellants:	**THE CHAGOS REFUGEES GROUP IN MAURITIUS** **CHAGOS SOCIAL COMMITTEE (SEYCHELLES)**
First Respondent:	**INFORMATION COMMISSIONER**
Second Respondent:	**FOREIGN AND COMMONWEALTH OFFICE**
Heard at	Field House, London EC4
Dates of hearing:	10, 11 July 2012
Date of decision:	4 September 2012

Before

Andrew Bartlett QC (Judge)
David Wilkinson
Andrew Whetnall

Counsel:

For the Appellants:	Lisa Giovanetti QC, Richard Wald
For the Commissioner:	Robin Hopkins
For the FCO:	Kieron Beal QC, Melanie Cumberland

Subject matter:
Environmental Information Regulations 2004 – whether adequate search for information – proportionality - whether Tribunal should infer that further information held

Environmental Information Regulations 2004 - whether material retained by external consultants was information held by the public authority

Environmental Information Regulations 2004 – exception - regulation 12(4)(e) - internal communications – need for 'safe space' - public interest balance – regulation 12(1)(b), regulation 12(2) – weighing of balance in case where disclosure would be of a relatively small amount of information on matters of considerable legitimate public interest

Environmental Information Regulations 2004 - time as at which issues to be considered – regulations 5, 7, 11, 14, 18

Tribunal procedure – whether complainants' solicitor to be cross-examined - Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 as amended, rule 2, rule 15

Cases:
All Party Parliamentary Group on Extraordinary Rendition v IC [2011] UKUT 153 (AAC)

Bromley v IC and Environment Agency EA/2006/0072 (31 August 2007), [2011] 1 Info LR 1273

Campaign against the Arms Trade v IC and Ministry of Defence [2008] UKIT EA/2006/0040 (26 August 2008)

Department of Health v Information Commissioner EA/2011/0286 & 0287 (5 April 2012)

Guardian Newspapers Ltd and Brooke v IC and BBC EA/2006/0011 and 0013 (8 January 2007)

IC v Gaskell and HMRC GIA/3016/2010, [2011] 2 Info LR 11

McBride v IC and Ministry of Justice EA/2007/0105 (27 May 2008)

Muttitt v IC EA/2011/0036 (31 January 2012)

Office of Government Commerce v Information Commissioner (Attorney General intervening) [2010] Q.B. 98

Sittampalam v IC and BBC EA/2010/0141 (4 July 2011)

Sugar v BBC [2012] UKSC 4

University of Newcastle v IC and BUAV [2011] UKUT 185 (AAC), [2011] 2 Info LR 54, on appeal from *BUAV v IC and Newcastle University* EA/2010/0064 (10 November 2010)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal in part and substitutes the following decision notice in place of the decision notice dated 21 November 2011.

SUBSTITUTED DECISION NOTICE

Public authority: **Foreign and Commonwealth Office**

Address of Public authority: **King Charles Street**

London SW1A 2AH

Name of Complainants: **THE CHAGOS REFUGEES GROUP IN MAURITIUS**

CHAGOS SOCIAL COMMITTEE (SEYCHELLES)

The Substituted Decision

For the reasons and to the extent set out in the Tribunal's determination, the substituted decision is that the public authority did not deal with the complainants' request in accordance with the requirements of Parts 2 and 3 of the Environmental Information Regulations 2004.

Action Required

The public authority shall within 14 days from the date of this decision disclose pursuant to EIR regulation 5 the following documents:

(1) The document referred to in the Tribunal's reasons as "the November note";
(2) The document referred to in the Tribunal's reasons as "the Hamilton/Amos note", subject to the redaction ordered by the Tribunal.

REASONS FOR DECISION

Introduction

1. This appeal relates to an information request to which the Environmental Information Regulations ("EIR") apply. The contested issues are concerned with what information was held at the material time by the Foreign and Commonwealth Office ("FCO"), and with the withholding of a particular document in reliance upon the EIR exception for internal communications of the public authority.

2. The Chagos Archipelago forms part of the British Indian Ocean Territory ("BIOT"), for which the FCO is the relevant public authority for the purposes of this appeal. In the late 1960s and early 1970s, the inhabitants of the Chagos Islands were required to leave the islands. At or around that time, a US military base was established on Diego Garcia, the largest of the Chagos Islands. The removal of the "Chagossians" (sometimes referred to in the past as the "Ilois") has been a matter of considerable political and media debate, as well as multiple and complex legal proceedings. Two legal challenges are ongoing: Chagos Islanders v UK before the European Court of Human Rights, and Bancoult 3 before the (English) Administrative Court.

3. In 2000 the then Foreign Secretary obtained a preliminary feasibility study concerning the possible resettlement of some of the islands.[1] In 2001 a Phase 2A study involved the establishment of equipment to generate information on climate, tides and water. This was followed in 2002 by a "Phase 2B Feasibility Study", commissioned from a firm of consultants now called Royal Haskoning. It concluded that, whilst it might be feasible to resettle the islands in the short term, the costs of maintaining long-term inhabitation were likely to be prohibitive; and even in the short term, natural events such as periodic flooding from storms and seismic activity were likely to make life difficult for a resettled population. It made a number of recommendations, including economic analysis of the development options put forward and consultation with those wishing to resettle in order to incorporate their needs and aspirations into the resettlement debate. The Phase 2B study is in the public domain.

4. Following the Phase 2B Feasibility Study, resettlement has not been progressed by the UK Government, although the FCO has stated that the Government's policy in relation to the BIOT will or may be reconsidered in the light of the final judgments of the European Court of Human Rights and the Administrative Court in the two ongoing cases.

[1] "Resettlement of the Salomons and Peros Banhos Atolls: A preliminary feasibility study", June 2000.

5. The Appellants (who together represent the majority of the deported population of the BIOT) have concerns about the extent of Government influence on the outcome of the Phase 2B Feasibility Study and wish to obtain further information about how the Study was conducted.

The request

6. A number of requests for information under the Freedom of Information Act ("FOIA") and the EIR have been made to the FCO in connection with the Feasibility Study. The Appellants are represented by Clifford Chance LLP, solicitors. This appeal is concerned with a particular request made on their behalf by Clifford Chance during an extended course of correspondence. They asked on 30 April 2010 for the following information:

> (a) all submissions, minutes, memoranda and letters relating to the conduct of the "Feasibility Study" for the period 1 January 2000 to 31 December 2002; and
>
> (b) all reports and drafts thereof relating to the preparation, amendment and publication of the Phase 2B Feasibility Study, including any such documents held by consultants or sub-consultants instructed in the matter.

7. In its response on 2 June 2010, the FCO disclosed some information within the scope of the request.[2] In its response the FCO withheld six documents. At internal review in September 2010 the FCO maintained its refusal in respect of those six documents.

The complaint to the Information Commissioner

8. The Appellants complained on 5 November 2010 to the Commissioner. They contended that the FCO had not answered the request adequately and that the FCO held more documents than had been disclosed or identified.

9. After investigation, the Commissioner issued his Decision Notice on 21 November 2011. His decision, as summarised by him, was:

[2] The FCO has also disclosed additional documents in response to separate requests for information, made on behalf of the Appellants on 21 and 22 October 2010, concerning correspondence between FCO and Royal Haskoning during the period in which the studies were produced.

> "The Commissioner's decision is that no further relevant information is held. He is satisfied that the FCO was correct to rely upon section 42 [legal professional privilege] to withhold some of the withheld information [ie, five documents]. He has decided that some of the withheld information [ie, one document] was environmental information, and that this information should be withheld under the internal communications exception (EIR regulation 12(4)(e)). However, the Commissioner has also decided that the FCO should have provided the complainant with a list of the documents that it held that fell under the scope of the request."

10. The Commissioner required the FCO to provide the list of held documents, which the FCO subsequently did. The list identified about 100 documents which were released, and six documents which were withheld.

11. The Appellants accept that the FCO was entitled to withhold production of five of the six on the ground of legal professional privilege (FOIA, s42). The sixth document is a note of 27 September 2002 from Charles Hamilton (then the FCO's Head of the BIOT) to the Private Secretary to Baroness Amos (then an FCO Minister). We refer to this as "the Hamilton/Amos note".

The appeal to the Tribunal

12. The Appellants appealed to the Tribunal on nine grounds. Three of them are no longer pursued. The Appellants accept that certain of them raise essentially the same issue. Matters have also moved on in the sense that the FCO has provided further information to the Appellants.

13. The circumstance that further documents have been found and released in the course of the appeal is relied on by the Appellants in support of a submission that the Tribunal should not take at face value the FCO's various assurances about what it holds or does not hold. The further documents include both documents which the FCO had found, and intended to disclose, but by mistake did not include in the disclosure, and documents which the FCO found after the initiation of the appeal, being documents in an FCO file held by the Treasury Solicitor. The circumstances are described in paragraphs 12-18 of the Appellants' skeleton argument, in paragraphs 85-91 of the FCO's skeleton argument, and in paragraph 35 of the FCO's aide memoire of closing submissions.

14. Clifford Chance also made inquiries which ascertained that some relevant material had been retained by the consultants. These inquiries are described as follows in the Appellants' Skeleton:

"[8] On 18 January 2012, the Appellants' representatives, Clifford Chance LLP ("CC") wrote to Posford Haskoning (now Royal Haskoning) explaining that as a result of the FOI request to the FCO on 30 April 2010 and the DN of 21 November 2011 it appeared that there was no longer any continuing contractual relationship between the FCO and Consultants. Accordingly a request was made to Royal Haskoning for: "*a) All reports and drafts thereof relating to the preparation, amendment and publication of the Phase 2B Feasibility Study. b) All communications between the FCO/BIOT and Royal Haskoning concerning the preparation of the Draft Phase 2B Study"*.

[9] On 13 April 2012, Royal Haskoning confirmed that they still held a paper draft (from February 2002) version of one of the sections of the Phase 2B Feasibility Study, a paper draft (from March 2002) version of another section and paper versions of correspondence with the FCO. However, before they would release any of the material they requested that the Appellants' representatives obtain written authorisation from the FCO.

[10] On 27 April 2012, CC contacted the Treasury Solicitor ("TSOL") forwarding copies of the correspondence with Royal Haskoning and seeking the FCO's authorisation for the release of the material held by the Consultants on behalf of the FCO.

