Neutral citation number: [2024] UKFTT 184 (GRC)

Case Reference: EA/2023/0216

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard by: CVP

Heard on: 12 December 2023
Decision given on: 26 April 2024

Before

TRIBUNAL JUDGE CHRIS HUGHES
TRIBUNAL MEMBER AIMEE GASSTON
TRIBUNAL MEMBER MARION SAUNDERS

Between

THE SECRETARY OF STATE FOR ENERGY SECURITY AND NET ZERO

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Representation:
For the Appellant: Rupert Paines (instructed by Government Legal Department)
For the Respondent: Raphael Hogarth (instructed by Jenny Roe)

Decision: The Tribunal allows the appeal and substitutes a Decision that the information contained in CLOSED Exhibit DW1 to David Wagstaff's witness statement shall be disclosed within 35 calendar days of the date of the Tribunal's Review Decision under Rule 44, save for those parts of the information which are agreed to be excepted under regulation 12(5)(b) of the Environmental Information Regulations 2004 and which are identified as such by yellow highlighting in CLOSED Exhibit DW1.

Cases and materials

The Aarhus Convention an Implementation Guide, Second Edition 2014 United Nations
Bingham *Widening Horizons The Influence of Comparative Law and International Law on Domestic Law* Hamlyn Lectures 2009, Cambridge University Press
CJEU C-71/10 - Office of Communications v Information Commissioner (Ofcom)
The Badger Trust [2014] UKUT 0526 (AAC)
Highways England Company Ltd v Information Commissioner and Henry Manisty [2018] UKUT 423 (AAC)
C-60/15 P, Saint-Gobain Glass Deutschland GmbH v European Commission
C-204/09 Flachglas Torgau GmbH v Federal Republic of Germany
Davies v IC and the Cabinet Office (GIA) [2019] UKUT 185 (AAC)

REASONS

1. This appeal arises out of a proposal by Horizon Nuclear Power Ltd (Horizon) to build a nuclear power station at Wylfa in Anglesey. Horizon was acquired in 2012 by Hitachi Ltd a conglomerate which among other activities builds and maintains nuclear power stations. The application by Horizon Nuclear Power Wylfa Ltd to build the station, dated 1 June 2018, was made under section 31 of the Planning Act 2008 and was received in full by The Planning Inspectorate on 1 June 2018. In a statement to the House of Commons published on 4 June 2018 the Secretary of State confirmed that negotiations had started:-

   "In 2016 we agreed to support the first new nuclear power station in a generation at Hinkley Point C in Somerset. Developers have set out proposals for a further five plants to come online over the next few decades as I said at the time the contract for Hinkley Point C was agreed the government expects future nuclear projects to provide lower-cost electricity than Hinkley Point C.

   The next project in this pipeline is the proposed Wylfa Newydd power station based on Anglesey in North Wales. The project developers Horizon Nuclear Power who are owned by the Japanese company Hitachi have developed proposals to build two reactors with a combined capacity of 2.9 GW. Hitachi's reactor design has been deployed on time and on budget in Japan and last December completed the Generic Design Assessment process required by the U.K.'s independent nuclear regulator, having satisfied our strict safety standards Horizon submitted the application for Development Consent to the Planning Inspectorate last Friday

   I am pleased to confirm that today Hitachi and the UK government have decided to enter into negotiations in relation to the proposed Wylfa Newydd project this is an important next step for the project although no decision has been yet taken to proceed and a successful conclusion of these negotiations will of course be subject to full government regulatory and other approvals including but not limited to value for money due diligence and state aid requirements.

   …

If the Wylfa project were to go forward following this period of negotiation it would provide around 6% for current electricity needs, until nearly the end of the century, while supporting thousands of jobs during construction and operation particularly in Wales.

The action this government is taking will support a long-term pipeline for new nuclear projects in this country and will provide the visibility needed to enable the country to invest in the skills including through the new National Nuclear College…"

2. The Planning Inspectorate completed its examination of the application on 23 April 2019 and submitted the "Examining Authority's Report of Findings and Conclusions and Recommendation to the Secretary of State for Business, Energy and Industrial Strategy" to the Secretary of State on 23 July 2019.

3. Activity by Horizon in relation to the project was suspended in January 2019 due to the failure to resolve issues around the funding of the project. On 16 September 2020 Hitachi announced that it was ending business operations on the nuclear power plant construction project in the United Kingdom. The same day the subsidiary (Horizon) announced that it was ceasing development operations at its two nuclear power sites Wylfa in Anglesey and Oldbury on Severn in Gloucestershire. On 31 December 2020 the BBC published a news story:

   "Hitachi abandoned its plan to build a new £20bn plant at Wylfa on Anglesey in the autumn. Developers Horizon nuclear have been holding discussions with "interested parties" to revive the proposals.

   The UK government has now extended the process known as development consent until 30 April 2021.

   A decision had been due to be made by New Year's Eve following a request in the autumn to give Horizon more time to hold discussions with potential backers.

   Horizon's Chief Executive wrote the UK Business Secretary Alok Sharma again on 18 December asking for a further extension"

4. The application was formally withdrawn on 27 January 2021, The Planning Inspectorate published its report on 4 February 2021. It is a substantial and complex document of over 900 pages, in chapters covering the power station, other onsite developments, marine works, off-site power station facilities and associated developments. It reviewed a wide range of issues and acknowledged the drivers behind government policy for the site:

   5.2.6. The site of the proposed nuclear power station at Wylfa Head is one of the eight sites identified by the Government in EN-6 as potentially suitable for the deployment of new nuclear power stations by the end of 2025.
   …
   5.12.4. The ExA are therefore satisfied that there is a clear need for low carbon energy infrastructure and that the Application could help address this need.

