Tribunals Service
Information Tribunal

**Information Tribunal** **Appeal Numbers:**
**EA/2006/0068 and 0080**

**Freedom of Information Act 2000 (FOIA)**

**Heard at Procession House, London** **Decision Promulgated**
**On 12, 13, 14 and 16 March 2007** **02 May 2007**

**BEFORE**

**INFORMATION TRIBUNAL CHAIRMAN**
**John Angel**
**And**
**LAY MEMBERS**
**David Wilkinson and Peter Dixon**

**Between**

**OFFICE OF GOVERNMENT COMMERCE**
**Appellant**

**And**

**INFORMATION COMMISSIONER**
**Respondent**

**Representation:**

**For the Appellant:** **Mr Robin Tam QC**
**For the Respondent:** **Mr Timothy Pitt-Payne**

**Decision**

**The Tribunal upholds the decision notices dated 31st July 2006 and 5th October 2006, except that we find that section 33 as well as section 35 FOIA is engaged, and dismisses the appeals.**

## Reasons for Decision

The requests for information

1. On 3rd January 2005 Mr Mark Dziecielewiski (Mr D) requested the following information from the Office of Government Commerce (OGC) (Request 1):

   "*Please provide me with the two pre-Stage Zero and the actual Stage Zero Gateway Reviews of the Identity Cards Programme project being run by the Home Office."*

2. On 1st February 2005 the OGC sent a letter to Mr D advising him that the information requested was subject to two qualified exemptions under section 33 (examination functions) and section 35 (formulation of government policy) of FOIA and that they would need time to consider the balance of the public interest. On 22nd February the OGC informed Mr D that they would be refusing part of Request 1 because the public interest in maintaining the exemptions outweighed the public interest in disclosure (Refusal Notice 1). The background information contained in both Gateway Reviews (GRs) was disclosed. Following an internal review of the decision Refusal Notice 1 was upheld by letter dated 24th March 2005 to Mr D from Peter Fanning, the Deputy Chief Executive of the OGC.

3. On 25th February 2005 Mr Mark Oaten MP (Mr Oaten) requested by way of Parliamentary Question (PQ) (Request 2):

   *"To ask the Chancellor of the Exchequer what traffic light status was awarded to the identity cards scheme by the Office of Government Commerce at the Gateway Review 1 Stage."*

4. Mr Boateng, the Chief Secretary to the Treasury, by way of Commons Written Answers, informed Mr Oaten that "The ID Cards programme has not yet undergone a Gate 1 Review. It has, however, undergone two OGC Gate 0 Reviews, in June 2003 and January 2004

respectively." He then went onto say that the information was exempt under FOIA and that "the public interest in disclosure of such information is outweighed by the public interest in non-disclosure" (Refusal Notice 2). Following an internal review of the decision John Healey MP, on behalf of HM Treasury, wrote to Mr Oaten on 22nd June 2005 upholding Refusal Notice 2.

The complaint to the Information Commissioner

5. Both requesters complained to the Information Commissioner (the Commissioner). On 31st July 2006 the Commissioner issued a decision notice reference number FS50070196 addressed to the OGC and Mr D (Decision Notice 1) upholding the complaint of Mr D. On 5th October 2006 the Commissioner issued a decision notice reference number FS50132936 addressed to the OGC and Mr Oaten (Decision Notice 2) upholding the complaint of Mr Oaten on similar grounds to Decision Notice 1. In the Decision Notices the Commissioner found that only section 35 FOIA was engaged and that the public interest in maintaining the exemption did not outweigh the public interest in disclosure.

The appeal to the Tribunal

6. The OGC appealed against Decision Notice 1 and Decision Notice 2 (the Decision Notices). Request 1 and Request 2 (the Requests) are based on the same Gateway Reviews (the Gate Zero Reviews). The Decision Notices are similar and the notices of appeal cover the same grounds. Therefore the Tribunal ordered the consolidation of the appeals with the approval of the parties.

7. Both Mr D and Mr Oaten were invited to apply to be joined as parties but declined to do so, hence neither is a party to this consolidated appeal.

8. The information that is the subject of the Requests (the disputed information) has been disclosed to the Tribunal in confidence in order for the Tribunal to be able to consider all the evidence in the case. As a result part of the hearing was held in closed session .

Background to Gateway Reviews

9. In 1998, against a background where many large, complex, novel and often IT-enabled civil programmes and projects had missed their delivery dates, run over budget or failed to fulfil requirements, the Government asked Sir Peter Gershon (Sir Peter) to review civil procurement in civil government. *The Review of Civil Procurement in Central Government*, April 1999 (the Gershon Report) recommended that a common strategic framework should be established within which all central government departments would conduct their procurement activities.

10. The Government accepted the recommendations of the Gershon Report and in 2000 the OGC was set up with Sir Peter as its first Chief Executive. The OGC introduced a number of initiatives to promote best value for money in government procurement, the central of which was the Gateway process, through which programmes and projects are examined at critical stages in their life cycle to provide assurance that they can progress successfully to the next stage.

11. As Sir Peter explained in his written evidence to the Tribunal, the Gateway process is now mandatory across Central Civil Government departments and Executive Agencies and that others such as the Ministry of Defence, the NHS and local government have adopted the process on a voluntary basis. The process is set out in detail in the *OGC Gateway Process Review Pack.*

12. A Gateway Review (GR) is a review of a delivery programme or procurement project carried out at a key decision point by a team of experienced people who are independent of the team running the project. Each programme or project has a Senior Responsible Officer (SRO), a senior individual in the department concerned who takes on personal responsibility for its success. SROs use Risk Potential Assessments to determine the level of risk associated with a programme or project and this helps determine the composition of the GR team and the extent of its independence from the department.

13. GR's are conducted on a confidential basis for the SRO. Typically (and this was the case in the Gate Zero Reviews that are the subject of this appeal) the review teams are made up of three people (the Reviewers) who take four days to conduct the on-site review. Reviewers are mainly senior civil servants or outside consultants with extensive experience of the area under review. The members of the review team conduct their interviews on a confidential basis with interviewees (the Interviewees) and present their findings in a non-attributable manner in the report to the SRO. The review team has access to all the stakeholders in a project and, for high risk projects, Ministers and Permanent Secretaries are usually interviewed. At the end of each day, the review team provides a progress report to the SRO and, before they leave the site on the final day, the team presents him/her with a draft report. The SRO has the opportunity to correct factual errors but the substance of the report, its recommendations and their RAG status (see paragraph 17 below) are not open to negotiation. In brief, the philosophy of the Gateway process is that an independent review team should come in, conduct a quick peer review, and leave behind a short, clear and sometimes blunt report that is easily digested by the SRO who can put it to immediate use in pursuit of the success of the project or programme.

