

IN THE ADMINISTRATIVE COURT

CLAIM NO:

B E T W E E N:

THE QUEEN

(on the application of MOOSA QURESHI and THOMAS GREENE)

Claimants

- and -

THE SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE

Defendant

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STATEMENT OF FACTS AND GROUNDS

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(CB/\*\*/\*) = Claimants' Bundle volume/tab/page

**Qureshi §\*** = Witness statement of Moosa Qureshi dated 1 June 2020, paragraph \*

**Greene §\*** = Witness statement of Thomas Greene dated 31 May 2020, paragraph \*

**Gregory §\*** = Witness Statement of Tessa May Gregory dated 1 June 2020, paragraph \*

**A. SUMMARY OF CLAIM**

1. The Claimants challenge the decision of the Secretary of State for Health and Social Care ("Secretary of State") to refuse to disclose a copy of the report/s produced following a 3-day simulation exercise ("Exercise Cygnus") conducted in 2016 by NHS England to evaluate the preparedness of the UK health system to deal with a viral pandemic known as the "*Cygnus Report*".<sup>1</sup>
2. A decision was taken not to publish the Cygnus Report in 2016, according to newspaper reports because it would have been "*too terrifying*" to the public. Since COVID-19 began spreading through the general population in the United Kingdom such justification has clearly evaporated and the Government has faced calls for the Report to be published in full, including from Members of Parliament and the press. The Secretary of State has

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<sup>1</sup> It is understood that more than one such report was produced: see §31 below. For the avoidance of doubt, the Claimants seek all of the reports prepared as part of Exercise Cygnus, including any reports provided to or filed by participants in the Exercise which contributed to the overall report. For ease, these are referred collectively herein as the "*Cygnus Report*".

reconsidered the position taken in 2016 but has decided not to publish the Report. The reasons why the Secretary of State has decided not to publish the Report are unclear, beyond the fact that he does not consider he has a legal obligation to do so. The date on which the Secretary of State took the decision is also unclear, but it appears to have been on or about 1 May 2020 prior to responding to pre-action correspondence in this case.

3. The Secretary of State's refusal to publish the Cygnus Report is unsatisfactory in circumstances where:
  - (1) The Government's handling of the current pandemic is being subjected to detailed scrutiny, including in respect of its ongoing preparedness and means of handling issues such as the supply of personal protective equipment ("PPE") and the protection of people in care homes. These are matters that were tested in Exercise Cygnus and which will have formed the basis of findings and recommendations in the Cygnus Report.
  - (2) The Government has itself repeatedly and publicly relied upon the Cygnus Report in referring to its preparedness for the current pandemic and defending itself from criticism about its handling of it, in particular in a lengthy rebuttal to newspaper criticism published on the [www.gov.uk](http://www.gov.uk) website.
  - (3) Parts of the Cygnus Report appear to have been leaked to the press and have been reported in the press. The Secretary of State however refuses to confirm whether the leaked documents are accurate or to disclose other aspects of the Report.

In short, the Cygnus Report is critical in holding the Government to account and for public understanding of issues of major contemporary public importance.

4. The Claimants submit that the decision of the Secretary of State is unlawful, being contrary to s.2 of the Civil Contingencies Act 2004 ("CCA 2004"), contrary to s.6 of the Human Rights Act 1998 ("HRA 1998") in violating their rights under Article 10 ECHR, contrary to the freedom of expression under common law, and otherwise unreasonable.
5. The Claimants also submit that the Secretary of State has failed to maintain arrangements for disclosing information relating to the emergency as he was required to do under s.2(1)(g) of the CCA 2004.

6. In this judicial review the following issues arise for determination:
  - (1) Does the Secretary of State's refusal to disclose and/or publish the Cygnus Report following the occurrence of the public emergency arising from the COVID-19 pandemic breach his duty under s.2(1)(f) CCA 2004 to arrange for the publication of all or part of assessments made and plans maintained to enable action to be taken in connection with the emergency?
  - (2) Is the Secretary of State in breach of s.2(1)(g) CCA 2004 in failing to maintain arrangements to provide information to the public where an emergency has occurred? Should the Cygnus Report have been disclosed pursuant to such arrangements?
  - (3) Does the Secretary of State's refusal to disclose and/or publish the Cygnus Report breach s. 6 HRA 1998 in violating the Claimants' right to receive information under Article 10 ECHR and/or violate the common law right to receive information? Do the provisions of the CCA 2004 need to be interpreted in a manner that ensures compliance with Article 10 ECHR and/or the common law?
  - (4) Is the Secretary of State's refusal to disclose and/or publish the Cygnus Report unreasonable at common law and/or vitiated by a failure to provide any or any adequate reasons as to why the report has not been published?
7. The Claimants submit that the answer to each of these questions is "yes" for the reasons set out in the grounds below.
8. It appears that the Secretary of State's principal defence to this judicial review is his contention that the Claimants must first pursue an alternative remedy before commencing judicial review proceedings, namely make a request under the Freedom of Information Act 2000 ("FOIA"). However, this is no answer to this claim for at least the following reasons:
  - (1) This judicial review raises a number of important issues of law that are obviously not capable of being determined by a FOIA request, including (a) the requirements of s.2 of the CCA 2004; (b) the scope and impact of Article 10 ECHR and the common law in the situation of an emergency; and (c) whether the Secretary of

State is required to give public substantive reasons for not disclosing the Cygnus Report.

- (2) The First Claimant has made a FOIA request for the Cygnus Report and the reasons for it not having been disclosed. On Friday 22 May 2020, the Department of Health responded to that request stating that it exceeded the costs exemption prescribed under FOIA. The request thus falls outside FOIA because FOIA is designed for dealing with requests that are less time-consuming to deal with. The costs exemption is an absolute exemption and is not balanced against the public interest.
9. Those reasons are fatal to the Secretary of State’s attempt to rely on FOIA as an alternative remedy. However, the Claimants also point to the fact that:
- (1) FOIA is unsuitable (or at least less suitable) where a Ministerial decision has been made, independent of any FOIA request, not to disclose a document. Such a situation is unlike a mere request for documentation from a public authority. Moreover, the need to use the internal complaints procedure before making any complaint to the Information Commissioner is absurd in a situation where a decision not to disclose the document has been made at the highest level of the Department, by the Secretary of State.
  - (2) The FOIA process takes a considerable period of time to pursue which, given the immediate need for the Cygnus Report in order to hold the Government’s ongoing decision-making to account, means that it is not a suitable alternative remedy. The country is in the midst of an ongoing pandemic, with risks of a ‘second wave’ of increased infection rates. It is important that the public understand what steps were recommended in the Cygnus Report to assess whether such steps are not being taken that could and should be, in order to mitigate the effects of the ongoing pandemic. The Government is clearly intent on exploiting the possibilities of delay afforded by the FOIA process to their full potential, having responded to the First Claimant’s FOIA request on the very last day that a response was required (notwithstanding such a response is supposed to be responded to “*promptly*”<sup>2</sup>) only to inform the First Claimant that the request was too costly to respond to.

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<sup>2</sup> Section 10(1) FOIA.