5. In the light of its review of all the issues it summarised its conclusion in the following terms:

   "Summary of Recommendation:
   The Examining Authority recommends that the Secretary of State should withhold consent. If however the Secretary of State decides to give consent, then the Examining Authority recommends that the Order should be in the form attached"

6. However while this was the headline recommendation there were many pages of discussion of possible amendments to the draft Development Consent Order which had been the subject of consultation and a chapter of detailed "Considerations for the Secretary of State" to assist the Minister in coming to conclusions.

7. On 8 March 2021 a member of the public (Mr Jas Chanay who was an interested party in the planning application and has long been concerned about the proposed development of the nuclear power station) wrote to the Department for Business Energy and Industrial Strategy ("BEIS" following a machinery of government change on 7 February 2023 the Secretary of State for Energy and Net Zero became responsible for this policy area) and requested information in the following terms:

   "Perhaps I may be permitted to enquire as to possible sight of the following:
   1. options at different points in time: namely, DCO deadlines set 30 September 2020, 31 December 2020 and 30 April 2021, respectively;
   2. provisional advice and assessment for the Secretary of State; and,
   3. the Secretary of State's respective view (albeit, incomplete)."

8. BEIS responded on 12 April 2021 explaining that it held information in respect of points 1 & 2 but this was withheld in reliance of regulations 12(4)(e) – internal communications and 12(4)(d) – material in the course of completion. Regarding the third point BEIS stated that the Secretary of State's view was:

   "…that one or more parties should be given the opportunity to provide further information which would be needed ahead of taking a decision on the development consent application itself."

9. Mr Chanay argued that with the withdrawal of the application the matter had ceased to be live and accordingly there was no need for a safe space for free and frank exchange of views under 12(4)(e)

   "Not the least, in view of the Department's acknowledgement that:
   "We recognise there is a public interest in disclosing the information as it could aid greater understanding of the process."
   Moreover, the requested information could reasonably be said to be be-spoke to the unique and particular circumstances, conditions and facts characterising the development planning application in question."

10. He further argued

"In so far as I understand it, regulation 12(4)(d) regarding "material in the course of completion" would normally be applicable to information which was still in the process of finalising. In other words, the matter had not yet reached the end point: completion of the material in question. On the other hand, once that end point has been severed and extinguished, could regulation 12(4)(d) properly and reasonably continue to capture material that has been abandoned a-mid-stream as it were and therefore remains frozen in time for perpetuity?

Likewise, regulation 12(4)(e) on "internal communications" would normally cover departmental communications on issues and matters that were still "live" at the time of disclosure request, thus warranting "private space". On the other hand, once those communications have fallen into a state of permanent arrest and silence, could regulation 12(4)(e) properly and reasonably continue to capture material concerning a development planning application that is no longer subject to any further ongoing internal consideration?

11. On internal review dated 22 June 2021 BEIS maintained its position explaining why it considered Mr Chanay's approach was incorrect and identifying difficulties which could arise in the future from the publication of the material:

The Explanatory Memorandum to the Environmental Information Directive was clear as to the purposes of the exemptions contained in regulations 12(4)(d) and 12(4)(e):

"public authorities should have the necessary space to think in private. To this end, public authorities will be entitled to refuse access if the request concerns material in the course of completion or internal communications. In each such case, the public interest served by the disclosure of such information should be taken into account."

That justification does not end where that work is left unfinished, as was the case when the Wylfa Newydd application was withdrawn, and the public interest must still be considered.

While we still consider that there would be a public interest in the release of information held by the Department, this position does not override the need to avoid potential prejudice to the Secretary of State's consideration of any future applications that might come forward for the Wylfa Newydd site or for nuclear generating projects more generally.
The Department is aware of continuing interest from developers in the potential for developing the Wylfa Newydd site and while any proposals for development would be subject to a new evaluation of their benefits and impacts, the release of information related to the determination of the development consent application for the now abandoned Wylfa Newydd project may influence development consent applications that come forward and could prejudice the consideration and determination of any such applications.
In similar vein, the consideration within the Department of the issues arising from and in relation to the Wylfa Newydd application have the potential to influence the way that future applications may be presented to the Planning Inspectorate. The unfinished nature of the Department's consideration of the application may mislead parties to any future examination as to what may or may not have been the Secretary of State's final decision and reasoning. There is, therefore, a risk that the Department's preliminary assessments of the Wylfa Newydd

application could be played back during any examination process thus providing an unwitting and potentially misplaced steer to potential developers or objectors.

12. Mr Chanay complained to the Information Commissioner (the "Commissioner") who investigated.

13. In considering the question of 12(4)(d) the Information Commissioner decided:

"23. The Commissioner has reviewed the withheld information which comprises four emails each with numerous attachments. The attachments include information which was already in the public domain at the time of the request, such as the Examining Authority's Report: a Horizon news release and a Hitachi Ltd press release. In addition to this material, other documents, for example Decision Submissions prepared by officials for consideration by the Minister and Secretary of State are included. The Commissioner notes that the holder of the role of Secretary of State at the time of the request was Kwasi Kwarteng however the previous holder, Alok Sharma had held the post from 13 February 2020 to 8 January 2021 during the time relevant to the request.