14. The number and nature of GR's has evolved since 2000. There are now five numbered Gates during the life cycle of a project which, for

this purpose, is defined as a piece of work designed to achieve specified outputs within a specified period of time and within planned cost, quality and resource constraints**.** Three of the reviews are conducted before the award of the contract, one examines the implementation of the service and one confirms the operational benefits.

15. A major upgrade of the process resulted in the introduction in January 2004 of Gate Zero Reviews, although there is evidence that they had started to be used earlier than this date but the process was not formalised until later. Gate Zero Reviews, two of which are the subject of this appeal, are undertaken only for programmes. A programme is defined in the Cabinet Office's Review of Major Government IT Projects as a portfolio of projects that aim to achieve a strategic goal of the lead government department, and that is planned and managed in a coordinated way. Gate Zero Reviews may be repeated through a programme's life and such reviews might typically be undertaken during the phase when the programme is being defined, when the programme is being implemented and when the programme has been completed.

16. Some programmes are more important than others. Some are deemed "mission-critical", such as the Identity Cards programme that is the subject of these two appeals, because they are essential to the successful delivery of a legislative requirement, a key departmental target, or a major policy initiative announced or owned by the Prime Minister or a Cabinet Minister. Also additionally "mission-critical" is used to define programmes or projects whose failure would have catastrophic implications for a delivery of a key public service or national security.

17. A "key" programme is a mission-critical programme that the Prime Minister's Office regards as having the greatest reputational risk or operational impact on government as a whole. The Chief Executive of

the OGC is required to give the Prime Minister regular reports on the status of these programmes. As at December 2006 there were 15 such key programmes, one of which was the Identity Cards programme.

18. About June 2002, the R(ed) A(mber) G(reen) status (RAG Status) was introduced to prioritise review recommendations. Red means that immediate action must be taken. Amber means that action must be taken before the next review. Green means that the recommendation is considered beneficial to the project but not essential for its success. The overall RAG status of a review is derived from the RAG status given to the individual recommendations: one or more reds produces an overall RAG status of red; no reds but one or more ambers produces an overall RAG status of amber; and no reds or ambers produces an overall RAG status of green.

19. Since April 2003, a project or programme given an overall red RAG status in consecutive reviews triggers what is known as a “double red” Gateway procedure. The Chief Executive of the OGC sends a letter to the Permanent Secretary of the Department concerned, with a copy (since June 2005) to the National Audit Office (NAO). Since February 2006 the NAO has passed on information about “double reds” to the Chairman of the Public Accounts Committee (PAC).

20. The Tribunal was provided with evidence that GR’s, of which there have been several thousand conducted since the process was introduced, have succeeded in improving the extent to which government projects are delivered on time, to quality and to budget. This has produced substantial benefits: it is claimed that GR’s saved the Exchequer some £1.5 billion between 2003 and 2005.

21. In addition to GR’s, internal reviews that mirror the Gateway process are undertaken by departments and their agencies. We were shown a funnel and pipe shaped diagram of these in relation to a particular department and how they relate the various OGC review gates. The

internal reviews are carried out without external help in contrast to GR's where Reviewers come from outside the department. We were informed in evidence that the Interviewees are often more candid, open and critical than they are during GRs.

Opportunities for public scrutiny

22. There are several ways to scrutinise procurement projects and programmes publicly. The NAO, headed by the Comptroller and Auditor General (C&AG), is totally independent of Government and scrutinises public spending on behalf of Parliament. It audits the accounts of all central government departments and agencies, as well as a wide range of other public bodies, and reports to Parliament on the economy, efficiency and effectiveness with which they have used public money. On the basis of reports by the C&AG, the PAC (whose main function under the National Audit Act 1983 is to examine whether the sums of money agreed by Parliament for public spending are properly spent) subjects departments to rigorous and public scrutiny.

23. In addition to the PAC with its government-wide remit on public spending, each government department is also subject to scrutiny by a Parliamentary Departmental Select Committee whose role is to examine 'the expenditure, administration and policy' of the relevant department and its 'associated public bodies'. Committees determine their own subjects for inquiry, gather written and oral evidence and make reports to the House of Commons to which the Government replies. In the course of this hearing, the Tribunal was referred to the inquiry conducted by the Select Committee on Work and Pensions that reported in 2004 on *Management of Information Technology Projects: Making IT Deliver for DWP Customers.* It considered, amongst other things, the arguments for and against publishing GR's.

24. GR's are conducted 'live' and make recommendations while the programmes/ projects are still going forward. In contrast the NAO, the

PAC and other Parliamentary Select Committees conduct historical audits and reviews whose recommendations are generally based on lessons learnt usually after the programme/project has been launched and often after it has been completed. In particular the NAO conducts retrospective audits that are looking at value for money rather than actually seeking to contribute to the successful delivery of the programme/project. Whereas NAO audits and PAC and Select Committee reports and proceedings are public and undertaken on a retrospective basis, GR's have remained private, are current reviews and look forward.

25. In evidence we were informed that GR's had been taken into account by the NAO, the PAC and Select Committees, but without disclosing the contents of the reviews. However the 27th PAC Report 2004-05 published on 6th April 2005 concluded that:

> *"this Committee believes that, to further enhance external scrutiny, there is a strong case for the publication of Gateway review reports, particularly given the repeated failures of public sector IT-enabled projects and programmes in recent years."*

Also the Work and Pensions Select Committee in its 3rd Report of the 2003-04 Session published in July 2004 recommended that;

> *"the Government should publish GR's with appropriate safeguards or failing that to set out how Parliament otherwise can be provided with the level of information it needs in order to scrutinize adequately questions of value for money from major IT contracts."*

26. The Government response to the PAC in the form of the Treasury minutes of the 19th and 27th PAC reports presented to Parliament in November 2005 also record that despite the conclusions reached in the previous paragraph that:

> *"The OGC does not agree with routine publication of Gateway reports. However, it does not operate a "blanket" exemption for Gateway information. Under the Freedom of Information Act*

*2000 each request for information is considered on a case-by-case basis and the public interest is carefully considered in each case. Where information is disclosed simultaneous publication on the OGC website is also considered."*

27. In its Response to the Work and Pensions Select Committee, published in October 2004, the Government said:

"*The Government recognises the concerns of the Committee with respect to the information provided to Parliament on IT projects and IT contracts. It takes seriously the need to consider requirements under the Freedom of Information Act 2000 (FOI) and Parliament's need for sufficient information to perform effective scrutiny. Equally, however, the Department and the OGC have been frank about their concerns around the provision of commercial information and the publication of OGC Gateway Reviews. There are legitimate concerns around the need to protect Government departments' onward programme of competitive supply, and to protect the inherent value of the openness and candour of the OGC Gateway Review process currently afforded by confidentiality."*

The evidence presented to the Tribunal was that no GR had been disclosed under FOIA.