[11] The TSOL replied on 9 May 2012, confirming "*…that the FCO declines to provide any authorisation for Royal Haskoning to release any material to [the Appellants]*.""

15. There was ultimately little disagreement between the parties concerning what were the principal questions which remain live for determination on this appeal. In our view these are:

    a. Whether the material retained by the consultants is "held" by the FCO for the purposes of the EIR. The Appellants contend 'yes'; the Commissioner and the FCO say 'no'.

    b. Whether the searches conducted by the FCO were adequate and whether, in the light of the searches and the FCO's document retention policies, the Tribunal should conclude on the balance of probabilities that the FCO holds further documents not yet disclosed or identified, which fall within the scope of the request. The Appellants contend that we should so hold. The FCO disagrees. Subject to a qualification which we explain below, the Commissioner takes the same view as the FCO.

c. In regard to the Hamilton/Amos note, which the Appellants accept falls within EIR exception 12(4)(e) (internal communications), whether in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information. The Appellants contend that the balance of public interest favours disclosure. The Commissioner and the FCO contend to the contrary.

16. Notwithstanding the Appellants' acceptance that the Hamilton/Amos note was an internal communication within the meaning of exception 12(4)(e), some parts of the Appellants' written arguments were framed as if the question for our consideration were whether a 'safe space' exemption applied to the note. That would not be the correct question, since the application of the exception to the Hamilton/Amos note was not in dispute; we interpret their arguments as meaning to convey a submission that reasons for maintaining the exception were not present or were insufficient, as set forth in grounds 6-7 of the Appellants' Grounds of Appeal, and as explained by Ms Giovanetti QC at the start of the oral hearing and confirmed in her oral closing.

17. The FCO in its skeleton argument sought to advance an additional contention that the appeal should be dismissed "on proportionality and/or cost grounds, pursuant to FOIA ss11 and 12". Mr Beal QC further explained to us in his oral closing that in so far as the request fell within FOIA, he relied on the £600 cost limit set by regulations, and in so far as the request fell within the EIR he relied on a general principle that a government department cannot be required to act disproportionately. This contention formed no part of the formal Response to the appeal served by the FCO on 29 February 2012, and was not addressed by the other parties either in writing or orally. In our view this contention was raised too late. The proper time to raise a concern that a search would be too costly is before the search is concluded, not at an appeal hearing two years later. We refer to the remarks of the Upper Tribunal in *All Party Parliamentary Group on Extraordinary Rendition v IC* [2011] UKUT 153 (AAC), [45]-[48], [96]. The lack of merit in the point is underlined by an appreciation that the formulation of the request was the result of an exchange of correspondence and emails between Clifford Chance and the FCO in which the FCO gave guidance concerning what would or would not be disproportionate.[3] Moreover, given the weight of the evidence and the live issues, and the amount of ground needing to be covered in the two days allotted for the hearing, in our view the other parties could not reasonably be expected to deal with this new point. To do so would have been prejudicially disruptive both of their preparations and of the hearing, and we consider that they were right in declining to be distracted by it. The FCO made no application to amend its Response; and the very helpful written 'Aide Memoire on Behalf of the Second Respondent', which summarised the FCO's closing submissions, did

[3] Bowyer 1st witness statement, paragraph 7.

not rely on the point. If or in so far as we should understand the FCO as impliedly making an application to be allowed to rely on this additional contention, in the exercise of our procedural discretion in the context of our duty to deal with the appeal fairly and justly pursuant to the rules[4] we reject any such application.

18. This ruling does not prevent the FCO relying on a more general argument that, when judging what constitutes an adequate search, it is appropriate to keep in mind the requirement of proportionality.

19. It appeared in closed session that the FCO desired to rely on two further exceptions in relation to the Hamilton/Amos note, pursuant to paragraph 113 of its Response. These were not of self-evident application and were not supported by appropriate evidence. At the commencement of Mr Beal's closing submissions at 11.45 on the second day of the hearing he confirmed that the FCO were no longer relying on the additional exceptions.

20. We indicated above that there is a qualification to the Commissioner's view on whether the FCO holds further documents not yet disclosed or identified, which fall within the scope of the request. This is because in the course of the closed session it became apparent that we needed to consider two particular documents, which were produced to us, which had previously been treated as outside the scope of the request, but which the Commissioner considered were within its scope. We make further reference to these below.

21. There is no controversy between the parties concerning the nature of our jurisdiction on appeal, as set out in *Guardian Newspapers Ltd and Brooke v IC and BBC* EA/2006/0011 and 0013 (8 January 2007), at [14].

The material time as at which the issues fall to be considered

22. The Commissioner and the FCO largely (though not exclusively) framed their arguments on the basis that the matters in issue are to be considered as at the date of the information request. Cases often proceed on the basis that the date of the request is the material date, but in our view this is an over-simplification. The Appellants (in our view, correctly) characterised their appeal as being against the Commissioner's decision concerning the way in which the FCO responded to the request for information: see FOIA s50(1)(2), as modified by EIR regulation 18. Such response took place over a period

[4] In particular, rules 2 and 5 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 as amended.

of time, from the date of the request to the conclusion of the FCO's internal review.

23. The reason why cases often proceed simply on the basis that the date of the request is the material date is that FOIA s1(4) provides that the information to be communicated to the applicant is the information held at the time when the request is received. However, there are several qualifications that need to be made to this statement.

24. The first is that FOIA s1(4) goes on to say that account may be taken of any amendment or deletion made between the time of receipt of the request and the time when the information is to be communicated, being an amendment or deletion that would have been made regardless of the receipt of the request.

25. The second qualification is that FOIA s10(3) allows the public authority such time as is reasonable in the circumstances for consideration of the public interest balance. If at the reasonable time when this consideration is concluded the public interest favours the maintenance of an exemption, the public authority would not be under a duty of disclosure, even if a different conclusion would have been reached at the date of the request.

26. Having regard to these and other provisions, under FOIA the relevant date for assessing the existence or scope of the duty to disclose is the time when the request was dealt with: *All Party Parliamentary Group on Extraordinary Rendition v IC and Ministry of Defence* [2011] UKUT 153 (AAC), [9]. The reasoning based on the statutory scheme is explained at length, and in our respectful view cogently, in *Campaign against the Arms Trade v IC and Ministry of Defence* [2008] UKIT EA/2006/0040 (26 August 2008) at [37]-[53].

27. In the *APPGER* case, while the Upper Tribunal drew attention to the provisions in FOIA ss 10 and 17 setting early time limits for the public authority to respond to the request and issue any refusal notice, the Tribunal also accepted the Commissioner's submission that access to the statutory process of complaint and appeal is conditioned by exhaustion of the public authority's internal review procedures, which are contemplated in the statutory scheme for responding to an information request: see [2011] UKUT 153 (AAC) at [40]-[41].

28. There is no precise equivalent of FOIA ss1(4) or 10(3) in the EIR regime, but having regard to the terms of EIR regulations 5 and 7, and given the procedural similarities between the FOIA regime and the EIR regime (see in particular in that respect EIR regulations 5, 11, 14 and 18), we consider that broadly the same analysis applies under the EIR as under FOIA. Accordingly, the material time with which we are

concerned in the present case is the period from the date of the request (30 April 2010) to the conclusion of the FCO's internal review (9 September 2010).

29. In the present case none of the parties suggests that there is any change of circumstances, after the conclusion of the internal review, which needs to be considered for the purposes of the 'steps discretion' explained in *Sittampalam v IC and BBC* EA/2010/0141 (4 July 2011) at [53]-[61] and in *IC v Gaskell and HMRC* GIA/3016/2010, [2011] 2 Info LR 11.

Evidence

30. The principal evidence was documentary, running to many hundreds of pages. At the start of the hearing the FCO made application, for reasons set out in TSol's letter of 5 July 2012, to add to the evidence a further volume containing the documents exhibited as ZPR1 to a witness statement in the ongoing judicial review proceedings known as Bancoult 3. The Appellants opposed this on the grounds that it was served very late and the appeal was already 'document heavy'.

31. We decided to admit the further volume, on the footing that, if it transpired that any particular document was referred to and relied on which gave rise to a difficulty for the Appellants, we would allow Ms Giovanetti to obtain instructions and ask for time to consider it. In the event, not many of the documents in that volume were referred to, and no difficulties arose.

32. The Appellants relied on a long witness statement of Mr Gifford, the solicitor at Clifford Chance dealing with the matter. For a variety of reasons the Appellants wished to rely on his statement without calling him to give oral evidence or be subjected to cross-examination. The FCO objected to this course and applied to be allowed to cross-examine him. The Commissioner did not wish to cross-examine him, but expressed support for the FCO's reasons for wishing to do so.

33. Mr Gifford describes the purpose of his statement as being "*to present to the Tribunal the full and relevant facts and documents relating to this Appeal as the Appellants believe them to be. All documents to which I refer in this Statement are exhibited in the Bundle and Index of Documents served on all parties to this Appeal*". Paragraphs 3-8 then recite the procedural history of the appeal. Paragraphs 9-17 set out the information request, the FCO's responses to it, and the proceedings before the Commissioner. Paragraphs 18-33 explain the background, history and content of the feasibility study, and attempts made up to December 2008 to obtain copies of drafts of the Phase 2B study. Within this section, paragraph 22 states: "*The extent of alterations*

required by officials to the draft Phase 2B report and/or the influence exercised by officials on the study's conclusion lie at the heart of this application and are the subject of the information request." Paragraphs 34-38 recite communications with MPs and Ministers in the period March 2009 to August 2011. Paragraphs 39-42 contain an explanation of how an email from 2003, disclosed by the FCO in the context of judicial review proceedings in October 2010, led to renewed inquiries for information. Paragraphs 43-47 set out the discovery of further material by the Treasury Solicitor in the course of the present appeal. Finally, paragraphs 48-54 recite Clifford Chance's recent contacts with the consultants, which led to the information emerging that the consultants still retain certain relevant documents which the Appellants wish to see.

34. The statement contains assertions about what inferences might be drawn from the documented facts, concerning the extent of the FCO's influence upon the draft of the Feasibility Study and the FCO's attitude to making disclosure. Mr Beal indicated that it was these qualitative comments on which he wished to cross-examine Mr Gifford, rather than the history. Mr Beal took particular exception to a document prepared by Mr Gifford in March 2009, referred to in paragraph 34 of the statement and exhibited. Mr Gifford describes this document as representing "*my own analysis of the Feasibility Study and how it was influenced by officials in the FCO*".

