[2019] AACR 17

(Highways England Company Ltd v Information Commissioner and Henry Manisty [2018] UKUT 423 (AAC))

Judge Jacobs **GIA/1589/2018**
12 December 2018

Information Rights – Aarhus Convention – Disclosure - Exceptions

The applicant requested detailed proposed route maps, relating to the area in which he lived concerning the possible route of the Expressway between Oxford and Cambridge. Highways England refused his request on the basis that the information requested formed part of its decision-making process which was still in the course of completion. The Aarhus Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters of 1998 ('the Convention') provided for access to environmental information, subject to exceptions including one in respect of 'material in the course of completion'. The Upper Tribunal considered the exception applying European Union ('EU') principles as well as the Implementation Guide for the Convention (2nd Edition 2014) and the EU Directive 2003/4/EC, which implemented the Convention. The Upper Tribunal also went on to consider the Directive which was in turn implemented by the Environmental Information Regulations 2004 (SI No 3391) ('the Regulations'). In response to the Applicant's request the Information Commissioner decided that the exception in Regulation 12(4)(d), which concerned a request for material still in the course of completion, to unfinished documents and to incomplete data, was engaged and that the balance of public interests was in favour of maintaining the exception. On appeal to the First-tier Tribunal it decided that the exception was not engaged and commented on an argument that releasing the information would blight the land in respect of planning. It did not undertake or purport to undertake a balancing exercise of the public interests involved. Highways England appealed with permission to the Upper Tribunal, at an oral hearing

Held, dismissing the appeal, that:

1. the Regulations must be interpreted consistently with the Directive and in accordance with normal EU principles including the requirement that exceptions be interpreted restrictively but not so narrowly as to defeat its purpose of allowing public authorities to think in private;
2. the exception cannot cover speculation or preliminary thoughts based on limited research and is concerned with 'information' that is held. It is only engaged if there has been a request and it is the information in the documents that is the subject of the request and the duty. It is not engaged when a piece of work is complete in itself. The terms of the request are important as the exception is wider than just 'material in the course of completion' and includes information that merely relates to that material;
3. adverse consequences must not be made a threshold test for regulation 12(4)(d), it is simply a relevant factor that only arises if the exception is engaged;
4. material must have a physical existence and it is not apt to describe something incorporeal like a project, exercise or a process; it is the material that must be in the course of completion not the project;
5. the exception which contains expressions of everyday use must be applied consistently with its context and contains two elements (a) that it is engaged and (b) the balance of public interests is in favour of maintaining the exception. The exception gives rise to three possibilities, that it is not engaged, that it may be engaged with the balance in favour of maintaining the exception or it may be engaged with the balance in favour of disclosure. A decision that the exception is not engaged means that disclosure is appropriate irrespective of where the balance of public interests lie.

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007:

The decision of the First-tier Tribunal under reference EA/2017/0155, made on 24 April 2018, did not involve the making of an error on a point of law.

REASONS FOR DECISION

A. What Mr Manisty wanted to know

1. This appeal concerns the possible route of the Expressway between Oxford and Cambridge, which is being investigated by Highways England. On 3 December 2016, Mr Manisty wrote to Highways England:

> I have read your new Oxford to Cambridge Expressway Strategic Study Stage 3 Report with great interest.
>
> I live in Oxfordshire between Wheatley and Thame and I wondered whether you have developed more detail on the proposed Southern Route (Option A) and the Oxford Sub-Option 54, both shown on Page 39 of your report.
>
> It would be really interesting to see more detailed proposed route maps if they exist, particularly as they relate to the areas around Wheatley and Thame.

B. Highways England refused to provide it

2. Highways England accepted that it had plans but refused to provide them for the reasons set out in its letter to Mr Manisty of 16 December 2016. It argued that the information requested 'forms part of our decision-making process which is still in the course of completion.' Here are the other relevant extracts from the letter:

> 'As the material forms part of our decision-making process, we have also decided that we require the safe space in which to do this away from public scrutiny. We believe that to release the information now will mislead land and property owners into believing they will be adversely affected by proposals when this may not be the case. This may in turn divert resources by responding to a disproportionate volume of enquiries that would require a response.'
>
> 'Based on the work so far, we have identified three options with various sub-options for further development. These options are still at a very early stage of development and further work will be required to determine the best route possible in terms of wider economic benefits to the surrounding area.
>
> 'The route options shown on page 39 of the stage 3 report have been generated solely to produce an indication of likely estimated costs, benefits and environmental effects of an alignment between the A34 and the M1, the output of which will be used to determine whether there is a case to further investigate an improved east-west connectivity. They have no other status.'

