IN THE FIRST TIER TRIBUNAL **Appeal No: EA/2013/0103**

GENERAL REGULATORY CHAMBER

INFORMATION RIGHTS

On appeal from the Information Commissioner's Decision Notice No FER0468055 dated 26.3.13

Before

Andrew Bartlett QC (Judge)

Gareth Jones

Darryl Stephenson

Heard at Field House, London EC4

Date of hearing 6-7 June 2016

Date of decision 28th July 2016

APPELLANT:	**LUCAS AMIN**
FIRST RESPONDENT:	**INFORMATION COMMISSIONER**
SECOND RESPONDENT:	**DEPARTMENT OF ENERGY AND CLIMATE CHANGE**

Attendances:

For the appellant Julianne Kerr Morrison

For the 2nd respondent Justine Thornton QC

The 1st respondent did not attend the hearing.

Environmental Information Regulations 2004 – Exception – Internal communications – Request relates to unfinished material – Time for application of public interest test – Public interest balance

Cases:

Cabinet Office v IC and Lamb 27 January 2009, EA/2008/0024 and 0029

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

Foreign and Commonwealth Office v IC and Plowden [2013] UKUT 275 (AAC)

Cabinet Office v IC and Aitchison [2013] UKUT 0526 (AAC)

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

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

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the appeal.

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Introduction

1. Against a background of concerns about climate change and about security of electricity supply, the UK's energy policy is a matter which involves important public interests, in regard to democratic participation in the formation, implementation and understanding of energy policy, in regard to Governmental accountability and transparency, and in regard to the practical impacts of energy policy on UK citizens. This appeal concerns a request for information which sought to find out more about how a particular aspect of energy policy incorporated into the 2012 Energy Bill was arrived at. It requires us to consider the application of exceptions under the Environmental Information Regulations 2004 ('EIR') applying to internal government communications and to material in the course of completion.

2. This appeal was originally determined by a First-tier Tribunal on 12 June 2014. An onward appeal to the Upper Tribunal was allowed on a point of law on 22 September 2015 and the case was remitted to a differently constituted First-tier Tribunal to be heard afresh. Some of our recitation of the facts and law is derived from the Upper Tribunal decision.

The EIR

3. The EIR provide, so far as directly material, as follows:

'5(1) Subject to [various provisions] ...., a public authority that holds environmental information shall make it available on request.

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

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

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

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

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

... ...

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

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

(8) For the purposes of paragraph (4)(e), internal communications includes communications between government departments.'

4. The EIR were enacted pursuant to the UK's obligations under EC Directive 2003/4/EC, which includes the following recitals:

   '(1) Increased public access to environmental information and 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.

   (16) The right to information means that the disclosure of information should be the general rule and that public authorities should be permitted to refuse a request for environmental information in specific and clearly defined cases. Grounds for refusal should be interpreted in a restrictive way, whereby the public interest served by disclosure should be weighed against the interest served by the refusal. ....'

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

5. Mr Amin is a director and co-founder of Request Initiative, a not-for-profit organisation founded in 2010 which makes requests for information on behalf of charities, NGOs and the like.

6. On 5 April 2012 Mr Amin, at the instigation of Greenpeace, made three information requests to the Second Respondent ('DECC'). Only one of these is at issue in the present appeal. So far as now material, it was for communications in the period 1 October 2011 to 5 April 2012 between DECC and (i) the Department for Business, Innovation and Skills and (ii) the Treasury 'in relation to proposals for the introduction of new emissions performance standards for fossil fuel power stations.'[1]

7. DECC responded to the Request on 2 July 2012, stating that it held information within the scope of the Request, but that it was withholding it under the exceptions in regulations 12(4)(d) (incomplete information) and 12(4)(e) (internal communications) of the EIR.

8. Following an internal review by DECC, Mr Amin complained to the Information Commissioner, who found that exception 12(4)(e) was engaged and that the public interest in maintaining the exception outweighed the public interest in disclosing the withheld information. The Commissioner therefore did not require the withheld information to be disclosed.

9. Mr Amin appealed to the First-tier Tribunal. DECC was added as Second Respondent to that appeal. Two civil servants, Mr Spurgeon and Mr Ibbett, made open witness statements on

[1] The full request, which ran to two pages, was less clearly worded than it might have been, and contained a number of ambiguities and difficulties of interpretation. It is not necessary for us to consider in this appeal how it should be interpreted, because it is not now in dispute that the disputed information identified by DECC is the information held by DECC which fell within the scope of the request. For the information of DECC and the Information Commissioner, we observe that pp33-34 at the back of tab 6 of the closed bundle fall outside the scope of the request which is the subject of the appeal.

behalf of DECC. Mr Spurgeon's witness statement also contained a closed annex in which he referred to and commented on the specific significance of the withheld information and the prejudice to the public interest which he contended disclosure of it would have caused. The Tribunal held an oral hearing of the appeal, which included a closed session from which the public and Mr Amin and his representatives were excluded.

10. By a majority decision the Tribunal dismissed the appeal, on the ground that the public interest in maintaining the applicable EIR exceptions outweighed the public interest in disclosing the withheld information. The Tribunal did not consider it necessary to issue any part of its decision in closed form.

