



Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2007/0072

Information Commissioner's Ref: FS50093052

Heard at Procession House, London, EC4

**On 31st January and 1st, 2nd and 25th
February 2008**

Decision Promulgated

29th April 2008

BEFORE

Chairman

JOHN ANGEL

and

Lay Members

TONY STOLLER AND ROGER CREEDON

Between

**THE DEPARTMENT FOR BUSINESS, ENTERPRISE
AND REGULATORY REFORM**

Appellant

And

INFORMATION COMMISSIONER

Respondent

And

FRIENDS OF THE EARTH

Additional Party

Representation:

For the Appellant: Ms Eleanor Grey
For the Respondent: Mr Akhlaq Choudhury
For the Additional Party: Mr Phil Michaels

Decision

The Tribunal mostly upholds the decision notice dated 4th July 2007 but allows the appeal in part and substitutes the following decision notice to reflect this decision:

Information Tribunal

Appeal Number: EA/2007/0072

SUBSTITUTED DECISION NOTICE

Dated: 29th April 2008

**Public authority: THE DEPARTMENT FOR BUSINESS, ENTERPRISE
AND REGULATORY REFORM (BERR)**

Address of Public authority: 1 Victoria Street, London SW1H OET

Name of Complainant: FRIENDS OF THE EARTH (FOE)

The Substituted Decision

For the reasons set out in the Tribunal's determination, the substituted decision is that the information ordered to be disclosed in the decision notice date 4th July 2007 (the July 2007 Notice) shall be varied to the extent that the following information shall be withheld:

1. Document 1.4
2. The last sentence of Document 1.5
3. The second part of the last sentence after the hyphen of Document 1.6
4. The second and third sentences of the second paragraph of Document 1.8
5. The names of substitutes and stand-ins in Document 2
6. Document 3.6
7. Document 3.7
8. The last two sentences of Document 3.8
9. The fourth paragraph of Document 4.1
10. The first sentence of Document 4.3
11. The names of those copied into the email other than the one name referred to in the Confidential Annex and the last paragraph in Document 6
12. The name of the stand-in in Document 7

And the following information shall be disclosed:

1. Last 3 sentences of Document 1.3
2. The address except the bay number of the author of Document 3
3. The second sentence of Document 3.2
4. The second sentence of Document 3.4

And for the following information BERR and the Information Commissioner are invited to consider and reach agreement as to which names should be disclosed and to submit such names in writing to the Tribunal for its approval within 14 days of this Decision and where any name is in dispute BERR and the Information Commissioner to provide their reasons for not reaching agreement and the Tribunal then to resolve whether or not to disclose such disputed name within 7 days thereof:

1. The names of those also attending in Document 4
2. The name of the CBI contact and DTI attendees in Document 5
3. The names in Document 8

4. The names in the accompanying email to Document 9

Otherwise the July 2007 Notice shall apply.

Action Required

BERR to comply with this notice and provide FOE with the information ordered to be disclosed within 28 days of the date of this notice, including the names.

Dated this 29th day of April 2008

Signed

Chairman

Information Tribunal

Reasons for Decision

Introduction

1. This case involves the extent to which communications and discussions between a government department and a representative body, one of whose main aims is to lobby government on behalf of its members, can be undertaken in private under the freedom of information regime operating in the UK.
2. Although the Tribunal has been called upon to consider the extent to which civil servants and ministers can have a private thinking space for their deliberations in particular cases, this is one of the first cases where the Tribunal has been called upon to consider whether a similar private space can be extended to a third party, who is a lobbyist, outside government.

The request for information

3. On 1 July 2005 Tamsyn East of Friends of the Earth (FOE), wrote by email to the Department of Trade and Industry (DTI), now the Department of Business, Enterprise and Regulatory Reform's (BERR), as follows:

“Please could you tell me what meetings and correspondence there have been between **Ministers and/or Senior civil servants** (Grade 5 or above) and employees from the CBI since the 5th May 2005 in the following divisions of the DTI:

- Fair markets group
- Energy group
- Strategy Unit

In respect of each meeting, please provide the following details:

- The dates of the meeting
 - Who participated in the meeting (Names, and/or position/rank)
 - Minutes from the meeting
 - Correspondence between the parties.”
4. On 26 July 2005 the DTI provided some information but refused to supply other information held on the basis it was exempt under ss. 35 (policy formulation), 41 (confidential information) and 43 (commercial interests) FOIA (the Refusal Notice).
 5. Mr Phil Michaels of the FOE requested an internal review by post and email dated 28 July 2005 which also contained further requests for “a full list of all documents that have been withheld in their entirety” and “for any documents that you decide to withhold in part you should provide us with a redacted copy clearly marking any redactions and, in respect of each such redaction, the exemption relied on.”
 6. On 5 October 2005 the DTI wrote to Mr Michaels at the FOE with the result of the review. It advised that further documents would be disclosed, some redacted, and set out which exemptions had been applied and where relevant how the public interest test had been applied. Ss. 35 and 41 continued to be relied upon but not s.43. In addition s.40 (personal information) was claimed in respect of various names. The DTI also provided a list in a tabular form of the date, event, job title of officials attending from both the CBI and DTI (but not their names) and whether there was a written record of the meeting, of what appeared to be all contacts between those parties between the dates in question in relation to the Request. Between 5 May 2005 and 6 July 2005 there had been over 30 such contacts/meetings of different types between DTI and CBI officials.

The complaint to the Information Commissioner

7. By letter dated 27 October 2005 the FOE made a detailed complaint to the Commissioner. There followed a prolonged exchange of letters between the Commissioner and DTI exploring the complaint during which further documents were discovered by the DTI and some were disclosed to the FOE and others withheld now (September 2006) claiming exemptions under ss. 35(1), 36(2), 40(2) and 41 FOIA. The investigation of the complaint continued and by letter dated 12 October 2006 the DTI provided an annex relating to 9 withheld documents, identifying which FOIA exemption(s) had been applied to each document or part of a document where it had been redacted. In the annex to this letter the s.36(2) (inhibit free and frank exchange of views) exemption had been introduced although it was not clear whether this was as an alternative to a previously claimed exemption and/or in relation the new information discovered. It subsequently became apparent that another document was being withheld, so 10 in all.
8. The CBI was consulted in relation to the Request during the Commissioner's investigation and on 5 May 2006 wrote to the DTI "to confirm that the CBI would not support any further disclosure of the details of the meetings that fall within the scope of the request" because "The CBI's participation in these meetings was on the basis that the information that we provided was done so in confidence. In many instances, our discussions involving the impact, or potential impact, of government policy on CBI members are of a commercially sensitive nature to the businesses in question." We note that the s.43 exemption was no longer being pursued by this stage.
9. During the investigation the DTI explained to the Commissioner that it had considered the applicability of the Environmental Information Regulations 2004 (EIR). It considered that some information was covered but had been disclosed but that if other information could be construed as environmental information then the information would be exempt under Regulation 12(4)(e) (internal communications). On 4 July 2007 the Commissioner issued a decision notice (the Decision Notice) upholding the DTI's decision to withhold some of the information but requiring the rest of the information to be disclosed.
10. The Decision Notice identified 10 documents which had been withheld of which 4 had been disclosed but in a redacted form. The Commissioner found that the EIR did not apply because the information concerned although referring to energy policy only related to policy in respect of supply, demand and pricing and not to the policy affecting or likely to affect the elements of the environment or factors affecting or likely to affect those elements. The Commissioner also found that the DTI could not apply ss. 35 and 36 in the alternate because "section 36(1)(a) states that it can only be applied to information held by a government department which is not exempt by virtue of section 35."
11. The Decision Notice reviewed each document in detail under FOIA and required the disclosure of the whole of 6 of them and some redacted parts of the others. For the rest the Commissioner upheld the DTI's decision to withhold.
12. Following the Decision Notice and the commencement of this appeal further disclosures in relation to the 10 documents have been made, but these disclosures were made in December 2007 in relation to a new FOE request.

The appeal before the Tribunal

13. BERR (the successor to the DTI) appealed to this Tribunal on 1 August 2007 against the Commissioner's Decision Notice. FOE were joined as an additional party. The disputed information must remain secret during our proceedings, for the reasons set out in our Practice Note on confidential information which can be found on the Tribunal's web site. As a result we received open and closed bundles of documents and heard evidence and submissions in open and closed sessions in accordance with our normal procedure for protecting such information until there is a decision of this Tribunal requiring disclosure which has not been successfully appealed.

14. We have heard evidence from a number of witnesses over three days, namely David Green, Andrew Warren (only written evidence) and Merlin Hyman, Tony Juniper and Craig Bennett in open session on behalf of FOE, and Ian Peters, Ron Gainsford, John Cridland and Mark Gibson, the latter two also in closed session, on behalf of the BERR.

The disputed information

15. The DTI provided a spreadsheet with brief details of each DTI engagement with the CBI between 5 May 2005 and 13 July 2005. There were over 30 such engagements. The Decision Notice identifies 10 documents which are in dispute in this case. Since then there have been the December 2007 disclosures. We set out below a general description of these documents and a brief description of the extent to which each has already been disclosed including the December 2007 disclosures:

Document 1 – memo from Matthew Hilton to Geoff Dart dated 19 May 2005 re “meeting with Sir Digby Jones: 18 May”: disclosed but most contents except subject matters of discussion redacted;

Document 2 - summary record of Business Whitehall Climate Change Group (BWCCG) 20 May 2005: disclosed except for names of non DTI persons referred to in the summary;

Document 3 – memo from Matthew Hilton to Nin Kadam dated 20 June 2005 re “Secretary of State’s meeting with Sir Digby Jones: Monday 20 June”: disclosed but most contents except subject matters of discussion redacted;

Document 4 – notes on CBI/DTI Workshop held on 21 June 2005 (away-day): withheld in full;

Document 5 – note on meetings held on 6 May and 30 June 2005: withheld in full;

Document 6 – note of meeting between Malcolm Wicks of the DTI and CBI officials on 20 July 2005: withheld in full;

Document 7 - summary record of BWCCG 6 July 2005: disclosed except for names of non DTI persons referred to in the summary;

Document 8 – emails in May 2005 re Company Law White Paper with attachments: disclosed in December 2007 except for some limited redactions;

Document 9 – letter from Alan Johnson to Sir Digby Jones date 17 June 2005: disclosed in full in December 2007 but without accompanying email;

Document 10 – letter from Sir Digby Jones to Alan Johnson MP dated 13 June 2005; disclosed in full in December 2007 but without accompanying email.

16. It is to be noted that a couple of the documents are dated shortly after the date of the Request but BERR and the Commissioner nevertheless elected to treat them as part of the Request. The Tribunal considers this is the right approach and is consistent with the approach to the timing of the application of the public interest test considered later in this decision.

17. There has been considerable disclosure in relation to these disputed documents following the internal review, Commissioner’s investigation, the issuing of the Decision Notice and during the preparation for this appeal. We are therefore left with only Documents 4 to 6 withheld in full and redactions in all the other documents. We will refer to the documents or parts of documents which have not been disclosed as ‘the Withheld Information’. We will refer to the documents as a whole as ‘the Disputed Information.’

The questions for the Tribunal

18. We have considered the following questions in relation to the Disputed Information:
- a. Whether FOIA or EIR is the applicable jurisdiction?
 - b. Whether the exemptions claimed are applicable?
 - c. Whether the claimed exemptions are engaged?
 - d. Where a qualified exemption is engaged where does the public interest balance lie?
 - e. Where an absolute exemption is engaged whether there are any of other tests which need to be applied and if so the application of those tests?
19. In order to answer these questions we have considered a number of preliminary matters, but firstly we have considered which jurisdiction should apply.

Under which legislation is the Request covered

20. At the time of the Request the FOE asked for it to be considered under both the EIR and FOIA. BERR and the Commissioner considered that the 10 Documents making up the Disputed Information were all subject to FOIA. The Commissioner's approach is set out at paragraphs 18-19 of the Decision Notice and indicates that information on 'energy policy' would not be environmental information to the extent that it dealt only with such policy in respect of 'supply, demand and pricing rather than policy affecting or likely to affect the elements of the environment or factors affecting or likely to affect those elements.'
21. The definition of "environmental information" contained in Regulation 2(1) of EIR has the same meaning as in Article 2(1) of Council Directive 2003/4/EC, namely
- any information in written, visual, aural, electronic or any other material form on:
- a. the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
 - b. factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
 - c. measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
 - d. reports on the implementation of environmental legislation;
 - e. cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
 - f. the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c).
22. Recital 10 to the Directive clarifies this definition "so as to encompass information in any form on the state of the environment, on factors, measures or activities affecting or likely to affect the environment or designed to protect it, on cost-benefit and economic analyses used within the framework of such measures or activities and also information on the state of human life and safety, including the contamination of the food chain, conditions of human life, cultural sites and built structures in as much as they are, or may be, affected by any of these matters."

