



**First-tier Tribunal
General Regulatory Chamber
Information Rights**

Appeal Reference: EA/2018/0104

Heard on 21 November 2018

Before

JUDGE HAZEL OLIVER

MR STEPHEN SHAW

MR DAVE SIVERS

Between

MR PHILIP SWIFT

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

HIGHWAYS ENGLAND

Second Respondent

Appearances:

The Appellant – Mr F Poncia

The Information Commissioner did not attend

The Second Respondent – Ms C Michalos, counsel

DECISION

The appeal is dismissed.

REASONS

Names of the parties

1. The Tribunal clarified with the parties at the start of the hearing that the correct name for the appellant is Philip Swift (without the added name of a claims management company), as the request for information was made by him as an individual.

Background to Appeal

2. This appeal concerns information sought under the Freedom of Information Act 2000 ("FOIA") on a tender process conducted by Highways England ("HE") for Asset Support Contracts ("ASCs").

3. Contractors are appointed under ASCs to provide various services to HE regarding the maintenance and improvement of the public road network. The appellant's request relates to geographical Area 10, which is one of 12 road network areas. The contractor's role includes pursuing claims against third parties where there has been damage to a public road. This is referred to as "damage to crown property", or "DCP". Where the damage exceeds £10,000, the contractor will bill HE for the repair work, and HE then claims the costs from the third party who caused the damage. Where the damage is less than £10,000, the contractor will claim its repair costs directly from the third party.

4. On 9 February 2017, the Appellant made a request to HE for the following information:

"I ask to be provided all of the information relating to the issuance, possibly referred to as 'technical validation clarification', for successful tenders in respect of ASC contracts assigned since their introduction.

It appears contractors were asked to tender for ASC contracts and to explain the basis they intended to calculate claims in respect of item A406 (A.406) in the ASC (the 'claims') to be pursued against insurers. Additionally, on occasions they were asked to provide evidence in support of the rates they stated they would use.

I am seeking with regard to this specific issue:

- *The rates stated to be used by each contractor for each contract*
- *All queries raised*
- *All responses provided*
- *All additional queries/responses to conclusion*

With regard to Area 10...all post 5/4/2012 (request/reply below) exchanges that ultimately led to agreement and c [sic] copy of the outcome."

5. HE responded on 23 February 2017 stating that as the cost of responding for Area 10 alone would exceed £450, section 12 FOIA did not oblige them to reply. HE said it would be able to disclose the following:

- *Queries relating to third party claims and Annex 23 for Area 10 only.*
- *All tender clarification relating to third party claims and Annex 23 for Area 10 only.*

- *All emails relating to the requested subject for Area 10 only.*

6. The Appellant replied on 28 February 2017. He refined his request as follows:

"I am seeking amendments and changes to the contract up until Award insofar as Annex 23 / TP pricing / charges are concerned. I am limiting the request.

I note all final documents will reflect every change. This appears to be just what I need - thank you.

I note information for Area 10 only:

- 1. Queries relating to third party claims and Annex 23 for Area 10 only*
- 2. All Tender Clarifications relating to third party claims and Annex 23 for Area 10 only*
- 3. All emails relating to the requested subject for Area 10 only"*

7. HE replied on 17 March 2017. HE said that it was disclosing all of the requested information, except for the rates stated to be used by each contractor (as requested on 9 February). Information relevant to this request was held by HE, but was withheld under section 43 FOIA as disclosure would, or would be likely to, prejudice the commercial interests of suppliers and of HE. The information provided by HE was: Annex 23 to the Area 10 ASC; a table setting out 61 queries and responses regarding that contract; one query and response in relation to additional queries; and a website link to the "Highways England Area 10 Model Contract".

8. The appellant requested an internal review on 24 March 2017, saying that various specific documents should be disclosed. HE provided the outcome on 25 April 2017. HE maintained that it would rely on section 43 FOIA, and said it considered the requests for specific documents to be new information requests.