Witnesses before the Tribunal

28. Mr Tam on behalf of the OGC called 7 witnesses. Sir Peter Gershon who was the first Chief Executive of the OGC. He was the instigator of the introduction of the Gateway Review process by Central Government. Keith Boxall, the Head of Standards and Practice at the Identity Passport Service, who has had experience of implementing projects both before and after the introduction of the Gateway Review Process. Derek James Baker, Director of Managed Services Operations at the Better Projects Directorate of the OGC, who was formerly Gateway Project Director responsible for developing and

rolling out the Gateway programme across Central Civil Government, developing and maintaining the design of the Gateway process and communicating the benefits of that process throughout Central Civil Government. Andrew Edwards a retired civil servant with more than 31 years experience, mostly at the Treasury. Since his retirement he has provided consultancy services to Government Departments and has led many GR's. Bernard Herdan, the Executive Director for Service Planning and Delivery at the Identity and Passport Service (IPS), who is responsible for all IPS operational delivery and for planning future evolution of services and capabilities. Anthony Melville Deputy Chief Constable of Devon & Cornwall Constabulary and finally Stephen Harrison Acting Executive Director, Strategy at the IPS.

29. These witnesses provided extensive evidence about the introduction and operation of the Gateway Review Process from the perspective of policy makers and project and programme initiators, managers, SROs, Reviewers and Interviewees both in relation to central government departments and other authorities who use the GR process on a voluntary basis. Their evidence forms the basis of the sections of this decision under the headings the 'Background to Gateway Reviews' and the 'Public Interest Test: Factors in favour of maintaining the exemption'. In a nutshell this evidence describes the GR process and how it works and their view of the future should GR's be disclosed under FOIA. In relation to the latter we would summarise their evidence as overwhelmingly of the view that notwithstanding the risk that GR's might be disclosed, they all considered that even the remotest possibility of disclosure would undermine the whole system which, it is claimed, has resulted in major benefits for government projects including substantial savings.

30. Mr Pitt-Payne on behalf of the Commissioner did not call any witnesses which we find surprising as it would have been helpful to have had a different perspective on the GR process. We have glimpses of this perspective from Mr D's email correspondence exhibited to the

Tribunal and in reports of other bodies such as the PAC and the Select Committee on Works and Pensions.

FOI training

31. We were informed in evidence by several of the witnesses that they had undertaken general FOI training. There had also been some briefing on FOI during training for the GR process. The witnesses seemed to believe that there was little risk of GR's being disclosed under FOIA or other means, which appears to have come from the briefings. Only in cross examination did some of the witnesses recognise that there could be no guarantee of non-disclosure. Mr Herdan said "OGC practice was that this information would not be disclosed and that people could talk without fear and that it would be non-attributable to them, but we were not able to say that there was a 100 percent guarantee that this information would never get into the public domain."

32. There was no evidence that the OCG had reviewed its training or briefing in relation to FOIA following the Commissioner's findings in the Decision Notices.

Background to the ID card scheme

33. This is set out in detail in the Tribunal's decision in *Department of Works & Pensions v The Information Commissioner's (DWP case)* at paragraphs 34 to 53. Briefly the Government completed its consultation exercise in relation to ID cards in January 2003 and announced its decision to introduce a scheme in November 2003 after the first Gate Zero Review in this case. A Bill was presented to Parliament in October 2004 after the second Gate Zero Review. At the time of the Requests the Bill was being debated in Parliament.

34. In evidence Mr Harrison confirmed that the Bill would not have been published without the benefit of the two Gate Zero Reviews. He also commented on why the GR process was used at such an early stage in the programme: “We were in the odd position where we could not set up a programme team because Government had not decided to have ID cards, so we eventually got there I think slightly subverting the gateway zero process, but it was the only process that was there at the time and that importantly other Government departments, particularly Number 10 and the Treasury would sign up to something that was an adequate assessment of the issues before they would agree to the policy.” Mr Harrison added “It was made very clear to us from Number 10 in particular that they wanted a Gateway process.”

The Questions for the Tribunal

35. In this case the Tribunal needs to address the following questions:
    a. Whether the exemption at section 33 of FOIA was engaged in respect of the requested information, i.e. whether the "prejudice" test was satisfied;
    b. If the section 33 exemption was engaged, whether the public interest in maintaining that exemption outweighed the public interest in disclosure;
    c. Whether the exemption at section 35 of FOIA was engaged in respect of the requested information;
    d. If the section 35 exemption was engaged, whether the public interest in maintaining the section 35 exemption outweighed the public interest in disclosure.

The Tribunal’s powers

36. These have been set up out clearly in other decisions of the Tribunal, for example the *DWP* case. The Tribunal’s general powers in relation to appeals are set out in section 58 of the Act. They are in wide terms. Section 58 provides as follows.

*(1) If on an appeal under section 57 the Tribunal considers-*

*(a) that the notice against which the appeal is brought is not in accordance with the law, or*

*(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

*the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.*

*(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.*

The question whether the exemptions in sections 33 and 35 apply is a question of law or alternatively of mixed fact and law. The Tribunal may consider the merits of the Commissioner's decision as to whether the exemption applies, and may substitute its own view if it considers that the Commissioner's decision was erroneous. The Tribunal is not required to adopt the more limited approach that would be followed by the Administrative Court in carrying out a judicial review of a decision by a public authority.

The examination exemption

37. The Commissioner found that section 33 was not engaged in this case. Mr Tam challenges this finding.

38. Under section 33(1) of FOIA "*any public authority which has functions in relation to – (b) the examination of the economy, efficiency and*

*effectiveness with which other public authorities use their resources in discharging their functions*" is caught by this exemption provided that:

> "(2) *Information held by a public authority to which this section applies is exempt information if its disclosure would, or would be likely to, prejudice the exercise of any of the authority's functions in relation to any of the matters referred to in subsection (1)*."