23. Mr Michaels on behalf of FOE contends that policies (sub-para (c)) on 'energy supply, demand and pricing' often will (and are often expressly designed to) affect factors (sub-para (b)) such as energy, waste and emissions which themselves affect, or are likely to affect, elements of the environment (sub-para (a)) including, in particular and directly, the air and atmosphere and indirectly (in respect of climate change) the other elements.
24. He provides by way of simple and practical example, national policy on supply, demand and pricing of different energy sources (e.g., nuclear, renewable, coal, gas) has potentially major climate change implications and is at the heart of the debate on climate change. Similarly, national policy on land use planning or nuclear power has significant effect on the elements of the environment or on factors (e.g. radiation or waste) affecting those elements.
25. Mr Michaels further argues that the term 'environmental information' is required to be construed 'very broadly' so as to give effect to the purpose of the Directive. Recognition of the breadth of meaning to be applied has been recognised by the European Court of Justice¹, by the High Court² and by this Tribunal in *Kirkaldie v Information Commissioner & Thanet District Council* EA/2006/001. The breadth is also recognised in the DEFRA guidance 'What is covered by the regulations'. It does not appear, Mr Michaels argues, that the Commissioner has adopted such an approach.
26. BERR also drew our attention to the DEFRA guidance which notes that both the 1990 and 2003 Directives import a concept of 'remoteness'. The guidance goes on to deal with the purpose of the policy or measure in question. The Commissioner concurs with BERR that there must be a sufficiently close connection between the information and a probable impact on the environment before it can be said that the information is 'environmental information'.
27. The Tribunal having heard the arguments of the parties agrees with Mr Michaels that the Decision Notice fails to recognise that information on 'energy policy' in respect of 'supply, demand and pricing' will often fall within the definition of 'environmental information' under Regulation 2(1) EIR. In relation to the Disputed Information we find that where there is information relating to energy policy then that information is covered by the definition of environmental information under EIR. Also we find that meetings held to consider 'climate change' are also covered by the definition.
28. However we are faced with documents which may contain both environmental and non-environmental information. Ms Grey on behalf of BERR argues that we should consider whether the Disputed Information is environmental information on a document by document basis. This would be a very convenient way to approach the matter. However the definition under Regulation 2(1) EIR covers "information", not documents as we understand is the position in other jurisdictions.
29. Under s.39 FOIA information that is covered by the definition of environmental information under EIR is exempt under FOIA and is to be dealt with under the Regulations. It is therefore necessary for us to consider which jurisdiction to apply to the Disputed Information. This is not easy because some documents may contain both environmental and other information. How should we approach such documents? Where a document divides easily into parts where the subject matter of each part is easily identifiable this should enable the document to be considered in parts so as to decide which information is caught by EIR. Where this is not the case do we need to review the document in exacting detail to decide which parts or even paragraphs or sentences are subject to EIR or FOIA? To do so would be an extremely onerous approach on those needing to apply the law. But our information laws are based on requests for information not documents. We believe Parliament may not have appreciated such a consequence and that where possible would have wanted a pragmatic approach to be taken. Therefore we find that where the predominant purpose of the document covers environmental information then it may be possible to find that the whole document is subject to EIR. Where there are a number of purposes and none of them are

¹ Case No: C-321/96 Wilhelm Mecklenburg v. Kreis Pinneberg – Der Landrat para 19.

² Both in the case of *R v. British Coal Corporation ex p. Ibstock Building Products Ltd* [1995] JPL 836 and *R v. Secretary of State for the Environment ex p. Alliance Against the Birmingham Northern Relief Road* [1999] Env. LR 447.

dominant then it would appear that the public authority has no choice but to review the contents of the document in detail. In deciding which statute applies the public authority cannot, of course, take into account the fact that one piece of legislation may be more favourable to it than another. There is no suggestion that this has happened in this case.

30. Applying this approach to the Disputed Information we find that Documents 2, 6 and 7 of the Disputed Information are covered by EIR. Also we find that certain paragraphs in other Documents are also covered by EIR which we identify in the Confidential Annex.
31. In relation to Documents 2 and 7, which are the summaries of two meetings of the Business Whitehall Climate Change Group, the only disputed information is the redaction of names of non DTI people attending the meetings or copied in on the summaries. BERR claims that this information is personal data of third parties and is exempt under s.40(2) FOIA. The Tribunal has decided to follow the approach in *Kirkaldie* and transfer the FOIA claimed exemption(s) to a closely related exemption under EIR. There is an almost identical exemption under Regulation 13 (personal data) and we find that we can consider the application of this exemption to the redacted names in Documents 2 and 7.
32. Where the s.35 or s.36 FOIA exemption is being claimed in relation to documents/information that we find are covered by EIR, then Regulation 12(4)(e), namely that 'the request involves the disclosure of internal communications' may be a similarly related exemption. It is a class-based qualified exemption which if correctly applied is automatically engaged and only subject to the public interest test set out under Regulation 12(1).

How should the Tribunal deal with documents covering many subjects under FOIA

33. Most of the Disputed Information is comprised of documents covering many subjects. This is largely because the documents comprise notes of meetings which covered a wide range of subjects. This has resulted in the Commissioner reviewing the Documents in some detail and making decisions sometimes in relation to paragraphs and even sentences. As already observed this is an extremely onerous process and clearly raises concerns for dealing with such requests.
34. This was not the original approach of BERR who seemed to have claimed exemption(s) per document. However during the investigation of the complaint both BERR and the Commissioner seem to have resorted to a much more detailed analysis partially arising out BERR's original disclosure of heavily redacted documents.
35. Was the Commissioner right to take this approach? As with environmental information, public authorities are required to deal with requests under s.1(1) FOIA for 'information'. Information is defined under s.84 as 'information recorded in any form.' There is no reference to 'documents'. We therefore find that the Commissioner's approach is correct, despite the onerous implications.
36. In deciding this case we have therefore had to undertake a detailed examination of all the Disputed Information and have appreciated at first hand the size of the task. However we would observe that we infrequently have to take this approach to documents, largely because most documents tend to be based on a single issue or predominantly one subject matter where exemptions are able to be properly claimed in relation to the whole document.
37. One of the problems arising with the Commissioner's approach in this case is whether it could lead to public authorities bringing the s.12 FOIA (cost of compliance exceeds the appropriate limit) exception into play. BERR has not raised the issue of costs in this appeal and we heard no submissions on it; therefore the Tribunal does not need to decide whether the time involved can be claimed under the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004. However we would comment, although not necessary to decide in this case, that the time taken to redact documents is not in our view caught by the 2004 Regulations and should not be taken into account when calculating the appropriate limit and that the Tribunal's

decision in *Jenkins v Information Commissioner* EA/2006/0067 should not be interpreted in any other way.

Relevant statutory provisions

38. We have already set out some of the relevant statutory provisions in this case. We set out below the other provisions we refer to in this decision.

FOIA

Section 2(2)

In respect of any information which is exempt by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Section 35(1)(a) so far as relevant, provides that:

Information held by a government department ... is exempt information if it relates to ...

- (a) the formulation or development of government policy

Section 36 so far as relevant provides that:

(1) This section applies to—

- (a) information which is held by a government department or by the Welsh Assembly Government and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—

- (b) would, or would be likely to, inhibit –
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation,

(5) In subsections (2) ... “qualified person”—

- (a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown,...

Section 40 so far as relevant provides that:

(2) Any information to which a request for information relates is also exempt information if—

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.

(3) The first condition is—

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—

- (i) any of the data protection principles, or
- (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data)."

Section 41 so far as is relevant provides that

- (1) Information is exempt information if—
 - (a) it was obtained by the public authority from any other person (including another public authority), and
 - (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."

EIR

Regulation 12 so far as is relevant provides that

- (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.
- (3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.
- (4)(e) the request involves the disclosure of internal communications.
- (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-
 - (f) the interest of the person who provided the information where that person-
 - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
 - (iii) has not consented to its disclosure

Regulation 13 so far as is relevant provides that

- (1) To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data.
- (2) The first condition is-

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—

(i) any of the data protection principles, or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

39. The Tribunal’s powers in relation to appeals under s. 57 FOIA are set out in s. 58 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.”

40. The starting point for the Tribunal is the decision notice of the Commissioner but the Tribunal also receives and hears evidence, which is not limited to the material that was before the Commissioner. The Tribunal, having considered the evidence may make different findings of fact from the Commissioner and consider the decision notice or parts of it are not in accordance with the law because of those different facts. Nevertheless, if the facts are not in dispute the Tribunal must consider whether FOIA or EIR have been applied correctly. In cases involving the public interest test in s.2(2)(b) FOIA and Regulation 12(1)(b) a mixed question of law and fact is involved. If the facts are decided differently by the Tribunal or the Tribunal comes to a different conclusion on the same facts, that will involve a finding that the decision notice or parts of it are not in accordance with the law.

Claiming exemptions for the first time before the Commissioner and the Tribunal

41. The DTI claimed a number of exemptions in the Refusal Notice, namely ss.35, 40(2) and 41, in relation to the Disputed Information. During the Commissioner’s investigation of the complaint the DTI claimed the s.36(2) exemption for the first time in replacement of s.35(1) exemption in relation to some documents. This may have been at the suggestion of the Commissioner. In order to claim the new exemption the DTI obtained an opinion of a qualified person, namely the BERR Minister at the time, Lord Sainsbury. The Commissioner accepted the new exemption at the investigation stage and the Decision Notice reflects this.

42. The question for the Tribunal is whether a new exemption can be claimed for the first time before the Commissioner. This is an issue which has been considered by this Tribunal in a number of other previous cases³ and there is now considerable jurisprudence on the matter. In summary the

³ *Bowbrick v Information Commissioner & Nottingham City Council* EA/2005/006, *England & London Borough of Bexley v Information Commissioner* EA/2006/0060&66, *Benford v Information Commissioner* EA/2007/0009

Tribunal has decided that despite ss.10 and 17 FOIA providing time limits and a process for dealing with requests, these provisions do not prohibit exemptions being claimed later. The Tribunal may decide on a case by case basis whether an exemption can be claimed outside the time limits set by ss. 10 and 17 depending on the circumstances of the particular case. Moreover the Tribunal considers that it was not the intention of Parliament that public authorities should be able to claim late and/or new exemptions without reasonable justification otherwise there is a risk that the complaint or appeal process could become cumbersome, uncertain and could lead public authorities to take a cavalier attitude to their obligations under ss.10 and 17. This is a public policy issue which goes to the underlying purpose of FOIA.

43. In this case some of the Disputed Information was discovered for the first time during the Commissioner's investigation. Also the Refusal Notice was at an early stage of the implementation of the Act when there was limited experience of the application of exemptions. There was particular uncertainty in relation to the application of the ss. 35 and 36 exemptions because of their complexity and close relationship. In *Bowbrick v Information Commissioner and Nottingham City Council* EA/2005/006 these were special circumstances which the Tribunal found enabled the Council to claim exemptions for the first time even before the Tribunal.
44. We find in the circumstances of this case that the Commissioner was correct to accept the late claiming by BERR of the s.36(2) exemption and that it was engaged by obtaining the reasonable opinion of Lord Sainsbury, despite the fact that this only happened in September 2006, but before the Decision Notice. We also find that the reasonable opinion was that disclosure of the information 'would' inhibit the free and frank provision of advice or exchange of views for the purpose of deliberation and we have taken this into account in applying the appropriate weight to the public interest in favour of maintaining this exemption when applying the public interest test under s.2(2)(b) FOIA.
45. We would observe that we would not necessarily come to the same view in respect of late claims/changes of exemption in relation to requests made now, as the understanding of the interrelationship between and meaning of ss. 35 and 36 has become clearer with the growing jurisprudence of the Tribunal in relation to these exemptions. We would reiterate that every appeal must be considered in the circumstances of the particular case.

BERR and its relationship with business

46. Mr Gibson, who is the Director General of the Enterprise and Business Group of the BERR, gave evidence that up until relatively recently the DTI's contacts and communications with representative or influencing bodies were on a formal basis. This meant that dialogue between the parties was usually on the basis of promoting formal positions on policy issues.
47. In 2001 with the shake up/reorganisation of the DTI and the eventual creation of BERR to more clearly represent the interests of industry in government he explained that the new Secretary of State, Patricia Hewitt, introduced a change of approach which required the Department to more fully engage with industry. This involved more regular contact with representative bodies/influencers and major corporations on an informal as well as formal basis. The key change was that there should be more bilateral meetings between representative bodies/influencers and BERR, in addition to group meetings/consultations where a number of representative bodies/influencers would be invited to attend. The other major change was that BERR would be instigating many of these bilateral meetings and using them to seek an exchange of views and possibly advice on policy matters.