35. In response to Mr Beal's objection, Ms Giovanetti withdrew the March 2009 analysis.

36. The Tribunal is not bound to apply the rules of evidence which apply in ordinary civil proceedings. Under rule 15 we have express powers to direct the manner in which any evidence or submissions are to be provided, to admit evidence whether or not it would be admissible in a civil trial, and to exclude evidence that would otherwise be admissible where it would be unfair to admit it. These powers are to be exercised fairly and justly in accordance with rule 2. This includes dealing with the case proportionately, flexibly and expeditiously.

37. We considered that Mr Gifford's evidence was likely to be useful by way of introduction, laying out the general background and context and indicating in broad terms the nature of the islanders' concerns; the extent to which those concerns are justified is a separate question. The fact of the involvement of the FCO in the production of the study is not controversial. In so far as the details of that involvement may be in controversy, as Ms Giovanetti pointed out, that is not a matter on which we are required to make findings. We note and rely upon the withdrawal of Mr Gifford's March 2009 analysis, and have not considered it. We saw no useful purpose in treating as admissible evidence Mr Gifford's views on what inferences we might or should

draw concerning the conduct of the FCO, whether originally, in relation to the draft study, or subsequently, in relation to disclosure of information. Where his statement makes allegations against the FCO, we resolved to regard those at most as submissions (where relevant at all), not as evidence relevant to the truth of the allegations.

38. Accordingly, we saw no sufficient purpose in allowing Mr Beal to take time at the hearing cross-examining Mr Gifford on his statement, and ruled accordingly. We received Mr Gifford's written statement with a view to the limited purpose indicated above. This course does not involve any unfairness or prejudice to the FCO.

39. We record that, in addition to the points concerning the limited nature of the findings that we are required to make in order to resolve the issues, and the evidential irrelevance of Mr Gifford's personal views on the FCO's conduct, Ms Giovanetti gave a number of other reasons why Mr Gifford should not be cross-examined, which we have not found it necessary to consider.

40. Mr Beal made a subsequent application that we should issue a ruling defining exactly which parts of Mr Gifford's statement were to be treated as withdrawn or inadmissible. We declined to do so, seeing no sufficient purpose in spending time on what we regarded as a pointless and disproportionate exercise. The parts of his statement which constitute evidence are largely agreed, since they merely recite the documented history or state what concerns the Appellants have raised. What we have said above, which reflects the ruling given during the hearing, sufficiently indicates how we have dealt with his statement.

41. The Commissioner did not call any witnesses.

42. The FCO adduced written evidence from two witnesses, who were also called and cross-examined.

43. The first was Colin Roberts, who is currently Director of the Overseas Territories Directorate in the FCO and (among other duties) HM Commissioner of the BIOT. He was put forward as a witness because he is the official now responsible for the relevant area of operations. However, as he himself emphasized, he was not personally involved either in the Phase 2B Feasibility Study or in any of the events which gave rise to the present appeal. He also stated that there was no one in his Section who could speak to the relevant events from personal knowledge. The information in his statement was therefore all from documents or from colleagues elsewhere in the FCO. It covered the factual background, the engagement of the consultants, an explanation of the FCO's position that it did not 'hold' the documents

retained by the consultants, and explanations of the FCO's document retention policies and documentary and electronic archiving systems. It also touched on the recent disclosure of FCO documents recalled from archive by TSol.

44. The points of greatest interest which emerged from his oral evidence were:

    a. Additional explanation of the FCO's "PA" (put away) and "PW" (put with) document retention system.

    b. The status of Government policy regarding resettlement of the Chagossians and associated matters. He stated in particular:

        i. Government policy since 15 June 2004 has been not to resettle the Chagossians.[5]

        ii. After the change of Government in May 2010 the Foreign Secretary wished to carry out a full and thorough review of all Government policy in relation to the Chagossians. That review is still underway.

        iii. Notwithstanding ii above, the coalition Government has confirmed that for the time being the policies implemented by the previous Government stand. (From the account given in the FCO's written submissions, this decision had been taken by no later than 12 August 2010.)

        iv. The Government is not actively considering allowing resettlement.

        v. When the European Court of Human Rights delivers its judgment, it is likely that the Secretary of State will want to look at the overall position on resettlement and the options for going forward, it being neither possible nor wise to do this before the judgment is delivered.

45. We infer from points i, iii, iv and v taken together that the review referred to in point ii is not active, and has not been active since the

[5] On 15 June 2004 a written ministerial statement of this policy was placed before the House of Commons. We refer to this below in our consideration of the public interest balance.

announcement in August 2010 that the policy of the previous Government would be continued.[6]

46. Mr Roberts mentioned the current litigation known as Bancoult 3 in his witness statement, but he did not offer any assessment of the possible significance of that litigation as regards a future review of policy, and in his oral evidence we understood his emphasis to be upon the European proceedings.

47. The FCO's second witness was Joanne Bowyer. She has worked for the FCO since 1989 and is currently the desk officer for the BIOT. She took up this position in January 2012, at which time she took over the present case from her predecessor. She spends a good deal of her time dealing with freedom of information requests. She was able to give further explanation of how the FCO retains or disposes of documents.

48. Based on conversations with her predecessor and study of the file, Ms Bowyer gave detailed evidence concerning how the physical and electronic searches had been conducted at the time the information request was dealt with, including on internal review. Because it was unclear to her exactly what methodology had been used for the electronic searches, she caused a further electronic search to be carried out, which captured two documents potentially within the scope of the request. She attached these (subject to certain redactions) as exhibits to her second statement.

49. She was cross-examined at some length. We understood her to accept that in some respects there were accidental oversights in the original process of search, review, and release of documents. It seems to us that the original searches were less than adequate because (a) insufficient thought was given to PW documents and (b) the electronic search terms "BIOT" and "Feasibility" were originally applied only to document titles and not to document content. In addition, we conclude that when the FCO provided to TSol for litigation purposes the files which ended up being archived by TSol, either the FCO failed to keep proper records of what was provided or the FCO lost track of such material as the FCO retained.

50. The Appellants made many points based on the FCO's past errors and inconsistencies, and the belated production of further documents. It is for us to judge what inferences to draw from the evidence. On this contentious area of the case we found Ms Bowyer to be an impressive witness. We considered that her answers in cross-examination

[6] Mr Roberts also stated that the Government is having to think about how it might respond to an ECtHR judgment. In view of the apparent inconsistency of this statement with point v, we take this to mean only that some preliminary thinking has been done by civil servants about what the options might be.

showed her to be intelligent, capable, thoughtful, resourceful, transparent and trustworthy. Ms Giovanetti realistically accepted in her closing submissions in reply that Ms Bowyer was a person who evidently approached her job with thoroughness. Notwithstanding the various errors that had been made in the past, after trawling through the history, making the additional electronic search, and considering the latest disclosures, Ms Bowyer was confident that, as she put it, "all the documents are out there". We accept her evidence. We consider that her confidence is probably justified and that on the balance of probabilities all the documents held by the FCO within the scope of the request have now been located.

51. Ms Bowyer gave further, brief, evidence in closed session. A short description of the closed session was supplied by TSol to the Appellants. Her evidence covered essentially (1) how documents were categorised during the searches, including the FCO's reasons for regarding as 'out of scope' certain documents found by the searches, (2) the FCO's reasons for certain redactions in otherwise disclosed material, and (3) the FCO's reasons for its position on the balance of public interest in regard to the application of the internal communications exception to the Hamilton/Amos note. She was asked questions by Mr Hopkins on behalf of the Commissioner and by the Tribunal, and was re-examined by Mr Beal.

52. In the course of her closed evidence a question arose concerning a document which we shall call "the September letter". This was a short letter held by the FCO which was originally marked for release as falling within the scope of the request, but subsequently categorised as out of scope. Ms Bowyer's personal view was that it was within scope. The Information Commissioner had not previously considered it but after doing so took the same view as Ms Bowyer. On further consideration the FCO decided to release the September letter to the Appellants, while maintaining the position that it was not within the scope of the request. In closed session it also became necessary for us to consider an additional document held by the FCO, which we shall call "the November note". There was disagreement between the Commissioner and the FCO over whether the November note was within the scope of the request.

53. The Hamilton/Amos note originally had attachments to it. We were able to obtain confirmation in the closed session that there was nothing in the attachments which on any view should be considered for disclosure under the request.

54. For completeness we record that, following the closed session, after some prompting from the Tribunal, the FCO disclosed to the Appellants some closed material which was not within the scope of the request but which helped to show how the request had been handled.

This disclosure was made voluntarily, not pursuant to the EIR, but in order to reduce the procedural disadvantage of the Appellants, who were necessarily excluded from the closed session.

Legal submissions and analysis

A. The material held by the consultants

55. The material held by the consultants is described in paragraph [9] of the Appellants' skeleton argument, which we have set out above.

56. The items in question are understood to constitute environmental information, so that the EIR apply to the question of disclosure, and not FOIA.

57. By regulation 5 of the EIR, the duty of a public authority to make environmental information available on request applies to environmental information which the authority "holds". By regulation 3(2):

> *For the purposes of these Regulations, environmental information is held by a public authority if the information-*
>
> *(a) is in the authority's possession and has been produced or received by the authority; or*
>
> *(b) is held by another person on behalf of the authority.*

58. The Appellants rely on paragraph (b), contending that the material held by the consultants is held by them on behalf of the FCO. The Appellants also correctly point out that, while information will usually be recorded in documents, the rights under the EIR relate not to documents as such but to information. The correct question is therefore whether the information is held by the consultants on behalf of the FCO.

59. The consultants' terms of appointment were made available to us within the documentary material, and were the subject of submissions by all parties. It is not necessary for us to reproduce the terms of appointment here.