10. The claim is properly arguable and the court should therefore grant permission for judicial review.

## **B. LEGAL FRAMEWORK**

### **Statutory powers and duties of the Secretary of State**

11. The National Health Service Act 2006 (“NHS Act 2006”) confers broad functions on the Secretary of State. In particular:
  - (1) It provides that “[t]he Secretary of State retains ministerial responsibility to Parliament for the provision of the health service in England (s.1(3));
  - (2) It confers a general enabling power on the Secretary of State to “do anything which is calculated to facilitate, or is conducive or incidental to, the discharge of any function conferred on that person by this Act” (s.2); and
  - (3) It imposes a duty on the Secretary of State to take “steps as [he] considers appropriate for the purposes of protecting the public in England from disease and other dangers to health” (s.2A(1)) which steps expressly include “providing information and advice” (s.2A(2)(f)).
12. The CCA 2004 imposes further positive duties on the Secretary of State relating to emergencies and contingency planning. The Secretary of State is listed as a Category 1 Responder insofar as his functions include “responding to emergencies by virtue of ... the Secretary of State’s functions under section 2A of the National Health Service Act 2006”<sup>3</sup>.
13. As a Category 1 Responder, the Secretary of State is subject to the mandatory duties in s.2 which provides:
  - “(1) A person or body listed in Part 1, 2 or 2A of Schedule 1 shall –
    - (a) from time to time assess the risk of an emergency occurring,
    - (b) from time to time assess the risk of an emergency making it necessary or expedient for the person or body to perform any of his or its functions,

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<sup>3</sup> Paragraph 9 of Part 1 of Schedule 1 to the CCA 2004.

- (c) *maintain plans for the purpose of ensuring, so far as is reasonably practicable, that if an emergency occurs the person or body is able to continue to perform his or its functions,*
- (d) *maintain plans for the purpose of ensuring that if an emergency occurs or is likely to occur the person or body is able to perform his or its functions so far as necessary or desirable for the purpose of–*
  - (i) *preventing the emergency,*
  - (ii) *reducing, controlling or mitigating its effects, or*
  - (iii) *taking other action in connection with it,*
- (e) *consider whether an assessment carried out under paragraph (a) or (b) makes it necessary or expedient for the person or body to add to or modify plans maintained under paragraph (c) or (d),*
- (f) *arrange for the publication of all or part of assessments made and plans maintained under paragraphs (a) to (d) in so far as publication is necessary or desirable for the purpose of–*
  - (i) *preventing an emergency,*
  - (ii) *reducing, controlling or mitigating the effects of an emergency, or*
  - (iii) *enabling other action to be taken in connection with an emergency, and*
- (g) *maintain arrangements to warn the public, and to provide information and advice to the public, if an emergency is likely to occur or has occurred.”*

14. In performing the duty of publication under s.2(1)(f), the Secretary of State “*must have regard to the importance of not alarming the public unnecessarily*” (regulation 27, Part 5 of the Civil Contingency Act 2004 (Contingency Planning) Regulations 2005 (“2005 Regulations”).
15. Section 2(1)(g) imposes a further duty on the Secretary of State (“*shall*”) to maintain arrangements to warn, inform and advise members of the public in the event of an emergency.
16. In performing that duty, the Secretary of State must have regard to any relevant plan maintained under s.2(1)(d) (regulation 28, Part 6 of the 2005 Regulations) and “*the importance of not alarming the public unnecessarily*” (regulation 30).

## **Article 10 ECHR and common law**

17. Section 6 of the 1998 Act requires the Secretary of State to act compatibly with the rights protected under the ECHR, including Article 10 which guarantees “*the right to freedom of expression*” which expressly includes “*the right....to receive and impart information*” (emphasis supplied).
18. In *Magyar Helsinki Bizottság v Hungary* (App. No. 18030/11) (**CB/D/108-204**), the Grand Chamber of the European Court of Human Rights (“ECtHR”) put it beyond doubt that Article 10(1) includes a right of access to information in certain circumstances. It undertook a detailed analysis of the ECHR case-law (§§126-137) and comparative and international law (§§138-148) and concluded that Article 10(1) does include a right of access to information (§149).
19. The Grand Chamber set out four criteria to be applied in order to establish whether Article 10(1) is engaged so as to give rise to a right of access to State-held information: (i) the purpose of the information request; (ii) the nature of the information sought; (iii) the role of the applicant; and (iv) whether the information is ready and available.
20. If Article 10 is engaged, any interference (i.e. a refusal to disclose information sought) must be justified under Article 10(2) as being ‘*prescribed by law*’, in pursuit of one of the express legitimate aims and ‘*necessary in a democratic society*’.
21. The Supreme Court in *Kennedy v Information Commissioner* [2015] AC 455 (**CB/D/1-107**) was clear that freedom of expression, including the right to access information, may also be protected under the common law, including the general presumptions in favour of openness and transparency. In certain circumstances, the common law may go further than Article 10 ECHR.
22. The Supreme Court in that case left open whether the ECHR gives rise to a right of access to information. That question has now been conclusively resolved by the Grand Chambers in *Magyar Helsinki*.

## C. FACTUAL BACKGROUND

### Exercise Cygnus and the Cygnus Reports

23. In October 2016, the Department of Health led a three-day simulation exercise, code-named ‘*Exercise Cygnus*’, for the purposes of examining “*the preparedness of [UK] health systems in a pandemic scenario*”.<sup>4</sup> The exercise was carried out pursuant to the s.2 CCA 2004 duties on Category 1 Responders (see §13 above). By this time, it was known that pandemic influenza constituted the highest risk threat on the UK’s list of civil emergencies.<sup>5</sup>
24. Exercise Cygnus was planned as a training and educational process, which would inform the Government, public health experts, NHS procurement, medical practitioners, health and social care providers on how they were best to prepare for an influenza pandemic.<sup>6</sup> An NHS England Board Paper published in March 2017 further stated that Exercise Cygnus examined “*the impact of a pandemic influenza outbreak, and the significant impacts on health delivery a widespread pandemic in the UK would trigger*”, challenging

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<sup>4</sup> See:

- NHS England, ‘Pandemic Influenza – Guidance to the NHS on current and future preparedness for an influenza pandemic (April 2016) (“*The exercise was led by DH with strong engagement from PHE, NHS England, and other stakeholders... Following the exercise a report will be published establishing the elements of the response that worked well and areas for improvement*”) (CB/C/151-160).
- Powys Teaching Health Board (Wales), ‘Board Paper: Agenda Item 2.6: Powys Pandemic Influence Planning Update 2016’ (25 January 2017) (“*[t]he aim of the exercise was to look at the preparedness of health systems in a pandemic scenario, with involvement at Ministerial level by UK government and the devolved administrations in Wales, Northern Ireland and Scotland*”) (CB/C/161-166).
- NHS England, ‘Board Paper — NHS England’ (No. PB.30.03.2017/10) p. 1 (“*Exercise Cygnus, a three-day exercise looking at the impact of a pandemic influenza outbreak, and the significant impacts on health delivery a widespread pandemic in the UK would trigger*”) (CB/C/167-172).
- Chris Smyth, ‘NHS fails to cope with bodies in flu pandemic test’ *The Times* (27 December 2016) (noting that Exercise Cygnus involved testing co-ordination between hospitals, Whitehall and disease-tracking experts in a scenario where tens of thousands of individuals were infected by a virulent new strain of influenza) (CB/C/464-465).
- NERVTAG, ‘Minutes of the fifth meeting of NERVTAG’ (14 June 2017) p. 5 (stating that ‘*[t]he aim of the [Cygnus] exercise was to assess the response to a pandemic of influenza.*’) (CB/C/258).