39. This is a qualified exemption which is subject to two tests. Firstly the "prejudice" test set out in section 33(2) above and provided that is met then the public interest test has to be considered under section 2(2)(b), namely that "*in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.*"

40. The Tribunal has considered the meaning and application of the prejudice test, which is common to a number of qualified exemptions under FOIA, in several decisions e.g. *Hogan and Oxford City Council v Information Commissioner* and *John Connor Press Associates Limited v Information Commissioner*. These cases have found the term "would prejudice" means that it is "more probable than not" that there is prejudice to the specified interest set out in the exemption. The other part of the prejudice test, "would be likely to", has been found by the Tribunal to mean something less than more probable than not but where "there is a real and significant risk of prejudice." (*Hogan* at paragraph 35). This finding has drawn support from the decision in *R (on the application of Lord) v Secretary of State for the Home Office* [2003] EWHC 2073 (Admin).

41. In other words the Tribunal has found that the occurrence of the prejudice to the specified interest in the exemption has to be more probable than not or that there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not. The probability of prejudice expressed by these two limbs of the test are not too far apart.

42. Mr Tam, although accepting the definition of the first limb of the test, challenges the definition of the second limb. He argues that in the *Lord* case the court was concerned with section 29(1) of the Data Protection Act 1998 (DPA) which provides, relevantly:-

> "Personal data processed for any of the following purposes:-
> (a) the prevention or detection of crime,
> (b) the apprehension or prosecution of offenders, or
> ... are exempt from ... [the subject access provisions] in any case to the extent to which the application of those provisions in the data *would be likely to prejudice* any of the matters mentioned in this subsection" (emphasis added).

43. He continues, Munby J held that 'likely' in section 29(1) connotes a degree of probability where there is a *very significant and weighty chance* of prejudice to the identified public interests. The degree of risk must be such that there *'may very well' be prejudice* to those interests, even if the risk falls short of being more probable than not" (judgment paragraph 100, emphasis added by Mr Tam).

44. Mr Tam then argues that Munby J's conclusion in that case provides no assistance to the Tribunal in this case, and presumably that the Tribunal's previous findings on this point have been wrong, for the following reasons:

    a. Munby J was considering an exemption in a different statutory scheme. The exemption, if applicable, would have the effect of preventing subject access to the data requested. It was therefore an absolute rather than a qualified exemption. This was, and was treated by the judge, as a reason to construe its requirements strictly. See in particular paragraph 99 of the judgment, where Munby J said:-

> "... I cannot accept that the important rights intended to be conferred by section 7 are intended to be set at nought by something which measures up only to the minimal requirement of being real, tangible or identifiable

> rather than merely fanciful. Something much more significant and weighty than that is required ..."

b. Equally, the construction adopted by the judge was influenced by the need to construe the DPA in the light of the requirements of Council Directive 95/46/EC of 24 October 1995 (see judgment paragraph 83). At paragraph 99, the judge observed that the Directive permitted:-

> "... restrictions on the data subject's right of access to information about himself only (to quote the language of recital (43)) 'in so far as they are *necessary* to safeguard' or (to quote the language of Article 13(1)) 'constitute a *necessary* measure to safeguard' the prevention and detection of crime (emphasis added). The test of necessity is a strict one."

45. Mr Tam concludes that by contrast, FOIA stands alone and is not to be interpreted by reference to any Directive or other instrument, still less by reference to one that requires a test of "necessity" to be satisfied before rights of access to information may be denied. Consequently, Munby J's judgment was not a sound basis for the adoption of a "very significant and weighty chance of prejudice" test in relation to FOIA, or indeed for any test higher than "not insignificant", "real, as opposed to fanciful", "not insubstantial" or "not minimal".

46. Mr Tam then refers us to a number of other authorities, namely - *Three Rivers District Council v Governor and Company of the Bank of England (No 4)* [2002] EWCA Civ 1182, [2003] 1 WLR 210 at 221H, para 22. See also *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 at 568 - which he says support his contention that the phrase “would be likely to” means that

a. The chance or likelihood of prejudice resulting must be more than insignificant or fanciful; and

b. The prejudice anticipated must be more than trivial or frivolous, for the qualified exemption to be made out, but that no further or higher hurdles should be imposed.

47. In other words Mr Tam is asking us to find that the gap between the two limbs of the prejudice test is wide and that this means there is a lower threshold than required under *Hogan* and *John Connor Press* to engage the exemption.

48. We have considered these arguments and are not prepared to change our finding in the previous decisions of the meaning of the prejudice test for the following reasons:

    a. The words in section 33(2) FOIA are closer to the words in the DPA interpreted in *Lord* than the words of the statutes being interpreted in other authorities cited by Mr Tam;

    b. In terms of the statutory context the DPA and FOIA are closely connected, despite the fact the former implements a European Directive and FOIA does not. There are links between the statutes and at various points in the DPA they are now referred to collectively as "the Information Acts" and to some extent these two pieces of legislation form a common scheme for dealing with rights of access to information, both personal information and other information, with common enforcement mechanisms both via the Commissioner and via this Tribunal;

    c. The *Lord* and the FOI cases are dealing with limitations on rights of access to information; in *Lord* with the subject access rights under section 7 DPA and in FOI cases with the general right of access to information under section 1 FOIA. Mr Tam says that in section 29 DPA, there is no public interest balance to be struck. Therefore if section 29 is engaged, the subject access right is lost, and that is an end of the matter. In the present context, even if a qualified exemption that is prejudice based is engaged, there is still the public interest test to go through. However, if a qualified exemption is engaged under FOIA, then what this means is that the important general right of access under section 1 is potentially lost. It is potentially at risk. The right of access to information held by a public authority is now under scrutiny and is subject to a public interest test after having gone through the gateway of the prejudice test. It is not simply a right

that is enjoyed without qualification. So although if a prejudice exemption is engaged it does not take the right away, it does have significance in relation to the right. It means that the right is potentially at risk, depending on where the public interest balance lies in the circumstances of the individual case. Therefore although this position is not on all fours with the *Lord* case, there are important similarities with *Lord* which although not binding on us are of assistance as to what a phrase like "would be likely to prejudice" means.

d In *Lord*, the expression "would be likely to prejudice" stands alone. In the present case, the phrase is "would or would be likely to prejudice". There is no disagreement that "would prejudice" indicates prejudice being more probable than not. If this phrase had been coupled with an alternative possibility whereby any non-fanciful, non-remote prospect of prejudice could engage the exemption, then the language that we would have expected Parliament to have used in FOIA is, as Mr Pitt-Payne submits, "would or might" rather than "would or would be likely to prejudice".