48. Mr Gibson was of the view that this change of approach has become invaluable to the formulation and development of government policy. However it was predicated on such contacts being largely confidential so that the parties could have full and frank discussions and would not be inhibited from speaking their minds even if it did not always represent the predominant interests of their members. This helped BERR and the Government, in his words, “to adopt the right policies, develop the right legislation and to take the right administrative decisions.”
49. He explained that there are various types of bilateral meetings - ad hoc discussions, regular informal meetings, away-days/half days, dinners etc. Sometimes there are agendas but the extent to which they are agreed in advance tends to reflect the degree of informality of the meeting. Sometimes notes are taken but usually for BERR internal purposes only and as he told us, these are deliberately not intended to be agreed minutes of the meeting nor are they checked with the third party. These, he explained, are the sensitive meetings where “the exchanges are on the basis of trust and with an expectation that they will remain confidential for a reasonable period.” There are also more formal consultation meetings on specific issues with a range of interested parties, including the CBI, and other Government Departments. Generally there is little sensitivity as regards the contents of such meetings or the notes which are produced afterwards, but the exchanges may be less useful to the Department because the Department is often already aware of a lobbyist’s formal views.
50. There is also a range of written communications including email and letters which tend to be more formal and less sensitive as they tend to represent the more formal positions of influencers.
51. Mr Gibson explained that the most sensitive bilateral meetings in this case are those at Ministerial/Director General level which take place monthly and away-mornings between officials of both organisations which are often used for exchanges of ideas.
52. Mr Gibson went on to explain that although representative bodies and major corporations had easier access today to BERR some, in effect, were given higher priority or status because they represented important business membership groups with whom the Government particularly wanted to engage. The two bodies given most priority were the CBI and Trade Union Congress with whom BERR started having monthly bilateral meetings after the May 2005 general election. The Department also met less frequently but regularly with other bodies such as the Engineering Employers’ Federation (EEF) and the Institute of Directors (IOD) with whom there were quarterly meetings and the British Chambers of Commerce (BCC) and the Green Alliance.
53. Mr Gibson explained that not only did government need a private space to consider policy options between civil servants and ministers but now needed a similar private space between civil servants, ministers and third parties, particularly with important influencing groups like the CBI.
54. Mr Gibson described the nature of the relationship between BERR and “its influencing bodies.....When a body such as the CBI seeks to influence government it also provides government with information, sometimes it provides information without seeking to influence. For government there is no clear distinction between influencing information and non-influencing information – all exchanges are valuable to government. Where exchanges with influencing bodies are of an informal and confidential nature the Government receives more frank and candid views and these can be particularly valuable....It is a carefully nurtured relationship of trust which encourages candour..... If influencing bodies cannot trust the Department and the Information Tribunal to protect reasonable confidentiality, candour is likely to suffer.”
55. He also explained “we exchange views on the basis of a relationship of trust, usually built up over years, and with as much candour as possible civil servants are not businessmen, so we need to hear from businessmen what their concerns are and what can be done about them. Similarly if government is proposing acting in a particular area it needs to test its ideas with influencing bodies to see if a measure will have the desired effect or if there are any unforeseen

consequences of taking that action. It can be crucially important to the Department's work to have a quick, informal steer on what the views of business might be."

56. Mr Gibson on numerous occasions in evidence expressed concern about how the media might deal with disclosures to the prejudice of the relationship between the CBI and BERR.

CBI and its relationship with Government

57. John Cridland, the Deputy Director General of the CBI, explained that the CBI lobbies on behalf of UK business on national and international issues. Policy is decided by members who are drawn from all sectors of UK industry: large, small, manufacturing and service. Policy is settled on an issue basis rather than a sector basis. The CBI speaks with one voice when it represents views in Whitehall or elsewhere. He confirmed that CBI staff have regular contact with senior civil servants and ministers and that discussions take place at all stages of policy development.
58. The CBI initiates contact with the Government about issues that are barely on its radar but are being raised as concerns by its members. Also contact may be initiated from Whitehall alerting the CBI to areas where ministers are considering acting.
59. Mr Cridland confirmed Mr Gibson's view that a private space is needed for informal discussions where full and frank views can be given. For the CBI to operate in this way the discussions between the parties need to remain confidential and whilst each party may make a note of what was said there is no formal agreed record taken. He maintains that if these discussions were "now to become public the CBI will be unable to continue to assist Ministers and officials in this way. Instead of Ministers benefiting from early and informal discussion the CBI will only be able to input a more formal position, which by nature will not allow for sensitive judgement and a process of informal negotiation. All such discussion would be likely to become scripted and need to be minuted."
60. Mr Cridland saw these informal meetings as an opportunity to build deeper relationships with government to both parties benefit. In relation to away-days these enabled a wider range of officials at various levels to build mutual understanding and deeper relationships.
61. Although there was no explicit agreement that these bilateral meetings were confidential, Mr Cridland considered that it was implicit that they were private particularly at Ministerial level.
62. The CBI had contacts with government across a range of forums and methods of communication. At one end of the spectrum meetings covered early policy formulation and development and in his view needed to be conducted in a private space. As policy moved to the other end of the spectrum where policy decisions had been formulated and were opened up to public debate through public consultation at say White Paper stage, the need for a private space diminished.
63. Mr Cridland, as well as Mr Gibson, was concerned about how the media would react to disclosures. They were both of the view that if details of bilateral meetings became public, particularly through BERR's own unapproved notes of a meeting, these could be reported in a way which could misconstrue an organisation's position and make it less likely that it would wish to engage with government.

Other lobbyists and their relationship with BERR

64. We heard from senior officers of two other professional bodies, the EEF and the Trading Standards Institute (TSI). Ian Peters the Director of External Affairs of the EEF also has regular but less frequent bilateral meetings with Departmental officials and ministers. For example the EEF meets with the Permanent Secretary about every 6 months. He basically endorsed the

position taken by Mr Cridland as to the nature of the bilateral meetings and that he had always assumed they were private or “off the record.” He was also concerned with disclosure to the media which could make it more difficult to consult with his members if the policy option was already in the media spotlight. He confirmed that the EEF was a member of the CBI and that regular meetings took place between the organisations at director general level.

65. Ron Gainsford the Chief Executive of the TSI which represents some 3500 trading standards officers and is a professional membership organisation has less contact with Government but does meet regularly with ministers and senior officials of BERR. He also greatly valued the informal bilateral meetings with government. His view was that although “we do not say that we are talking on Chatham House terms but this is generally understood to be the case. It is normally understood that the meetings are private exchanges.” His understanding of Chatham House rules is that the meetings are not in the public domain and are confidential meetings. If the meetings were not in private he says “the candour would be lost.” However he did not go so far as to say the meetings would cease if there was further disclosures in this case. However he does say “of course we would have meetings, but my concern is that would hit at the very heart of the purpose and value of those, as I see them, private exchanges.”
66. Mr Michaels called a number of witnesses. Merlin Hyman Director of the Environmental Industries Commission Ltd (EIC), whose mission is to promote the UK’s environmental technology and services industry, has about 330 member companies and is an industry lobbying group. EIC works closely with government at a high level including with DTI/BERR. Mr Hyman gave evidence that he was quite happy for lobbying communications with government to be made available on request, unless the government specifically requested that discussions remained confidential, which they rarely did, and then only if he felt ethically comfortable with the request. He was accustomed to civil servants putting several options to him for comment. If one was not an approved position by his members he would make that clear and report back to EIC members. Mr Hyman did not assume such meetings were private meetings, rather the opposite.
67. David Green OBE, who has a long career working as a lobbyist, was currently the Chief Executive of the UK Business Council for Sustainable Energy (UKBCSE) which was established to create a framework for high level policy engagement across the energy sector on climate change, sustainable development and the transition to the wider use of sustainable energy. He agreed with Mr Gibson that lobbyists can provide information that is important to policy formulation, that an under-informed department would make poor decisions and would be bad for business, the economy and the environment and it is of particular value for the Government to have positive relationships with influencers. But he did not agree that disclosure of notes of meetings would make UKBCSE’s dealings with BERR more circumspect or would otherwise reduce the value of their relationship. He was conscious that any notes of discussions that government takes may be liable to be released under FOIA or EIR. This happened with minutes of meetings UKBCSE attended with the Treasury. From his perspective this is fine because what is said at meetings is generally not of a confidential nature. If information is likely to cover a specifically confidential issue, which is rare, he would make sure that those at the meeting understood that the issue was confidential. He would then expect that confidentiality to be respected. Mr Green states “bearing in mind that the Act, as I understand it, enshrines the principle of disclosure other than in limited cases the presumption we work on is one of disclosure.”
68. Craig Bennett, the Head of Corporate Accountability at FOE at the time of the Request, gave evidence that in many important debates it seemed to FOE that only the views and voice of the CBI were being heard to the exclusion of all other views and voices. He said that in 2004 and the early part of 2005 FOE had noticed that the problem had become more acute and that the CBI’s then Director General, Sir Digby Jones, seemed to have an increasingly powerful voice within central government. As a result Mr Bennett commissioned a report entitled *Hidden Voices: The CBI, corporate lobbying and sustainability* which he claims provides evidence of this favoured position.

69. Mr Bennett shared many of the views of Mr Green; the assumption of openness, the need to flag up whether discussions were confidential and that records may end up in the public domain. In summary he considered that if you lobby you should be prepared to accept that what you have said to government may be made public. That is the price of access to government and lobbyists would not be less frank and candid if their exchanges were released.
70. The FOE's other witnesses largely confirmed the views of these Messrs Hyman, Green and Bennett.

Summary of the evidence

71. We would summarise the evidence of the witnesses as follows. The Government in recent years has introduced a new way of doing business. It now engages more fully with representative bodies by way of informal bilateral meetings and communications which encourage more frank and candid exchanges. This helps it to explore various ideas before deciding on policies. Such bodies as lobbyists get an early opportunity to influence policy before decisions are made. Everyone seems to agree that this is a beneficial process.
72. Where they disagree is the extent of the transparency of the process. From the evidence we have heard it would appear that where BERR is involved some lobbyists get more and better access than others. BERR and those more favoured lobbyists such as the CBI are of the view that the new informal bilateral consultations can only take place in private if this type of communication is to flourish with its beneficial effects. BERR and the CBI in this case have assumed that these discussions are private unless agreed otherwise.
73. The evidence of some of the other lobbyists is that the whole process should be transparent, unless BERR or the lobbyist make it clear that meetings or discussions should be in confidence. This transparency would not have an adverse effect on the process and would still result in better government.
74. BERR's witnesses are of the view that the expression of a candid personal opinion by a senior representative of a lobby group, particularly where it had not yet been approved by members, would no longer be forthcoming if it was considered it could later be made public. FOE's witnesses did not appear so constrained because they made it clear when expressing such views that they would need to seek approval of members for the opinion to be formally adopted.
75. There appears to be agreement that the dates, types of meetings and titles but not names of representatives present can be made public. There appears to be agreement that in most cases the broad subject matter discussed can be disclosed. Also there seems to be agreement that the names of very senior officials who attend meetings, particularly those officials who are seen as the public face of lobbyists groups, such as Sir Digby Jones, can be disclosed. There was a difference of view with less senior officials, although possibly an acceptance that junior official's names should be protected.
76. We have heard evidence from BERR and some lobbyists, that they had not fully appreciated the possible effect of FOIA on disclosures in relation to bilateral meetings before 2005, and after that had assumed that such communications would be exempt under the Act, despite the implications of the Decision Notice in this case. We heard evidence from other lobbyists that they were fully aware of the implications of FOIA from its inception and assumed recorded information could become public knowledge.
77. Again we have heard evidence that if there is a risk that notes of meetings could be disclosed then it would prevent the quick dissemination within BERR of information/advice/etc deriving from a meeting and note taking would be severely curtailed. Also it would be unfair on the lobbyist as such a departmental note would not have been approved and may not accurately represent what they considered was discussed at the meeting. This could cause embarrassment or worse to the

organisation if unapproved minutes were to be disclosed. We heard from other witnesses that they worked on the assumption that such notes would be disclosed and that they might not reflect the discussion as they saw it, but that provided they were consulted on the matter, as was the expectation under the s.45 Code of Practice, they would have the opportunity, if necessary, to set the record straight.

