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**IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL  
(INFORMATION RIGHTS) UNDER SECTION 57 OF THE FREEDOM OF  
INFORMATION ACT 2000**

**Appeal No. EA/2011/0286 & 0287**

**BETWEEN:-**

**DEPARTMENT OF HEALTH**

**Appellant**

**and**

**THE INFORMATION COMMISSIONER**

**Respondent**

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**OPEN WITNESS STATEMENT OF UNA O'BRIEN**

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I, **UNA O'BRIEN**, of The Department of Health, 79 Whitehall, London SW1A 2NS, state as follows:

1. I am the Permanent Secretary at the Department of Health (the Department) and was appointed to this post in November 2010. As such I am the most senior civil servant in the Department of Health. Prior to that appointment, I held the role of Director General of Policy and Strategy at the Department from May 2007. I joined the Civil Service in 1990 and have held a wide range of roles with responsibility for policy design in health and social care. The majority of my experience is in health, although I have worked in two other Government departments including the Cabinet Office.
2. Between 1998 and 2001, I was Secretary to the Kennedy public inquiry into paediatric heart surgery in Bristol. Between 2002 and 2005, I was a Director at University College Hospital Foundation Trust where I led a major change project in support of closing old hospitals and opening a new one.

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3. On the basis of this experience and expertise, I believe that I am well placed to assist the Tribunal in understanding both the nature of policy formulation and risk management in Government and the likely reactions of those involved in compiling risk registers if they are routinely disclosed at an early stage in the process of policy formulation.
4. I have seen the statement prepared for this appeal by Lord O'Donnell and agree entirely with the general principles and the points he sets out. He makes them from a cross-Government perspective, of which he has unique insight. My perspective and my evidence are focussed on the Department.
5. I personally gave advice leading to the original decisions not to disclose the risk registers in this case. I believe that the fact that this matter was brought to me as Permanent Secretary demonstrates the importance which the Department attaches to the dangers associated with premature disclosure of the registers.
6. In making my decision to advise against disclosure, I gave very serious consideration to the public interest in favour of disclosure. In a nutshell, the case for disclosure was that the reform of the NHS along the lines proposed was obviously important and in part controversial. Those features are of course very common across Government: most, if not all, major reforms of public services and many other issues on which Government makes decisions are of considerable importance (almost by definition), and are often controversial. The fact that a policy is important and controversial provides no meaningful limit to the public interest arguments in favour of disclosure. I confirm that I weighed the case for disclosure with care. Having done so, I concluded that the public interest, not merely on balance but clearly, favoured not disclosing the information at that time.
7. I make this statement to indicate the detriment I am confident would have occurred to the Government's plans for the modernisation of the National

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Health Service (the NHS), the management of risk of this policy and, more generally, the management of risk in the Department if the information sought by the Additional Parties had been released at the time of the requests. I also address the wider implications for the Department, and consequently for effective policy formulation and development, if risk registers of the nature and type of those in question were to be disclosed at a similar stage in future. I begin by describing the Department's approach to transparency, risk management in Government, the NHS reforms and the risk registers themselves. I conclude by summarising the very considerable material which has already been placed in the public domain in relation to the Health and Social Care Bill (the Bill).

### Transparency and openness

8. I emphasise one matter at the very outset of my statement. I place great importance on openness and transparency in government. I fully recognise the importance of the proper, informed public debate in relation to all the Department's policies. My general starting point is that a document *should* be made public unless there is a good reason to withhold.
9. This is the approach that the Department takes to freedom of information (FOI) requests. In the first three quarters of 2011 (January to September – figures for the final quarter have not yet been compiled), the Department received 1,512 FOI requests, 1,511 of which were answered within the 20-day deadline for responding to requests for information or within a permitted extension. In 394 of the FOI requests received, the Department did not hold the information requested. Of the 1,118 requests where the Department held the information requested, we agreed to full disclosure of the information requested in 730 (65%) of the cases and partial disclosure in response to a further 143 cases (13%). Of the remaining 245 (22%) cases, 124

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were refused on the grounds of costs, 24 were provided with advice and assistance, three were considered vexatious, one was considered a repeat request and 93 were refused citing other reasons or exemptions.