Engagement of section 33

49. The implications of our above finding is that the OGC has a more difficult task in complying with the prejudice test as the threshold is higher than Mr Tam has been contending. The Commissioner found in the Decision Notices that this higher threshold had not been met and therefore the section 33 exemption was not engaged and there was no need, therefore, to move to applying the public interest test.

50. This Tribunal has the power to review the OGC's application of the prejudice test, despite our finding that the Commissioner applied the right legal test (see *DWP* at paragraph 16). We have decided to exercise this power and find that the OGC was correct to find that the exemption was engaged.

51. The public interest test requires the public authority to stand back and abnegate its own interests except and insofar as those interests are properly viewed as part of the public interest when applying the test (See *DWP* paragraph 24). The prejudice test, however, does not require such a balancing act. It requires the public authority to determine reasonably and objectively whether disclosure would, or would be likely to, prejudice the exercise of, in this case, the OGC's GR functions.

52. The OGC has provided considerable evidence in this case from witnesses appearing before the Tribunal and in statements attached to Refusal Notice 1 that the Public Authority considers that the GR process would be harmed by public disclosure. We find that the OGC was reasonable in concluding there would be a weighty chance of harm, because the underlying way that GR's are undertaken would need some change to the current practice if it were to be demonstrated under FOIA that there could be no guarantee that GR's would be kept from disclosure in the future. These changes would put the currently practised GR process at some risk. We make no comment here on the way the GR process is practised or whether it could be argued that the way it is practised has contributed to the likely harm. It certainly does not amount to maladministration. Therefore we find it was reasonable for the OGC to determine that disclosure of the disputed information would be likely to prejudice the undertaking of GR's and therefore the OGC's function. However we would not go so far as to find that it would prejudice the OGC's functions in this respect.

<u>The formulation of government policy exemption</u>

53. The other exemption claimed in this case is under section 35 FOIA, namely *(1) Information held by a government department.....is exempt information if it relates to- (a) the formulation or development of*

*government policy.* This is a class – based exemption which means that there is no need to show prejudice or harm as under section 33.

54. Both the OGC and the Commissioner consider that parts of disputed information are caught by this exemption and that the exemption is engaged. The Tribunal has reviewed the disputed information and agrees that the exemption is engaged, although we find, as the Commissioner recognised in the Decision Notices, that the policy in relation to the introduction of identity cards had been formulated and was well under development by the time of the Requests. Most of the information which is not caught by the exemption has already been disclosed to the complainants.

55. Therefore we need to consider the application of the public interest test. Both parties agree that the factors to be taken into account are largely common to both exemptions so we consider these exemptions together in order to determine whether the test has been applied correctly by the Commissioner.

56. We would observe that we do not expect that section 35 would be engaged for every request for a GR. There will be little if any policy formulation or development in some reviews, particularly later in the project cycle where they are above all concerned with implementation and delivery.

Analogy to other exemptions

57. Mr Tam suggests to us that we should consider these exemptions as analogous to three other exemptions under FOIA, namely section 42 (legal profession privilege or LPP), section 40 (personal information) and section 41 (information provided in confidence). His reason for seeking to create such analogies is to require us to apply, in effect, a stricter test when considering the public interest balance.

58. In relation to the LPP exemption we have already considered such an analogy in the *DWP* case and rejected it in relation to section 35. We reject the analogy on similar grounds in this case in relation to both the section 33 and 35 exemptions engaged in this case.

59. In relation to the other two exemptions (sections 40 and 41), which are absolute exemptions, we again reject the analogy. If Parliament had intended the section 33 and 35 exemptions to be absolute exemptions than it would have provided as such. If these exemptions (sections 40 and 41) had been relevant to this case then the OGC should have claimed these exemptions. Mr Tam cannot expect us to allow him to introduce them in such an indirect manner. In any case both these exemptions are not as absolute as first appears. The application of section 40 will often require a similar balancing act to the public interest test when the date protection principles are being considered – see the Tribunal's decision in *House of Commons v Information Commissioner.* Section 41 will usually require the application of a public interest test as to whether there is an actionable breach of confidence at common law – see the Tribunal's decision in *Derry City Council v Information Commissioner.*

The public interest test

**Factors in favour of maintaining the exemption**

60. Mr Tam argues that there is a very strong public interest in maintaining the exemptions otherwise the success of GRs will be fundamentally undermined. There is a very strong public interest in the efficient and effective running of programmes and projects particularly where large sums of money can be saved. Mr Tam applies the same public interest to both of the exemptions engaged in this case and does not seek to apply separate and different factors to each exemption.

61. Mr Tam identifies two information flows within the Gateway process which he argues have to be protected. The first one is the information

flow from Interviewees and other sources to the review team. The team uses this information to reach its conclusions and recommendations. It is important, he argues, to distinguish that flow from information flowing back to the Department concerned and the SRO in the form of advice and recommendations. The Requests touch on both flows in this case and it is important to recognize the difference and not to confuse the two when considering the public interest test.

62. The GR system, he argues, is based on maintaining confidentiality in order to promote openness, honesty and the candid exchange of information. This is a fundamental philosophy resulting in a form of behaviour which makes the process work.

63. He identifies 14 areas of harm to GR's from even the remotest possibility of disclosure which is, in effect, a summary of the OGC's witnesses' evidence. He contends that if one of these is triggered, even the less substantial items, then all the other items will be triggered because they are interrelated, and that severe harm to the GR system will occur. He further argues that disclosure of a GR would essentially trigger an entire package of disadvantages and adverse effects on the whole process.