C. The Information Commissioner dismissed Mr Manisty's complaint

3. Mr Manisty complained to the Information Commissioner. The Commissioner decided that the relevant exception was engaged and that the balance of public interests was in favour

of maintaining the exception. The Commissioner's reasons for finding the exception engaged are in Appendix A.

D. The First-tier Tribunal allowed Mr Manisty's appeal

4. The tribunal decided that Highways England was required to disclose the information requested. It found that the exception was not engaged; its reasons for this are in Appendix B. Having found that the exception relied on was not engaged, the tribunal went on to comment on an argument that releasing the information would lead to planning blight, a point mentioned in the letter of 16 December 2016. The tribunal did not undertake, and did not purport to undertake, a balancing exercise of the public interests involved. All it did was to comment on one argument. I am not going to deal with the criticism of that comment. It was not part of the tribunal's decision. On the tribunal's reasoning, it did not affect the outcome of the appeal. It was not even presented as an alternative basis for decision.

E. Highways England appealed to the Upper Tribunal

5. I gave Highways England permission to appeal to the Upper Tribunal. After the exchange of written submissions, I directed an oral hearing, which was held on 7 November 2018. Richard Honey of counsel appeared for Highways England and Elizabeth Kelsey of counsel appeared for the Information Commissioner. Mr Manisty spoke on his own behalf. I am grateful to them all for their contributions. At the end of the hearing, I allowed Mr Honey time to make a further written submission. Mr Manisty took the opportunity to make further submissions as well. Highways England objected to that, as they had to Mr Manisty introducing new issues before the hearing. As it turns out, I do not need to deal with those objections.

6. In order to succeed, Highways England has to show that the First-tier Tribunal's decision 'involved the making of an error on a point of law' (section 12(1) of the Tribunals, Courts and Enforcement Act 2007). That means it has to show that the tribunal was wrong to decide that the exception was not engaged. The focus is on the outcome rather than on the tribunal's findings or reasoning: *Lake v Lake* [1955] P 336. That point is worth making for two reasons. First because that is the approach that I have to take and have taken in this appeal. And second because Mr Honey's approach for much of his argument was to counter Mr Manisty's arguments rather than focus on the tribunal's reasoning.

F. The Aarhus Convention

7. The Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 1998 provides for access to environmental information, subject to some exceptions. One is in Article 4(3)(c):

> (3) A request for environment information may be refused if-
>
> …
>
> (c) The request concerns material in the course of completion …

8. There is an Implementation Guide for the Convention (2nd edition 2014). It summarises the relevant provisions on access to environmental information on page 78:

Article 4, paragraph 3	Optional grounds for refusing disclosure	• Requested information not held by public authority • Request 'manifestly unreasonable' or 'too general' • Requested material in the course of completion or concerns internal communications

The commentary for Article 4(3)(c) is at pages 84-85:

> The public authority may refuse to disclose materials 'in the course of completion' or materials 'concerning internal communications', but only when national law or customary practice exempts such materials. The Convention does not clarify what is meant by 'customary practice' and this may differ according to the administrative law of an implementing Party. For example, for some Parties, establishing that such an exemption exists under 'customary practice' may require evidence of established norms of administrative practice to that effect.
>
> Even when the requirement exists in national law or customary practice, authorities are required to take into account the public interest that would be served by disclosure of the information before making a final decision to refuse the request. The requirement in paragraph 7 to put the reasons for refusal in writing means that authorities must document precisely how they considered the public interest as a part of their determination.
>
> The Convention does not clearly define 'materials in the course of completion'. However it is clear that the expression 'in the course of completion' relates to the process of preparation of the information or the document and not to any decision-making process for the purpose of which the given information or document has been prepared.
>
> A request for access to raw environmental data cannot be refused on the grounds that it is 'material in the course of completion' to be made publicly available only after processing or correction factors have been applied. In its findings on ACCC/C/2010/53 (United Kingdom), the Committee considered whether raw air pollution data collected from a monitoring station and not yet subject to data correction could be exempted from disclosure as 'material in the course of completion'. The Committee considered that the raw data was itself environmental information within the meaning of article 2, paragraph 3 (a), of the Convention. The Committee held that should the authority have any concerns about disclosing the data, they should provide the raw data and advise that they were not processed according to the agreed and regulated system of processing raw environmental data. The Committee held that the same would apply for the processed data, in which case the authorities should also advise on how those data were processed and what they represented.
>
> Similarly, the mere status of something as a draft alone does not automatically bring it under the exception. The words 'in the course of completion' suggest that the term refers to individual documents that are actively being worked on by the public authority. Once those documents are no longer in the 'course of completion' they may be released, even if they are still unfinished and even if the decision to which they pertain has not yet been resolved. 'In the course of completion' suggests that the document will have