10. During the calendar year of 2011, just 18 cases were referred to the Information Commissioner, of which five remain open, seven complaints were upheld, four Departmental decisions were upheld and two cases were resolved informally. Also during this period the Department has appealed only one other decision of the Information Commissioner and this was determined in the Department's favour. Indeed, since 2005, apart from the two instant cases, the Department has only appealed five other decisions (three of which related to one case and two of which were decided in the Department's favour). This demonstrates both the Department's commitment to transparency and the importance the Department attaches to overturning the Commissioner's decisions in the present case on the balance of the public interest.
11. The Department is at the forefront of initiatives on openness across Government. For example, it is possible to obtain from the Department's website weekly information about the number of people reporting flu-like symptoms, the uptake of flu vaccine and details of the pressures on urgent and emergency care. A copy of the Department's Business Plan, comprehensive data on Departmental spending, staffing and salaries and full details of all new Departmental contracts are published regularly on the Department's website. We also routinely publish summaries of the proceedings of Departmental Board meetings.
12. The Department will shortly publish on its website a scheme of publication for the Transition Programme for health and social care, including the NHS reforms. This sets out the Programme's approach to risk management and how risk is managed in projects of this type. It also sets out where

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information is available on the Transition Programme, including the very detailed January and September 2011 Impact Assessments that were published for the Bill and commitments to the publication of summary Board minutes (for the Boards described in paragraph 22), Project and Business Plans.

### **Risk management generally**

13. The statement of Lord O'Donnell describes the process by which project management and risk management were introduced into Government generally. As part of that process, the Department published its own risk policy and risk management guidance in January 2008, following the identification of risk management as an area for action in the 2007 Capability Review<sup>1</sup>. This sets the policy for the Department and is in line with Treasury guidance.
14. The key point to emphasise is that risk management is an integral part of the project management systems used to formulate and develop policy. Risk management cannot be separated from policy formulation and development and risk registers now are key documents in those risk management procedures.
15. I think it may be helpful to quote a section of a key reference guide to project management<sup>2</sup>:

"A project risk is a crisis that has not happened yet. Experienced project managers know that risk management is preferable to crisis management... Furthermore, hours spent

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<sup>1</sup> The Capability Review Programme was launched in 2005 with the aim of leading to a Civil Service which is better at delivering public services:

<http://www.civilservice.gov.uk/about/improving/capability>

<sup>2</sup> "The Definitive Guide To Project Management" by Nokes and Greenwood. Prentice Hall 2003, page 122.

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on risk management are much less stressful than the same number of hours spent on crisis management.”

16. I explain below my concern that disclosure of certain information requested during the current period of policy formulation and development could turn risk management into crisis management: I do not believe that the public interest in disclosure is worth taking the risk of such crisis management. As I explain below, I do not believe that the Commissioner’s decision sufficiently took into account the importance of the change to Government policy formulation which follows from this emphasis on risk management through risk registers.

### **The reform of the NHS**

17. Shortly after the formation of the coalition in May 2010, the White Paper “Equity and excellence: Liberating the NHS”<sup>3</sup> (the White Paper) set out the Government’s long-term vision for the commissioning and provision of healthcare services in England. It describes proposals which aim to put patients at the heart of everything the NHS does and to empower clinical staff to ensure continuous improvement of the quality of services. The Bill will provide the framework for taking the reforms forward. It is currently before Parliament. I deal with the stages in the formulation and development of this policy in the section of this statement headed “The timing of the requests”.
18. Successive Governments for the last twenty years (if not longer) have tried to reform the NHS in various ways, broadly within the same policy framework. This has most commonly been achieved through a rolling programme of changes, reforming different parts of the NHS individually

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<sup>3</sup> <http://www.dh.gov.uk/en/Healthcare/LiberatingtheNHS/index.htm>

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rather than all at once. For example, reform in the early part of the previous decade focused on changes to NHS providers through the introduction of NHS foundation trusts. The White Paper took the approach of setting out a comprehensive programme of reform; the Bill also reflects this. This has meant devising and implementing reforms *in parallel* for NHS commissioning, NHS providers, national arms-length bodies, public health, the role of local authorities, and to some extent, education and training, information, and research. This has required policy formulation to be an extensive ongoing process rather than an isolated task.

### The risk registers

19. It may assist if I explain something about how a risk register is produced in the Department. As the high-level objectives of a proposed reform become clear, the next step is to identify the risks and compile a risk register. This often takes place by "brainstorming" all the possible risks with a group of civil servants involved in, or familiar with, the proposals in question and listening to the views of stakeholders and officials at all levels. In doing this, it is important that all risks are identified, however outlandish or unlikely they are and whether or not they imply criticism of the proposals. The identification of these risks for the Transition Risk Register and Strategic Risk Register, involved considering the range of risk assessments and risk registers contained at different levels throughout the many arms of the Department and taking the most serious or high impact risks. The next step is to ascertain the likelihood of the risk occurring, on a scale of 1 to 5 (where 5 is the highest likelihood of the risk occurring), and the scale of impact if that risk occurred, again on a scale of 1 to 5 (where 5 is the highest impact). By taking the scores for likelihood and impact together, a "RAG"<sup>4</sup>

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<sup>4</sup> "RAG" stands for "Red, Amber, Green" and denotes the colours used in stratifying risks.