64. We set out the 14 areas briefly below, which are largely based on the witnesses' opinion of the future of the GR process should GR reports become routinely disclosable soon after publication:

    a. The effect on Interviewees who would become more guarded and cautious in their communication with the review panel and less open and candid. This would have three possible effects. Juniors would be reluctant to criticise or be seen to be criticising superiors or others involved in the project. Anyone would be reluctant to be seen to be criticising the department as a whole, the particular project or perhaps a minister's approach to policy or decisions. Finally Ministers who are

interviewed themselves may be reluctant to say anything critical about their own policies or decisions, for fear this would have an impact on the way they are seen.

b. Interviewees may refuse to be interviewed at all. Currently it is not actually a problem because of the way the process works, but past experience is no guide to the future where you are contemplating a wholesale change in the assumptions that are to be made by the participants to a review.
c. Reviewers will be less willing to be involved in reviews generally.
d. Reviewers might be less willing to become involved in reviews from a time commitment point of view because the whole process will lengthen due to concern that the content of the report might be published. The availability of Reviewers for increased periods of time would be less.
e. There will be an impact on civil servants wishing to become SROs for fear of adverse publicity.
f. The private sector would be less willing to be involved in reviews if they feared adverse publicity and this may have a knock on effect on their interest in working with government.
g. Although GR's are mandatory for central government there is flexibility in the timing of when reviews are undertaken and SROs would tend to delay reviews in order to maximize the chance of getting a green light RAG status.
h. It will affect the way reports are written. They would become more bland and anodyne if published. They would be drafted in "finessed language" or "Civil Service speak". The reports might omit issues of sensitivity which are then communicated orally rather than put in the report.
i. The time and energy taken to negotiate the content of reports in order to reduce the risk of criticism of the project or the review team, because the department involved feels obliged to take a public stand and defend itself against the criticism. Time and energy might also be expanded if things go wrong and the

review team then gets criticized for not having done a thorough job.

j. This will not only result in delays but influence the way the GR report is communicated to SROs.

k. Some of the above effects would introduce an atmosphere of conflict and confrontation between the two sides in the review process.

l. It would also lead to a general loss of enthusiasm and confidence in the process.

m. There would be resistance to recommendations. Participants would take entrenched lines, defending themselves, rather than embracing the recommendations. This is a natural reaction to criticism which is said is avoided by the current system.

n. This would particularly effect information relating to policy options which are of a sensitive nature to government, and also commercially sensitive information.

65. In Mr Tam's words the Gateway process is currently protected from these 14 areas of harm through non disclosure and provides a "huge boulder of protection for the Gateway process" and should not be tampered with. Put another way, what he is saying is that the effect of all of these areas of harm is that any FOI disclosure of any GR, regardless of the content of the review or of the timing (except perhaps after 30 years or a considerable period of time) of the disclosure, he says in every case, creates a very strong public interest in favour of maintaining the relevant exemptions, because of the almost certain adverse effect of disclosure on the GR process generally which is regarded as having so much value to the system.

66. Mr Pitt-Payne deals with the 14 areas of harm under 7 headings. Firstly the "frankness" of Interviewees where Mr Tam draws a contrast between the current frankness as he sees it and the feared future lack of frankness if there was disclosure. Mr Pitt-Payne argues that this

harm has been overdone. The most obvious concern of Interviewees will be the way that their superiors will respond to the content of the GR, and more specifically to anything that they say to Reviewers which, although non-attributable, is nonetheless most likely to be identified as coming from them by their superiors. The main constraint on frankness, he argues, is not the prospect or possibility of publicity. It is the concern of a junior employee who may say something to upset a superior.

67. According to Mr Pitt-Payne there are really two points relating to frankness. The first relates to Interviewees being identified in the reports as having made a particular point. He argues that as the way the process presently operates, which makes such points non-attributable to particular individuals in GR reports, means that this important practice would be completely unaffected by any prospect of FOI disclosure and can continue.

68. The second point he makes in relation to frankness is the culture or behaviour surrounding GR's. OGC reviews and mechanisms are likely to work well in organizations where the culture allows people to speak freely and, if necessary, critically, without recrimination. They will not work well in an organization that does not have that culture. Organizations either have that sort of culture or not. If they have it they are not going to lose it overnight merely by the prospect of FOI disclosure. It will be up to management to assure staff that frankness will still be valued despite the possibility of disclosure.

69. Mr Pitt-Payne points out that even with non-attribution there is still a risk that it will be possible from the context of a report to ascertain who must have been the source of particular comments or information in a report. But, he says, this is a risk that is present anyway from insiders particularly the SRO who currently sees the report and will be most familiar with the position of Interviewees. It is unlikely, he argues, that people will simply decline to take part in OGC interviews. In Sir Peter

Gershon's words the review process is part of the "DNA" of the public sector. It would be unrealistic to imagine that people would not take part in the system not least because, in accordance with the Civil Service Code, civil servants must fulfill their duties and obligations responsibly. This also goes for commercial partners who have an interest in ensuring that they have a good continuing relationship with public authorities.

70. The second heading of adverse effect referred to by Mr Pitt-Payne comes under the general remit of "delay": that if there is any perceived risk of GR reports being made public under FOIA then they would be negotiated and that will take time and use up everybody's energies and it will make the process confrontational. He argues that these consequences are largely in the hands of the public authority in general and the OGC in particular. The current ground rules are clear and work: the review is completed within a week; the SRO gets a draft report on the last day of the review; the report will include recommendations and a RAG status; these are non-negotiable; and there is a limited opportunity for the SRO to seek to correct matters of a drafting nature or factual errors. If the public authority and OGC makes it clear that these ground rules will still be applied, then the concerns will soon dissipate.

71. Mr Pitt-Payne labels the third area of concern as that of "deterrence": the concern that the prospect of publication would either deter people from having OGC reviews at all or deter them from having them in good time or deter them from acting on the recommendations made. He makes the point that they are compulsory for Civil Central Government. If an SRO deliberately chooses to delay a GR or ignore its recommendations the harm, he argues, would be even greater because of the risk to which the SRO might be placing the programme/project with the consequent risk of criticism say by the NAO or PAC. The prospect of a greater level of public accountability

and transparency would operate as an incentive to cooperate with the review system rather than withdraw from it.

72. The fourth area of concern Mr Pitt-Payne labels as “self-censorship”. The concern that Reviewers will be less frank, open and straightforward in their reporting than currently practiced. He argues that if the GR process is so highly valued then this is a matter for the OGC to get a strong message across to Reviewers that they should be frank, open and honest because that is in the public interest. If there is an increased level of publicity as would be expected under FOIA generally that is something that participants will have to be robust about.

73. The fifth area of concern identified by Mr Pitt-Payne comes under the general heading of “disincentives”: disincentives for people to be Reviewers, SROs etc. He argues that this is not a realistic submission by Mr Tam because the SROs and Reviewers are on the whole senior Civil Servants who are committed to developing their own careers and it would be inconceivable that they would choose not to engage in the Gateway process because of a possibility of some GR material being disclosed under FOIA.

74. The sixth area of concern relates to the position of “commercial” organizations. Mr Pitt-Payne drew our attention to The Select Committee on Works and Pensions 2004 Third Report (2004 Report) (see paragraph 75 below) where it is clear that some outsourced suppliers would welcome publication of the GR reports and considered this was not a strong point. He accepted that commercial organizations would want to protect their confidential information and trade secrets but noted that there were specific FOIA exemptions for such information which had not been claimed in this case.