> more work done on it within some reasonable time frame. Other articles of the Convention also give some guidance as to how Parties might interpret 'in the course of completion'. Articles 6, 7 and 8 concerning public participation require certain draft documents to be accessible for public review. Thus, drafts of documents such as permits, EIAs, policies, programmes, plans and executive regulations that are open for comment under the Convention would not be 'materials in the course of completion' under this exception.
>
> A similar conclusion was reached by the Conseil d'Etat of France, in case N° 266668 (7 August 2007) with respect to the use of the term 'unfinished documents' in Directive 90/313/EEC. The Conseil d'Etat held that a provision excluding preliminary documents produced in the course of drawing up an administrative decision from the right of access to environmental information is not compatible with article 3, paragraph 3, of Directive 90/313/EEC which limits the possibility for a request for environmental information to be refused to when the request concerns 'unfinished documents'.

G. The EU Directive

9. The EU was a party to the Convention and implemented it in Directive 2003/4/EC. Recital (5) recorded that:

> …..Provisions of Community law must be consistent with that Convention with a view to its conclusion by the European Community.

Article 4(1)(d) implements Article 4(3)(c) of the Convention:

> 1. Member States may provide for a request for environmental information to be refused if-
>
> …
>
> (d) the request concerns material in the course of completion or unfinished documents or data; …

10. This Directive repealed Directive 90/313/EEC. Article 3(3) of that Directive provided:

> 3. A request for information may be refused where it would involve the supply of unfinished documents or data …

11. The European Commission provided an Explanatory Memorandum to the proposed Directive. These are the relevant passages for Article 4:

> … there have to be provisions for exempting information from disclosure. These exceptions must be very tightly drawn in order not to weaken the general principle of access and to enable the Directive to actually meet its objective in practice.
>
> …
>
> It should also be acknowledged that public authorities should have the necessary space to think in private. To this end, public authorities will be entitled to refuse access if the request concerns material in the course of completion …

H. The Environmental Information Regulations 2004 (SI No 3391)

12. These regulations implement the Directive.

13. Regulation 5 imposes a duty on a public authority to make environmental information available:

> **5 Duty to make available environment information on request**
>
> (1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

14. Regulation 12 is in Part 3 of the Regulations and provides for exceptions to the duty under regulation 5:

> **12 Exceptions to the duty to disclose environmental information**
>
> (1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if—
>
> (a) an exception to disclosure applies under paragraphs (4) or (5); and
>
> (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
>
> (2) A public authority shall apply a presumption in favour of disclosure.
>
> …
>
> (4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—
>
> (a) it does not hold that information when an applicant's request is received;
>
> …
>
> (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; …
>
> (5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect- …

Regulation 14(4) is related. Given my decision, it does not arise:

> **14 Refusal to disclose information**
>
> …
>
> (4) If the exception in regulation 12(4)(d) is specified in the refusal, the authority shall also specify, if known to the public authority, the name of any other public authority preparing the information and the estimated time in which the information will be finished or completed.

