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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 WITNESS STATEMENT OF LORD O'DONNELL

I, LORD O'DONNELL, of the House of Lords, London, SW1A OPW, state as follows.

1. I retired from the Civil Service on 31 December 2011 after 32 years of service. I was Secretary of the Cabinet and Head of the Home Civil Service between 2005 and 2011. Before that, I was Permanent Secretary to HM Treasury between 2002 and 2005. Between 1979 and 2002, I held various posts in HM Treasury and at the British Embassy in Washington. I was also Head of the Government Economic Service from 1998 to 2003.
2. I make this statement to explain the relationship between risk registers and policy formulation. I begin by describing the nature of risk

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management in Government and some of the background to the current Freedom of Information legislation.

3. I have read the draft statement of Una O'Brien and fully endorse the views she sets out.

Risk management in Government

4. Risk management is at the heart of Government across all Departments. Risk registers need to be seen in the broader context of the use of project management practices across government in all stages of policy development from formulation to implementation. This is a recent phenomenon: ten or fifteen years ago, the concept of project management was simply not used. At the turn of the century, a number of reports¹ drove forward the risk management agenda across government. In 2001, the Treasury produced "Management of Risk" ("the Orange Book"), following which all government bodies now have risk management processes in place. At the same time, the Cabinet Office (in the form of the Office of Government Commerce) has been facilitating the roll out of professional project management techniques.
5. All Government Departments now use PRINCE2 for project management. PRINCE2 stands for Projects IN Controlled Environments and is a registered trade mark of the Cabinet Office. PRINCE2 is in the public domain and is widely used in the public and private sectors in the United Kingdom and overseas.

¹ The National Audit Office's 2000 Report, "Supporting innovation - managing risk in government departments" and the Strategy Unit 2002 Report, "Risk - improving government's capacity to handle risk and uncertainty".

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6. It is extremely important that there are common mechanisms used to assess risk across Government for a number of reasons. First, the information which goes into a risk register may come from a number of sources outside the Department responsible for the policy and there needs to be a common language and rating system to ensure broad understanding of the level of risk. Secondly, information on risks identified that have implications for other departments are generally shared to assist planning and risk mitigation across Government, (although some information is so sensitive that it is not shared widely within a department, let alone more broadly, as to do so could lead to serious harm by, for example, identifying vulnerabilities or commercially sensitive information).
7. PRINCE2 defines risk very broadly as any "uncertainty of outcome". It thus encourages civil servants across all areas of Government to think creatively about risk and to identify any uncertainty which may arise in the future (albeit for an individual register, judgement is required to ensure the risks included are kept to a manageable number).
8. Under PRINCE2, risk analysis and management fall into six stages:
 - (i) identifying the risk;
 - (ii) evaluating the impact of the risk occurring on the project. This involves two factors: the likelihood of the risk materialising and the impact in terms of cost, time, quality and so on if it does materialise;

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(iii) considering responses to the risk which may include:

- prevention: adopting a different course to avoid the risk
- reduction: taking steps to reduce the likelihood or the impact of the risk
- transference: transferring the risk to a third-party where appropriate (for example, through taking out insurance against the risk)
- acceptance: accepting a risk (for example, if nothing can be done to avoid it)
- contingency: identifying a series of actions to be performed if and when a risk materialises;

(iv) selecting a response to the particular risk from the options identified at (iii) above;

(v) identifying the resources which are required to perform the selected counter-measures; and

(vi) monitoring the counter-measures to ensure that they are effective. If they prove to be ineffective, the risk analysis will have to be performed again.

9. In relation to policy formulation/development, risk management additionally requires that the objectives of the policy be identified at the outset of the process and that risks are regularly reviewed. The regular reviews of risk are a crucial part of risk management in Government and of the purpose of risk registers. Those civil servants

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identified as responsible officers are expected to keep the risk under review and feed into the relevant risk register when it is updated.

10. Risk registers are the principal tools of risk management at Departmental Board and Audit and Risk Committee meetings. The role of Departmental Boards is to advise Ministers on the implications and effectiveness of policy and the delivery of their strategy and objectives. Risk registers should be used by Departmental Boards to identify high-level, strategic risks which may impact on the Government's policy objectives and assure the Board that appropriate steps are being taken to mitigate those risks. Although the primary purpose of risk registers is to identify risk, review may also initiate requests for, or decisions to provide, advice on the formulation and development of policy to Ministers. Risk registers also provide the context for such advice as well as influencing its content.
11. Risk registers are therefore the most important tool used by and across Departments to identify and assess risk in relation to policy formulation.