9. The Appellant complained to the Information Commissioner (the "Commissioner") on 28 April 2017. On 10 August the Commissioner asked the appellant to clarify the scope of his complaint, which included asking for a list of any missing documents that he was expecting to receive. The appellant replied on 26 August 2017. He explained that he was seeking the information withheld under section 43 FOIA, on the grounds that he did not believe there was a commercial interest. He was also seeking: *"The missing documents. This will include (a) all Appendices to Annex 23. (b) All correspondence relating to the Appendices"*.

10. The Commissioner issued Decision Notice FS50684021 on 23 April 2018. The Commissioner did not uphold the complaint. The Commissioner decided that HE was correct to rely on section 43 FOIA to withhold some information. Disclosure would be likely to prejudice the commercial interest of both HE and its contractors, and there were strong public interest factors in maintaining the exemption which outweighed the public interest arguments in favour of disclosure. The Commissioner was also satisfied on the balance of probabilities that no further information was held, on the basis that HR had stated that there are no appendices for Area 10 in relation to Annex 23 and no related correspondence.

The Appeal

11. The Appellant appealed to this Tribunal on 15 May 2018. His grounds for appeal are:

- a. That section 43 FOIA does not apply to the withheld information. The appellant says that the commercially sensitive argument is not sound, and that his enquiry has serious purpose relating to rates charged by contractors. He refers to a previous decision of the Commissioner (FS50664292) following which HE has disclosed the rates sought in that case.
- b. That there is information missing that falls within the scope of his request dated 28 February 2017. The appeal goes on to say that: he has previously been told by HE that they did not hold information when they did hold it; he was not asking for appendices information but all of the information he described; and he had obtained a technical validation clarification (numbered 7) that through another route which indicates that there were at least seven of these clarifications for Area 10.

12. The Commissioner resists the appeal. The Commissioner maintains that disclosure of the information is likely to prejudice contractor's commercial interests, and distinguishes information provided in other cases as this did not involve a detailed breakdown revealing methodology and costs. The Commissioner accepts that the information request has a serious purpose and value, namely to obtain information which the appellant believes will evidence unfair charging practices. However, this was taken into account in weighing the public interest, and the Commissioner has not seen any definitive evidence of wrongdoing.

13. In relation to missing information, the Commissioner notes that this appeal is concerned only with the appellant's request on 9 February, she has not seen any evidence to suggest that HE holds further information within the scope of the request, and HE has explained why it does not hold information of this type. The Commissioner focussed the investigation on the missing information set out in the appellant's email of 26 August 2017.

14. HE was joined as a party to these proceedings and also resists the appeal. HE says that the Commissioner correctly identified the nature of the applicable commercial interests and that there was a likelihood of prejudice, and reached the correct conclusion. The balance in this case is plainly in favour of the public interest in maintaining the exemption, taking into account the exceptionally detailed nature of the withheld information. HE also says there is no failure to disclose information.

The Hearing

15. We had a hearing on 21 November 2018. HE attended and was represented at this hearing. The Commissioner did not attend, having given the Tribunal prior notification of this. The appellant did not attend the hearing, but was represented by Mr Poncia.

16. The appellant had sent an email to the Tribunal on 19 November explaining that Mr Poncia would be representing him as a "McKenzie friend", following the unexpected illness of his son who is due to have an operation shortly. He said Mr Poncia was to attend in his capacity as company director of CMA (the claims management company with which the appellant is also associated), and was also familiar with this tribunal matter. He stated that he was not seeking an adjournment, which would be the alternative option if Mr Poncia was an unacceptable representative.

17. HE provided a skeleton argument to the Tribunal on 20 November. This argument made the points that (1) it is for a party to satisfy the Tribunal as to his reasons for non-attendance, and (2) a McKenzie friend is not entitled to act as an advocate or make oral submissions (acknowledging that in both cases it was for the Tribunal to decide).

18. After discussing the issue at the start of the hearing, the Tribunal decided to proceed with the hearing in the appellant's absence, taking into account the overriding objective and Rule 11 of the Tribunal Procedure (First-Tier Tribunal) (General Regulatory Chamber) Rules 2009. The appellant had explained that his son was unwell. All parties and the Tribunal were ready to proceed with the hearing. The appellant had indicated that he was not seeking an adjournment if he could be represented by Mr Poncia. The limitations of a "McKenzie friend" do not apply in the Tribunal, as under Rule 11(5) a party may be accompanied by another person who is not the notified representative and who (with permission of the Tribunal) may act as a representative or otherwise assist in presenting the party's case at the hearing. The Tribunal gave Mr Poncia permission to represent the appellant on this basis.