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rating is created. The RAG rating is a series of colours used to denote how serious a risk is: green, amber/green, amber, amber/red and red in order of severity. In line with other Government departments, the Department uses a grid system so that a common RAG rating is determined based on the likelihood and impact scores. The higher the likelihood and impact scores as judged at the time, the more serious the risk and the closer to "red" it is coloured.

20. The RAG rating is a simple way for those involved in formulating and developing policy to identify which are the most serious risks to the policy and act as a guide to prioritise where further work or action is needed. Finally, the actions to mitigate a risk (that is, reduce the likelihood and/or impact of it happening) are identified along with the risk owners (that is, those with responsibility for action). This information can then be used to advise Ministers to manage on-going policy development; manage the formulation and implementation of mitigating action; and identify whether the severity of a risk is increasing or decreasing and whether further action is required. Where the scope of a policy is wide-ranging, compiling and keeping this information up to date involves a wide spectrum of officials involved in the programme from across the Department.

### *The Transition Risk Register*

21. The Transition Risk Register (TRR) is a therefore key tool within the risk strategy implemented by the Department; its content drives the formulation and development of Government policy for the reform of the NHS. It is a means by which officials capture a "snap-shot" of the risks associated with the White Paper, at a given point in time, and through which they prioritise advice to Ministers on policy formulation and development. It identifies



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risks around, for example, the design of the reforms, the enabling legislation and financial issues.

22. At the time of the request (November 2010), the TRR was specifically used by the Transition Programme Board to formulate and develop policy for risk management in advising Ministers on the transition between the existing system and the reforms proposed by the Government. Since then, with the expansion of the Programme, the Transition Programme Board has been replaced by three new Boards that fulfil a similar function. The new Boards are the Department's Social Care and Public Health Board, the NHS Future System Executive and the Transition Board for Cross-Cutting Functions. All three of the new Boards feed into the Department's Executive Board, just as the Transition Programme Board used to.
23. The Department's Executive Board was and still is at the apex of the Transition Programme structure and includes myself, the NHS Chief Executive, the Chief Medical Officer, the Director General of Social Care, local Government and Care Partnerships, and the Director General of Finance, Policy and Strategy. The Transition Director attends the Executive Board for transition issues; other Directors General are invited as required. The Executive Board meets monthly and reports to the Departmental Board.
24. The Departmental Board is chaired by the Secretary of State and includes the full Ministerial team (the Ministers of State for Health and for Care Services and the two Parliamentary Under-Secretaries), five non-executive members and the five members of the Executive Board.<sup>5</sup>
25. The TRR therefore plays an important role in assisting the Department to advise Ministers of the risks of policy options as well as to ensure that

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<sup>5</sup> The executive members of the Departmental Board are: the Permanent Secretary, the NHS Chief Executive, the Chief Medical Officer, the Director General of Policy, Finance and Strategy, and the Director General of Social Care, Local Government and Care Partnerships.

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action is put in place to reduce the likelihood that risks could materialise or can be managed if they do. The TRR helps to shape the policy at an early stage as, for example, Ministers will wish to consider the assessment of risk when they analyse the different options for achieving their policy objectives, including options arising as a result of external and Parliamentary debate.

26. *[closed paragraph]*

### *The Strategic Risk Register*

27. The Strategic Risk Register (SRR) is used by the Departmental Board in its role of giving advice and support on the implications and effectiveness of policy and advising Ministers on developing their strategy for health and social care. The SRR aims to identify high-level, strategic risks which may have serious consequences for, for example, the health of the population, the quality of healthcare or the achievement of the Government's policy objectives. Its purpose is to assure the Departmental Board that risks are being identified and that the appropriate steps are being taken to mitigate those risks. All parts of the Department contribute towards the SRR.
28. As the Government's plans for reform of the NHS are a key priority for the Department, several of the risks identified in the SRR are drawn from the TRR and many of the risks on the SRR relate to transition more broadly. In general, the risks on the SRR are likely to be more pervasive and continue for a longer period than those on the TRR. There are some other differences between the format of the TRR and SRR: the TRR gives details of the official responsible for managing the risk and ensuring mitigating actions are implemented and the next significant date for review. This is because the TRR is used in a programme to manage the risks relating to transition policies and therefore includes information that allows risk managers in the

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transition programme to establish that the relevant action is being undertaken. The SRR does not contain this information as it is advice to the Board and the Board does not directly manage the risks listed in the register. The SRR is also used by the Department's Audit and Risk Committee, which provides advice on risk management, corporate governance and assurance arrangements.