I. The Information Commissioner's guidance

15. The Information Commissioner has published guidance on regulation 12(4)(d). This is the section that deals with material in the course of completion:

> **Material which is still in the course of completion**
>
> 8. The fact that the exception refers to both **material** in the course of completion and unfinished **documents** implies that these terms are not necessarily synonymous. While a particular document may itself be finished, it may be part of material which is still in the course of completion. An example of this could be where a public authority is formulating and developing policy. In this case, an officer may create an 'aide memoire' note which is not intended to be a formal record but is nevertheless part of the on-going process of developing a particular policy. If this aide memoire note is within the scope

of a request, the exception may be engaged because the request relates to material which is still in the course of completion. The need for public authorities to have a 'thinking space' for policy development was recognised in the original proposal for the Directive on public access to environmental information, which the EIR implement. The proposal explained the rationale for both this exception and the exception for internal communications:

> "It should also be acknowledged that public authorities should have the necessary space to think in private. To this end, public authorities will be entitled to refuse access if the request concerns material in the course of completion or internal communications. In each such case, the public interest served by the disclosure of such information should be taken into account." (Explanatory memorandum to COM/2000/0402 final)

9. However, the fact that a public authority has not completed a particular project or other piece of work does not necessarily mean that all the information the authority holds relating to it is automatically covered by the exception. This is illustrated in the following example:

> **Example**
>
> In decision notice FER0349127 the requestor had submitted a request to Chichester District Council for information about a proposal to build affordable housing on land next to her property. The Council applied the exception in regulation 12(4)(d) to certain documents on the basis that its proposals were still at an early stage and contracts had not been finalised. The Commissioner found that the exception was not engaged. The withheld documents included a statement that the Council had given to the County Council to seek its advice in its capacity as the Highways Authority, and a report to the Council's Executive Board about the proposal.
>
> Both the statement and the report were finished documents and the Council had submitted them to the County Council and the Executive Board respectively, for consideration as part of a formal process.

J. The exception for 'material which is still in the course of completion'

The EU principles

16. The 2004 Regulations implement the Directive. They must be interpreted consistently with the Directive and in accordance with the normal principles that apply to EU law. One of those principles is that exceptions must be interpreted restrictively. This is a separate point from the presumption in favour of disclosure in regulation 12(2). The presumption allocates the burden of proof; the restrictive approach controls the scope of the exception.

17. The exception can only be interpreted by reference to its language or its purpose. As to the language, 'material' is a vague word, probably deliberately chosen for that reason; and the only indication of the purpose I have been shown is the mention in the European Commission's memorandum of 'the necessary space to think in private.'

18. Given the vagueness of the language, I have looked at other language versions of the Directive (French, German and Spanish), but have not learned anything useful. The German and Spanish versions use equally broad terms. The French version uses *document* for both 'material' and 'document' in the English version.

The Convention and the Implementation Guide

19. The Directive implements the Convention. It is permissible to interpret the Directive as implementing the Convention and therefore as consistent with it. The European Court of Justice has commented on the relevance of the Implementation Guide. In *Fish Legal and Shirley v the Information Commissioner, United Utilities Water plc, Yorkshire Water Services Ltd and Southern Water Services Ltd* (Case C-279/12) ECJI:EU:C:2013:853[2014] AACR 11, the Court said:

> 38. In addition, the Court has already held that, while the Aarhus Convention Implementation Guide may be regarded as an explanatory document, capable of being taken into consideration, if appropriate, among other relevant material for the purpose of interpreting the convention, the observations in the guide have no binding force and do not have the normative effect of the provisions of the Aarhus Convention (Case C-182/10 *Solvay and Others* [2012] ECR, paragraph 27).

I was also referred to what the Advocate General said of the Guide in *Flachglas Torgau GmbH v Federal Republic of Germany* (Case C-204/09) ECJI:EU:C:2011:413:

> 58. … that document has no authoritative status as regards the interpretation of the Convention. Its authors specify that the views expressed do not necessarily reflect those of the UN/ECE or of any of the organisations which sponsored the guide; nor does it appear to have been specifically approved by the Parties to the Convention. …

In its Judgment (ECJI:EU:C:2012:71), the Court said:

> 35. In addition, Flachglas Torgau's argument based on the document published in 2000 by the United Nations Economic Commission for Europe, 'The Aarhus Convention: An Implementation Guide', must be rejected. Flachglas Torgau refers in that regard to the clarifications contained in that document, according to which '[a]s the activities of public authorities in drafting regulations, laws and normative acts is expressly covered by [Article 8 of the Aarhus Convention], it is logical to conclude that the [Convention] does not consider these activities to be acting in a "legislative capacity". Thus, executive branch authorities engaging in such activities are public authorities under the [Convention].'
>
> 36. Apart from the fact that that document's interpretation of the Aarhus Convention is not binding, Article 8 of the Convention, to which it refers, in any event does not expressly mention the participation of public authorities in drafting 'laws', so that an interpretation such as that adopted by that document cannot be derived from the wording of that article.