<sup>5</sup> See Cabinet Office, ‘National Risk Register for Civil Emergencies – 2015 edition’ (24 March 2015) (MQ5) (CB/C/100-150).

<sup>6</sup> Lincolnshire’s Resilience Forum, ‘Exercise Cygnus – Preparing for Emergencies – What you need to Know’ (14 May 2014) (CB/C/1-11).

*“the NHS to review its response to an overwhelmed service with reduced staff availability”*.<sup>7</sup>

25. It is clear that Exercise Cygnus gave rise to a number of lessons or recommendations to be implemented by the Government which were set out in one or more reports:

- (1) According to media reports, Exercise Cygnus revealed 22 key lessons for the Government, including that *“the UK’s capability to respond to a worst case pandemic influenza should be critically reviewed.”*<sup>8</sup>
- (2) Shortly after the conclusion of Exercise Cygnus, Dame Sally Davies (then-Chief Medical Officer) confirmed that *“a lot of things need improving.... We’ve just had in the UK a three-day exercise on flu on a pandemic that killed a lot of people. It became clear that we could not cope with the excess bodies, for instance”*.<sup>9</sup>
- (3) In April 2016, NHS England published a guidance document for the NHS on *“current and future preparedness for an influenza pandemic”* which stated that following Exercise Cygnus *“a report will be published establishing the elements of the response that worked well and areas for improvement”*<sup>10</sup> (emphasis supplied).
- (4) In March 2017, NHS England stated that its emergency plans were being revised *“to incorporate the learning from this exercise and ensure our continued preparedness for future pandemic influenza outbreaks”*.<sup>11</sup>

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<sup>7</sup> NHS England, ‘Board Paper — NHS England’ (No. PB.30.03.2017/10), p.1 and §8. (CB/C/167-172)

<sup>8</sup> Stephen Moyes and Nick McDermott, ‘The Pandemic Files: Bombshell secret report warned Britain was “critically” underprepared for a deadly pandemic like coronavirus’ *The Sun* (27 April 2020) (CB/C/539-542). See also Chris Smyth, ‘NHS fails to cope with bodies in flu pandemic test’ *The Times* (27 December 2016) (CB/C/464-465); Paul Nuki and Bill Gardner, ‘Exercise Cygnus uncovered: the pandemic warnings buried by the Government’ *The Telegraph* (28 March 2020) (CB/C/474-482); Bill Gardner and Paul Nuki, ‘Covid-19 strategies: Britain planned for herd immunity while Asia intended to contain virus’ *The Telegraph* (18 April 2020) (CB/C/499-502); David Pegg, Robert Booth and David Conn, ‘Revealed: the secret report that gave ministers warning of care home coronavirus crisis’ *The Guardian* (7 May 2020) (CB/C/543-545).

<sup>9</sup> Chris Smyth, ‘NHS fails to cope with bodies in flu pandemic test’ *The Times* (27 December 2016) (CB/C/464-465).

<sup>10</sup> NHS England, ‘*Pandemic Influenza: Guidance to the NHS on current and future preparedness for an influenza pandemic*’, April 2016 (CB/C/151-160).

<sup>11</sup> NHS England, ‘Board Paper — NHS England’ (No. PB.30.03.2017/10) §8 (CB/C/167-215).

- (5) In April 2017, Paul Cosford, Director for Health Protection and Medical Director of Public Health England, said that a report ‘*setting out the learning and recommendations*’ from Exercise Cygnus ‘*was in the process of being finalised*’.<sup>12</sup>
- (6) The June 2017 Minutes of NERVTAG (the New and Emerging Respiratory Virus Threats Advisory Group) further revealed a number of key lessons identified following Exercise Cygnus, including: the need “*to improve co-ordination between the complex network of partners involved in a pandemic influenza response, to better align individual organisations response plans, and to provide an overview of the entire response*”; “[*a*]dvance planning for legislative easements which would come into effect during a pandemic’, in order to ‘*provide greater flexibility during a pandemic*’; and “[*t*]he need to strengthen the surge capability and capacity in operational resources in certain areas”.<sup>13</sup> NERVTAG has also referred to these findings being contained in full within the Cygnus Report.<sup>14</sup>
- (7) In April 2020, Professor King (former Chief Scientific Adviser) referred to the report from Exercise Cygnus having been prepared in the context of criticising the Government’s response to the current pandemic.<sup>15</sup>
- (8) On 4 May 2020, Jo Churchill MP (Parliamentary Under-Secretary for Health and Social Care) stated that “*lessons identified*” from Exercise Cygnus “*have been considered across Government and shared with participants and local pandemic preparedness planners.*”<sup>16</sup>
26. Subsequent to this, a decision was taken not to publish the Cygnus Report. It is presently unclear who took that decision, or the reasons for it. There are indications that this

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<sup>12</sup> Paul Nuki and Bill Gardner, ‘Exercise Cygnus uncovered: the pandemic warnings buried by the Government’ *The Telegraph* (28 March 2020) (CB/C/474-482).

<sup>13</sup> NERVTAG, ‘Minutes of the fifth meeting of NERVTAG’ (14 June 2017) pp. 5-6. noting that “*Members received copies of an extract of the full report that focused on the lessons learned during the exercise*” (CB/C/258-259).

<sup>14</sup> *Id.*

<sup>15</sup> Krishnan Guru-Murthy, ‘Government not being honest enough, says former Chief Scientific Adviser’ *Channel 4 News* (19 April 2020) <https://www.channel4.com/news/government-not-being-honest-enough-says-former-chief-scientific-adviser>; ‘UK government accused of “sleepwalking into disaster” over coronavirus outbreak’ *YouTube (Channel 4)* (19 April 2020) (CB/C/509).

<sup>16</sup> Written question 41129, *Hansard HC (Deb)*, 4 May 2020, cW (CB/C/218).

decision may have been taken in order to avoid political embarrassment and/or to avoid implementing the recommendations made:

- (1) According to media reports, one senior Government source is reported to have stated that the results of Exercise Cygnus were “*too terrifying*” to be revealed.<sup>17</sup>
- (2) However, according to *The Telegraph* newspaper<sup>18</sup>: “*Reasons for the report not being published are likely to go beyond Whitehall’s paternal view and a desire not to frighten the public. The Telegraph has talked to multiple sources with first hand knowledge of Cygnus and all say the exercise revealed significant gaps in the NHS’s “surge capacity” ... Whatever the reasons, the final report on Exercise Cygnus was buried and its prophetic findings hidden from public view*”.
- (3) Phillip Lee, a former Liberal Democrat MP who was a Conservative Minister at the time of Exercise Cygnus, has also stated that “[*w*]e knew we were not prepared for a pandemic from the Cygnus report”.<sup>19</sup> Lee has since stated that “[*i*]t was a mistake not to publish it at the time. If we were not going to act on the lessons, than what was the point of the exercise?”.<sup>20</sup>
- (4) According to press reports, a senior academic directly involved in Exercise Cygnus and the current COVID-19 pandemic response has said that “[*t*]hese exercises are supposed to prepare government for something like this – but it appears they were aware of the problem but didn’t do much about it.”<sup>21</sup>

### **The COVID-19 pandemic**

27. On 29 January 2020, the UK’s Chief Medical Officer announced the first two cases of COVID-19 in the UK.<sup>22</sup> As at 27 May 2020, 37,837 individuals were confirmed to have died in hospitals alone from COVID-19 in the UK (see Qureshi §31 (CB/B/12) ). The UK has been in ‘*lockdown*’ since 23 March 2020. In a national address on 23 March 2020,

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<sup>17</sup> Paul Nuki and Bill Gardner, ‘Exercise Cygnus uncovered: the pandemic warnings buried by the Government’ *The Telegraph* (28 March 2020) (CB/C/474-482).

