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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

OPEN SUPPLEMENTARY
WITNESS STATEMENT OF UNA O'BRIEN

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

1. I make this statement to supplement my first statement dated 15 February 2012. Its purpose is to provide a response to issues raised by John Healey in his statement dated 11 February 2012 and to provide additional detail on some of the points I made in my first statement.
2. At paragraph 23 of his witness statement, John Healey states, in relation to Earl Howe having confirmed the nature of the risk register information to the House of Lords, that none of that important information has been made available elsewhere by the Government.
3. At paragraph 24 of his witness statement, John Healey states that risk registers are tools for managing delivery and not managing policy.

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4. I address these matters in turn below.

Risks in the public domain

5. At paragraph 66 of my first witness statement I set out details of published documents which included information on the risks involved with the Transition Programme. Copies of those documents, together with other Government published documents, have been provided in a supplementary bundle. I have indicated, in the Annex to this statement, where in those documents reference is made to issues related to the risks which were identified at each entry of the TRR and the SRR. These pointers are not intended to be an exhaustive analysis of what is in the public domain, but simply to indicate to the Tribunal that a considerable amount of material relating to the risks in the two registers has been made public.

Transition Risk Register: policy formulation and development at the time of the requests

6. At paragraphs 34 and 35 of my first statement, I set out the timing of the requests for the two risk registers in relation to the publication of the White Paper and the First Reading of the Bill. As I understand the timing of the requests to be of paramount importance¹, I feel it would be helpful to describe in a little more detail the position reached in relation to policy formulation and development of the Transition Programme at the time the requests were made. I think the following matters demonstrate how early in the process we were at the time of the request for the TRR.
7. First, it should be noted that The White Paper, "Equity and Excellence: Liberating the NHS", was published on 12 July 2010, just 2 months after

¹ ICO LTT43 "Guiding principles in relation to s35(1)(a) & Reg 12(4)(e) public interest" at section (iv) (timing).

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the General Election in May 2010. At the time of the White Paper's publication, policy was in the very early stages of development. As a result, the White Paper described the forthcoming Bill as a framework, indicating that "Much work now needs to be undertaken...to flesh out the policy details" (paragraph 6.2, on page 48 of the White Paper). Many of the matters described in the White Paper set out the Government's objectives for the NHS, rather than formulated policy.

8. At the launch, Andrew Lansley said:

"Today's White Paper is the start of an extensive consultation that will take place over the coming weeks. The Department of Health will shortly be publishing a number of consultation documents to seek views on more detailed proposals."

9. On 19 July, the first of four associated White Paper consultations was launched: "Transparency in outcomes: a framework for the NHS". Two other consultations were launched on 22 July: "Liberating the NHS: Increasing Democratic Legitimacy in Health", and "Liberating the NHS: Commissioning for Patients". The fourth was launched on 26 July: "Liberating the NHS: regulating healthcare providers". The deadline for responding to all the consultations (and to the White Paper) was 11 October 2010.
10. Consultation responses were therefore considered during October and November and, during November and December, we explored key questions about how policy might be formulated to deliver the aspirations and policy goals set out in the White Paper - with resultant advice to Ministers. The outcome was the Command Paper, "Liberating the NHS: Legislative Framework and Next Steps", published as the Government's response to the White Paper consultations, on 15 December. The response involved substantial modifications to the policy position as originally set out in the White Paper (pages 8-9).

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11. Secondly, a further series of consultations was being set up in the Autumn of 2010. On 18 October 2010, two consultations, "Liberating the NHS: Greater choice and control" and "Liberating the NHS: An Information Revolution", were launched with a view to having the responses feed into policy development. Both these consultations ran until 14 January 2011. (The Government published its two responses to the first of those consultations on 19 July and 11 October 2011 and published a summary of the responses received to the second consultation on 18 August 2011).
12. Thirdly, the White Paper (page 51) assumed that the Health and Social Care Bill would be introduced in Parliament in Autumn 2010. This did not prove possible as too many matters of policy remained to be decided. Instructions to Parliamentary Counsel (responsible for the legislative drafting) were first sent by Departmental lawyers on some aspects of the Bill in July 2010. Further instructions continued to be sent for the next 5 or 6 months and Departmental lawyers and Parliamentary Counsel were still working on versions of clauses of the Bill in late December 2010, just before the Bill's publication and introduction in the Commons in January 2011. It is normal that policy is developed as clauses are drafted and sent from Parliamentary Counsel to Departmental lawyers and officials for comment. However in this case, it is fair to say that because of both the speed with which the Bill followed the White Paper and the Bill's size, policy was very much being further developed and refined during iterations between Parliamentary Counsel and Departmental lawyers and officials.
13. Fourthly, I wish to draw the Tribunal's attention the contents of the TRR which demonstrate that the entries on the register are about formulating policy to address the risks presented by the overall programme of reform. For example ... *[examples given from closed documents]*