24. The Commissioner has considered the complainant's comments above at paragraph 22 and would explain that if a document is unfinished at the time of the request and there is no prospect of completion that in itself does not provide an argument for disclosure. It provides for the engagement of the exception. Disclosure may result following the public interest consideration.

25. In this case the Commissioner accepts that the Secretary of State did not make a formal decision on the Application and therefore when viewed as a project remains incomplete. However, the Commissioner considers that the withheld information comprises documents which are complete. The attachments to emails as described above were presented to the Secretary of State to inform his decision making and are not unfinished. The Secretary of State cannot base his opinion on unfinished information. He may seek further information but that is a separate matter. The only unfinished or incomplete element is the Secretary of State's decision.

26. On this basis the Commissioner finds that in these particular circumstances the exception is not engaged. He has therefore not considered the public interest."

14. The Information Commissioner accepted that this material constituted internal communications within the scope of 12(4)(e) and then considered the arguments and the balance of public interest (paragraphs 27-51) He noted that while the site was recognised as remaining a potential site for a nuclear power station the details of any new application would be very different raising different issues, the Examining Authority's report gave a large amount of information about the issues which arose in this application, any fresh application would be treated independently entirely on its merits and would raise different issues. He acknowledged the Appellant's arguments that it could be misleading for a new applicant to rely on the response in this case and the nature of the role:

"It would not therefore significantly enhance the public interest to add to this with the internal BEIS documents. … the information that is being withheld will not be made available to any future application for development consent at Wylfa Newydd."

"44 …BEIS referenced its quasi-judicial role and an associated inability to advise or assist applicants interested in development consent. It expressed concern that disclosure of the requested information may impact that role as it may serve as:

"an effective proxy to advice from officials to applicants which would otherwise be prohibited and may have the effect of misleading those considering any new application as to the approach the Secretary of State may take."

45. The Commissioner understands BEIS' comments regarding its role, however he considers that such a role is not a bar to disclosure under the exception at regulation 12(4)(e) and there can be no resultant restriction on the circulation of information disclosed under the EIR. The Commissioner is not persuaded that the disclosure of information relating to one specific application can be considered to act as advice or assistance in a different application. He has also been made aware that any new application for development consent will be considered as an entirely new application with the applicant being responsible for demonstrating that the application meets the requires standards. The Commissioner is not convinced that it would be a negative situation if an applicant was able to provide a more detailed application addressing the required standards as a result of information in the public domain. As Secretaries of State frequently change, in this case Alok Sharma was replaced by Kwasi Kwarteng on 8 January 2021, applicants should be aware that any particular incumbent will differ in their requirements and therefore it would be foolhardy to interpret any disclosed information as a permanent position. It therefore seems unlikely that any disclosure would mislead an applicant. As the complainant has commented any new application for development consent would be discrete and would be scrutinised by the Secretary of State in post at the time. The Horizon application did not reach the point of the Secretary of State's decision itis not possible to know what decision the incumbent at the time would have reached or what role the officials' submissions would have had in that decision. The Commissioner would expect any new application to be considered by all in an independent and impartial manner."

15. In weighing the public interest in disclosure the Commissioner concluded:

46. The Commissioner is mindful that a public authority is required to apply a presumption in favour of disclosure, and in any event the public interest in maintaining an exception must outweigh the public interest in disclosure. If the public interest is balanced then the information in question must be disclosed.

47. The Commissioner accepts that the material in the public domain at the time of the request provided significant detail on Horizon's application and this weighs in favour of maintaining the exception. The information requested by the complainant provides a conclusion to the project albeit a project which was not concluded by a decision of the Secretary of State. Disclosure of the material identified in the confidential annex allows the public to understand the final steps considered by government before the withdrawal of the application.

48. The Commissioner is satisfied that there is a public interest in protecting BEIS' ability to communicate internally, as set out in paragraph 35, in a "safe space". However, the Commissioner's opinion is that the need for a safe space is strongest when the issue is still live. In the circumstances of this case the Application was withdrawn by the time of the request and any potential future applications would result in other internal communications bespoke to those applications. He therefore does not accept that officers responsible for providing advice to the Secretary of State would be significantly impacted by disclosure in this case.

49. The Commissioner's view is that there is a compelling argument for the disclosure of government's considerations on decision making in regard to planning permission for a Nationally Significant Infrastructure Project such as a nuclear power station. Such a project has an immense impact on both people and the environment in so many respects as demonstrated and covered by the Examining Authority's Report. The Commissioner considers that disclosure of the requested information allows for scrutiny by an informed public.

50. Consequently, although a close call, the Commissioner finds that the public interest in maintaining the exception at regulation 12(4)(e) does not outweigh or balance the strong public interest in disclosing the withheld information.

16. In the appeal the Secretary of State argued two new exceptions which he had not raised before:

    - Regulation 12(5)(b) EIR (the "Course of Justice Exception"). This possibility had been identified by the Commissioner in the confidential annex to the decision notice and there has been subsequent agreement between the parties which has identified the parts of the documents which attract this exception and which they agree should not be disclosed.

    - That the entirety of the information was excepted from disclosure by reason of reg. 12(5)(d) EIR (the "Confidentiality of Proceedings Exception")

17. The Secretary of State also argued that the Commissioner had erred

    - In finding that "the material which is still in the course of completion, to unfinished documents or to incomplete data" exception in reg. 12(4)(d) EIR did not apply
    - In finding that the balance of public interest lay in disclosure

18. With respect to the second ground, the Secretary of State argued

    15. The information in dispute comprises ministerial submissions made to the SoS on various occasions, together with their attachments and draft responses.