75. The final area of concern was that if information was disclosed it would be “misinterpreted”. Mr Pitt-Payne pointed out that the Tribunal had

already considered this general issue in *Hogan and Oxford City Council v Information Commissioner* where it was not considered a good public interest argument in favour of maintaining the exemption to submit that if information was disclosed that it would be misunderstood. Mr Tam narrowed down the argument from misunderstood by the public to information disclosed would be misrepresented by the press. Mr Pitt-Payne quite rightly made the point that if such a general assumption could be made then it would undermine the whole public policy behind having a freedom of information regime in the first place.

**Factors in favour of disclosure**

76. Mr Pitt-Payne points out that the public interest in disclosure is very often stated at a rather higher level of generality than the public interest in maintaining the exemption which will centre on the interests set out in the exemption. The public interest in disclosure will be set out in terms of interests in transparency, openness, accountability and informed public debate and so on. However, in this case he argues there are actually some very specific public interests in disclosure at stake in relation to two matters; the ID cards scheme and OGC reports and GR's.

77. He then argues that one of the principal public interests in favour of disclosure is contained in the 2004 Report. The means of public scrutiny currently available such as NAOs and PACs are historical and retrospective reviews and not related to current projects. GR's would provide a level of public scrutiny of current projects. We set out the relevant paragraphs from 2004 Report:

> *118. We note that OGC guidance does not provide for a blanket refusal to publish Gateway Reviews. OGC guidance suggests that publication of reviews should be determined on the merits of each case. We asked the Department how Parliament could exercise its legitimate duty of scrutiny of the Department and its Agencies when the Department refused to publish any of the*

*many reviews into projects, such as CSA. In response the Department defended the Government's decision not to publish Gateway Reviews and pointed out that the NAO had a clear responsibility to scrutinise the Department and that "a review of the Child Support Reform programme will almost certainly take place when implementation is complete." We acknowledge the excellent work of the NAO. Indeed, in this report we have referred to some of the problems caused by defective IT that have been identified in successive NAO and PAC reports. The NAO, as the guardian of the public purse, discharges its responsibility in a highly effective manner. However, and this is not a criticism of its skill and dedication, the NAO tends to undertake post evaluations on projects as part of its value for money studies or as an audit. Although its reports are presented to Parliament and published, they are generally historic, whereas we believe major IT projects should also be subject to close scrutiny during their development. Current projects need to be subject to current scrutiny. Parliament and the public should not be required to wait years after the planning decisions were made or problems emerged before they can get a detailed account of what has gone wrong. Parliament requires the opportunity to scrutinise such projects armed with relevant detailed information. The NAO produces 60 reviews per year and cannot fulfil the necessary scrutiny process unaided.*

*119. It was noticeable from the evidence that a number of other witnesses supported the case for OGC Gateway Reviews being published. During oral evidence sessions, a number of major IT suppliers said that they would welcome publication of OGC Gateway Reviews, or had no problem with publication, provided all major IT projects were treated equally. For example, Kevin Saunders said that SchlumbergerSema would be happy for them to be published. He added:*

*"I cannot see any problem that we would have with them being published, providing there is a clear understanding of the framework, obviously. I think the reviews would have to be perhaps even more tightly controlled in terms of the management and input to them but I cannot see why we would have a problem with publication because we have been through them, we know how they work and they make key decisions."*

*120. We found it refreshing that major IT suppliers should be content for the reviews to be published. We welcome this approach. It struck us as very odd that of all the stakeholders, DWP should be the one which clings most enthusiastically to commercial confidentiality to justify non-disclosure of crucial information, even to Parliament. We were surprised also that there is little central guidance to departments for dealing with those circumstances when the commercial IT suppliers are content for information to be made available and departments cling to commercial confidentiality. As regards damaging the review process, Tony Collins made the valid point that perhaps the reviewers are too close. He told us:*

*"If Gateway Reviewers believe the quality and rigour of their advice and work would suffer if their reviews were published, we would question whether they are too culturally close to those they are reviewing and therefore perhaps not be sufficiently independent and objective to reach the tough conclusions that Gateway Reviews sometimes demand.*

*"133…In general, no witness thought FOIA would have any effect on the disclosure of information relating to IT projects. It was thought that exemptions would apply. Equally, there was no evidence that FOIA was likely to put off suppliers from bidding for public sector contracts. Sheelagh Whittaker (EDS) told us that EDS was experienced in working under jurisdictions that operated freedom of information legislation and that the only test*

*was to ensure that any claimed exemptions were genuinely commercial."*

Mr Pitt-Payne explains that this does not mean that GR's should be disclosed immediately under FOIA after being completed. That is not the position in this case where disclosure is being sought a year to 18 months after the relevant report was produced. It is still disclosure that would enable the delivery of what the House of Commons Select Committee is referring to in the previous paragraph, namely current projects, such as the ID card scheme, should be subject to current scrutiny. This, he argues, is a strong public interest.

78. Mr Pitt-Payne then argues that the public interest factors taken into account in the *DWP* decision at paragraphs 96 to 102 are all relevant to this case. In summary these are as follows:
    a. The importance of the decision to introduce an ID card scheme;
    b. The need for informed public debate of such an important decision;
    c. The importance of allowing the public to better judge the Government's performance; and
    d. The fact the disputed information was mature information.

79. Mr Pitt-Payne then refers us to Mr Edwards' witness statement where he sets out what a review team would be looking at in relation to the implementation of the ID cards programme. This includes whether the scope and priority had been sensibly defined? Whether the objectives have been clearly defined? Has a sensible range of options been properly identified? Have the technical options (for example, in relation to the National Identity Register, biometrics, etc) been properly identified and assessed? Have the procurement options been sensibly and rigorously assessed? Have promising options for rolling out the programme been similarly identified and assessed?

80. Mr Pitt-Payne agrees that these are all extremely good questions. They are questions he argues where there is a strong public interest element, in two respects. There is public interest in informed debate about these questions. There is a public interest in getting the right answer to these questions. There is also a public interest, he says, in understanding what answers the government has reached in relation to those questions and why, because these questions are all fundamental to the wider question, namely, is it a good idea to go ahead with the scheme? Is this a scheme that is do-able, that is deliverable? Is this a scheme where the benefits will outweigh or justify the costs? Are there sensible steps in place to ensure that those benefits are delivered for an acceptable cost and within an acceptable timeframe? If not, does that mean that the whole scheme should be abandoned or does that just mean that delivery should be rethought?