The appeal to the Upper Tribunal

11. An oral hearing was held at the Upper Tribunal (Judge Turnbull) on 14 July 2015. This included a closed session attended only by persons present on behalf of the Respondents. In his decision the Judge held that the reasoning of the First-tier Tribunal had been insufficiently clear, and hence was vitiated by error of law, and also that it would not be appropriate for him to re-make the decision. Accordingly he remitted the case to a differently constituted First-tier Tribunal.

12. By way of further guidance he emphasized a number of relevant legal principles concerning use of closed material (see [2015] UKUT 527 (AAC) at [78]-[83]):

    a. The First-tier Tribunal must examine critically submissions based on closed material.

    b. There is a duty of maximum possible candour in writing the reasoned decision. To the extent possible, the Tribunal must indicate the significance that the closed material plays in its decision.

    c. Closed reasoning may be necessary. Writing it may assist in the process of arriving at the right conclusion; and it may enable a higher tribunal, in the event of an appeal, to determine whether the reasoning contains an error of law.

13. He also discussed the concept of 'safe space' or 'space to think in private' in relation to the exception for internal communications in reg 12(4)(e) (see [2015] UKUT 527 (AAC) at [88]-[121]) and concluded:

    a. The prejudice to the public interest which can be relied upon under reg 12(4)(e) is not limited to the need for 'safe space' for 'policy formulation and development'. It is sufficient that disclosure would in some way prejudice the effective conduct of public affairs. The only limitation is that the prejudice must be related to the fact that the communications are internal ones. [102]

    b. 'Safe space' is needed at least in part in order to prevent the counter-productive disruption and distraction to the policy-making process which would be likely to occur if the recorded thoughts of officials in the course of working out a policy were

to be made public. That disruption and distraction would most obviously be likely to result from a perceived need to react to criticism based on previously unperfected thoughts and ideas. Disruption to the policy making process itself can obviously only occur while policy is actually being worked out. But it does not follow that the likelihood of it could only constitute prejudice in relation to a request answered while policy formulation is going on. If the government provides evidence to the effect that, even though no policy formulation was occurring at the time when the request was answered, it was likely that the policy would need to be reconsidered during the Parliamentary process, and that in the event of that happening a previous disclosure of the withheld information would or might well have given rise to unproductive disruption and distraction, there is no reason why the likelihood of such prejudice could not be taken into account. [110]

c. The sort of prejudice which can be relied upon can extend to anything which would or might result in the policy being formulated less efficiently or less well. It could include anything tending to result in the policy makers having to pay undue regard to matters not directly related to the merits of the policy arguments. Further, it could extend to matters other than disruption of the process of formulating policy. [112]

d. It is not necessary under reg 12(4)(e) to make a binary distinction between a policy being 'live' and no longer 'live'. There is in reality a broad spectrum of possibilities as regards the degree of finality of a policy, and there is not a particular degree of 'liveness' which must still exist if prejudice to the public interest by reason of impingement on the safe space for policy formulation is to be capable of being found significant. [119]

14. We have kept this guidance firmly in mind.

The questions for the Tribunal's decision

15. The following features are not in dispute between the parties:

a. The request falls for consideration under the EIR rather than FOIA (the Freedom of Information Act). The withheld information is 'environmental information' within the scope of the EIR.

b. The withheld information as a whole constitutes 'internal communications' within reg 12(4)(e).

c. Included in the withheld information is a draft Impact Assessment. This falls within reg 12(4)(d).

d. The public interest test must be applied as at the time when the request was made and dealt with.

16. As regards the time for application of the public interest test, in our view the relevant period is from 5 April 2012, when the request was made, through 2 July 2012, when DECC responded, to 5 October 2012, when DECC communicated the result of its internal review. To limit the consideration to the time when the request was first answered would unnecessarily circumscribe the public authority's internal review. If at the time of review a public authority concludes that the balance of public interest is in favour of release of information, it should not refuse release on the basis that the balance was in the other direction at the date of its original refusal. See *All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner and Ministry of Defence* [2011] UKUT 0153 (AAC) at [9](iii) and [40], and *Cabinet Office v IC and Aitchison* [2013] UKUT 0526 (AAC) at [15]; notwithstanding *Amin v IC and Department of Energy and Climate Change* [2015] UKUT 527 (AAC), at [85]. However, on the facts of the present case the public interest balance is not affected by the precise date applicable.

17. The outcome of the present appeal depends upon the application of the public interest test, that is, whether in all the circumstances of the case the public interest in maintaining the exceptions outweighed the public interest in disclosing the information. In the application of this test we must and do keep in mind the purposes of the legislation and the presumption in favour of disclosure (see paragraphs 3-4 above).

Procedure and evidence

18. The Information Commissioner was not represented at the hearing but relied on written submissions. We received written and oral evidence from Dr Parr, Policy Director of Greenpeace UK, and from Messrs Spurgeon and Ibbett.