From those references I draw this conclusion: the Guide can be used an aid to interpretation, but it is not binding and cannot override what the Convention provides.

What the exception does not mean

20. It is possible that whatever is being held by the public authority cannot properly be described as information. As Eady J said of earlier Regulations in *Maile v Wigan Metropolitan Borough Council* [2001] Env LR 11 at [8]: 'The regulations are concerned with the availability of information (and I emphasise that word) and not speculation or preliminary thoughts based on limited research.' The exception cannot cover that sort of case. Interpreting it to do so would produce an overlap with regulation 12(4)(a), which already provides for an exception if the public authority does not hold the information requested.

21. It is possible that disclosure of the information would have adverse consequences. That is a relevant factor to the balance of public interests, but that only arises if the exception is engaged. It is not a factor that can be taken into account in interpreting the scope of the exception. Interpreting it to do so would produce an overlap with regulation 12(5), which already provides for exceptions that apply if disclosure would adversely affect the specified interests. It may, though, be relevant as a factor in deciding whether the exception is engaged. The seriousness of disclosing information at a particular stage may be evidence that the material is still in the course of completion, but it is essential that it should not be used to turn a paragraph (4) exception into a paragraph (5) exception. Adverse consequences must not be made a threshold test for regulation 12(4)(d).

The request

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

Material and relates to

23. 'Material' must have a physical existence. It is not apt to describe something incorporeal, like a project, an exercise or a process. That is what the Implementation Guide says and it is surely right as a matter of language. Highways England's letter of 16 December 2016 was wrong to equate its decision-making process with the material in the course of completion. The Information Commissioner seems to have made the same mistake in paragraph 25 of her decision notice. The material may be part of a project or whatever, but it is the material that must be in the course of completion, not the project.

24. Material includes information that is not held in documents and is not data: things like photographs, film, or audio recordings. Can it also include documents that are finished and data that is complete? The Commissioner's guidance says that it can and I accept that that is correct. Take a simple example. A public authority is developing an online training package with printed notes to explain the effect of climate change on Norfolk. The notes will be a document when they are complete, but they may make no sense on their own in view of the way that the written and online elements interrelate. Until both elements are complete, each relates to material that is still in the course of completion.

25. That was a simple example. But suppose that the project for Norfolk is but part of wider project for England, which in turn is part of a cross-border project for the whole of Great Britain. When the whole package for Norfolk is complete, are the notes part of the material that is still in the course of completion until every county in Great Britain has been covered? As Mr Honey accepted, there has to be a line. The question I have to answer is: where and how is it to be drawn?

26. My analysis of 'material' helps to explain the wording of regulation 12(4) (d). It is not limited to requests for information *in* material that is in the course of completion, unfinished documents or incomplete data. It is engaged if the request *relates to* that material or those documents or that data. That suggests that the information may be held elsewhere, perhaps in preparation for being included later.

27. I was referred to cases on the meaning of 'relates to', but I have not found them helpful. Context is always important, even when the words are used in the same legislation. None of the authorities helped me interpret those words in the restrictive context of an exception.

What the exception means

28. My conclusion is this. 'Relates to' is an expression in everyday use. It is not possible to rephrase the language of the exception to make clear(er) what it means and it would be wrong to do so. The language is deliberately imprecise. Providing a more precise formulation would either override or gloss the language and, potentially, undermine or defeat the purpose of the exception. All that I can do, and all that it is right to do, is describe how the language of the exception has to be applied.