<sup>18</sup> *Id.*

<sup>19</sup> Jamie Doward, ‘Government under fire for failing to act on pandemic recommendations’ *The Guardian* (19 April 2020) (CB/C/503-504).

<sup>20</sup> *Id.*

<sup>21</sup> Bill Gardner and Paul Nuki, ‘Exercise Cygnus warned the NHS could not cope with pandemic three years ago but “terrifying” results were kept secret’ *The Telegraph* (28 March 2020) (CB/C/483-490).

<sup>22</sup> ‘Coronavirus: Two cases confirmed in UK’ *BBC News* (31 January 2020) (CB/C/466-469).

Prime Minister Johnson described COVID-19 as “*the biggest threat this country has faced for decades*”.<sup>23</sup>

28. The Government has repeatedly and expressly relied on the existence of Exercise Cygnus and asserted that “*lessons were learned*” as a result, in response to criticisms of its preparedness and response to the ongoing COVID-19 pandemic. By way of illustration:

- (1) On 2 April 2020, a spokesperson for the Department of Health and Social Care stated that the pandemic plans were regularly tested which had “*helped [the Government] to rapidly respond to COVID-19*”.<sup>24</sup>
- (2) On 5 April 2020, Jeremy Hunt MP (former Health Secretary) explained that the UK Government “*did a massive amount of work to prepare the NHS for this type of situation*”.<sup>25</sup>
- (3) On 19 April 2020, in a detailed rebuttal to an article published by *The Sunday Times* that was critical of the Government’s preparedness and response to the COVID-19 pandemic, the Government published a statement which remains hosted on the GOV.UK website.<sup>26</sup> In that statement, the Government expressly referred to and relied on the lessons learnt from Exercise Cygnus:

*“Claim - The last rehearsal for a pandemic was a 2016 exercise codenamed Cygnus, which predicted the health service would collapse and highlighted a long list of shortcomings — including, presciently, a lack of PPE and intensive care ventilators.*

*Response - The Government has been extremely proactive in implementing lessons learnt around pandemic preparedness, including from Exercise Cygnus. This includes being ready with legislative proposals that could rapidly be tailored to what became the Coronavirus Act, plans to strengthen excess death*

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<sup>23</sup> Prime Minister’s Office, 10 Downing Street and Rt Hon Boris Johnson MP, ‘Speech: PM address to the nation on coronavirus: 23 March 2020’ (CB/C/470-473).

<sup>24</sup> Dan Sabbagh, ‘Labour urges UK government to publish findings of 2016 pandemic drill’ *The Guardian* (2 April 2020) (CB/C/495-496).

<sup>25</sup> ‘Caller tackles Jeremy Hunt over why UK didn’t prepare for coronavirus’ *YouTube* (5 April 2020) <https://www.youtube.com/watch?v=-oOmOsROX08>

<sup>26</sup> See, in particular, Department of Health and Social Care Media Centre, ‘Response to Sunday Times Insight article’ (19 April 2020) (CB/C/505-508).

*planning, planning for recruitment and deployment of retired staff and volunteers, and guidance for stakeholders and sectors across government.”*  
(emphasis supplied)

- (4) On 21 April 2020, Baroness Nicola Blackwood (former Health Minister) stated that several lessons were learned and implemented from Exercise Cygnus, including scaling up the availability of PPE and having contracts in place to acquire PPE. She also stated that an increase in ventilators should have occurred in response to the Cygnus Report.<sup>27</sup>
- (5) On 29 April 2020, Nigel Adam MP stated on behalf of the Government that the lessons learned from Exercise Cygnus “*continue to be considered by the Government when we are reviewing our responses*” to the ongoing pandemic.<sup>28</sup>
- (6) On 4 May 2020, Jo Churchill MP (Parliamentary Under-Secretary for Health and Social Care) stated that the “*lessons identified*” from Exercise Cygnus “*continue to inform the development of pandemic preparedness plans*”<sup>29</sup> (emphasis supplied).
- (7) On 5 May 2020, Edward Agar MP confirmed on behalf of the Government (in response to a question about why the Government did not act on the Cygnus Report with respect to ventilators and PPE) that it “*did act in looking at all previous modelling and all previous exercises*”.<sup>30</sup>
- (8) On 13 May 2020, in response to a written question from Baroness Ritchie in the House of Lords about what steps the Government took in response to the results of Exercise Cygnus, Lord Bethell on behalf of the Government stated that “[*the*] *lessons identified from Exercise Cygnus continue to be considered by the Government and a range of stakeholders, including expert advisory groups and local emergency planners...the lessons from Exercise Cygnus have informed our preparedness, including strengthening health sector plans to surge and flex*

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<sup>27</sup> “Nick Ferrari’s fiery interview with Tory peer over government’s pandemic preparedness” *Leading Britain’s Conversation* (21 April 2020) <https://www.lbc.co.uk/radio/presenters/nick-ferrari/tory-peer-public-health-england-coronavirus/> (CB/C/514-515).

<sup>28</sup> *Hansard*, HC (Deb), 29 April 2020, vol.675, col.334 (CB/C/216-217).

<sup>29</sup> Written question 41129, *Hansard* HC (Deb), 4 May 2020, cW (CB/C/218).

<sup>30</sup> *Hansard*, HC (Deb), 5 May 2020, vol.675, (CB/C/219-239).

*systems and resources beyond normal operations, and stockpiling personal protective equipment specifically for a pandemic influenza*”<sup>31</sup> (emphasis supplied).

- (9) On 18 May 2020, Lord Bethell on behalf of the Government stated in the House of Lords that the *“lessons from Exercise Cygnus... have informed the UK’s preparedness to ensure that the country remains well prepared for infectious disease outbreaks”*.<sup>32</sup>

### **Refusal to publish the Cygnus Report**

29. In light of the onset and ongoing impacts of the COVID-19 pandemic, and this express reference to and reliance on the lessons said to have been learnt from Exercise Cygnus, there have been repeated calls for the Secretary of State to disclose the Cygnus Report. These include:

- (1) On 2 April 2020, Jon Ashworth MP (Shadow Secretary of State for Health) called on the Government to publish the conclusions of Exercise Cygnus, noting that *“[t]here are serious questions for ministers on what lessons were learnt from the Cygnus pandemic drill, which can only be answered by publishing its conclusions and the actions taken as a result.”*<sup>33</sup>
- (2) On 22 April 2020, Dominic Raab MP (Deputy Prime Minister) was asked at a Daily Briefing whether he would commit to making the Cygnus Report publicly available. Raab stated that he would have *“to look very carefully at the rule”* and that he was *“happy to take that away and have a look at it”*.<sup>34</sup>
- (3) On 24 April 2020, Jeremy Hunt MP (Health Secretary at the time of Exercise Cygnus) confirmed in response to media questions that he *“didn’t have a problem with [the Cygnus Report] being published.”*<sup>35</sup>

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<sup>31</sup> Written Question HL3149, *Hansard* HL (Deb), 13 May 2020, cW (CB/C/252).