Whether bilateral meetings/ other communications in confidence

78. BERR has claimed the s.41 exemption for some of the Disputed Information which is an absolute exemption. Firstly, under s.41(1)(a) the information has to be obtained by the public authority from another person. The Commissioner first took the view that this did not apply to information held by the public authority in its own accord even if a record of the third party information which is a large part of the Disputed Information in this case. BERR disagrees and considers the Commissioner incorrectly applied the exemption. Ms Grey argues that the Commissioner confuses the information imparted and the form in which it is recorded, or the party by whom it is recorded. The consequences of such an application, for example, are that highly confidential information passed by an informant to a police officer would be protected if it was recorded in a letter sent to the police by that source, but would not be protected if the police officer met the source, had a conversation, and then recorded it in a memorandum or statement. This privileges the accident of form (or record) over content, and cannot be correct.
79. We agree with Ms Grey that the Commissioner got it wrong in the Decision Notice and that the Disputed Information is covered by the requirement stipulated in s.41(1)(a).
80. Secondly, in order for information to be such that its disclosure would amount to an “actionable” breach of confidence the Tribunal recognised in *Derry City Council v Information Commissioner* EA/2006/0014 that it must satisfy three tests established in *Coco v A N Clark* [1969] RPC 41, namely
- i. It must have the necessary quality of confidence in order for it to remain protected;
 - ii. It must have been imparted in circumstances importing an obligation of confidence; and
 - iii. Its unauthorised use would be to the detriment of the provider.
81. The Commissioner and FOE maintain that none of the information in respect of which s.41 is claimed as an exemption satisfies all of the three limbs of the test in *Coco*. They argue that:
- a. As to whether the information has the necessary quality of confidence, BERR’s evidence has focused on s.35 and s.36 mostly where s.41 has also been claimed and the public interest rather than any intrinsic confidentiality in the information. In the circumstances, where it is incumbent upon the party seeking to rely upon confidentiality to identify the basis for confidentiality with a sufficient degree of rigour and cogency, this has not been made out in this case.
 - b. As to the circumstances in which the information has been imparted:
 - (a) None of the bilateral meetings which were the subject of the Disputed Information were expressly stated to be confidential;
 - (b) The claimed implicit understanding or assumption as to confidentiality of all bilateral meetings between lobbyists and BERR although maintained by BERR’s witnesses was not shared by FOE’s witnesses who were also lobbyists at similar types of meetings.
 - (c) Some witnesses have commented that expressly confidential matters are usually flagged up. That was not done, apparently, for any of the Disputed Information;

- (d) A general assumption as to confidentiality is at odds with the changed landscape introduced by FOIA. These are not discussions between private individuals about e.g. commercially sensitive matters; rather they are communications between a government department and lobbyists.

In short, they argue, the circumstances were not such as to import an obligation of confidence and the second limb of *Coco v Clark* is not satisfied.

82. As to detriment in the event of disclosure otherwise than under the Act, the Commissioner and FOE argue there has been little or no evidence of this with regard to the matters considered in open session. Mr Michaels provides an example. In relation to the redaction at Document 1.8 (which was disclosed in December 2007 except the name of an official) :
- a. This does not relate to information provided by a third party. It is information that is within BERR's own knowledge. As such, it is doubtful whether s. 41 is even engaged. He argues the same applies to the information at Document 3.4 (first sentence) and Document 9.2 (which were disclosed in December 2007);
 - b. Disclosure of such information could not conceivably have resulted in an actionable detriment to a third party.

We would observe there is some doubt as to whether detriment is required to show there is an actionable breach of confidence - *Coco v Clark*. Since the introduction of Human Rights legislation there appears no longer to be such doubt in respect of private information – see *Ash v McKennitt* [2006] EWCA Civ 1714.

83. BERR argues for the engagement of the exemption in its detailed closed submissions. These arguments are principally around the evidence of witnesses that the information was “sensitive” or highly sensitive and not suitable for disclosure and that the meetings were assumed to be in confidence.
84. The Tribunal having heard all the evidence and arguments of the parties finds it difficult to accept the implicit confidentiality argument for whole documents in this case. We find it even more difficult to accept this argument for particular paragraphs or sentences of a document, without the parties explicitly stating or agreeing that those parts are confidential, and there is no evidence this happened in this case. We therefore find, applying the tests in *Coco v Clark*, that the exemption is not engaged in this case in relation to any of the Disputed Information.
85. If we are wrong and it can be shown that disclosure would give rise to an actionable breach of confidence, BERR still has a common law public interest defence to any such action for the reasons set out in the following paragraphs. Whilst the public law considerations are not identical to those under FOIA, they are similar. The Tribunal in *British Union of Abolition of Vivisection v ICO & Home Office* EA/2007/0059 (*BUAV* case) at para 13 found “this is because there is a well established public interest defence available to those facing a claim for breach of confidence. It is similar, but not identical, to the public interest balance that must be applied under s2(2)(b) FOIA once a qualified exemption has been found to apply to particular information. In that there is a presumption in favour of disclosure whereas in the case of breach of confidence claim the presumption is in favour of protecting the confidential information.”
86. The starting point is that confidences should be honoured, and a discloser will only have a defence to a claim for breach of confidence (so that it is no longer “actionable” for the purposes of s. 41 FOIA) if the public interest in maintaining the confidence is outweighed by the public interest in disclosure. In the *Spycatcher* case - *Attorney General v Guardian Newspapers (No 2)*[1990] 1 AC 109 at 282, Lord Goff said:

“... although the basis of the law's protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure.”

This is the opposite balance to that required under s.2(2)(b) FOIA where the public interest in maintaining an exemption must outweigh the public interest in disclosure.

87. Old case law in which the defence only arose if the public interest in disclosure fell within certain tightly defined categories (for example prevention of crime, serious wrongdoing or risk of harm to the public) has been modified by Article 10 of the European Convention on Human Rights, as applied by the Court of Appeal in *London Regional Transport v The Mayor of London* [2001] EWCA Civ 1491. In that case Lord Justice Sedley said that the right to freedom of expression, set out in Article 10 of the Convention, and given a direct applicability in our law by the Human Rights Act 1998, reinforced the principles to be found in equity and the common law. He explained that Article 10 extended to cover the right to receive and impart information and that it recognised the legitimacy of disclosing information, even in breach of a contractual undertaking not to do so, "if the public interest in the free flow of information and ideas will be served by it." He said that the approach to be adopted in addressing the task of balancing the right to privacy and confidentiality, on the one hand, and freedom of expression, on the other, was the flexible test of proportionality developed by the European Court of Human Rights.
88. All parties agree that the relevant public interest factors to be taken into account are similar to those considered under the s.2(2)(b) test although, as recognised in the *BUAV* case, the presumption is different.

Naming of officials

89. BERR has largely disclosed the name of ministers and senior civil servants in the Disputed Information. In contrast it has only disclosed the name of Sir Digby Jones the Director General of the CBI in relation to the names of officials of lobbyists referred to in the Disputed Information, claiming that the other names are exempt under s.40(2) because the names of officials associated with their organisations are 'personal data' and it would be a breach of the first data protection principle (fair and lawful processing) under Schedule 1 of Data Protection Act 1998 (DPA) if the names were disclosed. As s.40(2) is an absolute exemption, the public interest test under s.2 FOIA is not applicable. The reason BERR has given for disclosing Sir Digby's name, is that applying condition 6 under Schedule 2 of DPA (the only condition the parties agree is applicable in this case), it is necessary in their view to disclose the name of the senior public spokesperson for the CBI, who would have a reasonable expectation that his name would be made public.
90. The first question for us to decide is whether the names of officials in this case are 'personal data' under DPA. Here we are bound by the Court of Appeal's decision in *Durant v FSA* [2003] EWCA Civ 1746, per Auld LJ, para 28 said

"It follows from what I have said that not all information retrieved from a computer search against an individual's name or unique identifier is personal data within the Act. Mere mention of the data subject in a document held by a data controller does not necessarily amount to his personal data. Whether it does so in any particular instance depends on where it falls in a continuum of relevance or proximity to the data subject as distinct, say, from transactions or matters in which he may have been involved to a greater or lesser degree. It seems to me that there are two notions which may be of assistance. The first is whether the information is biographical in a significant sense, that is, going beyond the recording of the putative data subject's involvement in a matter or an event that has no personal connotations, a life event in respect of which his privacy could not be said to be compromised. The second is one of focus. The information should have the putative data subject as its focus rather than some other person with whom he may have been involved or some transaction or event in which he may have figured or have had an interest, for example, as in this case, an investigation into some other person's or body's conduct that he may have instigated. In short it is information that affects his privacy, whether in his personal or family life, business or professional capacity. A recent example is that considered by the European Court in Criminal Proceedings against Lindquist, Case C-101/01 (6 November 2003), in which the Court held, at para. 27, that "personal data"

covered the name of a person or identification of him by some other means, for instance by giving his telephone number or information regarding his working conditions or hobbies.”
(underlining our emphasis)

91. We note the Tribunal's recent decision in *Harcup v Information Commissioner* EA/2007/0058 where lists of names of attendees (unconnected to the organisations they worked for) who attended a public authority's hospitality events were held not to be personal data under the DPA. We are not bound by the decision. However we are bound by the Court of Appeal's decision in *Durant*. We find in relation to the facts in this case that the names of individuals attending meetings which are part of the Disputed Information are personal data. This is because the individuals listed as attendees in the minutes and elsewhere in the Disputed Information will have biographical significance for the individual in that they record his/her employer's name, whereabouts at a particular time and that he/she took part in a meeting with a government department which would be of personal career or business significance. We make the same finding even where the individual did not attend the meeting but was on a circulation list only for the minutes where the name is associated with an organisation.
92. Where there is personal data the application of s.40(2) exemption and the test to be applied under condition 6 to Schedule 2 has been examined by the Tribunal in a number of cases including three cases involving the House of Commons.⁴ These decisions find that where s.40(2) is engaged, because they involve a request for 'personal data' of a third party, the data should be disclosed if it would amount to fair processing under Schedule 2.
93. As to the test to be applied under condition 6, the latest *House of Commons'* decisions examined how this should be applied at paras 56 to 62 of the decision. Applying the test to this case firstly, disclosure must be necessary for the pursuance of the FOE's legitimate interests. Secondly, even where the disclosure is necessary, the Tribunal has to consider whether the disclosure is unwarranted in this case by reason of the prejudice it will cause to the rights and freedoms or legitimate interests of the data subjects, namely the officials of the CBI and other lobbyists who attended the meetings in question. Put another way we need to consider:
- a. Whether the legitimate aims pursued by FOE could be achieved by means that interfere less with the privacy of those officials; and
 - b. If the aims could not be achieved by means that involved less interference, whether the disclosure would have an excessive or disproportionate adverse effect on the legitimate interest of those officials.
94. Also we note that the Tribunal (at paras 53 – 55) considered that Council Directive 95/46/EC (which the DPA seeks to implement) accepted the principal that the public access to official information as enshrined in FOIA was a factor that could be taken into account when considering the application of the data protection principles. Here we note the recent CFI decision in *Bavarian Lager Co Ltd (Supported by the European Data Protection Supervisor) v Commission of the European Commission* Case T-194/04 8 November 2007 (the Bavarian Lager Case). In this case there was a request for the minutes of a meeting between UK DTI, the European Commission (EC) and representatives of the Confederation des Brasseurs du Marche Commun. The EC sought the views of the attendees in relation to the disclosure of their names and only disclosed the names of those attendees from whom it had received consent and redacted the other names. Although the request was made under Regulation 1049/2001 regarding public access to documents of European Institutions (the Access to Information Regulation) there was recognition by the court that the relevant exemption (Article 4 - undermine the protection of ... privacy and the integrity of the individual) being applied by the Commission under the Regulations, which has

⁴ *Corporate Officer of the House of Commons v Information Commissioner and Norman Baker* [2007] UKIT EA 2006 0015, *Corporate Officer of the House of Commons v Information Commissioner* [2007] UKIT EA 2006 0074, *Corporate Officer of the House of Commons v Information Commissioner and Others* EA/2007/0060,61,63,122,123 and 131 26/2/08 and *MOD v Information Commissioner and Evans* EA/2006/0027.

similarities to condition 6 being applied in this case, should be applied in accordance with European data protection legislation. The CFI found that disclosure of the redacted names would not undermine the protected interests for the following reasons (para 124 – 126):

124. As the Commission itself has indicated, the persons present at the meeting of 11 October 1996, whose names have not been disclosed, were present as representatives of the CBMC and not in their personal capacity. The Commission has also indicated that the consequences of the decisions taken at the meeting concerned the bodies represented and not their representatives in their personal capacity.

125 In those circumstances, this Court finds that the fact that the minutes contain the names of those representatives does not affect the private life of the persons in question, given that they participated in the meeting as representatives of the bodies to which they belonged. Moreover, as noted above, the minutes do not contain any individual opinions attributable to those persons, but positions attributable to the bodies which those persons represented.

126 In any event, disclosure of the names of the CBMC representatives is not capable of actually and specifically affecting the protection of the privacy and integrity of the persons concerned. The mere presence of the name of the person concerned in a list of participants at a meeting, on behalf of the body which that person represented, does not constitute such an interference, and the protection of the privacy and integrity of the persons concerned is not compromised.