29. Although the primary purpose of the risk registers is to identify risk, review of the SRR, in particular, can and does lead to requests for (or decisions to provide) advice on the formulation and development of policy to Ministers, as well as setting important context for, and significantly influencing the content of, such advice. I therefore do not agree with the distinction advanced by the Commissioner (DN1: 34) between risk registers and reports, emails or draft papers which reveal details of policy discussions. The TRR and SRR are fundamental parts of the mechanisms by which civil servants advise Ministers about policy formulation and development and managing the risks to those policies. Most notably, the SRR is a paper tabled at each formal Departmental Board meeting and therefore is seen and considered in its precise form as a risk register by Ministers (who are all members of the Departmental Board). As the SRR is advice to the Departmental Board on the key risks facing the Department in achieving its strategic objectives, all of the risks are there to support the development of advice to Ministers on what action is being undertaken to reduce the likelihood or impact of that risk. I note that the Commissioner has previously acknowledged that his approach to defining how Government policy is formulated was too narrow (Policy Lines To Take (LTT170)). I believe that the distinction he has drawn in the present case provides a further example in that the Commissioner has failed to acknowledge the growing emphasis on risk management and the importance of risk registers to that process.

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30. *[closed paragraph]*
31. I wish to emphasise three final characteristics which are shared by the risk registers in the present case and which I believe the Commissioner may not have appreciated. First, I accept that the legislation requires the Commissioner to distinguish between the formulation and development of policy on the one hand and later steps towards implementation on the other. However, this distinction is much less clear-cut than might be thought. For example, it is a fundamental part of policy formulation that civil servants will engage in implementation-testing of new measures at an early stage in their development. Indeed, this an important part of the function of risk registers. Although this process relates to implementation, it does not follow that the policy itself has by then been formulated. To be effective, implementation-testing must take place at a stage when the insights it reveals can be fed back into the process of policy formulation and development. Indeed this has been a crucial step forward in the approach to policy making in Whitehall across the last decade.
32. Secondly, and related to this point, I accept that some policy initiatives may properly be regarded as falling into discrete and sequential stages. However, I do not regard this analysis as helpful in relation to the present reforms and these risk registers. I say more about the reforms themselves below. As regards the registers, they are intended to provide "rolling" overviews of risk and are associated with the progress of the programme of reform as a whole.
33. Thirdly, the mitigation actions which are identified in the registers in this case are themselves examples of policy formulation at a very early stage. As I explained above, once the potential mitigating action has been identified, a process of decision-making is started which will lead

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ultimately to implementing that mitigation action or using the insights derived from it to re-formulate the original policy.

### **The timing of the requests**

34. The TRR was compiled on 1 November 2010 and the request for the TRR was made on 29 November 2010. This fell between the publication of the White Paper on 12 July 2010 on the one hand and, on the other, the Government publishing its response to consultation on 15 December 2010 and the first reading of the Bill in the House of Commons on 19 January 2011<sup>6</sup>. I emphasise that the TRR in November 2010 was the *very first version* of this document with the reform programme in its infancy and risk management arrangements still being identified and established.
35. The SRR was compiled on 25 February 2011, albeit one of a series of regular updates of the risk register for the Departmental Board. The request for the SRR was made on 28 February 2011, during the first Committee stage of the Bill in the House of Commons (8 February 2011 to 31 March 2011), but before the launch of the NHS Listening Exercise and the establishment of the NHS Future Forum on 6 April 2011<sup>7</sup> (both of which I describe below).
36. In my experience of working in government, for a policy that has the scope and breadth of the NHS reforms, it is rarely if ever the case that the period required for policy formulation and development ends with the publication of a White Paper or the introduction of a Bill to Parliament. Although considerable amounts of policy work must take place to reach these stages, the scope for the Parliamentary process to scrutinise, amend or reject legislation means that the period for policy formulation and development typically lasts beyond Royal Assent. There have been very extensive

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<sup>6</sup> <http://services.parliament.uk/bills/2010-11/healthandsocialcare.html>

<sup>7</sup> [http://www.dh.gov.uk/en/MediaCentre/DH\\_125865](http://www.dh.gov.uk/en/MediaCentre/DH_125865)

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amendments inserted in the Bill in the process of its passage through Parliament which have required much re-thinking and re-formulation of policy. For example, the proposed failure regime for providers was re-designed following the Committee stage in the House of Commons in September 2011 after a range of concerns had been raised as to its operation. The Government also brought forward amendments in October 2011 and February 2012 to include duties relating to education and training, in response to concerns raised in the House of Lords. Indeed, the Government itself has introduced a wide range of amendments since the Bill was first published. While many of these relate to technical changes, as the above examples demonstrate, a large number relate to important matters of policy.