<sup>32</sup> Written question HL 3956, *Hansard*, 18 May 2020, cW (CB/C/242).

<sup>33</sup> Dan Sabbagh, ‘Labour urges UK government to publish findings of 2016 pandemic drill’ *The Guardian* (2 April 2020) (CB/C/495-496).

<sup>34</sup> ‘Coronavirus: Dominic Raab gives daily briefing on outbreak in UK — watch live’ *YouTube (Guardian News)* (22 April 2020) [https://youtu.be/tnSdp\\_4RZMQ?t=3038](https://youtu.be/tnSdp_4RZMQ?t=3038) (from 50:39)

<sup>35</sup> Christopher Hope, ‘Jeremy Hunt says he has no problem with Government’s 2016 pandemic report being published’ *The Telegraph* (24 April 2020) (CB/C/516-518).

- (4) On 5 May 2020, in the House of Commons Sir Christopher Chope MP called on the Secretary of State to release the finding of Exercise Cygnus. The Secretary of State confirmed that he would “*take away that point*” and consider the “*specific rules*” that applied as “*Exercise Cygnus was undertaken under my predecessor*” (i.e. Jeremy Hunt MP who had publicly stated he had no problem with the Cygnus Report being published).<sup>36</sup>
- (5) On 12 May, in response to written questions from Clive Efford MP, Justin Madder MP (Shadow Minister for Health and Social Care) and Sir Christopher Chope MP requesting the Secretary of State to publish the findings or recommendations of Exercise Cygnus and provide information on which recommendations were implemented, Jo Churchill MP (Parliamentary Under-Secretary for Health and Social Care) stated: “*The Department does not routinely publish reports on exercises*”.<sup>37</sup>
- (6) On 15 May 2020, Sir Christopher Chope MP submitted further written questions asking the Secretary of State for his reasons for not publishing the Cygnus Report. The answer was that “*it will not be possible to answer this question within the usual time period*”.<sup>38</sup>
30. Then, on 27 April 2020, *The Sun* newspaper partially revealed the findings contained in the Cygnus Report following an apparent leak.<sup>39</sup> On 7 May 2020, the *Guardian* newspaper published a 57-page report entitled “*Exercise Cygnus Report Tier One Command Post Exercise Pandemic Influenza 18 to 20 October 2016*”, again apparently following a leak (CB/C/546-602).
31. It appears that the report published by the *Guardian* (even if authentic) does not contain all of the findings, lessons or recommendations from Exercise Cygnus and that there are other unpublished reports. The Claimants understand that there were numerous reports, one of which would be a ‘compendium’ document containing all of the lessons and

<sup>36</sup> *Hansard* HC, 5 May 2020, vol. 675, col. 503, (CB/C/219-239).

<sup>37</sup> Written questions 38414, 38614, 37420. *Hansard* HC Deb, 12 May 2020, cW (CB/C/248); (CB/C/249); (CB/C/250).

<sup>38</sup> Written question 47173, *Hansard* HC (Deb), 20 May 2020, cW (CB/C/253).

<sup>39</sup> Stephen Moyes and Nick McDermott, ‘The Pandemic Files: Bombshell secret report warned Britain was “critically” underprepared for a deadly pandemic like coronavirus’ *The Sun* (27 April 2020) (CB/C/539-602).

recommendations from Exercise Cygnus and which did not resemble the ‘leaked’ report published by the *Guardian* (Gregory, §§6-7) (CB/B/68-69). In addition to the compendium document, it is understood that there is, at the very least, (i) a specific report focusing on NHS population triage; (ii) a specific report around the emergency powers act, and what needs to be done legally to prepare for a pandemic; and (iii) individual reports which were sent to each of the participants in Exercise Cygnus. The fact that there are other reports setting out the findings of the Cygnus Exercise is supported by the fact that the ‘leaked’ report does not contain detail that is expected to have been in the Cygnus Report based on comments from government sources and other documents in the public domain referring to the Cygnus Report, including that going to the provision of PPE or problems relating to “Surge Capacity” (Qureshi, §59) (CB/B/31)(Gregory, §6(b)) (CB/B/68).

32. The Secretary of State has refused to disclose the Cygnus Report and/or confirm whether the documents provided to *The Sun* and/or the *Guardian* were authentic and a complete sets of the reports produced as a result of Exercise Cygnus. Pursuant to its duty of candour in these proceedings, the Secretary of State must:
- (1) Confirm if the leak originated from Government and how tightly distribution and access to the Report has been controlled in the past. These are all factors that will be relevant to any decision on whether the Report should be disclosed more widely.
  - (2) Provide a full list of the reports that were prepared as part of Exercise Cygnus, including any reports provided to or filed by participants in the Exercise which contributed to the overall report. This should include, but not be limited to, the reports identified at §31 above.
33. On 19 May 2020 (in an email sent at 22:00, two hours before the long-stop period for a response expired pursuant to s.10(1) FOIA), the Secretary of State refused a FOIA request submitted by the First Claimant for “*any report and/or conclusions of Exercise Cygnus*” and “*documents recording the reason why documents from Exercise Cygnus were not made public*” (CB/E/47-49). That requested was refused on the basis of s.12(2) FOIA *i.e.* an absolute cost-based exemption to disclosure.<sup>40</sup>

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<sup>40</sup> In response, on 21 May 2020 the First Claimant submitted a reformulated FOIA request for “*the reports that were prepared as part of the Cygnus Exercise*” and “*the document(s) recording the decision*”

34. In pre-action correspondence in these proceedings, the Secretary of State has refused to disclose the Cygnus Report to the Claimants in response to their requests that he do so: pursuant to his duty to publish under s.2(1)(f) CCA 2004; pursuant to any arrangements maintained for disclosure in the event of a public health emergency under s.2(1)(g) CCA 2004; and/or pursuant to his obligations under s.6 HRA 1998 (read with Article 10 ECHR) and/or the common law right to receive information. (The Claimants also requested disclosure under the s.2A of the National Health Service Act 2006 but they do not pursue that request in these proceedings.)

#### **D. JUDICIAL REVIEW GROUNDS**

##### **Ground 1: Breach of the duty to publish assessments under s.2(1)(f) CCA 2004**

35. This Ground raises the following question:

Does the Secretary of State's refusal to disclose and/or publish the Cygnus Report following the occurrence of the public emergency arising from the COVID-19 pandemic breach his duty under s.2(1)(f) CCA 2004 to arrange for the publication of all or part of assessments made and plans maintained to enable action to be taken in connection with the emergency?

36. The Claimants submit the answer is "yes".

37. Section 2(1)(f) CCA 2004 imposes a duty on the Secretary of State ("*shall*") to publish assessments and plans falling under sub-paragraphs (a) to (d), insofar as this is necessary or desirable for the purposes of "*preventing an emergency*", "*reducing, controlling or mitigating the effects of an emergency*" or "*enabling other action to be taken in connection with an emergency*".