19. Our overall assessment of the three witnesses was generally very positive, though this does not mean that we necessarily accepted everything that they said, as we make clear where necessary below. We found each of them impressive in their different ways:

    a. Dr Parr was a straightforward witness who clearly had a deep knowledge of issues arising in energy policy.

    b. Mr Spurgeon had been Assistant Director in the Office of Carbon Capture and Storage from September 2009 to March 2016. He was no longer a civil servant but nevertheless had a clear memory of the relevant events in 2012; he had evidently been good at his job, being competent and clear-thinking. He was involved in the daily work of policy development.

    c. Mr Ibbett was Director of Carbon Capture and Storage from September 2012 to March 2016. Before that he was Principal Private Secretary to the Secretary of State for Energy and Climate Change. He was highly intelligent and articulate, and experienced in the area of policy-making and relating to Ministers. When dealing with questions he chose his words carefully, but not in a way that avoided answering the questions. Both DECC witnesses impressed us by their candour.

20. The gist of the closed session was communicated to the appellant in the following terms:

> The withheld information consists of 3 letters between Ministers, a draft impact assessment and a small number of short, related miscellaneous emails written by officials.
>
> Mr Spurgeon gave evidence first and was asked questions by the Tribunal. He gave evidence as to why, in his opinion, disclosure of the withheld information would have given rise to disruption and distraction to DECC's energy policy making and would have resulted in energy policy being formulated less efficiently or less well during the passage of the Energy Bill. He did so from his perspective of day to day handling of policy making during the passage of the Energy Bill.
>
> In particular; he gave evidence as to DECC's judgment at the time of the information request in 2012, as to the risk that disclosure of the withheld information could jeopardise the passage of the Energy Bill through Parliament. He gave further detail on DECC's concession planning in relation to the EPS policy[2] and the wider Bill, in response to a question which the Tribunal had asked in open.
>
> Mr Ibbett confirmed his agreement with Mr Spurgeon's opinion that disclosure of the withheld information would have given rise to disruption and distraction to DECC's energy policy making and would have resulted in energy policy being formulated less efficiently or less well during the passage of the Energy Bill. In particular, he gave evidence on the surrounding context in which the information request had been made. He gave further detail on DECC's judgment in 2012 about the risk of jeopardy to the Energy Bill arising from disclosure of the withheld information. He did so from the perspective of his roles as Director of the Office of Carbon Capture and Storage and Principal Private Secretary to the Secretary of State, Ed Davey, during the passage of the Energy Bill through Parliament.
>
> Mr Ibbett was questioned extensively by the Tribunal who went through the list of questions provided by Mr Amin's Counsel and put all applicable questions to Mr Ibbett. The Tribunal also asked their own questions.
>
> The closed session ran from approximately 3.45 to 4.45 on Tuesday 7th June 2016. It recommenced at 10am on Wednesday 8th June 2016 and lasted until 12.15.

21. At the request of the parties, we agreed to receive written closing submissions after the hearing. These were received from DECC on 10 June 2016 (open submissions) and 14 June (closed submissions), and from the appellant on 17 June.

Outline facts

22. Because the outcome of the present appeal depends upon the application of the public interest test, the background to and context of the information request plays an important part in both parties' cases. We here summarise the main outline.

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[2] 'EPS' stands for Emissions Performance Standard, which we refer to further below.

23. The Committee on Climate Change is an independent statutory body which was established under the Climate Change Act 2008 to advise the UK Government on setting and meeting carbon budgets, and preparing for climate change. In its Fourth Carbon Budget, December 2010, the Committee advised that new policies were required, including fundamental reform of the electricity market in order to promote cost-effective decarbonisation of the power sector. A central feature of such reform would be a system of long-term tendered contracts. In response, the Government consulted widely on electricity market reform and developed new policies.

24. In July 2011 the Secretary of State for Energy and Climate Change, the Rt Hon Chris Huhne MP, published and presented to Parliament 'Planning our electric future: a White Paper for secure, affordable and low-carbon electricity'. This White Paper accepted the need for electricity market reform (EMR), in order to move to low-carbon electricity generation, and set out and explained new policies to achieve it. In line with the Committee's advice, the central feature was to be a new system of long-term contracts in the form of Feed-in Tariffs with Contracts for Difference. Complementary features would be a carbon price floor and an emissions performance standard (EPS).

25. The White Paper stated that the EPS would be set at an annual limit equivalent to 450g CO_2/kWh at baseload. The effect of this would be to rule out the possibility of any new unabated coal-fired power stations, ie, stations without carbon capture and storage (CCS). This would give effect to a prior commitment in the Coalition Agreement. While ruling out new unabated coal plant, this level of EPS would not restrict new unabated gas plant, which the UK needed in order to maintain sufficient capacity (paragraph 2.4.13 of the White Paper).

26. In line with this, the regulatory impact assessment for the EPS published contemporaneously with the White Paper stated, under the heading 'What are the policy objectives and the intended effects?',

> The policy objective is for the EPS to act as a regulatory backstop, alongside the other decarbonisation policies set out in the accompanying EMR White Paper, ensuring that while fossil fuel-fired electricity generation continues to make an important contribution to electricity security of supply it does so in a manner consistent with the UK's decarbonisation objectives.