    16. The processes involved in drafting, submission, and consideration of ministerial submissions (i) are formal processes, forming part of the proceedings of the SoS; and (ii) are confidential. Ministerial submissions are part of an internal process of advice and deliberation that is not in the public domain, (as in this case) concerns matters of

importance and sensitivity, and (in this case) are marked OFFICIAL-SENSITIVE, which is a classification that indicates that there could be damaging consequences if the information were lost, stolen or published. Accordingly, ministerial submissions attract a common law duty of confidence, in line with the well-established principles set out in Coco v AN Clark (Engineers) Ltd [1968] FSR 415.

17. Disclosure would adversely affect that confidentiality: both retrospectively, in that the confidentiality of the submission process would no longer be maintained; and prospectively, in that those contributing to such submissions would not be able (or would be less able) to rely upon the confidentiality of those proceedings, with a corresponding detriment to the freedom and frankness with which matters may be put before, and considered within, such proceedings.

19. In resisting the appeal the Commissioner noted that with respect to confidentiality of proceedings exception *"there is no rule of law that gives the submissions process the necessary "confidentiality provided for by law" to engage the exception "* and further argued (relying on the Implementation Guide to the Aarhus Convention) "public authorities may not unilaterally declare a particular proceeding confidential and stamp documents 'confidential' in order to withhold them from the public" and that *"the factors to be taken into account in the balancing of the public interest [are] essentially the same whether either or both of the Confidentiality of Proceedings Exception and the Internal Communications Exception applies".*

20. David Wagstaff gave evidence for the Appellant. He is Deputy Director in the Energy Development Directorate of the Department of Energy Security & Net Zero leads for two teams one responsible for case work on applications for planning consent either taking decisions on behalf of or making representations to the Secretary of State for Energy Security and Net Zero (the "SoS"), and the other which works on the policy around energy infrastructure and wider planning reforms, has been in that role since 2021 and had no involvement with the specific matters under appeal but has wide experience in advising Ministers both generally and with respect to development consent. He gave evidence as to the making of submissions to ministers and emphasised their confidential nature with submissions having restricted circulations (in this case a list of 23 individuals all within the Department). He explained that planning decisions were a quasi-judicial function of Ministers with additional layers of confidentiality and a separate team advising the Minister from the teams dealing with planning applicants etc. In addition they:

"are covered by Planning Propriety Guidance ….] which explains the unique and important features of such decisions and why particular protocols and processes must be put in place for communications involving these decisions"

He explained the classification of the documents as:

"OFFICIAL information marked -SENSITIVE: Information that is not intended for public release and that is of at least some interest to threat actors (internal or external), activists or the media."-

21. In stressing the confidentiality of the submissions and problems which would be caused by disclosure:

"38. Submissions set out the reasoning of officials, along with the course of action that officials recommend. If the SoS does not accept that recommendation then officials would need to rework their recommendation and draft a fresh submission that reflected or addressed the SoS's views. It would be a breach of confidentiality if the earlier advice were to be made public, particularly if the subsequent direction of the decision and policy considerations had changed. This divergence will generate its own questions adding further public and political scrutiny on decisions, which are currently conducted with the expectation that they will be treated in confidence and not subject to public scrutiny.

39. I do not accept that because this application did not conclude in a formal decision, and was withdrawn, that these circumstances (compared to a formal decision by the SoS to refuse or consent an application) somehow weakens the reliance on the exceptions. These submissions were submitted on the basis that they were confidential and part of the confidential process of decision-making to which I have referred. Moreover, this situation would be the same as for any other project/site where planning permission has been granted or refused; the matters are seldom straightforward; a series of options and possibilities need to be set out, and the various considerations should not be put into the public domain as this would risk future applicants or interested parties "second guessing" how a case might go on the basis of having access to these internal considerations. Regardless of the outcome of the determination, we treat the submissions that are made to the SoS equally and the confidential nature of the documents does not change once the planning process is completed."

22. He emphasised the sensitivity and complexity of the issues around nuclear power "*it splits political parties and green groups*". He noted that in the previous 15 years there had only been approval of construction of new nuclear power stations at two sites, Hinckley and Sizewell and Sizewell had been the subject of a judicial review. He argued that disclosure of information was a threat to the candour of civil servants advising Ministers. "*In the longer-term this could lead to a significant diminishing of the benefit of these submissions, ultimately with effects upon the quality and robustness of Government decision-making, and their accountability.*"

23. He explained that the "working documents exception" was claimed for draft letters

"43. The draft letters remain a working (and unfinished) document even after the final letter is issued. The ICO appears to suggest that once a draft decision letter has been finalised, the previous drafts can no longer be considered as draft or unfinished if they were in the same terms as the finalised document. I do not agree. The previous drafts remain drafts for the reason that they remain unfinished.

44. When the final decision letter is issued, it is the formal record of the SoS's reasons that underpin his decision on the application, and it is this document that will be considered in detail in the event that his decision is judicially reviewed. The submission explains the key elements of the application and its associated issues to Ministers, and signposts them to the most pertinent parts of the draft decision letter for their consideration."

24. In addressing the public interest balance Mr Wagstaff sought to generalise from the specific case to the more general approach to non-disclosure:

"….The submission could cover factual issues peculiar to the individual site and/or considerations about how current, and potentially developing, planning policy applies to a particular case.