19. The issues were discussed at the start of the hearing and agreed as:

- a. Was the Commissioner correct to conclude that the exemption in s43 FOIA applies to the withheld information?
- b. Has HE failed to disclose all of the information that falls within the scope of the appellant's clarified request of 28 February 2017?

Evidence and submissions

20. We had two agreed bundles of open documents, and a small bundle of additional open documents. We also had a closed bundle running to some 430 pages containing the withheld information, namely schedules of rates relating to five different contractors.

21. We had two witness statements from Patrick Carney on behalf of HE, and one witness statement from Mark Ripley on behalf of HE. We heard evidence from Mr Carney. Mr Ripley did not attend the hearing to give evidence. It was originally intended that this matter would be dealt with on the papers. Under Case Management Directions made on 4 September 2018, the appellant and the Commissioner were asked whether they have any questions to ask of Mr Carney. If so, a hearing would be arranged. The appellant indicated that he did have questions for Mr Carney, and so this matter was dealt with at a hearing rather than on the papers. On this basis, it was not expected that the contents of Mr Ripley's statement would be challenged at the hearing and/or that he would attend to give evidence (and the statement was not challenged at the hearing).

22. In addition to the written submissions in the open bundles of documents, we heard submissions from Mr Poncia on behalf of the appellant and from Ms Michalos on behalf of HE.

23. We have taken all of the evidence and submissions into account in making our decision.

Applicable law

24. The relevant provisions of FOIA are as follows.

1 **General right of access to information held by public authorities.**

- (1) Any person making a request for information to a public authority is entitled—
- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
 - (b) if that is the case, to have that information communicated to him.

.....

2 **Effect of the exemptions in Part II.**

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- (2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—
- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
 - (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

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43 **Commercial interests**

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- (2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

.....

58 **Determination of appeals.**

- (1) If on an appeal under section 57 the Tribunal considers—
- (a) that the notice against which the appeal is brought is not in accordance with the law, or
 - (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,
- the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.
- (2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

25. In relation to whether information is “held” within section 1, the test to be applied is the balance of probabilities – as applied in a number of previous decisions of this Tribunal.

26. Section 43 is a qualified exemption, meaning that the information should only be withheld if the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

27. The approach to be taken in these cases was set out in the First Tier Tribunal decision of **Hogan v Information Commissioner** [2011] 1 Info LR 588, as approved by the Court of Appeal in **Department for Work and Pensions v Information Commissioner** [2017] 1 WLR 1:

- a. Firstly the applicable interests within the relevant exemption must be identified.

- b. Secondly the nature of the prejudice being claimed must be considered. It is for the decision maker to show that there is some causal relationship between the potential disclosure and the prejudice, and that the prejudice is “real, actual or of substance”.
- c. Thirdly, the likelihood of occurrence of prejudice must be considered. The degree of risk must be such that there is a “real and significant risk” of prejudice, or there “may very well” be prejudice, even if this falls short of being more probable than not.

The evidence

28. Evidence about the withheld information was provided by Mr Carney in his witness statements and at the hearing.

29. The Tribunal has viewed the withheld information. This consists of schedules of rates provided by five contractors who participated in 2012 in the last tender for Area 10.

30. Mr Carney explained that the withheld information consists of the rates and prices offered by bidders in relation to the tender in 2012 of the ASC for Area 10 (the “ASC Rates”). The ASC rates set an estimated target price for pre-planned work by the contractor. The successful bidding contractor’s performance is then judged against these targets through a “pain and gain” share - if the actual cost of the work exceeds the target the contractor bears part of the additional cost, and if the actual cost is less than the target the contractor shares in some of the savings. The ASC rates are a complex set of calculations by each bidding contractor based on their own methodology.