Open Government and its limits

12. Openness is an intrinsic part of good government, but it is equally important to acknowledge the need for safe space when formulating and developing policy. The Code of Practice on Access to Government Information, based on a White Paper published under the Conservative administration in 1993, identified confidentiality of opinion, discussion and advice within government as being essential

OPEN

to good government and therefore in the public interest. The White Paper stated:

"Governments and public authorities should be able to think in private, and this means that notes of internal discussions and exchanges should be protected. In the absence of such protection there would be a risk of a loss of candour in discussions, and an increasing gap between what is said at meetings and on the telephone and what is recorded on the files."

13. In 1997 the incoming Labour administration published the White Paper "Your Right to Know", the aim of which was to encourage more openness and accountability in government by establishing a statutory right of access to official information. The White Paper recognised the damage that random and premature disclosure of policy information could do and the need to maintain collective responsibility, the political impartiality of officials and the free and frank basis of internal discussion. The White Paper stated:

". . . the essential government functions of planning ahead, delivering solutions to issues of national importance and determining options on which to base policy decisions while still maintaining collective responsibility, can be damaged by random and premature disclosure of its deliberations under Freedom of Information legislation."

14. The Freedom of Information Act 2000 itself aims to achieve this safe space by providing a qualified exemption for information relating to policy formulation and development so that information may be withheld if the balance of public interest is against disclosure.

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Risk registers and policy formulation

15. The precise working of the risk registers at issue in these proceedings is discussed in detail in the witness statement prepared by Ms O'Brien and I do not repeat her analysis here.
16. However, I do think it is crucial that the Tribunal should appreciate the broader impact which the routine disclosure of risk registers at the stage requested in these proceedings would have on the process of policy formulation/development across Government.
17. As I explained above, risk registers are produced according to features which are common across Government². In order to fulfil their purpose as principal risk management tool, they must be:
 - Comprehensive: risk registers must be able to contain any areas of uncertainty associated with a policy if they are to provide policy makers with confidence that no significant risk has been missed. Otherwise Ministers might say, after the event, when it is too late to avoid or repair the damage: "Why wasn't I told". This also means that civil servants are encouraged and required to "think the unthinkable" in relation to policy development. That is, they must be imaginative and envisage the "worst reasonable case" in order to ensure that policy makers are aware of the potential consequences of a new initiative and can begin the process of risk mitigation. Policy formulation is where the most likely options are considered, and the pros and cons of those options weighed.

² The HM Treasury Orange Book guidance provides an example of documenting risks at Annex A which is routinely emulated by government departments as a template for risk registers.

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In order to be effective, risk management is more concerned with imagining the unlikely or unusual events and then ensuring they do not occur or that contingency plans are in place in the event they do.

- Succinct: risk registers must contain all identified risks within a relatively short document if they are to provide a manageable system of risk management. They do not therefore contain the lengthy explanations and caveats which one associates with advice to ministers or internal memoranda on policy.
- Able to use direct language: civil servants are encouraged to use direct and forceful language to describe identified risks. The use of such language is important to catch the attention of policy makers and to protect against collective self re-assurance by those reading the registers.
- Colour-coded: the need to ensure that Departments can understand each other's risk registers means that a common system of quantifying the likelihood and potential impact of risk is required. We have therefore adopted a common system of colour-coding across Government which means that anyone reading the register will immediately understand the likelihood and potential impact of an identified risk.
- Evolving: as I explained above, risk registers are frequently updated and constantly evolving as new risks are identified, new information is received (internally or from other Departments), policy is modified or mitigation measures are formulated and

OPEN

implemented. Information will also be entering the register from a range of sources across Government, some of which will be at very different stages in the process of policy formulation. As such, a risk register at a given moment offers a "snap shot" of the possibilities before Government on that day, but does not necessarily provide a reliable guide to the overall assessment of risk. A risk register is a "work in progress", rather than a balanced summary of risk.

The effects of disclosure

18. Based on my experience of Government, I firmly believe that the routine disclosure of the risk registers at the stage requested in the present case would have a profound and damaging effect on the public interest in sound policy-making for the following reasons.
19. First, risk registers must be entirely candid if they are to fulfil their purpose. Civil servants must be able to "think the unthinkable" and record the outcome of those thoughts in the register, particularly at the early stages of policy formulation. If civil servants are aware that the information contained on these risk registers will be routinely disclosed at the stage requested, the frankness and candour which are essential to the usefulness of risk registers will be fundamentally damaged. I acknowledge that civil servants are robust individuals and are fully aware of their responsibilities (DN1: 34). However, to suggest (as the Commissioner appears to do (DN1: 38)) that knowledge of the likelihood of such disclosure would not affect the frankness and candour with which future risk registers are completed is unrealistic

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and takes no account of realities of human nature. I strongly believe that such a decision in this case would be likely to cast a long shadow.