49. Officials have to advise on multiple applications and similar issues may come up which need to be addressed in the submission. Officials need to be free to discuss the implications if such issues in planning applications without the concern that this advice could be made publicly available. A safe space to consider and deliberate government policy is fundamental to officials being able to advise Ministers candidly. If confidential written advice were made publicly available, officials would have to consider the possible implications of its potential publication."

Consideration – the legal framework

25. The question for the tribunal to determine is in two parts. The first is which exceptions to disclosure contained in the Environmental Information Regulations are applicable to which parts of the information sought by this request. The second is, in the light of those exceptions, where the public interest lies between disclosure and withholding.

26. While the Environmental Information Regulations 2004 are UK regulations they derive from a less parochial context, the EU Council Directive 2003/4/EC on Public Access to Environmental Information A draft of the Regulations was approved by resolution of each House of Parliament in pursuance of paragraph 2(2) of Schedule 2 to the European Communities Act 1972. 2003/4/EC replaced Directive 90/313/EEC which was similarly brought into UK law under the provisions of the European Communities Act.

27. The EU Directive was in its turn derived from the Aarhus Convention an instrument approved by the United Nations Economic Commission for Europe (UNECE)–. UNECE was set up by the Economic and Social Council of the United Nations in ECOSOC in 1947 as one of the five regional commissions of the United Nations. ECOSOC which was established in 1945 as one of the six main organs of the UN created by the UN Charter. The UK in its declaration and ratification of the Aarhus Convention confirmed that it undertook to guarantee "the rights of access to information, public participation in decision-making and access to justice in environmental matters in accordance with the provisions of this Convention.

28. The Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters came into force on 30 October 2001. Ban Ki-Moon in the preface to the 2014 edition of the Implementation Guide to the Aarhus Convention commented:

"The Aarhus Convention's twin protections for environmental and human rights, and its focus on involving the public, provide a mechanism for holding governments to account in their efforts to address the multi-dimensional challenges facing our world today, including climate change, biodiversity loss, poverty reduction, increasing energy demands, rapid urbanization, and air and water pollution.

The Guide is an essential reference for policy-makers, legislators and officials at all levels of government. It contains important guidance for members of the public, including non-governmental organizations, seeking to exercise their rights, as well as for those in the private sector engaged in activities that are subject to the Convention. The Guide will equally interest practitioners and academics specializing in the issues covered by the Convention, as well as States not currently party to the Convention.

The second edition of the Guide builds on the considerable experience amassed during the Convention's implementation. It provides practical examples and offers valuable insights from the findings of the Aarhus Convention Compliance Committee, a unique body inspired by human rights treaty mechanisms.

I commend this publication to all those with an interest in promoting environmental democracy and sustainable development."

29. As *Bingham* noted in his Hamlyn lectures *"When construing a UK statute giving effect to an international convention, a British court does not interpret the statue as if it were a purely domestic instrument."* While the Implementation Guide contains a disclaimer *"The views expressed in the Implementation Guide do not necessarily reflect those of any individual, organization or Government involved at any stage in the preparation of its text. Similarly, the interpretations contained in the text do not necessarily represent the official opinion of any of the Parties to the Convention."* The Preface to the Second Edition states *"In recognition that considerable experience in the Convention's implementation had been gained since the first edition of the Implementation Guide was published, the Meeting of the Parties to the Convention, at its third session (Riga, 13–15 June 2008), requested an updated edition of the Implementation Guide be prepared".*

30. The Vienna Convention on the Law of Treaties 1969 at Section 3 The Interpretation of Treaties provides by Article 31

    Article 31 General rule of interpretation

    1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
    2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

    (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
…

Article 32 Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

31. The Implementation Guide published by UNECE accordingly by reason of the Vienna Convention Articles 31 and 32 should be taken into account in construing the Aarhus Convention as transposed into domestic law.

32. The Aarhus Convention provides by Article 4 Access to Environmental Information:

3….

(c) The request concerns material in the course of completion or concerns internal communications of public authorities where such an exemption is provided for in national law or customary practice, taking into account the public interest served by disclosure.

4…

(a) The confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law;

33. These provisions of the Aarhus Convention are put into law through EIR regulation 12:

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

….
(d)the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or
(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—
….
(d)the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law

34. The Guide addresses the issues raised by this case at page 84 (emphasis added):

"The public authority may refuse to disclose materials "in the course of completion" or materials "concerning internal communications", but only when national law or customary practice exempts such materials. The Convention does not clarify what is meant by "customary practice" and this may differ according to the administrative law of an implementing Party. For example, for some Parties, establishing that such an exemption exists under "customary practice" may require evidence of established norms of administrative practice to that effect.

Even when the requirement exists in national law or customary practice, authorities are required to take into account the public interest that would be served by disclosure of the information before making a final decision to refuse the request. The requirement in paragraph 7 to put the reasons for refusal in writing means that authorities must document precisely how they considered the public interest as a part of their determination. The Convention does not clearly define "materials in the course of completion". **However it is clear that the expression "in the course of completion" relates to the process of preparation of the information or the document and not to any decision-making process for the purpose of which the given information or document has been prepared.**

A request for access to raw environmental data cannot be refused on the grounds that it is "material in the course of completion" to be made publicly available only after processing or correction factors have been applied. In its findings on ACCC/C/2010/53 (United Kingdom), the Committee considered whether raw air pollution data collected from a monitoring station and not yet subject to data correction could be exempted from disclosure as "material in the course of completion". The Committee considered that the raw data was itself environmental information within the meaning of article 2, paragraph 3 (a), of the Convention. The Committee held that should the authority have any concerns about disclosing the data, they should provide the raw data and advise that they were not processed according to the agreed and regulated system of processing raw environmental data. The Committee held that the same would apply for the processed data, in which case the authorities should also advise on how those data were processed and what they represented.