31. Mr Carney’s evidence was that the DCP rates are very different. These are the actual charges by contractors to either HE or third parties for emergency responses and repairs. The contractor will estimate the costs of repair. Where HE pays these costs (when they are estimated at over £10,000), they are based on the reasonable costs of repair and are not based on the ASC Rates target price. The same elements as set out in the ASC Rates (e.g. plant, labour and materials costs) may be used to set DCP rates. However, this does not mean that DCP rates can be identified from the ASC Rates set out in the withheld information. This would require significant reverse engineering, and would not be accurate as the ASC Rates are subject to a wide range of variables, are adjusted on a frequent basis, and set out target rates rather than emergency repair costs.

32. Mr Carney wrote to each of these contractors in July 2018 stating that this appeal “could result in the disclosure of the Overheads and / or Fee percentages applied to Defined Costs by our Service Providers for Damage to Crown Property works”. The contractors were asked to state if they believe this information is commercially sensitive and whether disclosure would or would be likely to prejudice their commercial interests. All five contractors replied, stating that they did regard the information as commercially sensitive and that disclosure would prejudice their commercial interests. All of the contractors referred to disclosure of this information as damaging future tender opportunities. Four out of the five contractors were specifically concerned about release of this information giving an advantage to competitors. One contractor also stated that disclosure would affect relationships and pricing methodologies with other clients, as HE rates are individually negotiated.

33. A table of hourly rate charges by the contractor Kier to HE for an “Asset Incident Watchman” was disclosed following the Commissioner’s decision in FS50664292. This

relates to the ASC for Areas 9 and 3. The table sets out the hourly rates charged for watchmen for third party claims which are pursued by HE.

34. A-one+ has published details of rates charged for third party claims under ASC Area 12, as part of a guide to the claims process. We were referred to this document by Mr Poncia. This sets out rates for individual operatives, plant rates, material rates, and a schedule of costs components listing the components which make up the listed rates.

35. The evidence about whether there is any further information within the scope of the request which should be disclosed is set out in the witness statement from Mr Ripley.

36. Mr Ripley was asked to prepare a response to the appellant's request, and his statement explains how he searched for information that was within the scope of the request. In relation to "Technical Validation Clarification 7", Mr Ripley states that HE did not originally provide this to the appellant because the first page of this document had been pasted into the request and so it appeared that the appellant already had a copy of it. Mr Ripley also states that he has reviewed technical validation clarifications numbered 1, 2, 4, 5, 6, 8 and 9 in relation to the relevant tender, but these were not within the scope of the appellant's request as they concerned other topics.

37. We were referred by Mr Poncia to Appendix A to Annex 23 in the ASC for Area 9, which sets out the principles to be followed when calculating the maximum amount to be claimed for DCP, where HE is pursuing a claim against a third party. In his statement, Mr Ripley states that there is no Appendix A to Annex 23 of the contract for Area 10. A reference elsewhere in the documents to "Appendix A" is a reference to a document called "Pricing Schedule Appendix A", a document which bidders would have been required to complete as part of the Tender, and a blank version of this document is exhibited to his statement.

Submissions at the hearing

38. Mr Poncia submits that the appellant has a clear reason for seeking this information – that currently there is no means for ascertaining the fair market rate for repair in a DCP case, and claims made by third party contractors are unclear and inconsistent. Appendix 23 limits the authority of contractors to charge for repairs, and defined costs should be the same whether the damage is under or over £10,000. The current explanations are unclear and HE provided opaque technical paperwork to the Commissioner. The appellant now broadly agrees that the original tendering documentation is commercially sensitive, but what he is seeking is disclosure of the DCP standard schedule or defined costs, and this is in the public interest. This DCP information is not commercially sensitive. The voluntary disclosure by A-one+ provides a full schedule of rates, so this information has been revealed, and it is inconsistent for them to have provided a letter stating that the same information is commercially sensitive. The appellant also asks the Tribunal to use its discretion to require disclosure of specific DCP information.