38. These purposes are clearly intended to be read widely, to encompass all elements of dealing with an ongoing or potential emergency (the Explanatory Notes to this section referring to the duty as one of publishing where it is necessary or desirable "*to deal with an emergency*" (CB/D/205). It is clearly wide enough to include action that be taken by

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*not to disclose the Cygnus report or its findings and the reasons for non-disclosure*" (CB/E/50-52). No response to that request has been received to date.

other responders, including doctors, and by civil society more generally to ensure that the Government is responding appropriately to an emergency so as to mitigate or control its effects, to assess the robustness of the Government’s emergency planning to reduce ongoing effects and to hold the Government accountable.

39. It is common ground<sup>41</sup> that the ongoing COVID-19 pandemic has given rise to an emergency within the meaning of the CCA 2004; that the Secretary of State is a Category 1 responder and thus has various duties under s.2 CCA 2004 with regards to that emergency; and that Exercise Cygnus was an assessment exercise relating to the risks of an emergency, arising from a pandemic, within the meaning of s.2(1)(a) and (b) CCA 2004.
40. Accordingly, the Secretary of State is under a duty to publish the findings or results of Exercise Cygnus where publication would be “*necessary or desirable*” for any one of the three purposes outlined in s.2(1)(f), namely: (a) preventing an emergency; (b) reducing, controlling or mitigating the effects of an emergency; and/or (c) enabling other action to be taken in connection with an emergency.
41. For the reasons explained in the Claimants’ evidence (Qureshi §§35-60 **CB/B/17-32**, Greene §§8-20 **CB/B/36-45**) and §48 below, the information *is* necessary and/or desirable for controlling or mitigating the effects of the ongoing emergency, by enabling scrutiny and challenge to such information and enabling sensible representations to be made to Government. Moreover, “*other action*” is apt to include action by members of the public in scrutinising Government actions and decisions and holding the Government to account, which are integral aspects of any democratic response to an emergency.
42. The conditions “*necessary*” and “*desirable*” are objective. The wording is not subjective. This is to be contrasted with s.2A(1) of the National Health Service Act 2006 which states that the Secretary of State must take such steps “*as the Secretary of State considers appropriate for the purpose of protecting the public in England from disease*” (emphasis supplied), which can include “*providing information and advice*”.

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<sup>41</sup> See, in particular, letter dated 22 May 2020 (**CB/E/36-38**).

43. The absence of any similar subjective wording in the CCA 2004 is deliberate choice by Parliament. It ensures that the courts are ultimately able to ensure that assessments and plans are disclosed where this is necessary or desirable.
44. There is therefore no question of this being subject to a test of *Wednesbury* reasonableness. The requirement of *Wednesbury* reasonableness is implied into statutory powers that are framed in subjective terms. But as explained, s.2(1)(f) is not so framed.
45. That is *a fortiori* in circumstances where Article 10 is engaged, which requires the court itself to determine whether Article 10 requires information to be imparted to a person (§§63-77 below).
46. There has been very little judicial consideration of these statutory provisions. *Dennett v Lancashire County Council* [2018] EWHC 2721 (Admin) was an application for an interim injunction with regards to certain fracking operations. The claimant argued that the council was obliged under s.2(1)(f) to publish a specific kind of risk assessment about those operations. The Court’s decision turned upon the specific facts of that case, including the modest degree of risk the operations were assessed as giving rise to. Supperstone J stated that he considered that s.2(1)(f) “grants considerable discretion” to the Council, although no reasons are given for that statement (at §26).
47. Whilst of course the Court should have due regard to an assessment of what is necessary or desirable to disclose conducted by a Minister, (a) ultimately the question is an objective one, and (b) there must have been such an assessment, of which there is no evidence in this case. Furthermore, what is “necessary” to disclose admits of very little room for deference to a decision-maker, particularly where disclosure is “necessary” in order to comply with a person’s rights under Article 10 ECHR.
48. The Claimants submit that the publication of the Cygnus Report is necessary *and/or* desirable for the statutory purposes of dealing with the COVID-19 pandemic, and hence the Secretary of State is under a duty to publish it:
  - (1) Section 2(1)(f) clearly envisages publication of information to the public at large, and not merely to other Category 1 or 2 responders. It is no answer for the Secretary of State to say that his duty was satisfied by publication to other responders. That

publication under s.2(1)(f) was intended to be broad and to the general public is demonstrated by:

- (a) the fact that a scheme for requesting and sharing information as between different responders is separately provided for under the 2005 Regulations (see Part 8); and
  - (b) the fact that in performing the s.2(1)(f) duty, the Secretary of State must have regard to any relevant arrangements he maintains under s.2(1)(g) (§16 above), namely arrangements for the provision of information to the public.
- (2) The Cygnus Report contains information which is not available from other publicly available sources (such as those referred to by the Secretary of State in his letter dated 22 May 2020). The Claimants believe (based upon the evidence summarised at §§24-28 above) that the Cygnus Report is unique in that it contains information tending to show whether the UK at the time of Exercise Cygnus had achieved sufficient preparedness for a pandemic like the present one. The Claimants anticipate that the Cygnus Report may, for example, indicate the extent to which the UK had gaps in its critical care provision and PPE stockpiling or had adequate provisions in place for the protection of persons in care homes. That information is not otherwise publicly available. (Gregory §7) (**CB/B/69**). As Dr Qureshi explains, the Cygnus Exercise and its outcomes would be applicable and relevant to any respiratory viral pandemic given common characteristics, transmission and treatment (Qureshi §§20-23) (**CB/B/7-9**). Indeed, the Government has itself stated that the Exercise informed its approach to the first wave of the COVID-19 pandemic (§28 above).
- (3) It is necessary and desirable for the general public to have that information, not least because it will enable the public:
- (a) to understand and test the veracity of references by the Government to the Report and its assertion that it took on board and implemented the lessons and recommendations set out therein (see §28 above);

- (b) to hold the Government accountable for any past and/or ongoing failure to implement the lessons and recommendations set out in the Report (as to the risk of such failure, see §26 above);
  - (c) to ensure that proper steps are taken in the near future, in light of the findings and recommendations set out in the Report, to combat the COVID-19 pandemic and in particular, to prevent, reduce or control the risk and effects of a ‘second wave’ of infection; and
  - (d) to allow private individuals, businesses and other organisations to make informed decisions about their actions in light of any findings in the Report as to the preparedness of the UK for a pandemic of this kind, read in the context of what is otherwise publicly known about the UK’s preparedness.
- (4) All of these steps will serve to help mitigate the effects of the ongoing emergency per s.2(1)(f)(b), including the possibility of any rise in transmissions as part of a future ‘second wave’ (see Qureshi §§46-51, **CB/B/24-26**) and/or facilitate other action in connection with the emergency per s.2(1)(f)(c).
- (5) The Claimants are not alone in their belief that the Cygnus Report will be relevant to guiding the UK’s ongoing response to the present pandemic. There have been repeated calls for the Report (along with further information on the degree to which its recommendations were implemented) by civil society, including Members of Parliament (§29 above). By way of further illustration:
- (a) On 2 May 2020, Adam Price MP (leader of Plaid Cymru) stated that the public needed to know what actions “*the Welsh Government took to better plan and prepare our NHS for an inevitable pandemic*” after Exercise Cygnus, and “*the public deserve and need to know what happened in this test so that we can learn lessons to help us now*”.<sup>42</sup>

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<sup>42</sup> ‘Coronavirus: Pandemic exercise findings ‘must be published’’, *BBC News* (2 May 2020) (**CB/C/522-523**).