29. The exception must be applied, like all language in everyday use, consistently with its context. So far I have referred to 'the exception'. When a public authority relies on the exception, they are in effect saying two things: (a) it is engaged and (b) the balance of public interests is in favour of maintaining the exception. This decision is concerned with (a), but it is important to remember that the operation of the exception is not binary. There are three possibilities: it may not be engaged, or it may be engaged with the balance in favour of maintaining the exception, or it may be engaged with the balance in favour of disclosure. A decision that the exception is not engaged means that disclosure is appropriate regardless of where the balance of the public interests may lie. That is the context in which my approach has to be applied. It applies to all the exceptions in regulation 12 and does not undermine the point I made in paragraph 21.

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

31. It is not engaged when a piece of work may fairly be said to be complete in itself. 'Piece of work' is a deliberately vague expression that can accommodate the various circumstances in which the exception has to be considered. In this case, I would loosely apply that description to the Stage 3 Report and work on it. The piece of work may form part of further work that is still in the course of preparation, but it does not itself require further development. One factor that may help in applying this approach in some cases is whether there has been a natural break in the private thinking that the public authority is undertaking. Is it moving from one stage of a project to another? Another factor may be whether the authority is ready to go public about progress so far. The fact that the project, exercise or process is continuing may also be relevant, although this is probably always going to be a feature when a public authority is relying on this exception. Everything depends on the circumstances. That is why it would be inappropriate in a decision to provide a detailed critique of everything said in the Implementation Guide. Cases like those referred to in the Guide will have to be dealt with on their own terms when they arise.

32. The way that the public authority has treated the material is relevant but not decisive. A public authority cannot label its way out of its duty to disclose. A label like *draft* or *preliminary thoughts* may, or may not, reflect the reality. The scope of the exception depends on the substance, not the form in which the material is stored or presented.

33. The terms of the request are important. They form the request that must relate to material in the course of completion if the exception is to be engaged. And they set the limit to the public authority's duty under regulation 5(1) to provide the information. Mr Manisty referred me to page 78 of the Implementation Guide, which says of the exception: 'Requested material in the course of completion'. That suggests that the exception is only engaged if the subject matter of the request is 'material in the course of completion'. That cannot be right. It is contrary to the language of the Convention, the Directive and the Regulations. The request

may be for the material that is in the course of completion, but the exception is wider than that. It includes information that merely relates to that material. The interpretation suggested by the Guide would allow the purpose of the exception to be undermined by narrowly framed questions.

34. This approach involves a judgment. There are no bright lines here. That is the nature of the exception and the circumstances in which it has to apply. If applied in a practical and common sense way, my approach gives proper scope for the policy of allowing public authorities space in which to think, whilst respecting the restrictive nature of exceptions in EU law.

35. Mr Honey emphasised the importance of legal certainty. I accept that this approach is not going to produce legal certainty in the way he envisaged and that it will not be easy to apply. But there are limits to what can be achieved, especially when issues of judgment are involved.

Scotland

36. Just to be clear, I have not taken the approach, guidance or decisions of the Scottish Information Commissioner into account in coming to my decision. I have relied on the materials I have set out.

K. Why the First-tier Tribunal did not go wrong in law

37. I have set out the tribunal's reasoning in Appendix B, because it must be read as a whole. Read like that, the tribunal's approach accords with my analysis of how the exception operates. The tribunal did not, of course, know what my analysis would be. But it understood that it was exercising a judgment on whether the information requested could now properly be considered as independent from the continuing work on the Expressway. Reading its analysis of the circumstances of this case in the light of my interpretation of the exception, I consider that it would have come to the same decision if it had been applying the approach I have set out.

38. Mr Honey argued that all the facts set out in the first sentence of paragraph 35 of the tribunal's written reasons were not facts and, despite what the tribunal said, were in dispute. I do not accept that argument. It reflects the position of Highways England that there was ongoing work to which the request related. It is wrong to read the tribunal's findings in that way rather than in their own terms. The tribunal was recording the facts necessary to apply its analysis to the request made by Mr Manisty. They are not Cluedo facts – who did what when where why and how? Rather they are the result of applying the tribunal's analysis to the circumstances of the case; they are the tribunal's conclusions relevant to the application of the exception.