95. BERR accepts that the *Bavarian Lager Case* is authority for the proposition that “third party” attendees at official meetings cannot in general have an expectation that their names will be kept private where their privacy or integrity is not adversely affected by the mere release of a record of who attended the meeting (bearing in mind that the minutes concerned did not attribute specific comments to the individuals concerned, but only to the organization, see paragraph 125, and that the subject of the meeting was not particularly sensitive). As to this last point, they argue, it leaves open the possibility that different considerations might arise if specific views were attributed to named individuals – plainly, it would depend on the circumstances and the nature of the meeting. The CFI was influenced by the fact that this was a meeting with a Community institution about whether Community obligations had been fulfilled.
96. BERR also points out that the decision does not discuss, in any way, the issue of the seniority of attendees, or whether any distinctions should be drawn on that basis. It is impossible to know why it was not raised as an issue; it may have been that on the facts it did not arise. It can be assumed that members of the UK delegation in Brussels would be likely to have been relatively senior. As a result, BERR contends that the Tribunal should take into account the matters considered in the Tribunal’s decision in *MOD v Information Commissioner and Evans* EA/2006/0027, especially paragraphs 65-6, 79 and 82.
97. The FOE have also brought to our attention that in the *Bavarian Lager Case* the European Data Protection Supervisor (EDPS) intervened in favour of the requester (against the EC). The EDPS is the person tasked with “ensuring the application of the provisions of this Regulation and any other Community act relating to the protection of the fundamental rights and freedoms of natural persons with respect to the processing of personal data by a Community institution....” (Art. 41, Data Protection Regulation). The European Ombudsman had previously reached the same view as the EDPS and the Court when asked to investigate the same matter at an earlier stage (judgment, paras. 27-33). As noted by the Court:

31 On 23 November 2000, the Ombudsman made his special report known to the Parliament, following up the recommendation project addressed to the Commission in Complaint 713/98/IJH (‘the special report’) in which he concluded that there was no fundamental right to supply information to an administrative authority in secret and that Directive 95/46 did not require the Commission to keep secret the names of persons who submit views or information to it concerning the exercise of their functions.

32 On 30 September 2002, the Ombudsman wrote a letter to the Commission President, Mr Prodi, in which he expressed his concern that:

'data protection rules are being misinterpreted as implying the existence of a general right to participate anonymously in public activities. This misinterpretation risks subverting the principle of openness and the public's right of access to documents, both at the level of the Union and in those Member States where openness and public access are enshrined in national constitutional rules.'

98. In this case the Commissioner concluded, although it is not clear on what basis, that it must be within the expectations of individuals employed by third parties that their names would be published in the context of communications of the kind in question. The Tribunal heard evidence from some lobbyists that they saw no reason why their names should not be disclosed. Mr Cridland informed us that he was often a public spokesperson for the CBI and Mr Peters gave evidence that he would not have any difficulty with disclosure of his name.
99. The Commissioner argues that third parties (including the senior employees of third parties) dealing with public authorities cannot, in the light of FOIA, expect or be given any blanket assurance as to confidentiality or non-disclosure of their names. The Commissioner, however, recognises that there may be unfairness if there were to be disclosure of the names of junior employees with little responsibility in relation to the Disputed Information.
100. BERR's approach was to redact the names of all third party representatives save for the Director General of the CBI. The basis of this approach appears from the evidence to be because he was the senior public spokesperson of the CBI and that there needs to be a clear and consistent rule as to whose names to disclose and which to keep secret. We note that there are other senior spokespersons listed in the Disputed Information whose names have not been disclosed.
101. We have taken into account the submissions of the parties and the considerable jurisprudence in relation to the naming of officials. In the context of this case, when applying the appropriate test to the Disputed Information, we find that:
- a. Senior officials of both the government department and lobbyist attending meetings and communicating with each other can have no expectation of privacy;
 - b. The officials to whom this principle applies should not be restricted to the senior spokesperson for the organisation. It should also relate to any spokesperson.
 - c. Recorded comments attributed to such officials at meetings should similarly have no expectation of privacy or secrecy.
 - d. In contrast junior officials, who are not spokespersons for their organisations or merely attend meetings as observers or stand-ins for more senior officials, should have an expectation of privacy. This means that there may be circumstances where junior officials who act as spokespersons for their organisations are unable to rely on an expectation of privacy;
 - e. The question as to whether a person is acting in a senior or junior capacity or as a spokesperson is one to be determined on the facts of each case.
 - f. The extent of the disclosure in relation to the named official will be subject to the application of the tests set out under paragraph 93 above, and will largely depend on whether the additional information relates to the person's business or professional capacity or is of a personal nature unrelated to business.
102. Where we find that EIR applies to parts of the Disputed Information to which the s.40(2) exemption has been claimed then we consider that Regulation 13 is applicable and can be transferred on the same basis as our finding in *Kirkaldie*. The wording of Regulation 13 is almost identical to s.40(2) FOIA. Therefore we can also apply our findings in relation to the naming of officials in this section of the decision under EIR.

Public interest test

103. Once the exemptions under ss. 35 and 36 are engaged, as qualified exemptions, there is a need to determine, under s.2(2)(b), whether “in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.” This balancing exercise requires us to weigh the various public interests arising in this case and to decide whether the public interest in maintaining the exemption outweighs the public interest in disclosure. Ms Grey put to us that we should attribute an inherently greater weight to the public interest in maintaining these particular exemptions. This is not the first time that such an argument has been made to the Tribunal. We reject this argument for the reasons set out by the Tribunal in the *Department for Education and Skills v Information Commissioner EA/2006/006* (the *DfES* case) at paragraphs 60 to 63. These findings in the *DfES* case have recently being upheld by the High Court in *Office of Government Commerce v Information Commissioner and Her Majesty’s Attorney General on behalf of the Speaker of the House of Commons* [2008] EWHC 737(Admin).

Before considering the main public interests raised by the parties in this case, we need to cover some general points about the application of the test.

Timing of the application of public interest test

104. It seems clear to us that FOIA requires an assessment as at the date of the request (or thereabouts) and this appears to be the consistent approach of the Tribunal in its jurisprudence.
105. In the *DfES* case at para 20(iv) the Tribunal found that “The competing public interest must be assessed by reference to the date of the Request or, at least around that time. This is particularly important where considerable time has elapsed and the timing of the disclosure requested may be a significant factor in deciding where the public interest lies.” In *Norman Baker v Information Commissioner, Cabinet Office & National Council for Civil Liberties EA/2006/0045* the Tribunal found that “the competing public interests should be assessed by reference to the time when the request was made, not by reference to the time when the Commissioner made his decision or the time when the Tribunal hears the appeal.”
106. The FOE, however, argues that the Tribunal should balance the public interests engaged when considering s2 FOIA, as at 5 October 2005 the date of the internal review or, for the information that has been withheld under the s.36(2) exemption, 18 September 2006 when the qualified person’s opinion was obtained . Mr Michaels contends that two later events are relevant to the assessment of the public interest, namely Sir Digby Jones’ ministerial appointment within BERR in June 2007 and the response to a further request in December 2007.
107. Ms Grey for BERR argues these contentions are mistaken. The issues were analysed in *Evans v Information Commissioner EA/2006/0064* at paragraph 23. The public interest balance must be assessed as at the date of the s.17 reply letter. The fact that later decisions have been made (whether on internal review, by referral to a Minister under s36 or by the Information Commissioner himself) is irrelevant, since all of these parties should also be directing their minds to the same date. There should be no ‘moving target’ for any of those engaged in considering the request. It also follows that both the Ministerial appointment in June 2007 and the handling of the later FOE request by BERR in December 2007 are irrelevant.
108. Mr Michaels cites other Tribunal cases in support of this contention particularly paragraph 46 of *The Department of Trade and Industry v the Information Commissioner EA/2006/007*, where the Tribunal stated:-

“In general terms, the Tribunal would agree with Mr Pitt-Payne when he contended that there could properly be taken into account circumstances or matters which later came to light after the date of the request, but which might cast light on the balance of public interest at the time when the question fell to be decided. However, the Tribunal must stress that this principle should not be taken too far.”

109. Ms Grey replies that first, the Tribunal in the *DTI* case were talking of matters which were not known at the date of the decision, but which subsequently came to light. This is quite different, she maintains, from considering post-decision events. Second, the caveat is noted and should be applied here. Third, in any event it is too sweeping and simplistic to say that a decision made by the Prime Minister in June 2007 genuinely casts light on the relationship between the DTI and the CBI in general (or Sir Digby Jones in particular) in May – July 2005.
110. Although such later events are frequently put to the Tribunal as reasons why the timing of the public interest test is affected by such events, we agree with the Tribunal's findings in the *DfES* and *Baker* cases. We cannot let these events affect the timing of when the public interest test must be considered, except perhaps in the circumstances identified in the *DTI* case. Mr Michaels' argument is understandably put to us because so many cases before the Tribunal are heard so long after the request that new events or factors arising in the interim could affect the public interest balance if they were able to be taken into account. Therefore often it will be seen to be rather artificial not to take them into account, particularly as a new request could be made, as in this case, which then has a different result. However, we have found that this was not Parliament's intention and that the timing of the application of the test is at the date of the request or at least by the time of the compliance with ss.10 and 17 FOIA.
111. We make the same finding in relation to the timing of the application of the public interest test under EIR.

Other ground rules when applying the public interest test

112. The Tribunal has already established some ground rules in previous decisions in relation to its approach to the balancing exercise to be undertaken under s.2(2)(b) which this Tribunal endorses. We set these out as follows:
- a. The default position under FOIA is in favour of disclosure, albeit that that is not expressly stated as such as under EIR (Regulation 12(2)) - see *Guardian Newspapers & Brooke v ICO & BBC*, EA/2006/0011 and *Secretary of State for Work and Pensions v The Information Commissioner* EA/2006/0040 at paragraph 29. The High Court in the *OGC* case supports this view at paragraphs 68 to 71;
 - b. If the information is to be withheld, the public interest in maintaining the exemption must outweigh the public interest in disclosure. If the scales are evenly balanced then the information must be disclosed;
 - c. In considering the factors against disclosure, the focus must be on those factors that relate to the exemption relied upon. This is consistent with the way in which s.2(2) FOIA is framed and earlier decisions of this Tribunal - see *Bellamy v ICO and SSTI*, EA/2005/0023. Accordingly, it is not appropriate to look generally at the public interest against disclosure but only at those factors which support the maintenance of the exemption;
 - d. FOIA was designed to shift the balance in favour of greater openness – see *Guardian & Brooke*. In other words, the coming into force of FOIA means that long-standing conventions or assumptions, whether on the part of officers in public authorities or on the part of third parties having dealings with public authorities, about what is likely to remain private and away from public scrutiny can no longer be relied upon;
 - e. There is no scope for any blanket exemption applicable to information defined by any status other than that available under FOIA, e.g. there is no blanket exclusion in relation to “private” or “informal” meetings. The Tribunal noted that some of BERR's witnesses seemed, at times, to have largely assumed otherwise.

Public interest factors in favour of maintaining the exemptions

113. BERR argues that there are a number of public interest factors in favour of maintaining the exemptions. The general consideration is that government has a need to access the widest range of potential sources of information and this may involve a range of approaches in gathering such information. This involves both formal and public consultations as well as a role for earlier, informal and private discussion whether this involves raising new issues with government, the frank canvassing of options, or reactions to a particular suggested course of action. This all contributes to effective government which is why Patricia Hewitt introduced a wider engagement with stakeholders.

Need for a private space

114. BERR argues that there is a need for a private “thinking” space for the formulation and development of policy. The Tribunal has recognised that government needs such a safe or private space for ministers and civil servants deliberations as it formulates and develops policy (for example see *HM Treasury v the Information Commissioner*, EA/2007/0001 at paragraph 58(7)) This public interest is strongest at the early stages of policy formulation and development. The weight of this interest will diminish over time as policy becomes more certain and a decision as to policy is made public.

115. BERR asks us, in effect, to extend this private space to deliberations with third parties outside government. We can accept a similar private space should be extended to third parties who are genuine advisors to government such as external consultants or experts called upon to advise neutrally on policy options being considered by ministers and civil servants and whose professional services would normally be paid for. However BERR are asking us in this case to consider that the CBI, a significant lobbyist and influencer, and other similar lobbyists, can be placed in the same category.

116. We have more difficulty with that position. BERR argues that the CBI undertakes both roles, that of influencer and advisor, and it could be taking either role at any time in the various bilateral meetings and therefore these discussions are part of the same private space. Although there are no doubt occasions on which it can be said that CBI interests and the wider public interest coincide it should not be overlooked that it exists to promote a sectional interest. In the evidence before us the CBI describes itself as ‘the voice of business’ that has ‘delivered for business: lobbying, campaigning and arguing the case for a better business environment.’