Similarly, the mere status of something as a draft alone does not automatically bring it under the exception. The words "in the course of completion" suggest that the term refers to individual documents that are actively being worked on by the public authority. Once those documents are no longer in the "course of completion" they may be released, even if they are still unfinished and even if the decision to which they pertain has not yet been resolved. "In the course of completion" suggests that the document will have more work done on it within some reasonable time frame. Other articles of the Convention also give some guidance as to how Parties might interpret "in the course of completion". Articles 6, 7 and 8 concerning public participation require certain draft documents to be accessible for public review. Thus, drafts of documents such as permits, EIAs, policies, programmes, plans and executive regulations that are open for comment under the Convention would not be "materials in the course of completion" under this exception.

A similar conclusion was reached by the Conseil d'Etat of France, in case N° 266668 (7 August 2007) with respect to the use of the term "unfinished documents" in Directive 90/313/EEC. The Conseil d'Etat held that a provision excluding preliminary documents produced in the course of drawing up an administrative decision from the right of access to environmental information is not compatible with article 3, paragraph 3, of Directive 90/313/EEC which limits the possibility for a request for environmental information to be refused to when the request concerns "unfinished documents". **The second part of this exception concerns "internal communications". Again, Parties may wish to clearly define "internal communications" in their national law. In some countries, the internal communications exception is intended to protect the personal opinions of government staff. It does not usually apply to factual materials even when they are still in preliminary or draft form.** Opinions or statements expressed by public authorities acting as statutory consultees during a decision-making process cannot be considered as "internal communications". Neither can studies commissioned by public authorities from related, but independent, entities. **Moreover, once particular information has been disclosed by the public authority to a third party, it cannot be claimed to be an "internal communication". Finally, even if one of these two exceptions applies, paragraph 3 (c) further requires Parties or public authorities to take into account the public interest in disclosure of the information**. The public interest test is discussed again in paragraph 4"

35. The request relates to a series of emails with attachments sent to the Minister for decision. The attachments include (as well as material which had already entered the public domain or has subsequently been so placed) submissions to the Minister giving advice and options, the Planning Propriety Guidance, and draft letters which were either extending time to the applicant (which were sent after approval) or draft decision letters.

36. The 12(4)(e) exception is clearly engaged by such communications between civil servants and their Minister. However the Guidance quoted above explicitly excludes the letters which have been sent out to a third party – once they have been sent they

are not internal, while they are within the scope of the request on the basis that they were sent to the Secretary of State for consideration the transmission to the applicant meant that they ceased to be internal.

37. The 12(4)(d) exception "in the course of completion" is, in the light of the Aarhus Implementation Guide, problematic. The decision of the Conseil d'Etat was on the interpretation of Article 3(3) of the Directive 90/313/EEC (the predecessor to 2003/4/EC implementing the Aarhus information provisions) which provided:

    "A request for information may be refused where it would involve the supply of unfinished documents or data or internal communications, or where the request is manifestly unreasonable or formulated in too general a manner."

38. The Conseil D'Etat (the French Supreme Administrative Court) held that preliminary documents for a decision were not unfinished documents and therefore a regulation prevented their release was not compatible with the category of "unfinished documents" within the Directive. The Implementation Guide further suggests that for a document to be "in the course of completion" it must be anticipated that further work will be carried out "within some reasonable time frame" which patently is not the case with respect to this request. Mr Wagstaff in his evidence stated with respect to 12(4)(d):

    "It is claimed in respect of draft decision letters provided to the SoS for his consideration. I understand that the ICO accepts that this exception is engaged in respect of these documents, unless they were approved and sent out in identical terms."

39. In *Manisty* the Upper Tribunal quoted extensively from the Implementation Guide and relied on it in formulating its judgement and remitting the case to the first-tier tribunal to decide in the light of ECJ caselaw. However the issue of a process coming to an end and no prospect of further work being carried out on a withdrawn application (as explicitly raised in the guidance) did not arise in *Manisty* which means that *Manisty*, while quoting "*the document will have more work done on it within some reasonable time frame"* as a condition for the application of the exception did not explore the implications of that statement. In his evidence Mr Wagstaff was concerned as to the effect of disclosure on future applications "*any application in future, here or elsewhere will have similar issues… so things considered here will arise"*. He gave no indication that there was any possibility of work being resumed on this application. Accordingly the tribunal finds as a fact that no future work would be carried out and accordingly the circumstances of this case do not fall within what the Implementation Guide delineates of the boundary for the applicability of this exemption.

40. The assertion by Mr Wagstaff that draft letters remain draft and the concession by the Commissioner that draft decision letters fall within the exception is not in accordance with the Guide.