(b) On 6 May 2020 during a House of Common debate Valerie Vaz MP (Shadow Leader of the House of Commons) stated that “[i]t is important for us to know for the next step whether there is capacity so that the NHS can withstand any changes. If the Government had released the 2016 pandemic Exercise Cygnus report – or at least its conclusions – it might have helped with that next stage”.<sup>43</sup>

(6) The ongoing calls for publication of the Cygnus Report are highly relevant. The Cabinet Guidance makes clear that a relevant consideration is “*what the public wants to know not simply what the authorities need to say*”.<sup>44</sup>

49. It is possible, although the Secretary of State has refused to confirm, that publication was initially refused on the basis of regulation 27 and/or 30 of the 2005 Regulations (§§14, 16 above) (see, e.g., the suggestion that publication did not occur because the results were “*too terrifying*” to be revealed at §26(1) above). Irrespective of whether that was initially a valid justification, it clearly has no application now. In any event, properly construed avoiding unnecessary public alarm is about avoiding emotive or sensationalist language, rather than providing the basis for censorship. See the Cabinet Office guidance on the CCA 2004:

“Information relating to events, particularly terrorist events, where the consequences would include mass fatalities and casualties could be unsettling and upsetting. However, there is a clear need to strike a balance between not causing public alarm and providing necessary information to enable people to understand the threat and respond in an appropriate manner in the event of an incident occurring. There is no evidence that the public panics when receiving information. They want to feel they have all the relevant facts so that they can take informed decisions. Communication needs to be handled sensitively. Responders should use clear terminology, providing factual information which avoids sensationalism or emotive language.”<sup>45</sup>

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<sup>43</sup> *Hansard HC (Deb)*, 6 May 2020, vol 675, col 576 (CB/C/243-247).

<sup>44</sup> Cabinet Office, “*Emergency Preparedness*” revised March 2012, Chapter 7, §7.59 (CB/C/342).

<sup>45</sup> Cabinet Office, “*Emergency Preparedness*” revised March 2012, Chapter 7, §7.57 (CB/C/339).

**Ground 2: Breach of the duty to maintain arrangements to provide information to the public in an emergency under s.2(1)(g) CCA 2004**

50. This Ground raises the following issues:

Is the Secretary of State in breach of s.(1)(g) CCA 2004 in failing to maintain arrangements to provide information to the public where an emergency has occurred? Should the Cygnus Report have been disclosed pursuant to such arrangements?

51. The Claimants submit the answer to both questions is “yes”.

52. Section 2(1)(g) CCA 2004 envisages that the Secretary of State must create and maintain a plan or policy setting out principles and guidelines by which the Secretary of State (and others) will disclose information to the public in the event of an emergency. It envisages that the Secretary of State will be under wider disclosure obligations in an emergency context and/or that there will be good reasons why it should seek to share greater amounts of information. See also the Cabinet Office guidance on s.2(1)(g): “*Warning, informing and advising the public is not a stand-alone duty .... As with any other part of planning for the response to an emergency, the communications strategy – either direct with the public, or via the media- should be fully integrated into the responder’s emergency plans”<sup>46</sup> (emphasis supplied)*

53. In *Dennett Supperstone J* stated of s.2(1)(g) (albeit in an ex tempore judgment on an application for an interim injunction) that:

“It is a duty to maintain arrangements. The provision requires information to be provided and advice to be given to the public if an emergency is likely to occur or has occurred.”

54. Section 2(1)(g) clearly requires the Secretary of State to have and publish arrangements by which assessments are made about what information to disclose to the general public in the course of the pandemic. There must be at the very least a policy which sets out the criteria to be applied and how requests for information will be addressed and handled, having regard to the urgency of the situation. Those criteria should set out the facts and

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<sup>46</sup> Cabinet Office, “*Emergency Preparedness*” revised March 2012, Chapter 7, §7.26 (CB/C/323).

circumstances that will be taken into account in deciding whether to refuse to provide information.

55. Where a Secretary of State has broad powers, it is a basic principle of public law that he or she should publish a policy which sets out how that power will be exercised, consistently and fairly: see *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245 at §34 per Lord Dyson and §302 per Lord Phillips. The Courts have frequently recommended that public authorities develop and publish policies on how they will exercise discretionary powers (noting that such policies would also provide a useful benchmark against which to assess any refusals to exercise those powers): see *R (Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481, [2005] 1 WLR 2219 at §18; *R (Teleos Plc) v Customs and Excise Commissioners* [2005] EWCA Civ 200, [2005] 1 WLR 3007 at §24; and *B v Secretary of State for Work and Pensions* [2005] EWCA Civ 929, [2005] 1 WLR 3796 at §43.
56. That common law principle finds its parallel in the ECHR jurisprudence. Any exercise of executive power which interferes with an individual's Article 10 rights (e.g. a refusal to disclose, which interferes with an individual's Article 10 rights to access information) must meet the Convention principle of legality. This is enshrined within Article 10(2) which provides that any interference must be "*in accordance with law*". It includes the idea that any interference with a Convention right must be sufficiently foreseeable (see *Sunday Times v UK* (1979) 2 EHRR 345 followed in *Silver v UK* (1983) 5 EHRR 347 §§85-90). Foreseeability demands publicly accessible criteria guiding the exercise of executive power including when it will and will not be used.
57. The rationales for a requirement for foreseeable and accessible criteria governing discretionary power are numerous. It enables people affected by decisions to understand what to expect and what factors will be relevant to the decision, it enables those with the power to know how to go about making decisions, it enables applicants to challenge the legality of the policy itself if necessary and it serves to ensure that decisions about how

to exercise broad discretionary powers are properly evidenced and reasoned: *Nzolameso v City of Westminster* [2015] UKSC 22; [2015] PTSR 549 at §§39-42.

58. See also the recent judgment in *Privacy International v Secretary of State for Foreign & Commonwealth Affairs* [2016] HRLR 21 at §62 summarising the effect of the Convention case-law:

“There must not be an unfettered discretion for executive action. There must be control on the arbitrariness of that action. We must be satisfied that there exist adequate and effective guarantees against abuse... The nature of the rules fettering such discretion and laying down safeguards must be clear and the ambit of them must be in the public domain so far as possible; there must be adequate indication or signposting, so that the existence of interference with privacy may in general terms be foreseeable... It is not necessary for the detailed procedures and conditions which are to be observed to be incorporated in rules and substantive law.”

59. Section 2(1)(g) is a super-charged version of this public law duty. However, the Secretary of State has not even complied with the requirements of the common law. There appear to be no arrangements in place that structure what information should be disclosed to the public and/or those seeking access in exercise of their Article 10(1) rights so as to ensure transparency during a public health emergency like the present.
60. In pre-action correspondence, the Secretary of State was asked to identify the arrangements (whether policies or strategies or guidelines) in place under s.2(1)(g) for providing information to the public in the present emergency (**CB/E/33-35**). He identified none. He also failed to explain if and how he has had regard to any such arrangements in reaching the decision that s.2(1)(f) CCA 2004 does not require publication of the Cygnus Report. The Claimants also note the absence of any proper answer to Sir Christopher Chope MP’s request for the Secretary of State’s reasons for not publishing the Report (see §29(6) above). In those circumstances, the Claimants infer

that the Secretary of State has breached his duty to maintain such arrangements and is in breach of s.2(1)(g).