27. In a 'Background' section the impact assessment referred to the Coalition Agreement to introduce an EPS to prevent new unabated coal plant and added:

> As the policy developed, it was decided that EPS would cover all new fossil fuel plant, including gas plants from the outset. This will provide a degree of certainty for investors as they will know from the date the policy is implemented what regulatory emissions limit they will face, and it is designed to reduce any perceived risk that an EPS of an unknown level is introduced at a later date ... ...

28. Under 'Rationale', after referring to the impact on coal plant, the assessment stated:

> Further, the EPS will complement the economic signals provided by the carbon price floor and low carbon support mechanism. … … in the longer term it could be used to give a clear regulatory signal on emission reductions to back up the economic signals provided for through the rest of EMR … …

29. At the consultation stage the Government had proposed a system of 'grandfathering' for the economic life of a power station. In this context, grandfathering would mean that the level of EPS in place at the point when a power station was 'consented' (given official consent) would remain applicable during its economic life. This proposal had drawn both public support and public criticism. Supporters viewed it as essential to reduce regulatory uncertainty and hence enable investment in new gas-fired stations to proceed. Critics were concerned that, by perpetuating the relative attractiveness of unabated gas, it might discourage needed investment in other forms of low-carbon generation or in CCS. The White Paper discussed these considerations and expressed the Government's conclusion that the proposed EPS, with grandfathering on the basis of a clear and pre-determined, rather than indefinite, period would strike the right balance between investor certainty and appropriate support for decarbonisation; it noted that there were a number of options for how grandfathering should be implemented and stated that there would be further analysis and further engagement with stakeholders on how to do so.[3] Both the White Paper and the accompanying EPS impact assessment mentioned suggestions that decisions on investment in new gas plant were based on expectations 20 years into the future.

30. In September and October 2011 DECC conducted informal consultations with energy companies and environmental regulators. The Environment Agency and the Scottish Environment Protection Agency each argued that the grandfathering period should be severely limited. For example, the Environment Agency stated its opinion that an EPS of 450g CO_2/kWh in 2030 for fossil fuel plants would be too high to enable a target of 50g CO_2/kWh for the electricity supply industry as a whole to be achieved, and that a 10 year period of operational life should be sufficient to provide a return to investors. DECC also held a consultation meeting on 6 October 2011 with environmental NGOs (but which Greenpeace did not attend; we were not told why).

31. Most of the disputed information is dated between 5 and 15 March 2012 inclusive.

32. The Government's conclusion on how grandfathering should be implemented was published in a Press Notice dated 17 March 2012. This was a joint announcement by George Osborne, as Chancellor of the Exchequer, and Ed Davey, as Secretary of State for Energy and Climate Change. Mr Davey had very recently replaced Mr Huhne[4]. The Press Notice repeated the message of the White Paper, that gas-fired generation would continue to have an important part to play in providing security of supply, particularly at times of peak demand. The new

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[3] See White Paper paragraphs 2.4.18-2.4.26.

[4] The date of Mr Davey's appointment is a matter of public record. During the closed session Mr Ibbett referred to the date of appointment as being 3 March 2012; this was a mistake for 3 February 2012.

element in the Press Notice was the method of grandfathering, namely, that power stations consented under the EPS level of 450g/kWh would remain subject to that same level until 2045. From the timing and terms of the Press Notice, its purpose appears to have been primarily to provide information for potential investors in time for the Budget (21 March); it did not provide particular reasons for defining the grandfathering period as from consent to 2045.

33. The announcement provoked an immediate and strongly negative response from what may be called the green media. An article in the Guardian newspaper referred to it as comprising 'proposals for a new "dash for gas"', and cited criticism by Friends of the Earth. A Greenpeace campaigner (Joss Garman) wrote a long piece in The Independent newspaper, effectively ascribing the substance of the announcement to Mr Osborne, and describing it as 'the Liberal Democrats' most craven submission yet to the Chancellor's bonfire of environmental protections'. Mr Garman depicted it as 'a major change of course from the path followed by his [Mr Davey's] predecessor Chris Huhne', which would 'crash our carbon targets'. A Greenpeace press release made similar points. Given the contents of the White Paper, we infer that this strong negative reaction was unlikely to have been foreseen by Mr Davey, who would logically have regarded the announcement as doing no more than filling in further detail of a policy which had been announced by his predecessor as part of an overall package designed to maintain security of supply in a cost-effective manner while moving to low-carbon generation. Mr Davey responded to Mr Garman's attack in a letter published in The Independent, repeating the justification for the EPS policy as set out in the July White Paper.

34. Mr Garman gave evidence to the Tribunal at the first hearing of this appeal. Because of the passage of time, he was replaced by Dr Parr for the purposes of the hearing before us. We were informed that the substance of their views was very similar. This was that the result of the EPS with grandfathering would be that gas plants would be allowed and encouraged to 'continue to run at full pelt until 2045', and that this would be inconsistent with the necessary decarbonisation of the electricity sector.

35. The Committee on Climate Change responded to the Press Notice on 27 March 2012, with a letter to Mr Davey affirming that the approach set out in the announcement 'could be compatible with power sector decarbonisation required to meet carbon budgets' while also warning that it carried 'the risk that there will be too much gas-fired generation instead of low carbon investment'; the letter proposed that there be 'a clear decarbonisation objective' set as part of the Electricity Market Reform.