117. In our view, there is a strong public interest in understanding how lobbyists, particularly those given privileged access, are attempting to influence government so that other supporting or counterbalancing views can be put to government to help ministers and civil servants make best policy. Also there is a strong public interest in ensuring that there is not, and it is seen that there is not, any impropriety. We would make it clear there is no suggestion of any impropriety identified in this case. This means that there is a public interest in the disclosure of information in relation to such deliberations even at the early stages of policy formulation. This to a large extent counterbalances the strong public interest in maintaining a private space at the early stages of policy formulation as expounded above. However we accept the public interest in transparency may often be met to some extent where the date and subject matter of bilateral meeting is disclosed as happened in this case.

118. In view of the stated aims of the CBI and the evidence given by Mr Cridland in this case we consider that it is not possible to distinguish between their influencing and advisory roles when its officials are meeting with government and that it would be naive to take any other view. If lobbyists do have genuine advisory only roles then the adoption of a regulatory system, such as that in the USA in relation to third party contacts, might enable us to take a different view. But in the absence of such a regime we consider that there is a strong public interest in the transparency of such relationships.

119. However we do accept that there is a strong public interest in the value of government being able to test ideas with informed third parties out of the public eye and knowing what the reaction of particular groups of stakeholders might be if particular policy lines/negotiating positions were to be taken.

Secondary signals

120. Mr Gibson gave evidence that there is a strong public interest in the bilateral meetings and communications between BERR and the CBI remaining private because they enable the participants to have uninhibited full and frank discussions that ultimately lead to better policy decisions by government. If there is a risk of such private discussions and communications becoming public then Mr Gibson considers very strongly that there will be little point in having such meetings in the future. In his words “we simply would not have them. There would be no point because, in effect, they would be immediately public....and that, in essence, destroys the purpose of the meeting from our point of view.” Mr Gibson considers that if the Commissioner’s Decision Notice is upheld by the Tribunal in this case it would be tantamount to making these events public. This would not, he maintains, be in the public interest.

121. Ms Grey argues, relying on Mr Gibson’s evidence and the evidence of other BERR witnesses, that if such meetings have the prospect of being made public then they will result in all sorts of damaging or chilling effects on the relationship with the CBI. These ‘secondary signals’ would be the loss of frankness and candour, participants would become more circumspect, meetings would cease to take place because they would no longer have the same value, fewer meeting notes would be taken etc.

122. This argument has been put to the Tribunal in relation to internal government deliberations in a number of previous decisions and the Tribunal has expressed some scepticism as to the extent to which such chilling effects will actually take place (see the *DfES* case at paragraph 75) and as a result has given less weight to these interests. We share this scepticism.

123. Mr Choudhury has drawn our attention to a recent case *FCO v ICO EA/2007/0047* (the “Iraq dossier” case), where it was said (confirming what was said in the earlier *HM Treasury* case) that (i) it was the passing into law of FOIA that generated any chilling effect; and (ii) that the Tribunal could place some reliance on the courage and independence of senior civil servants to give robust and independent advice even in the face of a risk of publicity. Whilst the chilling effect here is as between lobbyists and ministers/civil servants as opposed to just ministers, Mr Choudhury asks us to find that the same principle would apply. Indeed, he argues, one could expect that a lobbyist, whose job it is to put views forward to government, would continue to do so robustly notwithstanding any fear of disclosure. We tend to agree with Mr Choudhury’s contention.

124. The evidence that lobbyists would become more circumspect was far from one-sided. We heard substantial evidence from FOE’s witnesses who were emphatic that there would be no change in their approach and that in fact they had assumed all along that dealings could be made public. We find that the approach of the FOE’s witnesses is more in keeping with the changed climate resulting from the coming into force of FOIA. We note that in most of the meetings in this case there were no records. We are particularly mindful of the fact that FOIA only applies to recorded information and therefore there is little risk under FOIA of candid and frank views, which are only expressed orally at informal meetings, becoming public.

125. We would observe that it is a matter of some concern that those entities having high level dealings with government ministers (e.g. the CBI and EEF) in their evidence seem to have given little or no thought to the consequences of FOIA on their dealings with government and continued, in effect, to operate on the basis of outmoded assumptions. It is also relevant to note that from the evidence of BERR’s principal witnesses, neither the CBI nor the EEF appear to have altered their conduct at all in light of the Commissioner’s Decision Notice. That appears to us indicative that

the approach to meetings is unlikely to be substantially altered in practice, i.e. that there is unlikely to be a real chilling effect if there is a prospect of disclosure which of course there must be where a freedom of information regime is in place. There was no evidence of any actual loss of candour or frankness notwithstanding the fact that the Act had received the Royal Assent some five years before the Request and following the Decision Notice. Therefore we are of the view that it is unlikely that the quality of information available to the Government will be substantively diminished as a result of the decision in this case.

126. In relation to the assertion that fewer meeting notes would be taken we recognise that the minutes clearly serve an important purpose in that they are relied upon by officials as a record of what is said by influencers to Ministers and others. However we consider it is unlikely that notes would cease to be taken or that they would become substantially less informative. Indeed the prospect of disclosure might have the beneficial effect of introducing a certain degree of rigour in drawing up notes. One concern expressed by the CBI and EEF witnesses is that the notes taken by BERR might not accurately reflect what is said at meetings. Mr Choudhury drew the Tribunal's attention to the pragmatic approach taken by Mr Green in evidence to the problem of inaccurate notes being released: He said "this is just something you live with" and "... it is just an inevitable function of having a *Freedom of Information Act* ... [and] a more open and pluralistic democracy". Insofar as this is a material concern, we would observe, that it is difficult to see why a standard entry on the notes stating that the minutes are not agreed would not go some way to addressing the concern.
127. On hearing the evidence and submissions in this case we share the approach of other Tribunals and place less weight on the so called 'chilling effects' which might derive from not maintaining the exemption. We would be very surprised if BERR did not want to maintain and develop the relationships with its various interest groups, whatever this decision, or, indeed, that any lobbying organisation would forgo the opportunity to put its point of view to the Government.

The effect of the media

128. Mr Gibson and Mr Cridland both expressed strongly their concerns that some of the Disputed Information would, if disclosed at that time, have led to prominent press coverage. In their view the press could not be relied upon to report such information neutrally, but would use it to create a story which would be embarrassing to the Government and the lobbyist. In effect the media could not be trusted to handle the information in a responsible way.
129. We find that information as to the nature and extent of relationships between lobbyists and the Government is not deserving of the same protection against media glare as express policy options being considered in the internal private space. In any case the Tribunal is entitled to assume that government departments and the CBI are capable of dealing with media intrusions.
130. Mr Cridland and Mr Peters also gave evidence that they were concerned that a lobbyist's "quick steer" on a point might be publicised before the membership's views were canvassed and result in an adverse reaction. We are not sure whether to regard this a 'public' interest in this case, but even if we should, we do not believe it is beyond the capacity of the membership to recognise what has actually happened.

Revealing negotiating positions

131. BERR's witnesses argue that the advance disclosure of actual negotiating positions in respect of ongoing national or international agreements would be contrary to the public interest. Actual negotiating positions could be confidential. We agree this is a strong public interest and we need to take into account the extent to which the confidentiality of such exchanges has been flagged.

Public interest factors in favour of disclosure

132. Many of the public interest factors in favour of disclosure have already been discussed as countervailing arguments to the public interest factors favouring the maintenance of the exemption. The Commissioner argues that there is a strong public interest in disclosure because it leads to greater transparency, accountability, public debate, better public understanding of public authorities' decisions and informed and meaningful participation by the public in the democratic process. Mr Gibson recognised that there is a public interest in the transparency of engagement with lobbying bodies but he maintains that this interest is weaker than the public interest in maintaining the exemption for the reasons already provided above. Moreover Ms Grey points out that a large part of the requested information has been released which again weakens the transparency interest.
133. Mr Choudhury expanded on the factors in favour of disclosure in the particular context of communications which, as in this case, are not internal but which are between the public authority and an external third party, like the CBI, as follows:
- a. In the only other decided case involving communications between ministers and lobbyists: *Evans v ICO and MoD* EA/2006/0064, it was accepted that *“there is a public interest in seeing the record of meetings between Ministers and lobbyists. Publication of the record would tend to increase public understanding of the role and influence played by lobbyists in the formulation of public policy; and that is matter of real public interest and concern; publication would assist the public in contributing to debates around the subject of the meeting though that factor diminishes the longer the delay between publishing and the meeting”* (emphasis added);
 - b. The public interest is stronger in respect of such communications than it might be in respect of communications between ministers and other non-lobbyist third parties because of the undoubted influence that these unelected (albeit representative) lobbying bodies can have on the formulation and development of policy;
 - c. As the Tribunal pointed out in *Evans*, publication can assist the public interest in contributing to the debate but that this factor may diminish over time. This is fundamental to a proper understanding of the public interest in this type of case. The interest lies not only in being able, as a matter of historical analysis, to determine ‘what went on’, but in being able to participate meaningfully in the debate. That can sometimes only happen at a point in time where there is still an opportunity to influence the debate; that is to say before policy is finalised. Looked at in this way, it is clear that the public interest in disclosure of communications between ministers and lobbyists may, in some circumstances, be at its highest at the time of those communications. Mr Choudhury however fully recognised that, correspondingly, the public interest in maintaining the exemption (and the need for a ‘private space’) is also at its highest at that time, and that this undoubtedly creates a situation where the public interest factors may be fairly evenly balanced notwithstanding the very great weight on each side. In his submission if that is the case then, consistent with the statutory requirements (and assuming that all else is equal), disclosure should follow since the public interest in disclosure will not have been outweighed. As stated in the Decision Notice, “there is a public interest, in certain circumstances, in maintaining private space away from public scrutiny to formulate policy ... [and] the Act will, therefore protect the formulation and development of government policy by maintaining privacy when it is sufficiently in the public interest to do so”. All will depend, therefore, on the outcome of the balancing exercise in each particular case. As we have seen Mr Gibson takes a particular view of this balance;
 - d. It is part of the FOE’s case that the CBI holds a position of particular (perhaps even undue) influence in relation to BERR. Whilst the Commissioner takes no stance on FOE’s particular view in that regard, the argument does highlight one of the reasons for the existence of the public interest in disclosure, namely the opportunity which it provides for scrutiny of the process, particularly in relation to the CBI having greater access to BERR than most lobbyists. Mr Gibson however points out that although there was priority in terms of the

number of contacts between the CBI and BERR, undue preference was not given to their views. Civil servants, he maintains, are well practised at weighing one lobbyist's views against other views received. However, Mr Choudhury contends that that argument is tantamount to saying that there is no legitimate public interest in scrutinising processes where there are already civil servants in place to do the job. He says that cannot be right, and would tend substantially to undermine the scope of the public interest in disclosure as it has been understood in the context of FOIA. It will only be in rare cases (perhaps where certain national security considerations are at play) that public scrutiny should give way entirely to blind faith that public officers will always do the right thing;

- e. The public interest in achieving a better understanding of the way in which lobbyists can seek to influence policy also involves an interest in understanding the nature and extent of the relationship between lobbyists and government departments. Understanding the relationship serves at least two purposes. First, it enables the public to better understand the mechanics of lobbying in that it reveals the many different ways in which lobbying can take place, from bilateral monthly meetings through to away-day (or away-morning) meetings with ministers and senior officials. Second, it subjects the relationship to a certain degree of scrutiny which can assist in ensuring that a particular relationship does not become unduly influential or dependent. BERR argues that the disclosure of the dates, type and subject matter of communications/meetings, as happened in this case, satisfies this interest;
- f. Finally Mr Choudhury draws our attention to Mr Cridland's repeated description of the CBI in evidence as an "interlocutor" whilst at the same time accepting that there is a strong public interest in knowing what the CBI says. His description of the CBI as an "interlocutor" providing advice on a wide range of issues and on a basis that is wider than that of a standard lobbying group ("more than virtually any organisation that is not a public body"), suggests that there may be a heightened interest in knowing what the CBI says.

134. We find Mr Choudhury's arguments in relation to the public interests, in the circumstances of this case, are very persuasive.

The public interest test under EIR

135. The public interest test under Regulation 12(1)(b) EIR is similar to the test under FOIA except that under Regulation 12(2) there is an explicit presumption in favour of disclosure. Therefore the analysis of the public interest factors set out above can be largely applied to the parts of Disputed Information that we have found are covered by the 2004 Regulations and to which an exemption or exception under Regulation 12 applies.