37. There are other characteristics of the Bill and the reform of health and social care which have further prolonged the period of policy formulation.
38. First, the Bill is a framework Bill. The Bill confers over 130 powers on the Secretary of State to make secondary legislation, the vast majority of which must be exercised in order to implement the Bill and its policies. In general, the drafting of that secondary legislation is only starting now (in 2012). The discussion and drafting of statutory instruments is a further stage in policy formulation which involves consultation and Parliamentary approval. In addition, various existing powers under the National Health Service Act 2006 and other health-related legislation will be exercised in order to make the consequential changes necessary to implement the new system. The Department will be exercising these various powers over the period 2012 to 2014, and expects to make a significant number of statutory and other instruments including orders, regulations, directions and transfer schemes.
39. Extensive consultation and engagement with stakeholders is being or will be carried out in many areas and numerous Ministerial policy decisions on

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the secondary legislation and related guidance remain to be made. The formulation and development of the details of the overall policy within the secondary legislation cannot be separated from the policy development in respect of the Bill itself. It is all part of the overall transition programme to which the TRR relates. In addition to the Department, a number of public bodies, including in particular the proposed NHS Commissioning Board and Monitor, will exercise various powers conferred on them by the Bill.

40. Secondly, in response to the public debate triggered by the Bill, a Listening Exercise was announced in April 2011 alongside the establishment of the NHS Future Forum. The Forum is a group of independent experts chaired by the former President of the Royal College of GPs, Professor Stephen Field, established to listen to the views of patients, staff and stakeholders and make recommendations to the Government. This was a further crucial stage in the formulation of policy in relation to the Bill. Parliamentary progress of the Bill was postponed while this extensive consultation exercise was undertaken. The NHS Future Forum held 252 events over 8 weeks: it listened to over 8,000 people face to face, received 25,000 emails and over 3,000 responses were submitted via the relevant website. The Forum made a range of recommendations to Government in June 2011, of which all of the core recommendations were accepted. These were fed into the policy formulation process which therefore effectively began again in a number of significant areas. This entailed further amendments to the Bill, for example, to make explicit the Secretary of State's responsibility for promoting a comprehensive health service, to ensure that competition would work in patients' interests and to include duties on Commissioners to promote integration in the Bill (that is, joint working between different health providers or between health and social care providers).

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41. **Thirdly**, the Government's health reform (transition) programme is not just about the NHS itself, but also covers the structure of social care provision. The Department has lead responsibility for adult social care. The Government established the Commission on Funding of Care and Support (the Dilnot Commission) in July 2010 to make recommendations on how to achieve an affordable and sustainable funding system or systems for care and support for all adults in England and in all settings. The Dilnot Commission published its recommendations in July 2011. The Government also published "A vision for adult social care: Capable communities and active citizens" in November 2010. This Green Paper set out how the Government wishes to see social care services delivered for people and set a new direction: placing personalised services and outcomes centre-stage. Following these publications, together with the Law Commission's report on social care law published in May 2011, the Department has been developing a White Paper on reforming adult social care services. This is due, together with a response to the Dilnot Commission's report, in spring 2012. As I hope this illustration makes clear, not all of the reforms are progressing at the same rate.
42. **Fourthly**, a number of other consultations remain on-going. For example, a consultation on the membership of Healthwatch England was launched on 26 January 2012 (to run to 2 March 2012). Healthwatch England will be a national body that enables the collective views of the people who use health or social care services and of other members of the public on their needs for and experiences of health and social care services to be heard. This consultation invites views on the number of members, suitability for membership, the process for appointing members and the period of time a member should be appointed. The outcome of this consultation will be taken into account in relation to the regulations on Healthwatch England membership to be made once the Bill is in place.



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43. There must always come a point where the period of policy formulation and development ends and a programme proceeds to full implementation. However, as the above description demonstrates, the breadth of the reforms proposed and other characteristics of the NHS reforms mean that the end of the process of policy formulation was very distant at the date of the requests and, in many areas, remains some distance into the future, even now.

### **The impact on the public interest of disclosure of the risk registers at the dates requested**

44. Lord O'Donnell identifies a number of characteristics of risk registers which strongly militate against their disclosure in the early stages of policy formulation. I endorse these points as applicable to the TRR and the SRR. Lord O'Donnell also identifies a number of detriments to the public interest which may flow from the premature disclosure of information on risk registers. Again, in my judgment, these detriments to the public interest apply with full force to the contents of the TRR and the SRR.
45. The first detriment is the risk to candour. Two characteristics of the risk registers are crucial to understanding the nature of this detriment to the public interest. The first relates to the content and mode of expression of the registers. The registers summarise the results of civil servants "thinking the unthinkable" and imagining the worst reasonable case associated with a policy proposal. Those involved in potential areas of risk are encouraged to be as open as possible about the potential risks and use forceful and cogent language to present them. The use of direct language is essential to capture the attention of Ministers and senior Departmental executives. In order to preserve the comprehensiveness and succinctness of the registers, the entries are expressed in short, graphic phrases without the usual caveats

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and qualifications that one associates with more traditional advice to Ministers. The registers also rely on the use of colour-coding.