36. Mr Amin's information request was made on 5 April 2012.

37. On 22 May 2012 the draft Energy Bill was published, together with an Impact Assessment of the grandfathering policy (22 pages).

38. The focus of the Impact Assessment was expressly 'to set out the analysis of the impacts of the last remaining EPS design option, that of the length of the grandfathering period'. It

stated the policy objective of the grandfathering period as being 'to ensure that the EPS does not prevent new fossil fuel-fired electricity generation from continuing to make an important contribution to electricity security of supply in a manner consistent with the UK's decarbonisation objectives'. It considered the impact of 3 possible grandfathering periods, namely Option 1: grandfathering for the operational life of each plant, whenever built; Option 2: grandfathering until 2018; Option 3: grandfathering until 2045. Option 1 was the 'do nothing' option, since this would simply guarantee that once a plant was consented there would be no change in the emissions limit applying to it (unless there were retrospective primary legislation, which would be very unlikely). Option 2 was a period so short that it would probably deter any investment at all in new gas plant.

39. While the primary purpose of the Impact Assessment was to assess the likely costs to the public of the grandfathering policy, on the basis of comparing the different options, the analysis provided a substantial amount of information on the thinking which led to the decision to adopt a grandfathering period with a cut-off at 2045 as per Option 3. This included:

    a. Setting the limit by reference to a specific date, rather than by reference to operational life, would mean that the later that a new gas plant became operational, the shorter the period of clarity over the emissions limit for that plant.

    b. How that would impact on investment decisions would depend on future gas prices, for which various scenarios were given.

    c. Since the cut-off date at 2045 would precede by five years the date for meeting the 2050 carbon emissions target, this would enable action to be taken during those five years, if necessary, on emissions of grandfathered plants with a view to meeting the target.

40. It can reasonably be inferred from this published information that, in seeking to balance the Government's well-known triple objectives of (1) procuring security of supply, (2) affordable prices for consumers, and (3) meeting climate change obligations, the Government's thinking was, in essence, that Option 1 would risk too much of an ongoing locked-in emissions problem, whereas Option 3 would avoid that risk, while also encouraging the maximum amount of new gas plant, in pursuance of objectives (1) and (2), and at the same time leaving 5 years' 'wriggle room' to take further measures if necessary in order to meet carbon targets by 2050.

41. However, the Impact Assessment contained no detailed justification of the choice of 2045. Why 2045 rather than, for example, 2035, or 2025? Why did the Government think that 5 years' wriggle room was the best choice, rather than some other period? The Impact Assessment, like the Press Notice, did not say. Whether a detailed justification of this particular kind was prepared by anyone in Government is not clear to us on the present evidence. From his evidence, Mr Spurgeon seems to have regarded the policy choice of 2045

as a simple decision to take, not requiring any further analysis than was provided in the Impact Assessment.

42. On 12 July 2012 DECC responded to Mr Amin's information request. Filling out the context of DECC's response, Mr Spurgeon explained in evidence that it had been made clear to him in his regular dialogue with environmental NGOs that it was their intention to campaign against the EPS. He described the NGOs in question as influential because of their influence with Parliamentarians. He referred orally to his conversations with officials from the Committee on Climate Change who had set out their views about why revisions to EPS policy were necessary. Mr Spurgeon also gave evidence about his 'concession planning'. He explained that policy makers develop plans for possible concessions in case policies come under so much political pressure during the passage of a Bill that concessions have to be made in order to secure the success of a Bill, or of its most important elements. EPS was identified as an area where concessions might be necessary, whether because it came under pressure itself or because it might be needed as a bargaining chip to help save other elements. Particular aspects of the EPS policy that were expected to come under pressure were grandfathering, provision for existing coal fired power stations, and arrangements for carbon capture and storage. He said there were some 'red lines' within the EPS policy, but that it was an area that could be looked at if sacrifices were needed to get the Bill through. We accept this evidence.

43. On the same day as DECC's response to the information request, or shortly afterwards, the Energy and Climate Change Select Committee concluded in its report on the pre-legislative scrutiny of the draft Bill:

> 'the Emissions Performance Standard as currently proposed would be at best pointless. At worst, the decision to grandfather the initial level until 2045 may undermine our ability to meet long-term carbon targets and so the length of the grandfathering period should be reduced.'[5]

44. Having heard the evidence, we see the force of DECC's case that Greenpeace's criticisms of the 2045 cut-off seemingly did not take fully on board two key features of the Government's policy: (1) that the relative attractiveness of plant for low-carbon generation and of other means of generation (such as gas) would depend upon other measures discussed in the White Paper, in particular the conditions of the long-term contracts and the level of the carbon price floor, and (2) that gas plants would be unlikely to 'run at full pelt until 2045', because electricity would be used preferentially from low-carbon sources for base load, so that gas plants would be called on progressively for coping with periods of higher demand. However, this does not mean that we express or imply any conclusion on the substantive merits of the grandfathering policy, which are not for us to decide. Important points for present purposes are:

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[5] From the summary on p5; see also p69 Recommendation 44. The parties agreed the date was 12 July 2012. The date of publication on the formal report is 23 July 2012. Nothing turns on this.

a. the fact that there was continuing public controversy over the EPS and the grandfathering period, some of it emanating from weighty and responsible sources, at a time when the information request was under consideration and the Bill was about to be introduced into Parliament;

b. the fact that, irrespective of any view on whether Greenpeace's or others' criticisms of the grandfathering period were justified, the published explanation for the 2045 cut-off date was a high-level explanation which did not deal with the relative merits of other possible periods, save for the extremes represented by option 1 and option 2.