60. The Appellants' principal submissions are:

a. We should construe the EIR rights, and hence the word "held", in a broad and liberal manner.

b. We should adopt the same meaning as was held to apply under FOIA in *University of Newcastle v IC and BUAV* [2011] UKUT 185 (AAC), [2011] 2 Info LR 54, approving the decision of the First-tier Tribunal in that case, *BUAV v IC and Newcastle University* EA/2010/0064 (10 November 2010).

c. Whether the information was held on behalf of the FCO is "simply a question of fact, to be determined on the evidence": *McBride v IC and Ministry of Justice* EA/2007/0105 (27 May 2008), [27][7].

d. The information was created at the behest of the FCO.

e. Under the terms of the consultants' appointment (especially clause 17) the FCO was to have ownership of the information, and the right to control its dissemination.

f. Correspondence in 2005, long after the appointment had come to an end, suggested that the information was held on behalf of the FCO at that time.

g. It was clear that in practice the FCO had the ability to authorise release – this was because it was the FCO's information.

61. For the purposes of the present case, we consider that the guidance given in *University of Newcastle* on the meaning of "held" is appropriate, despite some differences between the relevant wording of FOIA and regulation 3(2). See the First-tier decision at [48]-[49], expressly approved in the Upper Tribunal decision at [23], [27],[8] and [36]-[37]. We would also wish to qualify the proposition in *McBride* that whether information is held on behalf of a public authority is "simply a question of fact". In some cases it will be important to determine the exact nature of the legal relationship between a person holding information and the public authority, or to determine the legal structure pursuant to which information was created and held. *University of Newcastle v IC and BUAV* is an example of such a case.

[7] In *McBride* the particular use of this phrase is in a consideration of the converse question, whether a public authority holds information on behalf of another.

[8] There is a typographical error in the Upper Tribunal decision: in [23] and [27], the intended reference is to paragraph [48] of the First-tier decision, not to paragraph [47].

62. In the present case the consultants' appointment was made in December 2001 and came to an end on completion of the work in June 2002. The information request was made some eight years later.

63. In our view the express terms do not contain anything which supports the Appellants' case. Clause 17 assigns to the FCO all intellectual property rights owned by the consultants in any material generated by the consultants and delivered to the FCO in performance of the services under the appointment. From the fact that the FCO retains the right to control reproduction and use of any such material, it does not follow that the draft documents held by the consultants constitute information held on behalf of the FCO. The consultants remained bound by various specific confidentiality obligations contained in clause 18, none of which, so far as we can tell, is relevant to the retained material. In our view the consultants will also have remained bound by the ordinary implied professional obligation to maintain the confidentiality of materials prepared for a client. But to be bound by a confidentiality obligation is not the same as holding information on behalf of the person to whom the duty of confidence is owed.

64. The consultants were obliged to submit a draft final report to the FCO for comments (Terms of Reference, paragraph 6.3). This would then be the document that the FCO held. Any copies of drafts which the consultants retained after the conclusion of the appointment would be for their own records, as would their copies of letters written. It is very common for professional advisers to keep their own copies of drafts, letters or final reports for a period of time, in case of any future dispute over fees or over the quality of the work. The consultants were free to destroy or delete such copies as they might wish, without asking the FCO. That there were restrictions on the consultants' right to use or disclose the information which they kept is not to the point. The existence of the restrictions does not mean that the information was kept on behalf of the FCO.

65. On this issue, therefore, we accept the case put forward by the FCO and the IC, that the information retained by the consultants was not held on behalf of the FCO. This conclusion is based on the nature of the relationship between the FCO and the consultants, including the applicable contractual terms.

66. The Appellants also sought to construct out of correspondence some kind of express or implied admission by the FCO that the consultants retained material on the FCO's behalf. It is sufficient to say that, substantially for the reasons advanced by the Commissioner and by the FCO, we consider those arguments to be ill-founded, not being justified by a careful reading of the letters relied upon.

67. Some of the submissions touched on the question whether the FCO could be ordered in civil litigation to obtain the copies held by the consultants and disclose them. That is a question that is unnecessary for us to consider, and we have not formed any views on it. We are concerned only with the application of the EIR.

68. As a footnote to this issue we should mention that the FCO complained, in its aide memoire of closing submissions, of not being allowed to cross-examine Mr Gifford on earlier attempts made by him to contact the consultants, and that this was potentially significant because of the terms of FOIA s21 (documents accessible by other means). Section 21 was not relied on by the FCO in its Response in the appeal or in its opening skeleton argument, and any such reliance was therefore not a matter in issue. It is not clear to us how s21 could be relevant, but in any event, since our conclusion in relation to the material retained by the consultants is in the FCO's favour, the matter is of no significance.

B. The adequacy of the searches and whether further documents were held by the FCO

69. On the nature of the inquiry into whether the public authority is likely to be holding relevant information beyond that which has been identified, we were referred to the helpful guidance in *Bromley v IC and Environment Agency* EA/2006/0072 (31 August 2007), [2011] 1 Info LR 1273 at [13], with which we respectfully agree.

70. While we have rejected the FCO's attempt to rely on what it considers the excessive costs of its searches as a stand alone reason for dismissing the appeal, we consider it is relevant to draw attention also to the Tribunal's remarks in the context of a FOIA request in *Muttitt v IC* EA/2011/0036 (31 January 2012) at [68], to the effect that a search should be conducted intelligently and reasonably, and that this does not mean it should be an exhaustive search conducted in unlikely places: those who request information under FOIA will prefer a good search, delivering most relevant information, to a hypothetical exhaustive search delivering none, because of the cost limit. Unlike under FOIA, under the EIR there is no fixed cost limit for searches; instead, under general EU law principles, as was submitted to us in the present case, the public authority is required to act proportionately. This means that a proportionality criterion will be applied to the quality and thoroughness of a search. The required degree of quality and thoroughness will depend upon the relevant circumstances, including the importance of the subject matter and the need to make appropriate use of public resources.

71. We have indicated in our recitation of the evidence our conclusion that the original searches were inadequate. In our view they did not satisfy

the FCO's obligation to make searches for the purpose of disclosing environmental information sought in the request. We have also indicated our acceptance of Ms Bowyer's evidence, as a result of which we have concluded on the balance of probabilities that all the documents held by the FCO within the scope of the request have now been located. We further consider that the searches which have ultimately been carried out more than satisfy the FCO's obligation.

72. The question that remains is whether the November note was within the scope of the request and should be disclosed. We record that no exceptions are relied on by the FCO in relation to this document, so that the only question is whether it falls within the terms of the request.

73. For the reasons set out in Confidential Annex No 1 we accept the Commissioner's submission that the November note is within the scope of the request, and should accordingly have been disclosed.

74. In the course of the hearing a difference of view emerged on the question whether the documents archived by the Treasury Solicitor after Bancoult 2, and retrieved in 2012, were held in 2010 on behalf of the FCO. In view of our reasoning and conclusions set out above, we have not found it necessary to resolve this question.

C. The public interest balance in relation to the Hamilton/Amos note

75. EIR regulation 12(4)(e) provides that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications. The Hamilton/Amos note is an internal communication within the meaning of this exception. But regulation 12(4)(e) is qualified by regulation 12(1)(b), which provides that the authority may only refuse disclosure in reliance on the exception if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

76. The wording of regulation 12(1)(b) indicates that disclosure may only be refused where the public interest in maintaining the exception positively outweighs the public interest in disclosure. If the scales are equal, disclosure must be made. This is reinforced by regulation 12(2), which states: "*A public authority shall apply a presumption in favour of disclosure.*"

77. The Commissioner dealt with the public interest balance in paragraphs 36-48 of his Decision Notice. The parties are in agreement that, as the Commissioner identified at [41]-[43], the relevant public interest considerations attaching to the internal communications exception in

the circumstances of the present case are related to the need for a safe space for the formulation and development of Government policy. In regard to the public interest in disclosure, the Commissioner stated:

"[38] The Commissioner takes the view that there is a strong inherent public interest in releasing environmental information. It has long been recognised that in order to protect the environment it is important for people to have access to environmental information, to be able to participate in environmental decision making and have access to justice. The EU Directive from which the EIR is derived states that,

> "*Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment.*"

[39] In addition to this, the Commissioner considers that there is a public interest in increasing the openness, transparency and accountability of a public authority.

[40] In this case, the Commissioner is satisfied that the removal of the Chagossians from the Chagos Islands, and whether they should be allowed to return to some of these islands, has been (and continues to be) a matter of considerable public and political debate. The two feasibility studies have played a role in the shaping of government policy on this issue, and the contents of these studies (in particular their accuracy and independence) have also been a matter of considerable debate (see paragraph 6 above). The Commissioner considers that there is a strong public interest in helping to inform these debates, and is satisfied that the disclosure of the withheld environmental information would help contribute to this."

78. In order to make a judgment concerning the relative strength of the counterbalancing interests, it is necessary for us to consider in more detail the history of the matters to which the request relates. The account which follows is based on the FCO's skeleton argument, with a small number of additions from the Appellants' skeleton and the documents provided. It is possible that the Appellants may disagree with some points of detail in the account, but we do not consider that for present purposes it is necessary to resolve any such disagreements. In the event the only use we have made of Mr Gifford's witness statement has been to help us to locate relevant documents in the bundles.

(1) The creation of the BIOT and the removal of the islanders

79. The Chagos Archipelago lies in the middle of the Indian Ocean. It is about 1,000 miles from Mauritius and about 1,000 miles from the Seychelles.

80. The BIOT was constituted as a separate overseas territory on 8 November 1965 by the BIOT Order 1965, SI 1965/1920. The BIOT comprised not just the Chagos Islands (which were removed from the dependencies of Mauritius by the 1965 Order) but also certain other islands which were removed from the then colony of Seychelles. These islands (together with Mauritius and Seychelles) had been ceded to the Crown by France pursuant to the Treaty of Paris, 1814.

81. The 1965 Order provided the constitution for the BIOT. A Commissioner for the Territory was appointed to hold office during Her Majesty's pleasure, having such powers and duties as were conferred or imposed upon him by that Order or any other law or which Her Majesty might be pleased to assign him.

82. On 30 December 1966, in an Exchange of Notes, the UK and US Governments agreed that the BIOT should be available to meet their various defence needs for "an indefinitely long period", expressed to be an initial period of 50 years, and thereafter subject to renewal for periods of 20 years, unless either Government gave notice to terminate the agreement. There were further Notes exchanged during the 1970s.