41. In arguing that the disclosure would adversely affect the confidentiality of proceedings protected by law 12(4)(d) the Appellant argued that ministerial

submissions attract a common law duty of confidence and that the marking of documents "OFFICIAL-SENSITIVE" form part of the ministerial submissions process. The Appellant relied on the Commissioners guidance on 12(5)(d):

"It will include, but is not limited to:

- *formal meetings to consider matters that are within the authority's jurisdiction*
- *situations where an authority is exercising its statutory decision-making powers*
- *legal proceedings."*

42. This analysis drew on the Upper Tribunal decision in *White* which considered a Norther Ireland government department dealing with an analogous petroleum licensing issue where litigation had commenced. The Upper Tribunal approved the IC guidance then in existence and stated:

"The scope of 'proceedings' is not defined. However, I consider that the term must broadly apply to the final decision making stages of an authority…In the particular circumstances, the [Department] and TRUK were engaged in legal proceedings, which were not in themselves the proceedings of the [Department] as they fell to be determined by the High Court. However, in the course of the legal proceedings, the appellants had to make their own decisions about how those proceedings should be conducted…it appears to me that the decisions taken by the [Department] about their conduct of the legal proceedings potentially falls within the scope of their own regulation 12(5)(d) 'proceedings'. This is because their own conduct of the litigation required formal decision making steps and consideration of evidence and legal advice…."

43. The case was remitted to the first-tier tribunal to consider whether the 12(5)(d) exception was engaged in these circumstances in the light of the jurisprudence of the ECJ. The cases identified in *White* were *Saint-Gobain* (a case against the Commission where the Court having considered various regulations affecting access to EU documents ordered disclosures relating to the allocation of emissions allowances, however the reasoning is not entirely clear) and *Flachglas Torgau*. In *Flachglas Torgau*, several specific questions were explored including:-

"2 (a) Is the confidentiality of proceedings within the meaning of indent (a) [of the first subparagraph] of Article 4(2) of Directive [2003/4] provided for by law where the national-law provision enacted to implement Directive [2003/4] lays down generally that a request for access to environmental information is to be refused if the disclosure of the information would adversely affect the confidentiality of the proceedings of authorities which are required to provide information, or is it necessary, for that purpose, for a separate statutory provision to provide for the confidentiality of the proceedings?"

44. The Court found:

"60 According to settled case-law, while it is essential that the legal situation resulting from national implementing measures is sufficiently precise and clear to enable the individuals concerned to know the extent of their rights and obligations, it is none the less the case that, according to the very words of the third paragraph of Article 288 TFEU, Member States may

choose the form and methods for implementing directives which best ensure the result to be achieved by the directives, and that provision shows that the transposition of a directive into national law does not necessarily require legislative action in each Member State.

61 However, while it is true that transposing a directive into national law does not require the provisions of the directive to be formally enacted in an express and specific legal provision, since the general legal context may be sufficient for its implementation, depending on its content (see, in particular, Case 29/84 Commission v Germany [1985] ECR 1661, paragraphs 22 and 23; Case C-217/97 Commission v Germany [1999] ECR I-5087, paragraphs 31 and 32; and Case C-233/00 Commission v France [2003] ECR I-6625, paragraph 76), it should be noted that by specifying in indent (a) of the first subparagraph of Article 4(2) of Directive 2003/4 that the protection of the confidentiality of public proceedings must be 'provided for by law', a condition which corresponds to the requirement laid down in Article 4(4) of the Aarhus Convention that the confidentiality of proceedings must be 'provided for under national law', the European Union legislature clearly wanted an express provision to exist in national law with a precisely defined scope, and not merely a general legal context.

62 However, that specification cannot be interpreted as requiring all the conditions for application of that ground for refusing access to environmental information to be determined in detail since, by their very nature, decisions taken in that domain are heavily dependant on the actual context in which they are adopted and necessitate an assessment of the nature of the documents in question and the stage of the administrative procedure at which the request for information is made (see, by analogy, Commission v France, paragraphs 81 and 82).

63 None the less, public authorities should not be able to determine unilaterally the circumstances in which the confidentiality referred to in Article 4(2) of Directive 2003/4 can be invoked, which means in particular that national law must clearly establish the scope of the concept of 'proceedings' of public authorities referred to in that provision, which refers to the final stages of the decision-making process of public authorities.

64 Lastly and in any event, the requirement that the confidentiality of the proceedings of public authorities must be provided for by law applies without prejudice to the other obligations imposed by Article 4 of Directive 2003/4, in particular the obligation of the public authority concerned to balance the interests involved in each particular case (see, in that regard, Case C-266/09 Stichting Natuur en Milieu and Others [2010] ECR I-13119, paragraph 58).

65 In those conditions, the answer to question 2(a) and (b) is that indent (a) of the first subparagraph of Article 4(2) of Directive 2003/4 must be interpreted as meaning that the condition that the confidentiality of the proceedings of public authorities must be provided for by law can be regarded as fulfilled by the existence, in the national law of the Member State concerned, of a rule which provides, generally, that the confidentiality of the proceedings of public authorities is a ground for refusing access to environmental information held by those authorities, in so far as national law clearly defines the concept of 'proceedings', which is for the national court to determine."

45. There is therefore no hard and fast rule requiring an explicit transposition of every aspect of a Directive into UK law. However there is a requirement for legal certainty and the Court held (paragraph 61 above):-

"it should be noted that by specifying in indent (a) of the first subparagraph of Article 4(2) of Directive 2003/4 that the protection of the confidentiality of public proceedings must be 'provided for by law', a condition which corresponds to the requirement laid down in Article 4(4) of the Aarhus Convention that the confidentiality of proceedings must be 'provided for under national law', the European Union legislature clearly wanted an express provision to exist in national law with a precisely defined scope, and not merely a general legal context."