39. Ms Kelsey argued that the tribunal had misdirected itself in paragraph 48 of its written reasons when it said that the request 'relates to route maps' and not 'to any wider or other policy questions concerning the Report or the study more generally.' Ms Kelsey pointed out that the request was *for* the route maps, but the issue was whether it *related to* material in the course of completion. She was right about that, but I do not accept that the tribunal misdirected itself. Its reasons must be read as a whole. In particular, her argument overlooks the need for a request to relate to *material*. The tribunal analysed what that material might consist of. Paragraph 48 must be read as the culmination of, and as part of, an analysis that began with paragraph 41. The language of paragraph 48 picks up the theme of those paragraphs. In its context, it does not show that the tribunal misdirected itself.

APPENDIX A
The Information Commissioner's Decision Notice FER0661512

12. Regulation 12(4)(d) - Material still in the course of completion

13. Regulation 12(4)(d) states that a public authority may refuse to disclose information to the extent that the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data.

14. The exception sets out three distinct categories and the information must fall within one of these for the exception to be engaged. The first category is that the information relates to material which is in the course of completion. The 'material' in question may be a final policy document that is to be produced later. Therefore although the requested information may be contained in a document which is itself complete, if that document is intended to inform a policy process that is still ongoing, the information may attract the exception.

15. The interpretation of 'unfinished documents' is more straightforward. A document will be unfinished if the public authority is still working on it at the time the request is received. Furthermore, a draft version of a document will remain an unfinished document even once a final, finished version of the document has been produced.

16. Incomplete data is data that a public authority is still collecting at the time of the request.

17. The complainant has argued that the now completed Study Stage 3 Report makes it very clear that it will be followed by further reports. He considered that it would be rather unlikely therefore that anyone reading Study Stage 3 Report could be confused into believing that there will be no further reports that could introduce variations.

18. HE explained to the Commissioner that at the start of any major road scheme, it carries out a study to consider if there is a case for change, the potential viability of potential proposals and calculate the initial value for money of these by conducting an initial appraisal of what a scheme could look like. It is currently at this stage.

19. HE has been asked to carry out the Oxford to Cambridge Expressway Strategic Study on behalf of the Department for Transport. The requirement for this study was set out in the first Road Investment Strategy (RIS), published in December 2014, which announced a programme of new strategic studies which explore options to address some of the large and complex challenges facing the strategic road network. The results of these high-level studies will inform the development of the next RIS, which will commence in April 2020.

20. The aim of the study is to consider whether there is a case for improving east-west connectivity between Oxford, Milton Keynes and Cambridge and to then consider the options for improving the road network which can support growth. For the better options, this will include the preparation of strategic outline business cases which can be considered in developing future Road Investment Strategies.

21. The work reported in the stage 3 report published on 28 November, https://www.gov.uk/government/publications/oxford-to-cambridgeexpressway- strategic-study-stage-3-report outlines the high level case for a strategic link and will inform further work to develop options for intervention.

22. Based on work so far, HE has identified three options with various suboptions for further development. These options are still at a very early stage of development and further

work will be required to determine the best route possible in terms of wider economic benefits to the surrounding area.

23. HE further explained that if Government consider there may be merit in further analysis, it carries out work to investigate and assess route options. It then carries out public consultation, including information events in the local areas affected and produces a consultation document that is sent to interested organisations and people living near, or on, any of the options included in the consultation.

24. At that stage, HE still cannot say with any accuracy which property might be required. Following the consultation, if it decides to go ahead with a particular option, HE will announce a preferred route for the roads and reasons for the choice. It will then protect the route from conflicting development by registering it with the local planning authority. This provides clarity over which properties will be affected and triggers the statutory blight regime under the Town and Country Planning Act 1990.

25. Given the above explanation the Commissioner is satisfied that the information requested is material still in the course of completion. The policy processes to which the information relates were still ongoing, and therefore it related to material still in the course of completion. Although the requested information may be contained in a document which is itself complete, if that document is intended to inform a policy process that is still ongoing, the information may attract the exception.

APPENDIX B

First-tier Tribunal's Decision EA/2017/0155

34. Does the Appellant's request engage regulation 12(4)(d)? Only the first limb of the exception has been relied upon, so the question for us is whether the request *"relates to material in the course of completion".*

35. It is not in dispute that the proposed route map comprising the Disputed Information is itself complete, and that the Report is also complete, and indeed it has been published. It is further not in dispute that the Report is one step in Highways England's study into the proposed Oxford-Cambridge Expressway, and that that process is on-going.