83. In 1967 the UK Government bought all the land in the Archipelago from the Seychelles company which ran the coconut plantations. In December 1970, US Congressional approval was obtained for the construction of a naval defence facility on Diego Garcia. On 16 April 1971, the BIOT Commissioner enacted the Immigration Ordinance 1971, No 1 of 1971. It made it unlawful for someone to enter or remain in the BIOT without a permit; it also provided for the Commissioner to make an order directing that person's removal from the territory.

84. The exclusion of the islanders was described in the House of Lords in subsequent litigation (in the case that became known as Bancoult 2), in the following terms:[9]

> "[9] Between 1968 and 1971 the United Kingdom government secured the removal of the population of Diego Garcia, mostly to Mauritius and the Seychelles. A small population remained on Peros Banhos and the Salomon Islands, but they were evacuated by the middle of 1973. No force was used but the islanders were told that the company was closing down its activities and that unless they accepted transportation elsewhere, they would be left without supplies. The whole sad story is recounted in detail in an appendix to the judgment of Ouseley J in Chagos Islanders v Attorney General [2003] EWHC 2222 (QB), [2003] All ER (D) 166.

[9] R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2) [2008] UKHL 61, [2009] 1 AC 453.

> [10] My Lords, it is accepted by the Secretary of State that the removal and resettlement of the Chagossians was accomplished with a callous disregard of their interests. For the most part, the community was left to fend for itself in the slums of Port Louis. The reasons were to some extent the usual combination of bureaucracy and Treasury parsimony but very largely the government's refusal to acknowledge that there was any indigenous population for which the United Kingdom had a responsibility. The Immigration Ordinance, denying that anyone was entitled to enter or live in the islands, was part of the legal façade constructed to defend this claim. The government adopted this position because of a fear (which may well have been justified) that the Soviet Union and its "non-aligned" supporters would use the Chagossians and the United Kingdom's obligations to the people of a non-self-governing territory under article 73 of the United Nations Charter to prevent the construction of a military base in the Indian Ocean.
>
> [11] When the Chagossians arrived in Mauritius they found themselves in a country with high unemployment and considerable poverty. Their conditions were miserable. There was a long period of negotiation between the governments of Mauritius and the United Kingdom over payment for the cost of resettlement, but eventually in September 1972 the two governments agreed on a payment of £650,000, which was paid in March 1973. The Mauritius government did nothing with the money until 1977 when, depleted by inflation, it was distributed in cash to 595 Chagossian families."

(2) Legal proceedings brought in relation to the BIOT 1975-2002

85. The Chagossians have since the 1970s commenced a series of legal proceedings against the UK Government. The case of Vencatessen v. Attorney General was started in February 1975. The writ claimed compensatory damages, aggravated damages and exemplary damages for intimidation, deprivation of liberty and assault in the BIOT, the Seychelles and Mauritius in connection with the claimant's departure from Diego Garcia, the voyage and subsequent events.[10] The claim was not formally brought as a representative action, but it was treated by both parties as being a test case for the benefit of the Chagossians as a whole.[11]

86. The claim led to a settlement between the United Kingdom, the Government of Mauritius and the Chagos Islanders in 1982, with the UK giving £4 million to the Ilois Trust Fund for distribution to eligible Chagossians, and the Mauritian Government contributing £1 million by way of land. The Chagossians received advice from two eminent firms

[10] See the judgment of Ouseley J. in Chagos Islanders v. Attorney General [2003] EWHC 2222 (QB), [2003] All ER (D) 166 at [55] of the judgment. References hereafter to passages in the judgment are given as *CIL* [J***] and references to the findings set out in the Appendix to the judgment are given as *CIL* [A***].

[11] See R (Bancoult) v. Secretary of State for Foreign & Commonwealth Affairs (No. 2) [2009] 1 AC 453 HL, per Lord Hoffmann at [12]-[13].

of English solicitors (Messrs. Bindmans and Messrs. Sheridans) and from two leading barristers (John MacDonald QC and Louis Blom-Cooper QC) confirming that the settlement reached was a reasonable one.[12] Both English and Mauritian legal advisers were present during the course of the settlement negotiations to advise the Chagossians.[13]

87. Many years later, in 1998, further proceedings were instituted which became known as Bancoult 1.[14] That case consisted of a judicial review challenge to the legality of section 4 of the 1971 Immigration Ordinance, which had provided the legal backing for the exclusion of the Chagossians. The Divisional Court held on 3 November 2000 that it was *ultra vires* and unlawful.

88. The third set of legal proceedings was a group claim brought by the Chagos Islanders against the Attorney General and the Secretary of State for Foreign and Commonwealth Affairs seeking compensation and declaratory relief. It was begun in April 2002. It led to the judgment of Ouseley J in Chagos Islanders v. Attorney General [2003] EWHC 2222 (QB), [2003] All ER (D) 166. The Chagos Islanders were represented by Mr Gifford, then a partner with the law firm Sheridans. An application to strike out the claim as disclosing no reasonable cause of action was heard over 37 days.[15] On 9 October 2003 Ouseley J struck out the claim in the course of a very detailed judgment, making a number of factual findings.[16] The strike-out was on the grounds that the claim to more compensation after the settlement of the Vencatessen case was an abuse of process, that the facts did not disclose any arguable causes of action in private law and that the claims were in any case statute-barred. Following an oral hearing, the Court of Appeal dismissed an application by the claimants for permission to appeal against the order: Chagos Islanders v. Attorney General [2004] EWCA Civ 997. The judgment of Ouseley J "*made it clear that there was no legal obligation upon the United Kingdom, whether by way of additional compensation or otherwise, to fund resettlement*".[17]

(3) The Feasibility Study

89. The initiation of the Feasibility Study was related to the prosecution of the Bancoult 1 proceedings. The nature of this relationship was subsequently explained in Bancoult 2 as follows:

> "[15] The government's reaction to the institution of these proceedings [ie, Bancoult 1] was to commission an independent feasibility study to examine whether it would be possible to resettle some of the Chagossians on the outer islands of Peros Banhos and

[12] *CIL* [J67, J532, J570 and J583].
[13] *CIL* [J529 to J533; J581 to 582; J682]; *CIL* [A575 to A586].
[14] R (Bancoult) v. Secretary of State for Foreign & Commonwealth Affairs [2001] QB 1067, DC.
[15] It involved hearing oral evidence from 19 of the claimants and their legal advisers (past and present). There were approximately 30 lever arch files of material made available to the Judge during the course of the hearing. A chronology submitted by the defendants to the action alone ran to 154 pages.
[16] The learned Judge found that the plantations on the Chagos archipelago were run down and effectively the population had no choice but to leave for that reason: *CIL* [J126; J261; J299-305; J315-316; J329; J331; A303].
[17] As described in Bancoult 2 [2008] UKHL 61, [25].

> the Salomon Islands. There was no question of their return to Diego Garcia, which the United States was entitled to occupy until at least 2016. It must have been clear to both parties that the challenge to the validity of the 1971 Ordinance was largely symbolic. There was no evidence that it had ever been used to expel anyone from the islands. The islanders who left between the time it was made and the final evacuation in 1973 did so because they were left with the alternative of being abandoned without support or supplies. Nor would its revocation have any practical effect on whether the Chagossians could go back and reside there. That would require an investment in infrastructure and employment which the Chagossians could not themselves provide. As was demonstrated by subsequent actions, the judicial review proceedings were only a part of a new campaign by the Chagossians to obtain UK government support for their resettlement to right the wrongs of 1968-1973."

90. The Feasibility Study was initially commissioned in February 2000. The form which the Study would take was itself suggested by the independent experts appointed to carry out the Preliminary Feasibility Study (Phase 1). They reported in June 2000. Annex 1 to their Study (prepared by the independent experts) set out the terms of reference for future work. It was envisaged that Phase 2 would examine the physical constraints on and the consequences of any planned resettlement.

91. As noted above, the Divisional Court's decision in Bancoult 1 that the 1971 Ordinance was unlawful was published on 3 November 2000. The then Foreign Secretary issued a press release responding to the judgment:

> "I have decided to accept the Court's ruling and the Government will not be appealing.
> **The work we are doing on the feasibility of resettling the Ilois now takes on a new importance. We started the feasibility work a year ago and are now well underway with phase two of the study.**
> Furthermore, we will put in place a new Immigration Ordinance which will allow the Ilois to return to the outer islands while observing our Treaty obligations.
> This Government has not defended what was done or said thirty years ago. As Lord Justice Laws recognised, we made no attempt to conceal the gravity of what happened. I am pleased that he has commended the wholly admirable conduct in disclosing material to the Court and praised the openness of today's Foreign Office."
> [emphasis supplied]

92. Phase 2 of the feasibility study was divided into two sections: Phase 2A was conducted by the British Geographical Survey and constituted an analysis of the meteorological, hydrological and hydro-geographical parameters pertaining in the Chagos Islands; Phase 2B was a larger

undertaking, and the appointment of experts to conduct it was put out to tender, a process which was ultimately won by Royal Haskoning. Phase 3 would only take place when a decision had been made in principle to support resettlement. Phase 3 would examine the technical, financial, economic and environmental aspects of such specific development proposals as had been advanced.

93. The Phase 2B Report was published in July 2002. A copy was sent to Mr Gifford. Copies of the Executive Summary were also placed in the House of Commons Library. The Executive Summary of the Phase 2B Report stated the general conclusion to which we have referred in our introduction, namely, that whilst it might be feasible to resettle the islands in the short term, the costs of maintaining long-term inhabitation were likely to be prohibitive; and even in the short term, natural events such as periodic flooding from storms and seismic activity were likely to make life difficult for a resettled population.

94. Mr Gifford obtained a review of the Phase 2B Report from an American anthropologist, Mr Jonathan Jenness. Mr Jenness's review praised some aspects of the Report, but in other respects was highly critical of its scope and reasoning. The review was submitted to the Government. By letter of 3 December 2002 Baroness Amos acknowledged it, noted some comments, and provided some comments by Dr Charles Shepherd.

95. The FCO's account of what happened next is that, in the light of the conclusions set out in the Phase 2B Report, and other material considerations relating to cost, defence interests and the environment, the view formed by Ministers was that anything other than a short term resettlement on a purely subsistence basis would be highly precarious; it would also involve expensive underwriting by the UK for an open-ended period, and probably permanently; Phase 3 of the Feasibility Study did not therefore take place. We note in passing that at the time when the Phase 2B Report was delivered the litigation in Chagos Islanders v Attorney General was still proceeding.