The Tribunals Analysis and Findings

81. Although Mr Tam says he is not putting forward a case for GR's to be subject to an absolute exemption under FOIA it seems very like that to us. He says that the combined extent of the harm which will flow from disclosure is so overwhelming that there can be very few exceptions and then only possibly after a long period of time, say 30 years. His whole argument is based on the fact that the GR system can only continue to be successful if disclosure is not a realistic possibility.

82. The FOIA has been around for 7 years, from before the start of GR's. Parliament in its wisdom has absolutely exempted certain information from the Act, but it has not exempted GR's as such in this way. The OGC seems to us to have taken the view that they are exempt despite the Act and their public utterances that they will consider each request on its own merits is difficult to reconcile with their training of those involved in the GR process, their practice of not having released any GR's so far and the arguments being put forward in this case.

83. We cannot understand how the OGC appears to have given such internal assurances that reports would not be disclosed under FOIA. There has always been a possibility that GR's would be disclosed under FOIA. GR's are all about the management of risk. We would have thought that FOIA would have been factored into that risk assessment because cases like this appeal were foreseeable. To have developed a system on the apparent assumption that there was little or no risk of disclosure is at the very least unprofessional and at variance with one of the aims of GR's which is to encourage and support, in effect, more professionalism in the way programmes and projects are undertaken.

84. We are influenced by what the 2004 Report considered in relation to the publication of OGC GR's. The Government argued as in this case that publishing GR's would weaken the process. Despite this the Select Committee came to the following conclusion:

> *121. We are not convinced that the Gateway Review process is so fragile that the current levels of secrecy are necessary. We are genuinely sympathetic to any reasonable argument that justifies some material to be excluded from the published version of a Gateway Review, but in our view, the Government's objection to publishing Gateway Reviews is based on an untested assertion that publication would invalidate the review process. Publication of inspections and reviews is a widespread feature of public life nowadays and there is no reason why a major public IT projects costing millions of pounds, should not be subject to the same open scrutiny that applies in other areas of public life. This is especially true when the projects in question have such a long history of poor service.* ***We recommend that the Government should publish Gateway Reviews with appropriate safeguards or failing that to set out how Parliament otherwise can be provided with the level of information it needs in order to scrutinise***

***adequately questions of value for money from major IT contracts.***

*123. In short, we believe that more openness is needed and in our view one way to achieve this would be to give parliamentary committees greater access to Gateway Reviews.* ***In the event that the case against full publication of Gateway Reviews can be substantiated, we call upon the Department to provide a summary document of each review within 6 weeks of the review being completed.*** *We consider that by providing more information to Parliament, Ministers and officials will be under corresponding pressure to be kept fully informed about projects.* (Bold emphasis taken from the report.)

We note that the 2004 Report records the Government and OGC's offer to develop a set of guidelines to cover increased access to information on IT contracts, which could then be used to inform decisions under FOIA about the amount of information provided on GR's and how it proposes to deal with requests for detailed information on publicly funded IT projects from members of the public. We were not provided with any evidence of progress on this offer, despite the fact the 2004 Report recorded that the guidelines were expected to be agreed by Ministers and published ready for the entry into force of FOIA on 1st January 2005.

85. We have accepted in *DWP* and *Department for Education & Science v The Information Commissioner* that Government needs to operate in a safe space to protect information in the early stages of policy formulation and development. We can understand the need for a similar safe space in relation to examination functions, despite what one witness described as an unusual use in this case of the Gate Zero Review process. However at the time of the Requests the decision had already been taken to introduce ID cards, a Bill had been presented to Parliament and was being debated publicly. We therefore find that in

the circumstances of this case that it was no longer so important to maintain the safe space at the time of the Requests.

86. We find that the grave consequences for the Gateway process which Mr Tam maintains would result from even the remotest possibility that reports would be disclosed is overstated. We prefer Mr Pitt-Payne's arguments in paragraphs 64 to 73 above.
87. All the witnesses seem to be of the view that once one report was disclosed under FOIA the floodgates would open and they would have to work on the assumption that all reports would need to be disclosed very soon after publication. This is clearly incorrect. FOIA provides for many exemptions and where the public interest test is applicable it is applied to the circumstances of the particular request, not generally to say any GR's. There is no reason to believe the floodgates would open, but clearly GR's are subject to FOIA.

88. We find it difficult to accept that the OGC is really convinced by the arguments put forward by Mr Tam on their behalf. Mr Herdan, an experienced Reviewer and SRO, under cross examination accepted that although working under OGC rules and the care he took that nothing said to him by an Interviewee would be attributable, that given FOIA there could be no guarantee that a report would not be disclosed. Incidentally Mr Herdan had recently been involved with a GR relating to the Olympic Games, after at least one of the Decision Notices had been published, and despite the risks of disclosure following those Notices had still been able to undertake the GR successfully.

89. We are aware that some of the risks identified in Mr Tam's areas of harm are already being addressed in practice. For example Mr Edwards said in his evidence that he already draft's GR reports in a way which recognise that they may become public. He said to us:

> "There is always a concern that these reports, like other public documents, may occasionally enter the public domain, for example as a result of leakage. For myself, therefore, I always

try to ensure that the reports are drafted diplomatically so that if this did happen there would be no unnecessary political embarrassment and no unnecessary damage to the relationship between Government and officials. The style of the reports is therefore sensitive to that consideration."

90. The Tribunal has considered all the circumstances of this case and finds that the public interest in maintaining the exemption does not outweigh the public interest in disclosure. In other words we uphold the Commissioner's Decision Notices in this case.

91. The Tribunal observes that the RAG status only was requested under Request 2. If the Requests had not been consolidated this may have created a problem because the RAG status alone could be misconstrued unless other parts of Gateway report are disclosed. Therefore a public authority faced with such a limited request in the future might choose to disclose other parts of a report in order that the RAG status can be fully understood, unless of course an exemption is being claimed.

Remedies

92. The Tribunal orders that the disputed information is disclosed to the complainants. However before requiring this order to be carried out we are prepared to give the parties 14 days from the date of this decision to make written submissions to us as to whether the names of the individuals listed as Reviewers and Interviewees in the disputed information should be redacted. Once we have determined this matter we will then require the OGC to disclose the information in whatever format we determine within 14 days of that determination.

John Angel
Chairman Date 02 May 2007