20. If routinely disclosed at the stage requested in these cases, or if civil servants fear that they will be routinely disclosed, risk registers will become bland documents which are prepared with half an eye to how they will be received when published and how they may be exploited as part of the opposition to a new policy. The candid assessments of risk will be carried out and communicated in less formal documents or by word of mouth (with consequent damage to the audit trail and the historical record). The crucial information which they currently contain will not therefore be circulated as widely either within the Department or with other Departments. Nor will the information be as readily understood and assimilated as is the case with entries in the risk registers. As a result, fewer individuals will be able to contribute their ideas and insights to policy formulation and risk management and policies themselves will be less rigorously scrutinised and tested. There would be an inevitable move towards government by cabal. Risk management will become less effective. All of these factors will damage the public interest.

21. These fears are not just part of the "Government mind-set". They have been acknowledged across parties and by independent experts and journalists. In a recent debate in the House of Lords, on 23 January 2012, concerning the Freedom of Information Act, Baroness Royall, the leader of the Opposition in the Lords stated (Col 545):

"My own experience in government suggests that there is indeed a need for proper policy-making space in government and also suggests that FOI, as a piece of legislation, has had some negative

OPEN

as well as positive effects. Discussion in government can be less open as a result of FOI. Fewer things are now written down in government as a result of FOI. These are not good outcomes either for good governance or for future historians."

The cross-bench peer and academic, Lord Hennessy of Nympsfield, stated (Col 533):

"FOI, to be candid, is not an unmixed blessing for scholars because it has led to greater caution in what is written down."

In a recent article in *The Times*³, Matthew Parris concluded:

"The advance of Freedom of Information should be reversed. Boundaries need to be pushed back. Otherwise FoI could have the reverse effect to what its proposers intended, driving the important information back into the closet. Those who need to communicate will always find ways, and wherever FoI sets the radar, they will communicate beneath it. The victims will be tomorrow's historians for whom ours could become a new Dark Age, a time of shapeless digital abundance: a feast of electronic traffic and a famine of meaning, in which everything that mattered was whispered into cupped ears. Motives and explanations will escape between a forest of e-mails, and slip away into the dark."

22. This danger cannot be overstated since the failure of proper risk management may be catastrophic. Andrew Haldane, Executive Director for Financial Stability at the Bank of England has written and spoken extensively on the failures of effective risk management within the banking system prior to the credit crunch. He identifies three failures in the risk management tools that contributed to the credit boom and subsequent bust. These were (i) disaster myopia, (ii)

³ 'Back to scrawled notes and secret whispers? - Freedom of Information isn't working. The more we shine the spotlight, the more things hide away in the dark', *The Times*, 28 January 2012.

OPEN

network externalities, and (iii) misaligned incentives.⁴ Inappropriate or premature disclosure of the information in risk registers could lead to these failures occurring in government risk management.

23. If, for fear of disclosure and misinterpretation, the direct and forceful language that is currently used to describe risk was toned down, or worse, the risks were not identified on the registers at all, this would lead to the disaster myopia Andrew Haldane refers to. This is essentially an under-estimation of risk which then leads to policy makers under-insuring against low frequency (but high damage) risks.
24. Andrew Haldane further considers what he terms network externalities. This is essentially the complex nature of the networks that exist in the financial world. Equally, in a policy as far reaching as the NHS reforms, the risks will extend through many different organisations and areas of work. It is easy for the message about a particular risk to be diluted as it passes up the chain of command, if at any stage in that process, there is concern or fear about the language or candour that can be used in identifying and describing that risk. Hence the need for the vivid and forceful language to ensure the message is not diluted or impaired, and the need for disparate officials to have confidence in the process (and confidentiality) further up the chain.
25. A misaligned incentive could arise where officials are concerned that their vivid and forceful description of a risk could be disclosed to the public, potentially be misunderstood and ultimately lead to the embarrassment of their minister.

⁴ 'Why Banks Failed the Stress Test' - Speech given at the Marcus-Evans conference on Stress-Testing, 9-10 February 2009.

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26. I believe that Government risk management is as vulnerable to these pressures as other sectors, but that the need to prevent them is even greater because of Government's policy making function.
27. I am aware of considerable concern across government at the prospect that these two registers should be released prematurely. As Ms O'Brien indicates in her statement, there are virtually no examples of departmental risk registers having been released in the past. There is already the widespread allegation that the Civil Service is too reluctant to record risk. Any decision that these registers should have been released at the dates requested would exacerbate this tendency with the result that policy will be formulated (and even implemented) without relevant risks being identified and mitigating action being taken. That cannot be in the public interest.
28. Secondly, routine disclosure of risk registers at the stage these were requested may itself increase the likelihood of such risks materialising. An obvious example of where premature or inappropriate disclosure of risks can lead to those risks eventuating would be if the Bank of England were to publish its assessment that a particular bank was insolvent or in difficulties. This could then turn into a self-fulfilling prophesy by leading to a run on the bank before the necessary steps had been taken to secure those retail deposits. The Select Committee's report on the run on Northern Rock in September 2008 illustrates this⁵. At paragraph 147 of that report it states that:

⁵ House of Commons Treasury Committee 'The run on the Rock' Fifth Report of Session 2007-08.