Application of the public interest test

136. Where ss. 35 and 36 are engaged or their equivalents under EIR we have applied the s.2(2)(b) FOIA and Regulation 12(1)(b) EIR public interest tests to the Disputed Information where relevant taking into account the evidence, our above findings and all other relevant circumstances in this case. We have set out our more specific findings in relation to where the public interest balance lies in the Annex to this decision. In order to preserve the confidentiality of the Withheld Information some parts of the Annex have been redacted.

Conclusions

137. We have considered all the evidence and arguments in open and closed sessions and our above findings in order to undertake the necessary detailed analysis of the Disputed Information. Our findings in relation to each document or part document are contained in the Annex redacted in part in order to preserve the confidentiality of the Withheld Information. The Annex is drawn up in tabular format for ease of reference.

138. We have largely upheld the Decision Notice, sometimes for different reasons, but have also upheld the appeal in part. Therefore we have substituted a new Decision Notice which is contained at the commencement of this judgment.

139. Our decision is unanimous.

Signed

Professor John Angel

Chairman

Date 29th April 2008

Annex (redacted)

| Doc | Exemption Claimed | Whether Engaged | Reason for Decision | Tribunal's Decision | IC's Decision |
|------------|----------------------------|------------------------|--|--|----------------------|
| 1.1 | s.40(2) FOIA | Yes | The names of both CBI officials are already in the public domain as spokespersons for the organization, . Applying the tests set out in the Reasons for this Decision we find there would be no breach of the Data Protection Principles to disclose the names of | Disclose | Disclose |
| 1.2 | ss.36(2) and 41 FOIA | s.36(2) only | S.41 is not engaged because the information was not obtained from another person and in any case lacks the quality of confidence and does not constitute an actionable breach of confidence applying the appropriate tests set out in the Reasons for this Decision. This information is claimed to be a sensitive because of uncertainties at the time around the newly re-created department following the election. | Disclose | Disclose |
| 1.3 | s.35(1) | Yes in part | The Information Commissioner (IC) did not require disclosure. He accepted that the balance of the public interest test (PIT) fell in favour of maintaining the exemption because of the strength of the interest in allowing the Secretary of State thinking space to develop policy. We agree with that application of the test to the second and third sentences of the paragraph. However the final 3 sentences do not fall within the scope of the exemption as they do not deal with policy but with a request for information as to whether something was within the scope of the draft directive. | Withhold 2 nd and 3 rd sentences Disclose last 3 sentences of the paragraph | Withhold |
| 1.4 | s.35(1) | Yes | The safe space public interest advanced for the first few sentences of 1.3 applies with equal strength to this information. The public interest in knowing what was discussed between BERR and the CBI is met by disclosure of the subject matter of the discussion and the balance of public interest does not require any further disclosure. | Withhold | Disclose |
| 1.5 | ss. 36(2) and 41 | s.36(2) only | S.41 is not engaged because the information lacks the quality of confidence and does not constitute an actionable breach of confidence applying the appropriate tests set out in the Reasons for this Decision. There is a strong public interest in the free and frank exchange of views on energy issues. However most of the views expressed by the CBI in this paragraph are of an anodyne nature and as we understood it from the evidence were already being publically debated and therefore we find | Disclose all except last sentence | Disclose |

| Doc | Exemption Claimed | Whether Engaged | Reason for Decision | Tribunal's Decision | IC's Decision |
|-----|-------------------|-----------------|---|--|---------------|
| | | | the public interest balance lies in favour of disclosure of most of the information in 1.5. However the last sentence discloses a specific future intention of the CBI which was not in the public domain where the Tribunal finds the balance of the public interest weighs in favour of maintaining the exemption. | | |
| 1.6 | ss. 36(2) and 41 | 36(2) only | <p>S.41 is not engaged because the information lacks the quality of confidence and does not constitute an actionable breach of confidence applying the appropriate tests set out in the Reasons for the Decision.</p> <p>This redaction and the redactions at 1.7 and the third paragraph of 1.8 relate to the nature and extent of the relationship between Sir Digby Jones and the Secretary of State. There is a strong public interest in knowing the nature and extent of this relationship as it reveals the very high and frequent level of access of the CBI which is not outweighed by the public interest in favour of maintaining the exemption. However the last clause of the final sentence () reports a personal view on individuals where we find the balance just falls the other way.</p> | Disclose all except second part of last sentence | Disclose |
| 1.7 | ss. 36(2) and 41 | 36(2) only | <p>S.41 is not engaged because the information lacks the quality of confidence and does not constitute an actionable breach of confidence applying the appropriate tests set out in the Reasons for the Decision.</p> <p>The public interest balance is in favour of disclosure for the reason set out under 1.6.</p> | Disclose | Disclose |
| 1.8 | ss. 36(2) and 41 | 36(2) only | <p>S.41 is not engaged because the information lacks the quality of confidence and does not constitute an actionable breach of confidence applying the appropriate tests set out in the Reasons for the Decision.</p> <p><u>First paragraph</u> has now been disclosed except the named official and the last two sentences. However we consider the balance of public interest favoured the disclosure of the subject matter of the discussion which had already been disclosed at a CBI dinner – first sentence. In relation to the rest of the paragraph we consider that there was a strong public interest in knowing that the CBI were being invited to help with government plans in relation to a policy matter and that they were willing to help. We do not accept Mr Gibson's explanation for withholding this information represents a strong public interest. In our view it would not prejudice any free and frank exchange of views on the plans at a later stage. Even if s.40(2) had been claimed the CBI official named is a senior public spokesman for the lobbyists and should be disclosed.</p> | Disclose | Disclose |

| Doc | Exemption Claimed | Whether Engaged | Reason for Decision | Tribunal's Decision | IC's Decision |
|-----|-------------------|--------------------------------------|--|---|--|
| | | | <p><u>Second paragraph.</u> There is a strong public interest in knowing the subject matter of what was discussed between BERR and CBI. The sensitivity surrounding this matter does not diminish the strength of this interest. However the views expressed in 2nd and 3rd sentences are particularly frank views where there is a strong public interest in ensuring that the expression of those views should not be inhibited. As regards the last sentence, the public interest in knowing the extent of the relationship with the CBI in relation to the subject matter is not outweighed by prejudice to the free and frank exchange of views on the subject and therefore should be disclosed.</p> <p><u>Third paragraph.</u> The public interest balance is in favour of disclosure for the principal reason set out under 1.6.</p> | <p>Disclose, except 2nd and 3rd sentences</p> <p>Disclose</p> | |
| 2 | s.40(2) FOIA | No, but EIR Regulation 13(2) engaged | In our view the wrong jurisdiction has been applied – see body of Reasons for this Decision. As there is a similar exemption under EIR we are able to transfer to and apply Regulation 13(2). Applying the tests in the body of this decision we find that the names are personal data and that the first data protection principle has not been breached. We have particularly taken into account that all those persons designated as principal representatives of their respective organizations at the Business Whitehall Climate Change Group would have a reasonable expectation of their names being disclosed. However that would not necessarily be the same for substitutes and stand-ins. | Disclose all names except substitutes or stand-ins, namely | Disclose |
| 3 | s.40(2) | Yes | The Decision Notice found that all information in the heading to the memo except the Bay number should be disclosed. The Tribunal agrees with this finding because applying the tests under paragraph 92 above it is not necessary for the FOE to have the Bay number in order to pursue its legitimate interests. | Disclose except Bay number | Disclose address of the author of document except Bay number |
| 3.1 | s. 40(2) | Yes | The names of both CBI officials are already in the public domain as spokespersons for the organization, . Applying the tests in the Reasons for the Decision we find that disclosure is not a breach of the Data Protection Principles. However it is not necessary to disclose the bay number. | Disclose names but withhold bay number | Disclose names but withhold bay number |
| 3.2 | s.35(1) | Yes | In relation to the second sentence we find that there is strong the public interest in knowing that the CBI is supporting a government position and this outweighs the public interest in maintaining the exemption. | Disclose 2 nd and last sentences and withhold the rest (except first | Disclose final sentence only |
| | | | Mr Gibson maintained that there was a strong public interest in withholding the last sentence as it would disclose a position on the Reach Directive not yet in the public | | |

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| | | | domain i.e. still in the private space for policy development. When evidence was presented before us that the position was already in the public domain at the time, Mr Gibson, on recall before the Tribunal, sought to persuade us that the expression of hope and the "parking" of the Service Directive was not language that would have been used in public and therefore still provided a strong public interest for maintaining the exemption. We have difficulty in reading into such phrases the damaging effects which are being suggested and find that the public interest in the transparency of the discussion of such matters with the CBI results in the balance favouring disclosure. However we find that the balance is reversed for the third and fourth sentences which express candid views on policy and that this information should not be disclosed. | sentence which was part of original disclosure) | |
| 3.3 | ss. 36(2) and 41 | s.36(2) only | S.41 not engaged because the information lacks the quality of confidence and does not constitute an actionable breach of confidence applying the appropriate tests set out in the Reasons for the Decision. The view expressed by Sir Digby Jones is a personal view where there is a strong public interest in the free and frank exchange of such views. This outweighs any public interest in disclosure. | Withhold | Withhold |
| 3.4 | ss.36(2) and 41 | s.36(2) only | S.41 not engaged because the information lacks the quality of confidence and does not constitute an actionable breach of confidence applying the appropriate tests set out in the Reasons for the Decision. We agree with the Decision Notice that the second sentence should be disclosed but not the remainder of the paragraph. The second sentence reflects the letter written which is Document 9 and whose existence was disclosed to the FOE at the time of the Refusal Notice. We can find no strong public interest in maintaining the exemption in respect of the sentence which relates to the subject matter already disclosed in the first sentence. The public interest in transparency is stronger. | Disclose first (subject matter already disclosed) and second sentences, but withhold subsequent sentences | Disclose first sentence only |
| 3.5 | s.35(1) | No | We find this information does not relate to the formulation and development of policy and that the exemption is not engaged. Even if we are wrong on this point we find the public interest in maintaining the exemption is weak and that the public interest in knowing how the government would be handling the Warwick agreement is stronger. | Disclose | Disclose |
| 3.6 | ss. 36(2) and 41 | s.36(2) only | S.41 not engaged because the information lacks the quality of confidence and does not constitute an actionable breach of confidence applying the appropriate tests set out in the Reasons for the Decision. | Withhold | Disclose |

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| | | | We accept this was frank advice offered by Sir Digby Jones and that there is a strong public interest in such frank advice remaining in a private space which in our view outweighs the public interest in knowing about the advice given by a | | |
| 3.7 | ss. 36(2) and 41 | s.36(2) only | <p>S.41 not engaged because the information lacks the quality of confidence and does not constitute an actionable breach of confidence applying the appropriate tests set out in the Reasons for the Decision.</p> <p>This paragraph provides a frank view by the CBI of the elements of the Warwick agreement which had not yet been formulated. We again find there is a strong public interest in such frank views remaining in the private space between BER and the CBI which outweighs the public interest in disclosure</p> | Withhold | Disclose |
| 3.8 | ss. 36(2) and 41 | s.36(2) only | <p>S.41 not engaged because the information lacks the quality of confidence and does not constitute an actionable breach of confidence applying the appropriate tests set out in the Reasons for the Decision.</p> <p>As the first sentence has been disclosed there is no point in withholding the second sentence as it goes directly to the subject matter, without invading the private space the exemption is designed to protect. Otherwise we find that there is a strong public interest in a private space to give government a chance to consider the matter and this outweighs the public interest in disclosure.</p> | Disclose the 2 nd sentence and withhold the last two sentences | Disclose |
| 4 | s.40(2) | | <p>The covering sheet with a list of actions does not appear to have been addressed by BERR and the ICO. We can only assume that they were generally to be covered by the other exemptions claimed for this document.</p> <p>We do not consider s.41 is engaged because the information lacks the quality of confidence and does not constitute an actionable breach of confidence when applying the appropriate tests set out in the Reasons for the Decision.</p> <p>In view of our other findings below we consider there is a strong public interest in knowing the actions resulting from the away-morning. We do not find that there are any public interests in favour of maintaining the exemptions which outweigh this public interest in favour of disclosure.</p> <p>In relation to the names of officials of both the DTI and the CBI at the back of the note we find that they are personal data. Applying our findings in the Reasons for the Decision we do not consider that it would be a breach of the Data</p> | Disclose, except possibly those listed as "also attending" – see substituted decision notice | Disclose all names in the document |