45. Mr Ibbett concluded DECC's internal review of Mr Amin's request on 5 October 2012. On 29 November the Energy Bill (in a revised form, as a result of the pre-legislative scrutiny) was introduced into the House of Commons. After a long and somewhat chequered history, involving hard-fought amendments and 'ping pong' between the Lords and Commons, it eventually received the Royal Assent and became the Energy Act on 18 December 2013. One of the ultimately unsuccessful amendments was an attempt to change the 2045 cut-off to 2029.

The parties' cases on public interest

46. The Commissioner's Decision Notice acknowledged that there were strong factors of significant weight on each side but came down in favour of withholding the information under reg 12(4)(e) (paragraphs 20-31 of the Decision Notice). Mr Amin emphasizes the public interests in favour of disclosure and minimizes those in favour of maintaining the exceptions. DECC contends that the latter were stronger in this case.

47. In outline, Mr Amin's case for disclosure is:

a. The Aarhus Convention, the Directive, and the EIR place importance on citizens having access to environmental information, to improve public participation in decision-making and to promote better decisions affecting the environment.

b. Public debate was hampered by the lack of published information explaining the choice of the 2045 cut-off.

c. While that lack was a matter of particular concern, Mr Amin's information request was not limited to that topic. The information sought, so far as contained in communications in the period 1 October 2011 to 5 April 2012 between DECC and the other two Departments, was 'in relation to proposals for the introduction of new emissions performance standards for fossil fuel power stations'. The significance of the disputed information should be assessed in that larger context, not merely by whether it revealed the Government's reasoning for the 2045 cut-off.

d. If, as DECC contends, publication of the disputed information would have been in some way prejudicial to the Government's ongoing formulation of energy policy or

to the passage of the Bill, it must presumably have been important information that would have impacted upon the public debate and should therefore have been disclosed.

48. He invites us to examine critically the Department's reasons for withholding the information. In particular he contends-

    a. If publication of the disputed information would have caused a delay to the passage of the Bill so that important environmental issues, such as EPS policy, could be properly reconsidered, in light of the objectives of the EIR that would be a reason for disclosure, not a reason for withholding the information.

    b. The Tribunal should be sceptical of any suggestion that publication would have resulted in Ministers or officials giving undue regard to matters not related to the merits of the policy arguments.

49. In his Reply dated 7 August 2013 he also contended that the policy making process was not live as at the date of his information request. This contention rather faded from view, given the evidence of likely reconsideration owing to the controversial nature of the reforms.

50. The Department fully accepts both (1) the general principle that environmental information should be disclosed in order to inform public debate and improve decision-making and (2) that the present subject matter was an intensely controversial and contested area; however, the Department contends, in outline:

    a. EPS policy was a relatively small element of the White Paper and of the Energy Bill.

    b. DECC judged it to be likely that EPS policy would need to be reconsidered during the passage of the Bill, and the reasonableness of this judgment was confirmed by subsequent events (ie, the stormy passage experienced by the Bill).

    c. Disclosure would have given rise to unproductive disruption and distraction to policy making.

    d. Because of the particular contents of the disputed information, disclosure would have resulted in DECC having to give undue regard to matters not directly related to the merits of the policy arguments, so that policy would have been formulated less efficiently or less well. To put it another way, there would have been a potentially negative impact on the progress of the Bill for reasons unrelated to the merits of the policy arguments.

    e. Disclosure would have interfered unduly with the convention of collective Cabinet responsibility, which is protected under the EIR by reg 12(4)(e).

    f. Very substantial amounts of information were published, setting out the Government's thinking on EPS policy and grandfathering. Disclosure of the disputed

information would not have materially advanced the public's understanding of the development of the EPS policy.

g. The draft impact assessment was no more than a rough early working draft in the course of evolution; it could have caused confusion and there was no public interest to be served by its disclosure.

h. Thus the public interest balance was in favour of maintaining the exceptions.

Public interest balance: the Tribunal's approach in this case

51. In our view, for the purposes of assessing the public interest balance the disputed information needs to be considered in three parts, because the relevant factors on each side of the question are not uniform in nature or weight but vary as between the three parts. We consider that, given the nature of the information, this approach is appropriately consistent with the 'package' approach suggested in *Foreign and Commonwealth Office v IC and Plowden* [2013] UKUT 275 (AAC), at [16].

52. First, however, we make the factual observation that no part of the disputed information contains a detailed justification of the choice of 2045 in preference to some other date such as 2035, or 2025, or of why the Government thought that 5 years' wriggle room was the best choice, rather than some other period.