46. The second characteristic relates to the sources of information on the registers. Officials from across the Department are involved in considering and collating information for risk management, which may later feed through into the SRR and TRR. Those who may identify the risks are not the same individuals who would be responsible for owning, managing or mitigating those risks. The involvement of this range of individuals from across the Department is essential if the registers are to contain a holistic assessment of risk.
47. Such a broad range of civil servants feel able to express themselves so forcefully in the TRR and the SRR because they have been confident that any entries which would be potentially damaging to the public interest if disclosed, will remain confidential whilst the issues remain live and sensitive. This confidence has been based on the fact that (as far as we have been able to discover) all previous freedom of information requests for risk registers have been refused by the Department. Apart from the example I give below in relation to Heathrow airport, I am aware of no other occasion on which a departmental risk register has been released either voluntarily or in response to an FOI request.
48. If this confidence is dented or destroyed, what will or is likely to occur? That is a matter of judgement. Lord O'Donnell's judgement from the broader governmental perspective is based on the widest experience of Government at the highest level. My judgement (which I understand he shares) is that, first, it is inevitable that the wide range of people who are necessarily and properly involved in the risk management procedures that feed into the preparation of these registers will tend no longer to express themselves in the same way. The registers will have to be prepared on the

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basis that they are hereafter to be treated as in effect "external". In my judgment, civil servants would not want to jeopardise a project by using language that would cause sensationalism or political embarrassment if exposed to the public gaze. The Civil Service Code requires civil servants to retain the confidence of their Minister. They would chose different and less powerful language, where the meaning is likely to be less obvious to those reading the register. They would also be more reluctant to use the higher RAG ratings for such risks as they did identify.

49. It can be seen that in the registers the risks are often expressed in terms of failure to meet our objectives. That is, individuals and teams are asked to set out what failure on their part would look like. This is not easy for people to do as they are committed to success and have a general bias towards optimism. This optimism bias has been identified by the HM Treasury<sup>8</sup>, and academic analysis, as one of the reasons that projects fail. It is clearly more difficult for people openly to contemplate failure if they know or fear that this information will quickly enter the public domain and potentially be used against the Department *before* they have identified or taken the action needed to prevent failure.
50. Worse, there is a real likelihood that other, even more concerning, consequences would ensue. Those preparing the registers might choose to cover only part of the risk analysis in writing – dealing with risk analyses that would be controversial if disclosed at a sensitive time orally. Or there might develop a "code" for enunciating risks which may or may not be discerned by more senior officials. Or disclosure of the more serious risks might be restricted to a more limited number of officials.

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<sup>8</sup> The Green Book: HM Treasury guidance for Central Government, sets out a framework for the appraisal and evaluation of all policies, programmes and projects. It recommends (page 85) making specific adjustments for optimism bias in appraisals and estimates.

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51. Any reduction in the quality of the advice given to Ministers at this early stage would be thoroughly detrimental to the public interest because the identification of risk through the registers must be a fundamental and integral part of policy formulation and development. If risks are less likely to come to the attention of Ministers and senior officials, the potential damage to the public interest is immense. The whole point of modern risk management in Government is to minimise unforeseen risk. Unforeseen risks have the potential to cause harm to the public and mitigating their impact after they have arisen leads to crisis management and much increased expense to the public purse. The importance of full candour and the broadest dissemination of risk within the Department is particularly acute where the proposals concern public health, where the reforms are as broad as those in the Bill and where policy formulation is at an early stage.
52. I am aware that the Information Commissioner considers that disclosure will not "affect the detail and frankness of future risk registers of this nature" and that "the expectation that risk registers would be completed with full frankness would clearly remain a core governance requirement" (DN1: 34). I acknowledge, of course, that the full and thorough completion of risk registers remains a core governance requirement. However, the conclusion that disclosure in this case at the date of the requests would not affect the detail and frankness of future registers (both directly and immediately in respect the transition programme but also more widely across government) seems to me to be untenable for all the reasons set out above. In my judgement, there would undoubtedly be a change of behaviour and approach. Moreover, the effect on civil servants would be insidious and it would not be easy to identify when and where the degrading of the risk management processes was occurring. But I believe that these effects would have occurred very quickly in the transition

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programme had disclosure taken place at the early stages when the request was made.