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| | | | Protection Principles to disclose the names of the DTI and CBI attendees particularly as they all appear to be senior officials. We do not know the position of the two names listed as 'also attending' and invite BERR and the Commissioner to comply with the terms of the substituted decision notice. | | |
| 4.1 | ss.36(2) and 41 | s.36(2) only | <p>S.41 is not engaged because the information lacks the quality of confidence and does not constitute an actionable breach of confidence when applying the appropriate tests set out in the Reasons for the Decision.</p> <p>The opening paragraphs relate to the relationship between BERR and the CBI and there is a strong public interest in understanding the relationship. The last paragraph relates to topics or the subject matters for discussion which it has been accepted by all parties that it is in public interest to disclose. That leaves the fourth paragraph which relates to our decision that BERR can withhold the last sentence of 3.8. Here it goes further and provides a very frank view of a government policy. We find that the public interest in maintaining the exemption in relation to this view outweighs the public interest in disclosure.</p> | Disclose, except 4th paragraph which withhold | Disclose |
| 4.2 | s.35(1) | Yes | We accept that the balance of the public interest favours maintaining the exemption for the first paragraph because of the strong public interest in the private space for such policy deliberations whilst being formulated. However the second paragraph only relates to the topics being discussed between BERR and the CBI. We have already found that there is a strong public interest in knowing about the topics of discussions between BERR and the CBI. | Disclose except the 1 st paragraph | Disclose except the 1st paragraph |
| 4.3 | ss.36(2) and 41 | s.36(2) only | <p>S.41 is not engaged because the information lacks the quality of confidence and does not constitute an actionable breach of confidence when applying the appropriate tests set out in the Reasons for the Decision.</p> <p>The first paragraph should be treated as a whole. We find that the strong public interest in the exchange of free and frank views about Europe expressed in this paragraph outweigh the public interest in the transparency of such deliberations. However the balance changes in relation to the last paragraph where a joint course of action is agreed because there is a strong public interest in the transparency of joint endeavours between BERR and the CBI.</p> | Disclose the second paragraph only | Disclose the first sentence and second paragraph only |
| 4.4 | s.35(1) | No, EIR applies and Reg 12(4)(e) engaged | This section is devoted to energy policy. For the reasons explained in the Reasons for the Decision we find that the information in these paragraphs is caught by the definition of environmental information and that EIR should have been applied. Although this section involves the recording | Disclose | Disclose |

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| | | | <p>of a discussion between a government department and lobbyists it is part of an internal communication and therefore Regulation 12(4(e) is engaged.</p> <p>We find that there is a strong public interest in disclosing the topics discussed and the agreement reached with the CBI and this is equally as strong as the inherent public interest in maintaining the exemption. Also we find that the bullet points in the second paragraph and the last paragraph appear to be lobbying points rather than frank views or advice and there is strong public interest in the CBI's lobbying position being disclosed which outweighs any public interest in maintaining the exemption.</p> | | |
| 4.5 | s.40(2) | Yes | Taking into account our findings on the naming of officials in the Reasons for the Decision we find that there would be no breach of the Data Protection Principles in disclosing the names of the CBI officials referred to in this highlighted paragraph. | Disclose | Disclose |
| 4.6 | s.35(1) | Yes | There is a strong public interest in knowing the subjects or topics of discussion between BERR and the CBI, and the contents of such discussions unless they are deserving of a private space. As for the substantive discussion in this paragraph it seems to identify a broadening of the approach to R&D and a way to take this forward which from the evidence does not provide a stronger public interest in maintaining the exemption. However there is a strong public interest in transparency in order to widen the public debate on the topic. | Disclose | Disclose |
| 4.7 | ss.36(2) and 41 | s.36(2) only | <p>S.41 is not engaged because the information lacks the quality of confidence and does not constitute an actionable breach of confidence when applying the appropriate tests set out in the Reasons for the Decision.</p> <p>We find this is an example of direct lobbying. The transparency of lobbying is a strong public interest. We have to accept that this exemption has been engaged because of the reasonable opinion of the qualified person. However we have difficulty in placing much weight on the public interest for maintaining the exemption because we cannot understand from the evidence how the disclosure of the information would inhibit the free and frank provision of advice or exchange of views provided for by the exemption. Therefore we find that the public interest balance favours disclosure.</p> | Disclose | Disclose |
| 4.8 | s.35(1) | Yes | There is a strong public interest in knowing the subjects or topics of discussion between BERR and the CBI and the contents of such discussions unless they are deserving of a | Disclose | Disclose |

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| | | | <p>private space. As for the substantive discussion in the first paragraph it offers the CBI the opportunity to influence government on the needs of business in the area of education, skills and training which from the evidence does not provide a stronger public interest in maintaining the exemption. In fact there is a strong public interest in disclosure so that others can have a similar opportunity to influence government on such an important matter.</p> <p>As far as the second paragraph is concerned this returns to the subject of the CBI's lobbying on innovation. . In any case our view is that the risks are greatly overstated and that the public interest in maintaining this exemption does not outweigh the public interest in disclosure for similar reasons to those set out in 4.6 above.</p> | | |
| 4.9 | s.36(2) | Yes | This is a summary of the information where we have already found that the public interest in maintaining the exemption does not outweigh the public interest in disclosure and make a similar finding in relation to this paragraph. | Disclose | Disclose |
| 5 | ss.35(1) and 40(2) | ss.36 and 40(2) | <p>We consider that the appropriate exemption which should have been claimed is s.36(2) as the points recorded from the meetings are full and frank views expressed on behalf of the CBI. If we assume that the reasonable opinion of the qualified person covers this document then applying the public interest test we find that there is a strong public interest in the free and frank exchange of such views and that they outweigh the public interest in disclosure.</p> <p>We are surprised at the criticism by Mr Gibson of the Decision Notice in relation to this document. We agree with the Commissioner's decision that the information should be withheld.</p> <p>The first part of the memo recording the dates of the meetings and attendees should be disclosed because of the strong public interest in the knowing such meetings are taking place. However we invite BERR and the Commissioner to comply with the substituted decision notice.</p> | Withhold minutes of meeting, except the dates of meetings and in relation to the names of the CBI contact and the DTI attendees BERR and the IC to comply with the substituted decision notice | Disclose names and whole document except text a-j |
| 6 | ss.35(1) and 41 | No, but EIR Regulation s 12(4)(e) and 12(5)(f) are | The document appears to cover a follow up meeting in relation to the discussion on energy issues at the away-morning (see Document 4.4). For the same reasons, considered in the Reasons for the Decision, we find this information is also covered by EIR and that the FOIA exemptions claimed can be transferred to similar EIR exceptions namely Regulations 12(4)(e) (internal | | Disclose |

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| | | engaged | communications) and potentially 12(5)(f) (confidentiality). | | |
| | | | <p>The meeting note reflects CBI member concerns on the existing energy policy and, in effect, lobbies for a change to that policy and the role the government should be taking. It also informs government that the CBI will be making an energy statement in the autumn. The last sentence provides particular advice to ministers.</p> <p>This is an internal communication between civil servants and although recording a meeting with CBI officials is caught by the Regulation 12(4)(e). . Therefore we find the public interest balance is in favour of disclosure of the note, except the advice given in the last sentence, under this exception. The advice in the last sentence provides the CBI's candid view and the Government deserved a private a space at the time of the Request to consider the implications of the advice.</p> <p>We do not find that the condition under Regulation 12(5)(f)(i) is satisfied as the CBI was not under a legal obligation to provide the information to BERR and therefore the exception is not engaged. Even if we are wrong the exception under Regulation 12(5)(f) requires that we first find that that the disclosure "would adversely affect" the interests in the exception. For similar reasons to those already stated we do not find that it would adversely affect the interests of the CBI.</p> <p>Even if we are wrong and the exemption is still engaged then we find the public interest balance favours disclosure for the reasons stated above. The only exception to disclosure what we have found above relates to the last sentence of the email which provides frank and candid advice to ministers. In relation to this advice we consider that there is a strong public interest in providing such free and frank advice to government and that this outweighs the public interest in favour of disclosure. Also we would see no strong public interest in disclosing the names of those copied into the email other than any person who attended the meeting.</p> <p>If FOIA does apply to this document and we are wrong to find that EIR applies then applying the public interest test under FOIA to the s.35 exemption we find that as energy policy had already been formulated then there was no longer a need for a private space.</p> <p>The public interest in maintaining a private space after policy formulation has been completed and before it is has been decided to reopen the policy does not outweigh the</p> | Disclose, except last paragraph and names of those copied into the email other than 'Elizabeth Baker' the person referred to in the first sentence of the email | |

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| | | | <p>public interest in disclosure.</p> <p>If FOIA applies then s.41 is not engaged because the information lacks the quality of confidence and does not constitute an actionable breach of confidence when applying the appropriate tests set out in the Reasons for the Decision.</p> | | |
| 7 | s.40(2) to redact names of third parties | No, but EIR Regulation 13(2) engaged | Same as for Document 2 except that the distribution list covers people who attended the meeting, one name of which has already been inadvertently disclosed. | Disclose all names except stand-in | Disclose |
| 8 | s.35(1) | Yes | <p>This is a response to the CBI about a routine query about a draft Bill which is part of a White Paper which was already in the public domain and explained on a web site. It proposes developments to the Bill and is therefore covered by the exemption but at a later stage in policy formulation and development where the need for a private space is diminishing. The BERR witnesses did not, in our view, provide any strong public interests for withholding the information and it is not surprising that this document was later disclosed to FOE. The strongest public interest for maintaining the exemption appears to be that it sheds light on the closeness of the relationship between the Government and the CBI at quite a junior level. Set against that is the very strong public interest in scrutinising the lobbying process during a public consultation exercise. We find that the public interest in maintaining the exemption does not outweigh the public interest in disclosure.</p> <p>We note that s.40(2) was not specifically claimed for this document but that some personal data has been redacted in the subsequent disclosure. We are under no duty under FOIA to apply a new exemption on behalf of a public authority. However Ms Grey invites us to do so. In the circumstances of this case we are prepared to accept the exemption is engaged in relation to the names in the email. We invite BERR and the Commissioner to comply with the terms of the substituted decision notice in relation to these names.</p> | Disclose but in relation to the names in the accompanying email dated 10/05/05 BERR and the IC to comply with the terms of the substituted decision notice | Disclose |
| 9. | | | We are not sure what exemptions if any were applied to the covering email memo. If we assume it is both ss. 35(1) and 41(1) the arguments applied to the rest of the letter would be applicable. BERR in final submissions considered that the s.40(2) exemption is more appropriate. We are not obliged to consider the claim of a new exemption for the first time before us. However in the circumstances of this case we are prepared to accept the exemption is engaged | Disclose email sent on 17/06/05 except the names which are subject to | Disclose |

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| | | | in relation to the names in the email. Mr Gibson gave evidence that the names in this email, except that of the Minister, are those of junior officials and therefore we consider it is unlikely that they should be disclosed. However we invite BERR and the Commissioner to consider and reach agreement on this matter on the terms provided for in the substituted decision notice. | terms of the substituted decision notice | |
| 9.1 | s.35(1) | Yes | The opening two paragraphs of this letter provide background information which was largely in the public domain at the time. Therefore it is hard to understand what public interests there are for withholding the information. However there is a strong public interest in knowing that such correspondence is taking place between a Secretary of State (SoS) and the Director General of the CBI and the influencing the lobbyist is seeking. Therefore we find the public interest balance favours disclosure. | Disclose | Disclose |
| 9.2 | s.41(1) | No | <p>S.41 is not engaged because the information lacks the quality of confidence and does not constitute an actionable breach of confidence when applying the appropriate tests set out in the Reasons for the Decision. We would be surprised if a formal letter between a Secretary of State and the Director General of a major lobbying organisation could be implicitly confidential.</p> <p>Even if we are wrong and somehow this part of the letter has sufficient quality of confidence and could amount to an actionable breach of contract we find, applying the tests set out in the Reasons of the Decision that the public interest in knowing how the government intends to pursue concerns raised by the CBI "on behalf of UK business" is far greater than the public interest in the CBI keeping those concerns confidential, although we would suspect that such concerns were public knowledge at the time if they were being expressed on behalf of UK business. The fact the government was prepared to disclose its negotiating approach to the CBI in what appears to be a formal letter is not, in our view, caught by the exemption, particularly when it is not stated to be confidential.</p> | Disclose | Disclose |
| 10 | s.35(1) | Yes | The letter puts the CBI's position only on a point in a draft directive being debated at EC and European Parliament level. It is sent by Sir Digby Jones to the Secretary of State and copied in to high level EC officials, an MEP and others. In our view this is lobbying on a formal basis. We understood Mr Cridland to say that such letters would normally reflect the CBI's official position, although Mr Cridland also said this letter as a whole does not reflect the CBI's public statements on the matter. We are not really sure that the exemption claimed is appropriate but, on the assumption it is, we consider that there is a very strong | Disclose | Disclose |

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| | | | <p>public interest in the transparency of such lobbying activities but that the public interest in maintaining the private space during the live debate on policy is much weaker. We therefore find that that the public interest in maintaining the exemption does not outweigh the public interest in disclosure. We observe that it is surprising that the CBI consider that the legislation involved should not be negotiated "behind closed doors" but that BERR considers that the concern about the issue expressed in this letter should be kept secret.</p> | | |