53. Second, we should explain that our assessment below focuses on the factors which we consider important or potentially important in the determination of which way the balance falls. We do not consider that any other circumstances of the case are capable of altering the assessment of the relative merits of disclosure or withholding.

Public interest balance: (1) the draft impact assessment

54. The finalised regulatory impact assessment (22 pages) was published between the date of Mr Amin's request and the date of DECC's first substantive response to his request. The draft which DECC still had on file (14 pages) was a first rough draft prepared at a substantially earlier date.

55. The process of preparing a regulatory impact assessment is relatively complex. There is a standard template which must be used, and there is published guidance to help Government officials produce the assessment. There is also a published business impact target assessment calculator (a form of spreadsheet) to assist with the calculations. In practice the preparation of an impact assessment is an iterative process which takes place usually over an extended period, involving the draft travelling from one person to another within Government so that officials with different skills, expertise or areas of interest may write particular sections or carry out editing or checking of what is already there. When initially complete in terms of content, it has to go to a committee, which reviews it by way of quality control, and which may raise queries or require re-writing before finalisation.

56. In this case the essence of the differences between the draft assessment and the published version is that the latter is much fuller, with more and clearer explanatory text, and some corrected figures. The former is only a first draft at a very rough stage of working. In our judgment, disclosure of the draft assessment would have contributed to transparency, in the minimal sense that the public would be able to read it, but it would not have provided any information such as would have advanced the purposes of the EIR and in particular it would not have made any contribution to public understanding of the Government's reasons for adopting its stated EPS and grandfathering policy or any other policy. It would not have shed any light on the matters of public interest highlighted by Mr Amin and Greenpeace. For that purpose, it was the much fuller final version that needed to be examined.

57. Accordingly, there was almost nothing in the scales on the side of disclosure.

58. Conversely, if it had been disclosed in response to Mr Amin's request, it would have had a strong potential to cause confusion, by reason of its errors and omissions, which needed to be corrected through the usual completion and checking processes, and by reason of speculative and unjustified inferences which might have been drawn from uninformed comparisons with the finished version. Because of the sensitivity of the subject-matter, with the Energy Bill about to go forward, the Government would probably have had to deploy resources to correct the misunderstandings arising. This would have been an unnecessary and avoidable waste of public money, and an unnecessary and avoidable diversion of officials from getting on with more constructive work. This would have been against the public interest. We consider that these factors strongly outweigh the very small transparency factor.

59. In agreement with DECC and the Commissioner, we judge that in all the circumstances of the case the public interest in maintaining the reg 12(4)(d) and (e) exceptions outweighed the public interest in disclosing the draft impact assessment.

Public interest balance: (2) the three letters between Ministers

60. Our assessment of the public interest balance, as regards disclosure of the three letters between Ministers, is of course made with the benefit of having seen the letters and having heard the closed evidence.

61. In our view the important public interest factors in favour of disclosing the letters were:

    a. If disclosed, the letters would have played a part in the debate over the EPS and grandfathering proposals.

    b. Accordingly, disclosure would have advanced the public interest of public participation in environmental decision-making promoted by the Aarhus Convention, the Directive and the EIR.

62. Given the particular subject-matter, in our view these are substantial factors in favour of disclosure.

63. We find, however, from our examination of the contents of the letters, that-

    a. Disclosure would not have provided a substantially better explanation of the choice of 2045 as the cut-off than was available from the published Impact Assessment; and

    b. We do not consider that the public interest in better decision-making, in terms of the merits of Government policy, would have been promoted by disclosure.

64. The important public interest factors in favour of maintaining the exception for internal communications were-

    a. As we accept, the Department made a reasonable and sound judgment that EPS policy would come under pressure and would be likely to need reconsideration during the passage of the Bill. Because of their contents, disclosure of the letters would have made the Government's position more difficult, for reasons unconnected with the objective merits of the policy, and hence would have prejudiced the process of policy formulation and implementation during the progress of the Bill.

    b. Disclosure would have tended to undermine the principle of Cabinet collective responsibility.

65. We regard these as weighty factors in the circumstances of the present case.

66. We do not ascribe any weight to the Department's further point that the EPS policy was a relatively small element of the White Paper and of the Energy Bill; while this is factually correct, it was nonetheless an important matter affecting the interests of the public, and on which public participation was of value.

67. As regards the application of the principle of Cabinet collective responsibility to the present case, we note that under FOIA there are express exemptions for Ministerial communications and for information where disclosure would be likely to prejudice the maintenance of the convention of collective responsibility (ss35(1)(b), 36(2)(a)(i)), whereas in the present case the principle is protected by the exception in EIR reg 12(4)(e) for internal communications. The convention was discussed in *Cabinet Office v IC and Aitchison* [2013] UKUT 526 (AAC) at [81]-[82]:

    > [81] The foundation for Cabinet secrecy, which is what the Cabinet Office is understandably anxious to protect here, is conventional. That presents the usual difficulties in the United Kingdom where the constitution is not a single written document. What is the convention? I take it to be as set out as part of the Ministerial Code in recent years. ... ... The relevant passages in the 2010 Code are:
    >
    > > General principle
    > >
    > > 2.1 The principle of collective responsibility, save where it is explicitly set aside, requires that Ministers should be able to express their views frankly in