53. This is not a question of "courage". Officials are aware that much of what they write will ultimately be open to disclosure upon request, and this is a necessary and useful part of open and transparent government. However, for particular documents, such as the risk registers, during the period of policy formulation and development, officials must be confident that they can use the language and directness necessary for the intended purpose, without having constantly to second guess whether the information will be released while it remains sensitive.
54. This is not of course to say that the information may not come to be released as time passes and, more importantly, the sensitivity surrounding the issues diminishes. There is all the difference in the world between releasing information that is effectively historical and releasing information and analyses prepared in a particular format and for one specific purpose at a time when Ministers are still considering advice on important aspects of policy development.
55. The second detriment is that the fact of disclosing the risk may well make it more likely to happen. For example ... *[examples given from closed documents]*
56. The third detriment is that policy makers are distracted from their task of policy formulation and development by the need to crisis-manage a premature disclosure. This cannot be underestimated. It is not solely a matter of the Department's press office providing an explanation. It is highly unlikely in my view that any attempts to provide an explanation would in fact avoid the sort of coverage that would be likely to fuel public and political controversy. But attempting to manage that anticipated controversy would in any event be highly distracting and diverting of

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precious time and effort from officials at all levels. We would have to handle the reaction to the risk without the risk having materialised and not yet having had time to put the mitigating action in place.

57. From my experience of high profile matters which emerge at short notice, I can testify to the demands on time and resource that are created. Officials in the relevant policy areas (and lawyers as appropriate) would need to set aside other essential and pressing work to prepare briefings on the likely impact of disclosure and options for next steps. "Lines to take" and a media-handling strategy would need to be discussed, agreed and signed off by Ministers. Ministers' diaries may also be disrupted, cancelling planned meetings, events and other important commitments, to attend rapidly-convened meetings to discuss the handling of the disclosure in a high-profile policy area of continuing sensitivity. The media might press for interviews with Ministers and/or senior officials, which require careful preparation. Stakeholder organisations, themselves also subject to urgent media enquiries, would need to be contacted and informed of the disclosure. Consideration would need to be given to any larger groups of people, including staff, affected by the disclosure (which it may not always be possible to contact directly) to offer any advice and support that may be necessary. In other words, there would need to be very considerable Departmental effort devoted to dealing with the results of disclosure at a time when those efforts most need to be concentrated on formulating and developing the policy and managing the risks so as to best advise Ministers, serve the interests of the public and deliver the best possible health and care service for patients and service users.

58. The fourth detriment is that rather than enhance and inform public debate, premature disclosure has a distorting effect focusing solely on the most serious risks to the policy which are contained in the registers, rather than a

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proper consideration of the policy and a balancing of the risks and benefits. What is not, by definition, part of a risk register is a list of the opportunities and benefits likely to flow from a policy. This is correct because the whole point of risk management is to counter the natural optimism bias that people working on projects often convey. However, the effect is that risk registers are inevitably one-sided. For example ... [*examples given from closed documents*]

59. It is likely that these descriptions of risks would have been interpreted without reference to the mitigation plans that were in place. As such, premature release of the contents of the register would present a wholly misleading picture of the likelihood and potential impact of a particular risk materialising. It is not difficult to imagine the sort of sensational headlines and political capital to be made of the presentation of these risks in this way as the Bill progresses through Parliament.
60. It could also easily be anticipated that the press coverage would either describe or convey the impression of the risk registers as being stand alone advice to Ministers from officials on the risks of the policy that Ministers then went on to ignore - which would be a misrepresentation of the status of registers as risk management tools that are fully integrated into the process of formulation and development of policy.
61. As I described above, the purpose of the registers is to ensure proper risk management. The identification of risk on the register may therefore lead Ministers to re-formulate their policy (which, in turn, would lead to amendments to future versions of the risk register). The risk registers therefore provide a "snap-shot" view of the perception of risk at that given moment. The SRR and TRR are living documents which are regularly reviewed and revised over time. New risks may be identified as new information becomes available or as policy changes. Equally, a risk

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assessed as being highly likely to occur and having a serious impact during the process of policy formulation and development may, when re-assessed at a later stage of policy development, no longer be considered as presenting a problem, partly as a result of appropriate management and mitigation action. New information may come to light or initial mitigating action may not be sufficient, which means risks can remain or re-appear on the register. The TRR and the SRR are also compilations of the most serious risks which have been identified by a range of officials in different parts of the Department. They may therefore give the (misleading) impression to those not familiar with them that all the risks identified in relation to the Bill are highly likely or very serious (or both) rather than giving a balanced overall assessment of risk.

62. As the Court will be aware, the passage of the Bill has been contentious. It would be all too easy to claim that, by the Department's own assessment, there were many risks. Our explanations, that the likelihood of the risks occurring is in truth changing all the time because appropriate mitigating action will have been taken, are very likely to be swept aside in the debate that would take place. It would then be difficult, perhaps impossible, to return to constructive discussion in such a situation, especially in view of the authoritative source of the information.
63. The Commissioner appears to regard the fact that the Bill has been contentious as an additional reason for disclosure of the risk registers (DN1: 27). I do not understand this reasoning on two grounds. First, I understood that the balancing of the public interest arguments for and against disclosure depended on the specific contents of the information requested and not on generalised statements about the nature of the policy proposal itself. Secondly, I do not accept the equation of contentiousness and greater openness. Where the impact of an area of policy is as significant as in this



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case, I consider that only adds to the need to protect the policy-making process and allow fearless discussion of potential risks. In my view, there is a much more significant public interest argument in ensuring the effective and efficient formulation and development of policy and the management of change in the health and social care system than in providing disclosure at the stage the registers were requested.