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Strategic Risk Register: policy formulation and development at the time of the requests

14. I have described above how policy formulation and development was continuing as regards the Transition Programme risks. Many of the risks identified on the TRR also appear on the SRR and the considerations I refer to above are therefore equally applicable to them (subject to the somewhat later timing of the request). As regards those risks which were not part of the Transition Programme, again, policy was still at the early stages of formulation. The obvious example of this is social care. On 20 July 2010, the Commission on Funding of Care and Support ("Dilnot Commission") was established to review the funding system for social care and support in England, following a commitment in the Coalition Agreement; the Dilnot Commission's call for evidence began on 1 December 2010 and ended on 28 January 2011. (The call for evidence invited views on what a future funding system for care and support should look like). The Dilnot Commission's Report was not published until 20 June 2011. It set out the Commission's findings and presented a number of recommendations for changes to the system of funding. The Government's response is not due to be published until later in 2012 and is still being formulated.
15. As regards wider reform of social care, on 16 November 2010, "A Vision for adult social care: Capable communities and active citizens" was published. This set out the Government's vision for social care, and was the first step in developing policy for the anticipated (not, as at March 2012, yet published) White Paper. The vision paper was followed by "Caring for our Future: Shared ambitions for care and support", an engagement exercise that was launched on 15 September 2011 and ran

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until early December 2011. This brought together recommendations from the Law Commission and the Dilnot Commission, together with the "Vision for adult social care", to discuss with stakeholders what the priorities for reform should be. On 30 November 2010, "Healthy Lives, Healthy People: Our strategy for public health in England" was published: the public health White Paper. Consultation on this White Paper ended on 31 March 2011 and the Government's response was published on 27 July 2011.

16. The SRR was created as a means of providing advice to the Departmental Board, including Ministers, about the risks facing the Department in order that policy could be formulated or amended to address them. Some examples on the SRR include ... *[examples given from closed documents]*

Statement of Truth

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



Signed:

Dated: 1 March 2012

Schedule of references to risk information in the public domain

Transition Risk Register		
ID	Risk Description	Where covered in published document
		<ul style="list-style-type: none"> • Letter from Earl Howe to all Peers: Pgl
		<ul style="list-style-type: none"> •
		<ul style="list-style-type: none"> • Impact assessment: E142 pg147
		<ul style="list-style-type: none"> • Operating Framework for the NHS in England 2011/12: para 1.16 page 8 • Impact Assessment: A84 pg19, E140 pg 146 • CPA NHS Landscape Review : Q32 pg Ev4 • Health Committee Public Expenditure Second Report of Session 2010/11: paras 67-70 pg 22
		<ul style="list-style-type: none"> • This risk is the subject of general references in many debates concerning the ability of the DH and NHS to deliver this sizable change. • The August Transition Programme Board Summary Minutes, posted on the DH site states: "There was discussion around proposed timescales, workstream capacity / capability issues, and progress on organisational design".
		<ul style="list-style-type: none"> • Combined Impact Assessments: B88 pg50

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		<ul style="list-style-type: none"> • Sir David Nicholson's letter: pg3-4
		<ul style="list-style-type: none"> • Sir David Nicholson's letter: pg12 • Combined Impact Assessments: F52 pg 74
		<ul style="list-style-type: none"> • Combined Impact Assessments: paras A61-76 pages 16 -18, paras C81-C82 pg89, para E138-139 pg146 • CPA NHS Landscape Review: Q94 pg Ev10
		<ul style="list-style-type: none"> • Combined Impact Assessment: para A97-98 pg21, E141 pg146 • CPA NHS Landscape Review : Q26 pg Ev3
		<ul style="list-style-type: none"> • Combined Impact Assessment: para E138-140 pg146 • CPA NHS Landscape Review: Q94 pg Ev10
		<ul style="list-style-type: none"> • Government's response to the NHS Future Forum: pg 2
		<ul style="list-style-type: none"> • Combined Impact Assessments: E142 pg 147
		<ul style="list-style-type: none"> • Combined Impact Assessments: paras A78-83 pgs 18-19 • Sir David Nicholson's letter: pgs 3-4 • NHS Operating Framework 2011/12: para 5.10 pg 48
		<ul style="list-style-type: none"> • Operating Framework 2011/12 para 2.24 pg18
		<ul style="list-style-type: none"> • Combined Impact Assessments: para A30 pg 11, para A88 pg19, paras B22-23 pg38
		<ul style="list-style-type: none"> • Evidence to the Health Select Committee (CPA NHS landscape Review) covers many of the issues around GP commissioning.
		<ul style="list-style-type: none"> • Combined Impact Assessments: paras A78-79 pg 18