46. The Appellant in relying on the caselaw of confidentiality and the designation of official documents as "OFFICIAL SENSITIVE" is relying on a general legal context. There is no legal prohibition on the Minister releasing the contents of submissions should he choose - that is more an issue for the Ministerial Code of Conduct; similarly the restriction on a civil servant releasing it is a question of the contract of employment. Furthermore the requirement identified *"in particular that national law must clearly establish the scope of the concept of 'proceedings'"* is a further requirement of the legislation transposing the Aarhus arrangements which is not adequately met. Accordingly the tribunal is satisfied that exception 12(5)(d) is not engaged.

47. It may be noted that the Convention itself uses two distinct formulations for related questions with the narrower formulation "law" being for "proceedings" and the wider formulation "law or customary practice" being for the internal communications exception, this formulation more closely matches the actual arrangements for the "confidentiality of proceedings". The Convention provides (so far as is relevant)-

3. A request for environmental information may be refused if: ….

(c) The request concerns material in the course of completion or concerns internal communications of public authorities **where such an exemption is provided for in national law or customary practice**, taking into account the public interest served by disclosure.

4. A request for environmental information may be refused if the disclosure would adversely affect:

(a) The confidentiality of the proceedings of public authorities, **where such confidentiality is provided for under national law**;

48. While some material may fall to be considered as relating to emissions since 12(5)(d) does not apply it is unnecessary to consider it further.

Consideration – the balance of public interest

49. The leading case on the evaluation of competing interests in environmental information is *Ofcom* in which CJEU which emphasised the range of interests served by disclosure:-

"Recital 1 to Directive 2003/4 sets out the various reasons for disclosure; they include, in particular, 'a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and … a better environment'.
27 It follows that the concept of 'public interest served by disclosure', referred to in the second sentence of the second subparagraph of Article 4(2) of that directive, must be regarded as an overarching concept covering more than one ground for the disclosure of environmental information.
28 It must accordingly be held that the second sentence of the second subparagraph of Article 4(2) is concerned with the weighing against each other of two overarching concepts, which means that the competent public authority may, when undertaking that exercise, evaluate cumulatively the grounds for refusal to disclose.
29 That view is not undermined by the emphasis placed in the second sentence of the second subparagraph of Article 4(2) on the duty to weigh the interests involved '[i]n every particular case'. Such emphasis is intended to stress that interests must be weighed, not on the basis of a general measure, adopted by the national legislature for example, but on the basis of an actual and specific examination of each situation brought before the competent authorities in connection with a request for access to environmental information made on the basis of Directive 2003/4"

50. The information relied on the conclusion in *Badger* "the factors to be taken into account in the balancing of the public interest [are] essentially the same whether either or both" of the Confidentiality of Proceedings Exception and the Internal Communications Exception applies."

51. It is clear from *Ofcom* that the tribunal should focus not on generalities but the specific circumstances of the case. The question of building new nuclear power stations is of major importance for society and the environment with its consequences impacting for many decades in terms of significantly reducing future CO2 emissions and having a major impact on the local environment and raising issues about possible releases of radioisotopes. As Mr Wagstaff stated, there have only been two other cases in the last 15 years. While substantial information about this case has been placed in the public domain by the release of the examining authority's report, how those complexities were considered with a view to coming to a determination and the handling of issues emerging after the report have not been disclosed, and would give a valuable insight into the management of such significant environmental issues.

52. The Appellant's argument that disclosure would function as advice to a future applicant for permission to build a power station on the site and that this would be to the detriment of other applicants (who had not seen it) is fundamentally flawed. The information would be available to all potential applicants as well as civil society including potential objectors and the public bodies who would have an interest (including the "activists or the media" who may attract the OFFICIAL SENSITIVE label.) Mr Wagstaff attempted to advance arguments both as to the general

implications of disclosing the advice and the site-specific issues *"Officials have to advise on multiple applications and similar issues may come up which need to be addressed in the submission. Officials need to be free to discuss the implications if such issues in planning applications without the concern that this advice could be made publicly available."* However transparency as to how similar issues will be treated is a fundamental aspect of the rule of law – as Ban Ki-Moon wrote in the preface to the Implementation Guide *"The Aarhus Convention's twin protections for environmental and human rights, and its focus on involving the public, provide a mechanism for holding governments to account in their efforts to address the multi-dimensional challenges facing our world today"*. The desire to avoid disclosure of the advice of civil servants advising the Secretary of State on what would have been one of the most consequential decisions he would take on the basis that in the future they may be inhibited and less candid than would otherwise be the case pays little regard to the sophistication and integrity of civil servants as set out in *Davies*. Although the Appellant's arguments are strongly advanced they are based on a very traditional UK approach to public administration, as *Bingham* (quoting Armatya Sen) wrote at the conclusion of his lectures *"we have to recognise that our global civilization is a world heritage- not just a collection of disparate local cultures"*.

53. As the decision was never taken, any future application will of necessity be different and its consideration will not be prejudiced by revealing how the intricacies of this application were unpicked. The significance of the issue raises the importance of transparency and the weight of public interest in transparency about this major issue far outweighs any residual risk from disclosure. The incremental impact of the application of the confidentiality of proceedings exception or indeed the unfinished document exception would be slight, the harms identified for all these exceptions picked out are closely related – the identified consequential harm of disclosure is little enhanced by salami slicing the reasoning.

Signed Hughes Date: 5 March 2024

Amended by the judge under the slip rule 25 April 2024