64. I have set out in the attached closed Schedule the risks in the TRR and the SRR and my general judgement as to the principal reasons (out of the four main detriments that I have described) for withholding the information in relation to each entry. I should add that I believe that the risk of candour applies in relation to most entries.

### **Information disclosed to inform public debate**

65. Overall, I believe that we have operated a principle of responsible transparency in managing policy formulation and development in relation to the Bill. In Parliament and in the media there has been, and continues to be, very full scrutiny of the plans as the Bill works its way through both Houses. The Bill has been in Commons Committee for 40 sessions, longer than any Bill spent in Commons Committee in the period 1997 to 2010. Prior to Lords Report stage, the Bill had already been scrutinized by the House of Lords for over 100 hours. As described earlier in my statement, this public scrutiny has included Ministers pausing proceedings to undertake the Listening Exercise, which gave the health sector and individual members of the public the chance to comment further on proposals, and which resulted in material changes to the formulation and development of policy. Now a further set of changes is to be introduced following thorough scrutiny in Lords Committee.

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66. A vast amount of information has been placed in the public domain, as indicated by the following examples, many of which contain material identifying risks and proposed mitigating action:
- Publication of Impact Assessments accompanying the Health and Social Care Bill in January 2011 (and revised in September that year);
  - Publication of the Command Paper "Liberating the NHS: Legislative framework and next steps" in December 2010;
  - The House of Commons Public Accounts Committee's Health Landscape Report in January 2011;
  - The NHS Operating Frameworks which were issued by the Department in December 2010 and December 2011;
  - The letter sent by David Nicholson to the NHS on 15 December 2010; and
  - Oral and written evidence given to the Health Select Committee and Public Accounts Committee.
67. Many months after the date of the requests, Earl Howe was able to go further in response to requests from colleagues in the House of Lords, making a statement on 28 November 2011 which provided a list of nine areas within which the risks in the TRR fell.
68. While a number of the Department's Arm's Length Bodies (ALBs) hold and routinely publish risk registers, these should be distinguished from the TRR and the SRR as the core purpose of these bodies is to focus on operational issues and the efficient discharge of their designated functions. This is fundamentally different to the role of the TRR and SRR in the process of formulating and developing policy. I believe the issues I have outlined above are therefore much less likely to apply to these ALBs. It should also

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be noted that if an organisation routinely publishes its risk registers then it would be reasonable to assume that its officials have worded their risks for inclusion in the register in the knowledge that the wording would be likely to form part of a document that would be placed in the public domain. As set out above, this is not the case in respect of the TRR or SRR.

69. I consider it highly relevant that I am aware of no other department of Government which has disclosed its strategic or policy-related risk registers, whether voluntarily or in response to an FOI request, despite careful enquiry across government. I am aware of only one example of a department releasing a risk register at all. That example is the risk register relating to the expansion of Heathrow airport (referred to by the Commissioner at DN1: 23). I do not regard this as providing a useful parallel to the present case for a number of reasons. First, I understand that the Department of Transport in fact decided to disclose a redacted version of the risk register before the Commissioner made a decision (and therefore the complaint was resolved informally). More importantly and as I have repeatedly sought to emphasise above, the decision whether to disclose information on a risk register must depend on the information contained in the register, the nature of the policy and the timing of the request. The Heathrow expansion policy concerned a single narrow issue (unlike the reform of health and social care provision). Moreover, by the time it was disclosed, the risks identified in the Heathrow register had already been the subject of public debate, and policy formulation had been largely finalised.
70. Finally, we invite the Tribunal to note the names of the civil servants who are below Senior Civil Service Deputy Director level, whose names should in any event be redacted: ...*[names given in closed documents]*

**Conclusion**

71. The Department of Health is fully committed to transparency and openness. However, openness is not the only element of good government; good public administration also matters to tax-payers. It is in the public interest that departments are able to manage large, complex and difficult policy programmes. This requires that those departments should have in place robust mechanisms for the identification of risk and the formulation of measures to mitigate such risk and arrangements to engage Ministers in decisions about risk and risk mitigation. For the reasons I have explained above, the identification and rating of risk in the early stages of policy formulation must be shielded from public scrutiny if it is to be effective. This is fundamental to the meaning of the safe space which is required for policy formulation and development. I firmly believe that in the present case, the public interest was balanced in favour of non-disclosure of the risk registers at the time of the requests.

**Statement of Truth**

I believe that the facts stated in this witness statement are true.



Signed:

Dated: 15 February 2012