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		<ul style="list-style-type: none"> • Operating Framework 2011/12 paras 2.1 -2.5 pgs 11-12
		<ul style="list-style-type: none"> • CPA NHS Landscape Review. Evidence to the Select Committee goes into some detail on the percentage reductions in staff numbers and costs of redundancy. It also covers the achievement of the planned Efficiency Savings.
		<ul style="list-style-type: none"> • Human Resources Transition Framework: para 2.1 pg 4, para 2.4 pg 5 • CPA NHS Landscape Review: Q27 pg Ev 3 • Sir David Nicholson's letter: Annex para 6.1 pg8
		<ul style="list-style-type: none"> • Government's response to the NHS Future Forum: pg 6 • CPA NHS Landscape Review: Pg 8, Q211 pg Ev24, Q223 pg Ev26 • Liberating the NHS: paras 1.19 – 1.25 pgs12-14
		<ul style="list-style-type: none"> • Combined Impact Assessments: para D120 pg112 • Liberating the NHS. Legislative framework and next steps: paras 1.8-1.12 pg7
		<ul style="list-style-type: none"> • CPA NHS Landscape Review: Evidence to the Select Committee sets out the accountability structures including for Monitor and the Department.
		<ul style="list-style-type: none"> •
<p>Strategic Risk Register</p>		
<u>ID</u>	<u>Risk Description</u>	Where covered in published document
		<ul style="list-style-type: none"> •

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		<ul style="list-style-type: none"> • Operating Framework 2011/12: paras 1.19-1.20 pg 9
		<ul style="list-style-type: none"> • Operating Framework for the NHS in England 2011/12: para 1.16 page 8 • Impact Assessment: A84 pg19, E140 pg 146 • CPA NHS Landscape Review : Q32 pg Ev4 • Health Committee Public Expenditure Second Report of Session 2010/11: paras 67-70 pg 22
		<ul style="list-style-type: none"> • A Vision for Adult Social Care: paras 7.2-7.3 pg 27 • Government response to Health Committee Public Expenditure Second Report of Session 2010/11: paras 3 -25 pgs 2-7
		<ul style="list-style-type: none"> • Press release of 4 July 2011 stated: "The Government will consider each recommendation carefully to test whether it meets the wider objectives for reform, including increased personalisation, choice and quality, closer integration of health and social care and greater prevention and early intervention. The Commission recognises that implementing its reforms would have significant costs, which the Government will need to consider against other calls on constrained resources."
		<ul style="list-style-type: none"> •
		<ul style="list-style-type: none"> • Combined Impact Assessment: para E138-140 pg146 • CPA NHS Landscape Review: Q94 pg Ev10
		<ul style="list-style-type: none"> • Sir David Nicholson's letter: pg1 • Combined Impact Assessments: F52 pg 74
		<ul style="list-style-type: none"> • Operating Framework 2011/12 paras 2.1 -2.5 pgs 11-12
		<ul style="list-style-type: none"> • Government's response to the NHS Future Forum: pg 2

OPEN

		<ul style="list-style-type: none">• Combined Impact Assessments: paras A78-79 pg 18
		<ul style="list-style-type: none">• Combined Impact Assessments: paras A78-83 pgs 18-19• Developing Clinical Commissioning Groups: Towards Authorisation:• NHS Operating Framework 2011/12: para 5.10 pg 48
		<ul style="list-style-type: none">• Combined Impact Assessment: para A97-98 pg21, E141 pg 146• CPA NHS Landscape Review : Q26 pg Ev3
		<ul style="list-style-type: none">•
		<ul style="list-style-type: none">• Letter from Earl Howe to all Peers: Pg1