96. Following consideration of the Phase 2B report, and after some considerable delay, the Government's policy position was announced by the Parliamentary Under Secretary of State for Foreign and Commonwealth Affairs, who said in a written statement on 15 June 2004:

> "... In effect, therefore, **anything other than short-term resettlement on a purely subsistence basis would be highly precarious and would involve expensive underwriting by the UK government for an open-ended period - probably permanently. Accordingly, the Government considers that there would be no purpose in commissioning any further study into the feasibility of resettlement; and that it would be impossible for the Government to promote or even permit**

> **resettlement to take place. After long and careful consideration we have therefore decided to legislate to prevent it.**
> Equally, restoration of full immigration control over the entire territory is necessary to ensure and maintain the availability and effective use of the Territory for defence purposes, for which it was in fact constituted and set aside in accordance with the UK's treaty obligations entered into almost 40 years ago. Especially in the light of recent developments in the international security climate since the November 2000 judgment, this is a factor to which due weight has had to be given.
> It was for these reasons that on 10 June 2004 Her Majesty made two Orders in Council, the combined effect of which is to restore full immigration control over all the islands of the British Indian Ocean Territory. These controls extend to all persons, including members of the Chagossian community."
> [emphasis supplied]

97. It may be that the delay in the making of this announcement was connected with the progress of the pending group litigation. We note that the announcement was made two days before the Court of Appeal heard, on 17 June 2004, the application for permission to appeal from the judgment of Ouseley J.

98. From this history it is clear that the Phase 2B Feasibility Study played an important role in the Government's decision to rule out the possibility of the Chagossians' return to some of the islands. The Appellants are understandably concerned to obtain as much information as they can concerning whether the Study was entirely objective and to trace whether, and if so to what extent, the Government had a hand in influencing the conclusions which were reached.

(4) The litigation in Bancoult 2

99. The fourth set of legal proceedings was the case known as Bancoult 2.[18] This was launched in August 2004. It consisted of a judicial review challenge to the Orders in Council which implemented the decision to reintroduce a prohibition on anyone entering the BIOT without a permit (the 2004 Constitution Order[19] and the 2004 Immigration Order[20]). The Divisional Court and the Court of Appeal considered that the 2004 Orders were unlawful, but the House of Lords disagreed. By three to two (Lords Bingham and Mance dissenting) the House of Lords dismissed the claimant's challenge to the lawfulness of article 9 of the Constitution Order and to like provision made by the British Indian Ocean Territory (Immigration) Order 2004, essentially because the Government was entitled to take the view that it was not in the public interest that an unauthorised settlement on the islands should be used as a means of exerting pressure to compel it to fund a resettlement

[18] R (Bancoult) v. Secretary of State for Foreign & Commonwealth Affairs (No. 2) [2006] EWHC 1038 (Divisional Court); [2008] QB 365 (Court of Appeal); [2009] 1 AC 453 (House of Lords).
[19] The British Indian Ocean Territory (Constitution) Order 2004.
[20] The British Indian Ocean Territory (Immigration) Order 2004.

which it had decided would be uneconomic: R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2) [2008] UKHL 61, [2009] 1 AC 453; see in particular [54]-[55].

100. Accordingly, the 2004 Orders remain in force. By Article 4 of the 2004 Constitution Order, there shall be a Commissioner for the Territory who shall be appointed by Her Majesty (since July 2008, this has been Mr Roberts) by instructions given through a Secretary of State. Article 9 of the Constitution Order provides:

> "(1) Whereas the Territory was constituted and is set aside to be available for the defence purposes of the Government of the United Kingdom and the Government of the United States of America, no person has the right of abode in the Territory.
>
> (2) Accordingly, no person is entitled to enter or be present in the Territory except as authorised by or under this Order or any other law for the time being in force in the Territory."

101. In the course of Bancoult 2, Mr Gifford made a witness statement on behalf of Mr Bancoult, dated 31 March 2005. He exhibited the study prepared by Mr Jenness, and at [16.5] of his statement he said this:

> "Mr Jenness ... pointed to the significance of agriculture for which inadequate appraisal had been made by Phase 2B, and emphasised the feasibility of refurbishing the coconut plantations (RDG-I p.421). Mr Jenness concluded that the Chagos Archipelago has a benign environment (p. 67) that human ingenuity can address possible climate problems, and there was no reason to believe the islands could not be resettled, having been successfully settled for several generations and having a substantial population at the present time on Diego Garcia who enjoyed excellent environmental conditions. As to seismic events which consultants thought 'would make life difficult for a resettled population', Mr Jenness stated there was no evidence to base the conclusion of damage from seismic events, and that there is no other single record of a tsunami doing any damage anywhere in the Chagos (RDG-I p. 458-459)."

102. Notwithstanding these different opinions, the conclusions of the Phase 2B Feasibility Study were not challenged by the claimant in Bancoult 2. While the claimant applied to amend its grounds of review on the sixth day of the hearing before the Divisional Court to include a reference to the Feasibility Study, it was not the subject of a direct challenge in itself. Permission was granted for the amendment in the course of the judgment of Hooper LJ: [2006] EWHC 1038 (Admin) at [103]. The claimant's case (as advanced by Sir Sydney Kentridge QC and Professor Antony Bradley among others) was that the conclusions of the Feasibility Study did not justify the making of the 2004 Orders in

Council.[21] Nor was the Feasibility Study challenged on appeal. In his judgment in the Court of Appeal in Bancoult 2,[22] Sedley LJ said this:

> "Mr Anthony Bradley ... made it clear that there was no contest about the Government's entitlement to terminate the feasibility study and to decline to support a return to the islands. The challenge was to the abolition of the right of abode in the absence of proven good reason and of consultation."

(5) The application to the European Court of Human Rights

103. On 14 April 2005, an application was brought before the European Court of Human Rights challenging the decision of the Court of Appeal on 22 July 2004 to dismiss the application for permission to appeal by the Chagos Islanders. That application to the ECtHR is still pending. It was stayed pending the outcome of the judicial review proceedings in Bancoult 2. Amended grounds of challenge subsequently also sought to challenge the judgment of the House of Lords in Bancoult 2. The applicants' revised case was served in Observations in Reply dated 23 October 2009. The complaint is brought on the basis of an alleged breach of their rights under articles 3, 6, 8 and 13 of the Convention and also of Article 1 of the First Protocol. The UK Government responded to both challenges in Observations dated 31 July 2009 and 15 January 2010. Further written observations were submitted by the Applicants on or about 17 February 2010. The UK Government responded to these by short further Observations dated 23 March 2010. The UK Government also submitted further Observations in relation to jurisdiction in September 2011. The Court has yet to rule on the admissibility or merits of the application.

(6) The challenge to the MPA (Bancoult 3)

104. On 1 April 2010, by Proclamation No. 1 of 2010 the Commissioner for the BIOT established a marine reserve to be known as the Marine Protected Area ("MPA"). Mr Bancoult subsequently brought proceedings dated 11 August 2010, seeking to challenge the designation of an MPA. He does so on the basis of allegations that the consultation process which took place prior to its creation was unlawful in three respects:

a. "failure to reveal" that the defendant's "own consultants had advised that resettlement of the population was feasible",
b. "failure to disclose relevant environmental information",
c. creation of the MPA for an improper motive, namely to prevent resettlement of the Chagossians in the islands.

[21] The terms of the amendment are cited in the judgment of Hooper LJ at [103] in R (Bancoult 2) v. SSFCA [2006] EWHC 1038 (Admin). The relevant paragraph contained an expanded challenge to the rationality of the 2004 Orders. The material part of the amendment read as follows: "The second reason put forward for the impugned Orders is termination of the feasibility study. That does not logically require the removal of the right of abode from the entire relevant class in respect of the entire archipelago. Nor were the true findings of the Feasibility consultants to the effect that settlement was both feasible and without serious costs consequences given due weight."

[22] [2007] EWCA Civ 498; [2008] Q.B. 365, at [75].

105. The real gravamen of the complaint[23] is directed against the preparation and contents of the Phase 2B Feasibility Study, which was published in July 2002. The complaint is essentially that:

a. Mr Stephen Akester, one of a panel of independent experts conducting the Phase 2B Feasibility Study in 2002, has "revealed for the first time" in February 2010 that he considered resettlement to be feasible and that he had proposed three development scenarios;
b. Mr Akester's advice was disregarded in the published Phase 2B Report;
c. his three development scenarios were not revealed to the court in Bancoult 2.

106. The FCO contends, for reasons that were explained to us, that these allegations are wholly mistaken and unjustified. The Secretary of State filed Summary Grounds in defence of this claim on 7 October 2010. The Secretary of State has contended in Bancoult 3 that in so far as the claim seeks to challenge the Phase 2B Report, it is significantly out of time. Such a challenge should have been brought promptly after its publication in July 2002. The application for permission was originally stayed pending the outcome of the Chagos Islanders' application to the European Court of Human Rights. By a consent order signed by the parties and approved by Ouseley J on 16 March 2012, permission was granted, and the claim awaits a substantive hearing, which we were given to understand may take place in October 2012.

107. The claimant in Bancoult 3 sought a temporary stay of the proceedings pending a "review" referred to by the Minister of State, Lord Howell, on 29 June 2010. The Minister was responding to questions in the House (see Hansard 29.06.10, Col. 1652-1654), and said only that the new government was looking at the whole pattern of issues raised by the BIOT's situation. This was done, and on 12 August 2010 Henry Bellingham MP, Parliamentary Under Secretary of State at the FCO, wrote to both Lord Luce, a member of the All Party Parliamentary Group on the Chagos Islands, and to Mr Bancoult, notifying them of the outcome. The letters explained that the Government had decided not to change the fundamental policy on resettlement, compensation and the MPA. The Government's position was summarised by the Foreign Secretary in his evidence to the Foreign Affairs Committee on 8 September 2010 (published as Hansard HC 438i).