39. HE submits that there is a clear difference between the withheld information, which is a schedule of rates provided as a target in the context of a bidding process, and the actual costs charged by contractors in DCP cases. The prejudice to commercial interests is clearly shown by the letters from the contractors provided for these proceedings, which adds to the evidence considered by the Commissioner. The material disclosed in FS50664292 is entirely different. The A-one+ information was published voluntarily, and they have clearly said in

their letter that the requested information is commercially sensitive. The issue here is the request actually made by the appellant, which was not about defined costs. In relation to failure to disclose all information, HE relies on Mr Ripley's evidence as showing that there is no further information within the scope of the request.

Conclusions

40. Was the Commissioner correct to conclude that the exemption in s43 FOIA applies to the withheld information? The first question is whether section 43 (prejudice to the commercial interests of any person) is engaged. We find that it is.

41. The applicable interests are the commercial interests of the contractors in preserving the confidentiality of the rates submitted during the tender process, and the commercial interests of HE in ensuring an effective tender process which delivers best value for money. We find that these interests are clearly engaged by the withheld information, which sets out in detail the target rates submitted during the tendering process for the ASC Area 10. We accept that these rates are complex calculations based on each contractor's methodology.

42. In relation to the nature of the prejudice, we find that there is real prejudice which is causally connected to the disclosure. This falls into three main areas:

- a. Advantage to competitors. The information is based on detailed methodology of each contractor, which is commercially sensitive. The publication of this information would advantage other contractors in future tenders, as they would be able to analyse the approach of the five contractors involved and use this to help them in future bids. This would clearly cause commercial prejudice to all of the five contractors, and particularly disadvantage the successful contractor as their successful strategy would have been made public. Competitors would have an unfair advantage as they would have access to this commercial information without having revealed the same information themselves. This would prejudice these contractors generally in their commercial activities, as competitors could copy their methodology. It would also prejudice them specifically in bidding for other work for HE, where knowledge of previous bidding strategies would clearly give an advantage to their competitors.
- b. Disadvantage in relation to other clients. As specifically noted in the letter from one of the contractors, disclosure of the information would also cause commercial prejudice in relation to other private clients. The rates offered to HE are individually negotiated. Such individual client rates are usually confidential. The commercial negotiating position of the contractors would be significantly weakened if potential clients were aware of the rates offered to HE on such a major contract. It is possible that this would also discourage contractors from bidding on future HE contracts.
- c. Disruption to the tendering process. The disruption to the tendering process that would be caused by disclosure of this information would cause commercial prejudice to HE. The essence of a tender process is that the bids should be confidential, to ensure fair competition and best value for money. This would be distorted if competitors of the five contractors involved obtained an unfair advantage by gaining knowledge of the previous bids and underlying methodology, and would result in HE receiving less competitive bids.

43. In relation to the likelihood of the prejudice, we find that this easily reaches the threshold of there being a real and significant risk of this prejudice arising. We note that the rates set out in the withheld information are very detailed and so would provide significant information about the contractors' methodology. We find that all of the three types of prejudice set out above are likely to arise. In particular, we are satisfied that disclosure of the withheld information would be likely to give competitors of the five contractors involved a clear commercial advantage in future HE tenders, and this would cause commercial prejudice to both the five contractors and to HE.

44. The appellant submits that two other disclosures of information about DCP rates show that the requested information is not commercially sensitive.

45. Firstly, the table of hourly rate charges for an "Asset Incident Watchman", as disclosed following the Commissioner's decision in FS50664292. We accept HE's position that this is very different from the withheld information. This disclosed information is a table of rates for one type of operative. It does not reveal details about the contractor's methodology in anything approaching the level of detail contained in the withheld information. The Commissioner's decision in this previous case is not inconsistent with a decision in this case that the withheld information is commercially sensitive.

46. Secondly, the publication by A-one+ of rates charged for third party claims under ASC Area 12. This is more similar to the withheld information, in that it contains a long list of items and rates for operatives, plant and materials. This cannot be regarded as commercially sensitive by A-one+ as it has been published voluntarily. However, we again accept HE's position that this is very different from the withheld information – it is a list of rates actually charged in third party claims, not a set of target rates for the main contract which would reveal the contractor's methodology in a competitive tender.