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"Before the provision of emergency liquidity assistance by the Bank of England to Northern Rock could be announced formally, the outlines of the operation were reported by the BBC—at 8.30 pm on BBC News 24 and then on other BBC media outlets. Several witnesses argued that the premature disclosure of the support operation in this way was instrumental in the run that followed. Mr Applegarth [the former Chief Executive of Northern Rock] said that the leak "caused immense difficulties". He thought that "it was the announcement of the facility being leaked that actually was the start of the run".

29. Thirdly, routine disclosure of risk registers at the stage requested will distract policy makers from their tasks at a crucial point in the process of formulation and development. Instead of concentrating on policy, they will be required to address press or wider public concern which has been provoked by the premature disclosure of the contents of the risk register. During the process of policy formulation, attention should be focussed on identifying and mitigating risk rather than engaging in public fire-fighting with media, opposition and interest groups in order to correct the misleading impression created by premature disclosure. This concern should not be understated.

30. Fourthly, there is a danger that disclosure of the risks in the form that they are set out in these risk registers could harm rather than assist public debate. As described above, the risk register is intended to contain, not just those risks which are the most likely outcome of the policy, but risks which include unusual or unlikely events; those risks are described using intentionally vivid and forceful language; they are a "snap-shot" and may pre-date attempts to identify ways of mitigating the risk; and they are given colour-coded ratings which reflect the register as a risk management tool. If a risk register of that format were placed in the public domain at a key stage of the policy development,

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the effect could be to distort the public perception of the real or likely risks related to a particular policy and encourage sensationalist, rather than responsible and balanced, reporting of Government risk management.

31. I do not accept the Commissioner's argument (Consolidated Response: 46) that the public is likely to be reassured by the thought that Government is considering all areas of risk. Even if the public might otherwise share the Government's assessment that a risk is unlikely to materialise, the mere fact that it is seen to be worthy of assessment in a risk register will tend to heighten public concern about it.
32. Without wishing to trespass on matters covered in detail in Ms O'Brien's statement, I consider that all of the dangers of premature disclosure which I identify above are illustrated by the contents of the risk registers at issue in these proceedings. For example ... *[examples given from closed documents]*
33. Before I move to my conclusions, I wish to address two further issues from the Commissioner's decisions.
34. First, I note that the Commissioner has suggested that disclosure of risk registers is less damaging than reports, emails or draft papers which reveal detail of policy discussions (DN1: 34). With respect, I believe that this reveals a misunderstanding of the function of risk registers within the process of policy formulation, which I hope this statement, together with that of Ms O'Brien's, has now described. It is precisely because of the characteristics I have outlined above that candour arguments are particularly important in this context. Unlike a policy

OPEN

document which sets out a range of options with a balanced assessment of their risk implications, risk registers are singularly likely to be misrepresented. Further, risk registers are communicated across Departments in order to manage risk in a way which is simply not true of the documents referred by the Commissioner. As such, I reject the distinction which the Commissioner has sought to draw.

35. Secondly, the Commissioner relies on the widespread concern about the Government's plans to reform the National Health Service as making this an exceptional case (DN1: 26). I accept, of course, that the reforms proposed in the Health and Social Care Bill are significant and controversial. However, they are hardly exceptional for that reason alone and I would remind the Tribunal of the many other areas where there may be similar reforms such as defence reviews or welfare reforms. In any event, I challenge the assertion that the more controversial an area is, the stronger the public interest becomes in disclosure. On the contrary, the more radical (and therefore potentially controversial) the policy reform envisaged, the greater will be the danger of serious and proper consideration being distorted by premature disclosure. I believe that it is in areas where radical reform is proposed that the process of policy-formulation requires a greater degree of safe space which is itself entitled to the highest level of protection.

Conclusion

36. I would expect most or all of the information in any risk register to be disclosed as the balance of the public interest shifts in favour of disclosure over time. Precisely when that stage is reached will depend

OPEN

on the particular policy and the particular risk entry in the register. However, given the damage that could be caused at this stage to the relevant policy or more seriously, the whole risk management process, a precautionary approach to this balancing exercise is in my view appropriate and necessary. My experience of Government convinces me that disclosure of these registers at the stage they were requested would have fundamentally damaged the quality of policy formulation and development across Government. As described above, it is at the core of the process of risk management that Civil Servants have the confidence that when they are identifying and describing risks, these will be kept confidential whilst those risks remain sensitive. Ministers and officials, who are in the best position to do so, need then to be given a degree of discretion in determining where and when those sensitivities lie.

Statement of Truth

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

Signed:



Dated: 16 February 2012