36. The issue we must decide, therefore, is whether the exception is engaged where, as here, the specific information requested is complete, but it is part of a process which is not complete.

37. More specifically, the questions are:

(a) what "material" does the Appellant's request relate to?

(b) is that material "still in the course of completion"?

38. The EIR does not define "*material which is still in the course of completion"*, nor even "material". The Directive uses the expression "*material in the course of completion",* but also contains no definitions.

39. The Commissioner argues that the term "material" is broad, that it is not synonymous with "documents", and may include a variety of work products. She further says that to determine whether "material" is complete, it is necessary to consider whether the policy process to which the information requested relates, is ongoing. If it is, then it is likely that material relating to that process will remain "in the course of completion". In the present case, while the Report is complete, the study to which it relates is part of a wider policy process. Since that process is ongoing, the Report is *"material still in the course of completion".*

40. The Appellant says that when the Commissioner asserts that "material" is broader than "information" or "documents", she may be conflating the "*information"* with the "*material forms"* in which the *information* appears. He says that *"material"* and "*documents"* are not opposed as the Commissioner suggests; rather *"document"* is one type of *"material".*

41. On the facts of the present case, there are 2 possibilities as to what the "material" comprises: (a) The route maps comprising the Requested Information; or (b) The Study in respect of which the Stage 3 Report forms a part.

42. If the request relates to the route maps then since, like the Report, those are complete, the request does not relate to material which is *"still in the course of completion"*. However, if the request relates to the process as a whole that the Report is part of, then since that is not complete, the request relates to material which is "*still in the course of completion*" and the exception is engaged.

43. In deciding this question, we have considered the Commissioner's Guidance Note from May 2016 on "Material in the course of completion, unfinished documents and incomplete data (regulation 12(4)(d))". This states (*inter alia*), that *"material which is still in the course of completion"* can include information created as part of the process of formulating and developing policy, where that process is not complete.

44. We have also considered the Tribunal's decision in **Ames v Information Commissioner & Department for Transport** (EA/2015/0283) in which the Tribunal considered whether information relating to an ongoing policy process engaged the regulation 12(4)(d) exception. The request there was for proposals relating to the terms of reference ("ToR"), of the Independent Airports Commission. That information was complete. The Tribunal did not reject the Commissioner's general proposition that a finished document may relate to material that is in the course of completion, but stated that:

> *"…it is artificial on the facts of this case to regard information on finalising the ToR as information relating to material which was still in the course of completion. The request did not relate to government aviation policy material; it related to the particular matter of the formulation of the ToR, and the disputed information concerns that topic. An ongoing policy process is not in and of itself 'material' within the meaning of regulation 12(4)(d).* (paragraph 38):

45. The Appellant has also referred us to the United Nations Economic Commission for Europe's interpretative guidance on the Aarhus Convention, which states that:

> *"… the expression 'in the course of completion' relates to the process of preparation of the information or the document and not to any decision-making process for the purpose of which the given information or document has been prepared …".*

46. In addition, the Appellant points out that the Commissioner's decision in FER0349127 is aligned to the Appellant's own view in the present case. In rejecting a local authority's refusal to disclose a complete document on the grounds that its overall policy proposals were still at an early stage, the Commissioner explained its approach as follows:

> *"It is the Commissioner's view that the relevant consideration here is the information contained within each document and the purpose for which it was created not the overall project or development proposal it relates to. The Commissioner considers the fact that the proposal to develop affordable housing was still at idea stage at the time of the request and therefore an unfinished project is not a relevant consideration for the application of this exception."*

47. None of the guidance, or decisions we have referred to above, are binding on us, and we have not been referred to any Upper Tribunal or higher court decision on point.

48. However, we accept, as did the Tribunal in **Ames**, that a particular document that has itself been finished, *may* still be part of "material which is still in the course of completion". Whether it is, does not depend, in our view, on any forced interpretation of *"documents"* versus "*material".* Rather it depends, in our view, on the facts of the individual case, and the terms of the request. The request here clearly relates to route maps. In our view it would be artificial to regard the request as relating to any wider or other policy questions concerning the Report or the study more generally. Such an interpretation would, in our view, also be contrary to the presumption in favour of disclosure enshrined in the EIR.

49. For all these reasons, we find that regulation 12(4)(d) is not engaged. …