47. A-one+ is one of the contractors which provided a letter confirming that it regarded the withheld information as commercially sensitive, which specifically refers to the tendering process and need to safeguard its accumulated know-how and skill. The appellant submits that this position is inconsistent with the information it has chosen to publish. We note that the letter from HE requesting A-one+'s comments does refer specifically to DCP works rather than tender information. But, A-one+ has provided reasons relating to the tendering process for its view that the withheld information is commercially sensitive, and we also note that the other four contractors have taken the same view. We therefore find that the voluntary disclosure by A-one+ of specific third-party rates for Area 12 does not prevent the withheld information for Area 10 from being regarded as commercially sensitive.

48. The next issue is whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

49. In relation to the public interest in maintaining the exemption, the main public interest engaged here is the interest in an effective tender process for major contracts between HE and private contractors. It is in the public interest for there to be a process which maintains fair competition between bidders and so helps to ensure best value for money for the taxpayer, and for contractors to be willing to offer their best price as part of a confidential bidding process. Any prejudice to HE's commercial interests in this area would not be in the public interest. There is also a general public interest in maintaining competitive commercial

markets, and ensuring that contractors who bid for public sector contracts are not commercially disadvantaged and so continue to participate in competitive tenders.

50. In relation to the public interest in disclosing the information, the appellant's case is based on the public interest in understanding how DCP costs are charged to third parties. In particular, he says that there is a lack of understanding as to how these claims are calculated, and how they differ depending on whether they are charged to HE or to the third party directly. This causes difficulties in assessing a fair market rate in insurance claims cases. He also alleges that contractors may be overcharging when they claim costs directly from third parties.

51. We accept that there is a general public interest in transparency in respect of government contracts, and in accountability in respect of public funds and how they are spent. In relation to the appellant's points, we also accept that his request has a serious purpose. There is a significant public interest in understanding how third parties are charged in DCP cases – particularly if this causes difficulties in insurance claims, or if there is evidence that third parties are potentially being overcharged.

52. However, we do not find that disclosure of the withheld information would substantially further these public interests. The appellant had asked for the rates stated to be used by each contractor for the ASC, in the context of tenders for those contracts. These rates are contained in the withheld information. However, the withheld information does not contain specific DCP rates. We accept Mr Carney's evidence that the withheld information sets out target rates for the main contract as part of the tendering process for ASC Area 10, and is very different from DCP rates which are actual costs charged in emergency situations. Although there may be some overlap in the types of items covered, the withheld information would not easily allow DCP rates to be calculated, and would not give an accurate picture. In particular, it would not show clearly how DCP rates charged to third parties are calculated, or whether different rates are charged to third parties directly by contractors.

53. We find that the public interest in maintaining the exemption does outweigh the public interest in disclosure. The public interests in withholding the information are substantial. The public interests put forward by the appellant in favour of disclosure are not significantly furthered by the withheld information. Put simply, the withheld information simply does not show what the appellant wants to know about DCP rates.

54. Mr Poncia asked the Tribunal to use its discretion to order disclosure of specific DCP information. However, we are not able to order disclosure of information which falls outside the scope of the appellant's request in this case. Our role is to decide whether the Commissioner's decision was in accordance with the law. We are considering her decision based on the request which the appellant actually made - which was for contractor rates used in the tender process for Area 10, not for specific DCP information.

55. Has HE failed to disclose all of the information that falls within the scope of the appellant's clarified request of 28 February 2017? We can deal with this point more briefly. The witness statement from Mr Ripley explains HE's position, as set out in the evidence above. We accept Mr Ripley's evidence on these points, and find on the balance of probabilities that HE has not failed to disclose all information which fell within the scope of the appellant's clarified request. We are satisfied by the explanations provided by Mr Ripley, and have seen no evidence to indicate that his version of events is incorrect, or that HE holds any other information which should have been disclosed in response to this request.

56. For the above reasons, we uphold the decision of the Commissioner and dismiss the appeal.

Signed Hazel Oliver

Judge of the First-tier Tribunal

Date: 2 December 2018

Promulgation date: 4 December 2018