> the expectation that they can argue freely in private while maintaining a united front when decisions have been reached. This in turn requires that the privacy of opinions expressed in Cabinet and Ministerial Committees, including in correspondence, should be maintained
>
> … …
>
> Collective responsibility
>
> 2.3 The internal process through which a decision has been made, or the level of Committee by which it was taken should not be disclosed. Decisions reached by the Cabinet or Ministerial Committees are binding on all members of the Government. They are, however, normally announced and explained as the decision of the Minister concerned. On occasion, it may be desirable to emphasise the importance of a decision by stating specifically that it is the decision of Her Majesty's Government. This, however, is the exception rather than the rule. … …
>
> 2.4 Matters wholly within the responsibility of a single Minister and which do not significantly engage collective responsibility need not be brought to the Cabinet or to a Ministerial Committee unless the Minister wishes to inform his colleagues or to have their advice. No definitive criteria can be given for issues which engage collective responsibility … Where there is a difference between departments, it should not be referred to the Cabinet until other means of resolving it have been exhausted …

[82] … … a fuller analysis of the Ministerial Code might draw on other relevant passages in the Code. For instance, at paragraph 1.2 all ministers are expected to observe the Seven Principles of Public Life set out in the Annex to the Code, two of which are accountability and openness. Further, paragraph 1.2.d. adds the following principle of ministerial conduct:

> d. Ministers should be as open as possible with Parliament and the public, refusing to provide information only when disclosure would not be in the public interest, which should be decided in accordance with the relevant statutes and the Freedom of Information Act 2000; …

68. We see that according to the Code the privacy of opinions expressed in Ministerial correspondence and of the internal process through which a Cabinet decision is made is not said to be dependent on the extent of any internal agreement or disagreement which may have been expressed, albeit it seems to us that what has actually been said may in a particular case affect the strength of the public interest in withholding disclosure in support of the convention. (This is briefly discussed in *Cabinet Office v IC and Lamb* 27 January 2009, EA/2008/0024 and 0029, at [55].)

69. Whether a FOIA exemption has 'inherent weight' where it protects a constitutional convention has been the subject of a variety of judicial pronouncements. We take the latest and current view of the Upper Tribunal to be that expressed in *Department of Health v IC and Lewis* [2015] UKUT 159 (AAC), namely, that there is no 'inherent weight' in exemptions

under FOIA; and therefore, by extension, no inherent weight in EIR exceptions. We therefore adopt that approach here.

70. To override the privacy of correspondence between Ministers in this case, with the likely resulting prejudice to the process of policy formulation and implementation during the progress of the Bill, there would have needed to be seriously weighty factors favouring disclosure in the public interest. In our judgment the factors favouring disclosure, although substantial, were not sufficient. Given our finding about the likely prejudice, the critical element which determines the outcome of the balancing exercise is our conclusion, based on the contents of the letters, that the public interest in better decision-making, in terms of the merits of Government policy, would not have been promoted by disclosure.

71. Accordingly, we judge that in all the circumstances of the case the public interest in maintaining the reg 12(4)(e) exception outweighed the public interest in disclosing the Ministerial letters.

72. This decision is accompanied by a short confidential annex which sets out, by reference to the content of the Ministerial letters, some misgivings which we have felt in accepting the Department's case and why those misgivings have ultimately not altered the result. This annex will be available to the Department, to the Information Commissioner, and to any appellate tribunal.

<u>Public interest balance: (3) the short emails written by officials</u>

73. The disputed information contains very short emails between officials in 2012 dated 5 March (1 no), 7 March (1 no), 14 March (2 no) and 15 March (5 no).

74. These emails are within the scope of Mr Amin's request because they passed between the relevant Departments in the course of dealing with 'proposals for the introduction of new emissions performance standards for fossil fuel power stations'. Many of them enclosed or commented on attachments.

75. In our judgment the emails themselves, if disclosed, would not have made a material contribution to public understanding of the proposals: they do not contain reasoning on that topic. Nor would they advance an objective of transparency in any meaningful way. Moreover, some of them do not make sense without their attachments, which we have decided should not be disclosed.

76. We consider that on one side of the balance there was some reason to protect them, as internal communications which the writers did not write with a view to publication, and which would have needed to be explained if disclosed, to that extent diverting and wasting public resources; and on the other side of the balance the scales are empty, since we can see no public interest being served by their disclosure.

77. Accordingly, we judge that in all the circumstances of the case the public interest in maintaining the reg 12(4)(e) exception outweighed the public interest in disclosing the short emails written by officials.

Conclusion

78. Disclosure of the disputed information would not have made a material contribution to discussion of the objective merits of the EPS and grandfathering policy. The factors in favour of maintaining the applicable exceptions outweighed the factors in favour of disclosure. We therefore dismiss the appeal.

79. We wish to record our sincere appreciation of the very clear and very thorough submissions made to us by Mrs Morrison on behalf of the appellant and Ms Thornton QC on behalf of the Department.

Signed on original

Andrew Bartlett QC, Tribunal Judge

28th July 2016

Re-promulgated 29th July 2016