108. Having set out the history, we need to return to the question of the public interest balance. Before doing so, we indicate our approach to the concerns raised by the Chagossians for the purpose of assessing the public interests. On the one hand, we observe that a client (including a Government department) may give instructions to consultants, discuss drafts of reports, and make suggestions as to both presentation and content, without necessarily compromising in any way

[23] At [21] of the Statement of Facts and Grounds.

the independent judgment of the consultants. In addition, after the receipt of a consultants' report, a client is free to take into account, in making a decision, further matters which were not addressed in the report. The FCO may have acted in exemplary fashion in its handling of the Phase 2B Feasibility Study. On the other hand, given the nature of the history of events which we have related above, and the importance of the matter to the Chagossians, it does not seem to us unreasonable that they should raise concerns and seek to investigate them. The FCO strongly denied that the Chagossians' concerns were justified, and made a general submission about the large extent of disclosure already given and about the request being 'the continuation of protest by other means'. But the FCO did not contend that the request for information was manifestly unreasonable or that the concerns which lay behind the information request were frivolous.

The public interest in disclosure

109. Ms Giovanetti submitted, in summary, that the decision announced by the Government in 2004 was of enormous importance to the people affected by it, and that there was a strong public interest in enabling the public to understand as fully as possible what led to the decision. The obtaining of and consideration of the Phase 2B Feasibility Study were key elements in that process. She also prays in aid the Commissioner's view, as set out in paragraphs [38]-[40] of his Decision Notice.

110. We accept her submission. Given the very unusual, and in some respects extreme, nature of the history which we have set out above, we consider that the general public interests in transparency of environmental information, in accountability of Government for policy decisions made concerning matters affecting the environment, and in public understanding of such policy decisions, are very weighty in the context of this case. Neither the Commissioner nor the FCO addressed any arguments to us to contradict this as a general proposition.

111. Their only argument concerning the weight of the public interest in disclosure is that the public interest in disclosure of the Hamilton/Amos note is limited because of the nature of its contents:

a. Part of the contents of the note comprise information of which the Appellants are already aware from other sources, and which is in the public domain. No useful purpose would be served by disclosing those parts.
b. The other parts of the note, which particularly bear on policy issues, are limited in scope.
c. Therefore, given the quantity of information already disclosed, little is to be gained, in terms of public understanding, by disclosure of the note.

112. In the light of the evidence which we have received, this argument seems to us to have limited force in the circumstances of the present case. We accept that the public interests in disclosure must be judged

in relation to the particular information which is potentially to be disclosed. The amount of information in a potentially disclosable document is without doubt a material matter to take into account. At the same time, it is important not to discount unduly the significance, in the public interest, of the disclosure of small amounts of information. Publicly useful freedom of information requests are generally limited in scope. If too broad, they face the obstacle under FOIA of the costs limit, and under the EIR of the proportionality requirement. If the Tribunal were to take an unduly minimalist view of the value of the publication of relatively small amounts of information on matters of considerable legitimate public interest, this would materially reduce the effectiveness of the legislation. We would regard this as tending to conflict with the general purpose of the legislation, as seen in the authoritative remarks in *Sugar v BBC* [2012] UKSC 4 at [76]-[77], which in our view apply with equal force to the EIR, particularly in view of the presumption in favour of disclosure found in EIR regulation 12(2). In the circumstances of the present case, and having considered with care the contents of the Hamilton/Amos note, we judge that the weighty public interests to which we have referred would be usefully served by its publication.

The public interest in maintaining the exception

113. The FCO submits that the Government's policy in relation to the BIOT was under review at the time of the request and will naturally have to be reconsidered in the light of the final judgments of the ECtHR and the Administrative Court in Chagos Islanders v. UK and Bancoult 3 respectively.

114. We have indicated above our findings of fact concerning the current status of Government policy derived from Mr Roberts' oral evidence. The following circumstances seem to us be of particular relevance to the strength of the considerations involved in the safe space argument:

a. The Hamilton/Amos note is dated 27 September 2002. This was two months after the publication of the Phase 2B Feasibility Study.

b. On 15 June 2004 the Government announced its settled policy, which was that in the light of the Feasibility Study and defence considerations it would be impossible for the Government to promote or even permit resettlement to take place. That policy has remained the same ever since.

c. The proceedings in the European Court of Human Rights were commenced in 2005 and are still current.

d. The information request with which this appeal is concerned was made on 30 April 2010, approximately six years after the

announcement of the policy. The FCO responded to the request first in June 2010 and on internal review in September 2010.

e. Shortly before the internal FOI (freedom of information) review, on 11 August 2010 Mr Bancoult commenced the proceedings known as Bancoult 3.

f. Between the date of the information request and the concluding of the internal FOI review there was a general election, a change of Government, and a reassessment of the no-resettlement policy. By no later than 12 August 2010 the Government had decided not to change its policy. Thus at the time of the internal FOI review the policy was again in a settled state.

g. Since 12 August 2010 the policy has not been under fresh review.

h. At some time in the future, when the European Court of Human Rights delivers its judgment in the pending litigation, it is likely that the Secretary of State will want to look at the overall position on resettlement and the options for going forward, it being neither possible nor wise to do this before the judgment is delivered. While Mr Roberts did not place any particular emphasis on the Bancoult 3 litigation, which relates to the proclamation of the Marine Protected Area, we assume there is a possibility that the Bancoult 3 litigation could also generate a reassessment of policy.

115. The Appellants referred us to two discussions, in a FOIA context, of the need for a safe space for the formulation and development of Government policy. In their skeleton argument they submitted:

"[34] It is well established in a series of judicial decisions that the degree of "safe space" required is directly related to the stage of development of the policy at issue. In *Office of Government Commerce v Information Commissioner (Attorney General intervening)* [2010] Q.B. 98, 129-130, Stanley Burnton J held that:

> "[100] Section 35 of FOIA reflects the public interest in confidential information held by a government department relating to the formulation of government policy remaining confidential. The tribunal accepted, in para 85, that Government needs to operate in a "safe space" "to protect information in the early stages of policy formulation and development". In doing so, it followed the statement at para 75(iv) of the decision of the tribunal in *Department for Education and Skills v Information Comr* 19 January 2007:

> "*The timing of a request is of paramount importance to the decision. We fully accept the DFES argument, supported by a wealth of evidence, that disclosure of discussions of policy options, whilst policy is in the process of formulation, is highly unlikely to be in the public interest, unless, for example, it would expose wrongdoing within government. Ministers and officials are entitled to time and space, in some instances to considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy. We note that many of the most emphatic pronouncements on the need for confidentiality to which we were referred, are predicated on the risk of* ***premature*** *publicity. In this case it was a highly relevant factor in June 2003 but of little, if any, weight in January 2005.*"
>
> The emphasis is in the original.
>
> [101] Having referred to the fact that the Identity Cards Bill had been presented to Parliament, and was being debated publicly, the tribunal found that it was no longer so important to maintain the safe space at the time of the requests. I have [underlined] the adverb because it makes it clear that the tribunal did not find that there was no public interest in maintaining the exemptions from disclosure once the Government had decided to introduce the Bill, but only that the importance of maintaining the exemption was diminished. I accept that the Bill was an enabling measure, which left questions of Government policy yet to be decided. None the less, **an important policy had been decided, namely to introduce the enabling measure, and as a result I see no error of law in the finding that the importance of preserving the safe place had diminished.** Accordingly, this ground of appeal is not made out." [Emphasis added]

[35] The First Tier Information Tribunal considered the operation of "safe space" in relation to a policy that had to be revisited at a later date in *Department of Health v Information Commissioner* (First Tier Tribunal, EA/2011/0286 & 0287), and held that the "safe space" exemption from disclosing information held by public authorities was not maintained until all contingencies were resolved; rather, the "safe space" exemption was of narrower scope and so was resurrected only at the specific time that the policy in issue was redeveloped or reformulated. It was held at §28 that:

> *"Therefore* ***there may be a need to, in effect, dip in and out of the safe space during this passage of time so government can continue to consider its options****. There may also come a time in the life of an Act of Parliament when the policy is reconsidered and a safe space is again needed. Such a need for policy review and development may arise from implementation issues which in themselves require Ministers to make decisions giving rise to policy formulation and development. We therefore understand why the UCL report describes the process as a "continuous circle" certainly until a Bill receives the Royal Assent. However the need for safe spaces during this process depends on the facts and circumstances in each case. Critically the strength of the public interest for maintaining the exemption depends on the public interest balance at the time the safe space is being required."* [Emphasis added]
>
> ... ...
>
> [37] It is difficult to see any basis for the application of the "safe space" exemption in circumstances where, following "long and careful consideration" a policy decision has been made, legislation has been passed to implement it, and several years have elapsed. The fact that the relevant decisions are being challenged through the Courts is, without more, irrelevant. The "safe space" principle is intended to allow Ministers and officials "*time and space...to hammer out policy by exploring safe and radical options alike*". It is not intended to prevent public (or judicial) scrutiny of the decision making process once the relevant decisions have been made."

116. We accept these judicial dicta as helpful reminders of public interest considerations associated with the need for safe space for the development of Government policy, while also reminding ourselves that they should not be read as any more than general indications, the application and weight of which in any particular case are heavily dependent on the particular facts, and that we are concerned in the present case not with the policy exemption in FOIA as such, but with the public interest in maintaining the EIR internal communications exception in the circumstances of the present case.

117. The principal reason given by the Commissioner for regarding the public interest in protecting the safe space as "particularly weighty" (Decision Notice, paragraph 46) was that "the FCO's decision making process represented in the withheld information related to an issue that was live at the time of the request (and indeed remains live)". He considered there was (paragraph 45):

> "a strong public interest in avoiding potential prejudice to the FCO's decision making process whilst this is still a live issue. This is especially the case given the presence of a US military base on one of these islands, and the subsequent inevitable international and diplomatic dimension of this decision making process. The Commissioner does not believe that it is in the public interest to cause unnecessary prejudice to this process by disclosure of information under EIR whilst this is still a live issue."

118. The Commissioner added to his findings this rider:

> "[48] Although he has found that this information should be withheld, the Commissioner is deeply concerned that in order to make this finding he has had to rely solely upon his own judgement and knowledge of events. Despite the FCO being invited to provide submissions to support its use of the FOIA exemptions and the EIR exceptions – and being given a considerable amount of time to provide these arguments – he is particularly concerned by its failure to produce any coherent or cogent arguments to support its use of this exception [ie, exception 12(4)(e)]."

119. The FCO had the opportunity during the appeal to provide its further evidence and arguments on the public interest considerations supporting the maintenance of exception 12(4)(e). It relied on the argument that the issue of resettlement remained live because of the pending litigation, and explained in its closed skeleton and in Ms Bowyer's closed evidence its view of how that argument related to the contents of the Hamilton/Amos note.

120. We fully endorse the proposition that "*Ministers and officials are entitled to time and space, in some instances to considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy.*" In our view it is also plain, both from the authorities and from our experience in this Tribunal, that the need for safe space for the formulation of policy is a question of degree. More generally, the strength of the need in the public interest to maintain the confidentiality of internal Government communications depends upon the particular circumstances, and can be particularly sensitive to questions of timing.

121. Our judgment is that the public interest in maintaining the internal communications exception is not weighty in the present case. On the contrary, it seems to us to be particularly weak. Our finding on the evidence before us (which is more extensive than was before the Commissioner) is that the policy of preventing resettlement was not

live, in the sense of being currently under reconsideration, either at the date of the request or at the time of the conclusion of the internal review. (Nor, if relevant, is it currently live in that sense.)

122. Having had the benefit of Mr Roberts' oral evidence, we consider that the Commissioner was mistaken in thinking that there was an active decision-making process in progress at the time when the FCO concluded its internal review. Moreover, while the Commissioner referred to the "international and diplomatic dimension of this decision making process", the evidence before us (whether open or closed) did not in our view establish that disclosure of the Hamilton/Amos note would be of material significance in an international or diplomatic context.

123. We acknowledge the prospect that at some future date – perhaps in 2013, perhaps later - after the final conclusion of the two pending pieces of litigation, the resettlement policy is likely to be the subject of reconsideration. In our view that was at all material times, and remains today, a very weak reason for maintaining the confidentiality of a document written in entirely different circumstances in 2002.

124. We also acknowledge that for a part of the time between the date of the request and the date of the conclusion of the FCO's internal review the resettlement policy was under reconsideration, as a result of the change of Government in May 2010. This does not alter our view. The request was not for information generated in the course of that reconsideration but for information created in different circumstances some eight years earlier; and the reconsideration had in any event been completed, and the policy reconfirmed, before the FCO's internal review of its response to the information request.

125. We have set out in Confidential Annex No 2 additional reasons for our conclusions regarding the Hamilton/Amos note.

The balance of public interest

126. In the light of our assessment of the public interests, our conclusion is that the FCO and the Commissioner have not demonstrated that the public interest in maintaining the exception outweighs the public interest in disclosure. On the contrary, our judgment is that the public interest in disclosure in all the circumstances of the case materially outweighs the public interest in maintaining the exception.

127. Our principal reasons for that conclusion are set out above. Further reasons are set out in Confidential Annex No 2. We do, however,

consider that there is one sentence of the Hamilton/Amos note which should be redacted, for reasons given in Confidential Annex No 3.

Conclusions and remedy

128. In summary, the appeal is dismissed on the first issue, allowed in part on the second issue, and allowed on the third issue, subject to the redaction.

First issue

129. At the relevant time the material retained by the consultants was not "held" by the FCO for the purposes of the EIR. The appeal on this issue is dismissed.

Second issue

130. The FCO's original searches were not adequate but, subject to one qualification, the FCO subsequently remedied this failure, and the Tribunal is satisfied on the balance of probabilities that there are no further documents held by the FCO within the scope of the request. More particularly, there are no further documents held by the FCO which a reasonable and proportionate search would identify. The qualification is that there is one document which in our judgment was rightly located by the FCO in response to the information request but wrongly classified by the FCO as falling outside its scope. This document is the one that we have called "the November note". No exception is relied upon by the FCO. This document must be disclosed.

131. Confidential Annex No 1 contains our reasons for regarding the November note as within the scope of the information request. This depends upon construing the meaning of the request in its factual context. Subject to any agreement of the parties and any order of a higher Tribunal or Court, Confidential Annex No 1 must remain confidential to the FCO and the Commissioner until the time for appeal by the FCO has passed and, if an appeal is pursued by the FCO in respect of this item, unless and until it is finally disposed of in favour of the Appellants.

Third issue

132. The exception in EIR regulation 12(4)(e) (internal communications) is engaged in relation to the Hamilton/Amos note. Our judgment of the public interest balance is that the public interest in disclosure of the

information in this note materially outweighs the public interest in the maintenance of the exception in relation to it. The note must therefore be disclosed, subject to the redaction identified in Confidential Annex No 3.

133. Confidential Annex No 2 contains additional reasons for our conclusions on the Hamilton/Amos note. It considers the contents of the note and concludes that, subject to the redaction, we are wholly unimpressed by the reasons put forward by the FCO for regarding disclosure of the Hamilton/Amos note as a material hindrance to the formulation of Government policy. Subject to any agreement of the parties and any order of a higher Tribunal or Court, Confidential Annex No 2 must remain confidential to the FCO and the Commissioner until the time for appeal by the FCO has passed and, if an appeal is pursued by the FCO in respect of the Hamilton/Amos note, unless and until the appeal is finally disposed of in favour of the Appellants.

134. Confidential Annex No 3 contains the Tribunal's reasons for the redaction of one sentence of the Hamilton/Amos note. Our reasoning in Annex No 3 is essentially that the redacted material remained sensitive at the time the request was dealt with and its disclosure would not have enhanced public debate or understanding concerning the matters to which the information request was directed. Subject to any agreement of the parties and any order of a higher Tribunal or Court, Confidential Annex No 3 must remain confidential to the FCO and the Commissioner.

Further matters

135. Disclosure of the documents which should have been disclosed in response to the request made on 30 April 2010 shall be given within 14 days from the date of this decision. In setting the period at 14 days we are conscious of the need to take into account the length of time that has elapsed since the request was made, the desire of the Appellants to see any further documents before the pending judicial review proceedings are heard, and the time reasonably required by the FCO to consider whether it wishes to appeal.

136. The FCO's skeleton argument sought an award of costs. In our view there is no sufficient ground for awarding costs to the FCO; the application for costs is refused.

137. Our decision is unanimous.

Signed:

Andrew Bartlett QC
Tribunal Judge

Dated: 4 September 2012

EA/2011/0300

CONFIDENTIAL ANNEX NO 1:

WHETHER NOVEMBER NOTE WITHIN SCOPE OF REQUEST

Subject to any agreement of the parties and any order of a higher Tribunal or Court, this Confidential Annex No 1 is confidential to the FCO and the Commissioner until the time for appeal by the FCO has passed and, if an appeal is pursued by the FCO in respect of the November note, unless and until it is finally disposed of in favour of the present Appellants.

1. The "November note" is dated 27 November 2002. It is a note from Charles Hamilton to the Private Secretary to Baroness Amos, which contains comments on Jenness's critique of the Phase 2B Feasibility Study.

2. The FCO submits through Mr Beal QC that the November note is outside the scope of the information request, on the ground that it does not directly relate to the conduct of the Feasibility Study. On the contrary, it relates to comments upon the Jenness review. The request was directed to the Study itself, not to criticisms made afterwards. If Mr Gifford had wanted disclosure of critiques, he would have asked for them specifically.

3. The IC submits through Mr Hopkins that the November note is within the scope of the request. Since it relates to the Jenness review, which was itself a critique of how the Feasibility Study was conducted, it relates to the conduct of the Feasibility Study.

4. The IC, in support of his submission, points out that the terms of the request ask for "submissions, minutes, memoranda and letters relating to the conduct of the Feasibility Study for the period 1 January 2000 to 31 December 2002". The choice of dates shows that the requester was looking beyond the date when the final Phase 2B Feasibility Study was delivered. This shows that a broad interpretation should be given to the phrase "relating to the conduct". The document in question is part of an ongoing discussion about the conduct of the study after it had been conducted.

5. Moreover the FCO itself originally understood the request in a broad sense, since it included in the material disclosed in response to the request some correspondence concerning the Jenness review. Mr Beal accepted in oral argument in closed session that there was an inconsistency in this respect in the FCO's position.

6. We accept the submissions made Mr Hopkins. In our view, for the reasons he gives, the November note is within the scope of the request.

EA/2011/0300

CONFIDENTIAL ANNEX NO 2:

ADDITIONAL REASONS FOR THE TRIBUNAL'S CONCLUSIONS ON THE HAMILTON/AMOS NOTE

Subject to any agreement of the parties and any order of a higher Tribunal or Court, this Confidential Annex No 2 is confidential to the FCO and the Commissioner until the time for appeal by the FCO has passed and, if an appeal is pursued by the FCO in respect of the Hamilton/Amos note, unless or until it is finally disposed of in favour of the present Appellants.

1. In closed session Ms Bowyer was briefly questioned about the Hamilton/Amos note dated 27 September 2002, for clarification of the FCO's position on why it was regarded as sensitive.

2. The text of the note consists of 6 numbered paragraphs. Ms Bowyer accepted that the only parts of any sensitivity were the last two sentences of paragraph 3, and paragraph 4.

3. The penultimate sentence of paragraph 3 is an explanation of the intended difference in scope of Phase 2 of the Feasibility Study, as compared with Phase 3. The final sentence of paragraph 3 is an expression of opinion concerning the logical outcome, given the actual conclusions reached in Phase 2. These sentences anticipate what became settled Government policy, as laid out in the announcement made on 15 June 2004. In our judgment there is no convincing reason why disclosure of these sentences in September 2010 (ie, upon internal review of the information request by the FCO) would have substantially interfered with the safe space that was required by the Coalition Government for the brief reconsideration which culminated in a confirmation of the 2004 policy on or about 12 August 2010. Nor do we consider that the prospect of a further reconsideration at some future date, when the Bancoult 3 and ECHR litigation proceedings were concluded, provided any convincing justification for keeping these sentences confidential in 2010.

4. The second sentence of paragraph 4 is merely a statement that the FCO was not in a position at that point in time to give a public indication of its view regarding Phase 3 of the Feasibility Study. In our view, this is anodyne. In the course of time, the Government's view was announced.

5. In summary, subject to the redaction of the first sentence of paragraph 4 (which we explain in Confidential Annex No 3), we are wholly unimpressed by the reasons put forward by the FCO for regarding disclosure of the Hamilton/Amos note as a material hindrance to the formulation of Government policy.