**Ground 3: Breach of s.6 HRA read with Article 10 ECHR and the common law**

61. This Ground raises the following question:

Does the Secretary of State's refusal to disclose and/or publish the Cygnus Report breach s. 6 HRA 1998 in violating the Claimants' right to receive information under Article 10 ECHR and/or the common law right to receive information? Do the provisions of the CCA 2004 need to be interpreted in a manner that ensures compliance with Article 10 ECHR and/or the common law?

62. The Claimants submit the answer is "yes".

63. If (contrary to the above) the Secretary of State is under no freestanding duty to disclose the Cygnus Report pursuant to the CCA 2004, he must still act compatibly with the Claimants' Article 10 ECHR rights by virtue of s.6 HRA 1998 and/or the common law right to receive information.

64. Furthermore, by virtue of s.3 HRA 1998, the CCA 2004 must be read in a manner that complies with Article 10 insofar as it is possible to do so.

65. Article 10 ECHR therefore provides an independent basis upon which an individual or entity may seek disclosure of documents from a public authority where disclosure is instrumental for the individual's exercise of his or her right to freedom of information: see *Magyar Helsinki*, §149.

66. The Supreme Court expressed a contrary view in *Kennedy*, but that was *obiter* and expressed in the context of jurisprudence that the Court described as "*neither clear nor easy to reconcile*" (see §§59-60, 90-94 per Lord Mance). Following the Supreme Court's judgment, the Grand Chamber clarified the law in *Magyar Helsinki*. This court must have regard to that authority and, since UK courts will follow clear decisions of the Grand Chamber on the meaning of the ECHR, and since the comments in *Kennedy* were *obiter*, *Magyar Helsinki* should be applied. Even if a lower court remains bound by domestic

authority, which is not the case here<sup>47</sup>, permission to appeal to a higher court should be granted to ensure that UK law is consistent with the Grand Chamber judgment: see *Kay v Lambeth* [2006] 2 AC 465, §43.

67. Indeed, when Mr Kennedy challenged the Charity Commission’s refusal to exercise its freestanding (non-FOIA) statutory power to disclose the documents he sought before the ECtHR, the UK Government successfully argued that his application was inadmissible for failure to exhaust domestic remedies. As recorded in the admissibility decision (§84) the UK Government argued that judicial review would be an effective remedy for Mr Kennedy precisely because:

“the Supreme Court’s conclusions [in Kennedy] as to the scope of Article 10 were expressly stated by Lord Mance to be *obiter*, and it would now be open to the High Court and the Court of Appeal to revisit the question in light of *Magyar Helsinki...*”.

68. In *Magyar*, the Grand Chamber set out four criteria relevant to whether Article 10(1) is engaged so as to give rise to a right of access to State-held information: (i) the purpose of the information request; (ii) the nature of the information sought; (iii) the role of the applicant; and (iv) whether the information is ready and available. All four criteria are satisfied in the present case.

***(i) Purpose of the information requested***

69. The Claimants’ purposes in requesting the Secretary of State to publish the Cygnus Report are to enable the UK public to have access to the findings, lessons and/or recommendations arising from Exercise Cygnus, contained within the Cygnus Report. That is fundamentally important in a situation in which a public health crisis is sadly causing tens of thousands of deaths, many more illnesses and untold economic and social

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<sup>47</sup> Contrary to what is suggested at §22 of the Defendant’s pre-action response letter dated 1 May 2020 (**CB/E/16-20**), there is no authority that supports a general proposition that *obiter* statements of the Supreme Court are binding on lower courts. Insofar as the decision in *R (Youngsam) v Parole Board* [2017] 1 WLR 284 indicated that *obiter dicta* of the Supreme Court should be followed where it was “clearly intended to ... be followed by all courts of inferior jurisdiction” (§40), that has no application in the present context. It is inconceivable that the Supreme Court would have intended its analysis on Article 10 to be binding on inferior courts in circumstances where there has, since the judgment in *Kennedy*, been a judgment of the Grand Chamber which definitively and conclusively decides the very issue which the Supreme Court was considering. That is all the more so in light of the Supreme Court’s express regret in *Kennedy* that the matter had not at that time been considered by the Grand Chamber (see §59 per Lord Mance).

harm; where Exercise Cygnus was the main way that the Government sought to prepare for such an eventuality; and where the Government has relied upon the exercise in support of its claims to have been well prepared.

70. The Claimants wish to obtain and publish the Cygnus Report for all of the purposes outlined at §48(3) above.
71. The Claimants’ access to the Cygnus Report can plainly be characterised as “*a relevant preparatory step in activities ... constituting an essential element of, public debate*”<sup>48</sup> on the UK’s past, current and future responses to the COVID-19 pandemic, and on the UK’s future pandemic preparedness more broadly (Qureshi §§38-58 **CB/B/18-31**, Greene §§8-20 **CB/B/36-45**). Disclosure of that Report is plainly instrumental to the Claimants’ rights to freely receive and impart information.

***(ii) Nature of the information sought***

72. There is an exceptionally strong public interest in the publication of the Cygnus Report. This is more than sufficient to satisfy the public interest criterion set down in *Magyar Helsinki*. The Cygnus Report contains matters that, *inter alia*, concern the public to a significant degree — especially in that they “*affect the well-being of [the UK’s citizens] and the life of the community*”<sup>49</sup> — and concern an “*important social issue ... that the public would have an interest in being informed about.*”<sup>50</sup> Ultimately, disclosure of the Cygnus Report would provide “*transparency on the manner of conduct of public affairs and on matters of interest for society as a whole and thereby allow[ ] participation in public governance by the public at large.*”<sup>51</sup>
73. Evidence in support of the high level of public interest is addressed in detail in the witness statement of Dr Qureshi (at §§38-58, **CB/B/18-31**), Mr Greene (at §§17-20, **CB/B/44-45**). In summary:
- (1) The Cygnus exercise was carried out for the express purpose of informing Government, public health experts, medical practitioners, NHS procurement,

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<sup>48</sup> *Magyar Helsinki*, §159.

<sup>49</sup> *Magyar Helsinki*, §162.

<sup>50</sup> *Magyar Helsinki*, §162.

<sup>51</sup> *Magyar Helsinki*, §161.

health, social care and education providers, on how best to prepare for an influenza pandemic (see §23-24 above).

- (2) Exercise Cygnus appeared to result in a number of lessons learned or recommendations to be implemented in order to improve the UK's preparedness for a pandemic (see §25 above).
- (3) The lessons and recommendations within the Cygnus Report are directly relevant to the laws, regulations, systems and procedures that have been developed, and are currently being developed, in response to the COVID-19 pandemic. Indeed, the Government has expressly relied on the existence of the Cygnus exercise and the content of the Cygnus Report in defending its response to, and preparedness for, COVID-19 (see §28 above).
- (4) The Cygnus Report is directly relevant to informing public debate on the deficiencies raised by Exercise Cygnus, including reports that it revealed significant gaps in the NHS' "surge capacity" and suggestions that the Report was withheld for inadequate reasons (see §26 above).
- (5) There have been widespread calls for the publication of the Cygnus Report by politicians and the press (see §29 above).
- (6) There is a general public interest in promoting transparency in Government. Two provisions of the Ministerial Code, *'The 7 principles of public life'* — which *'apply to all aspects of public life'* — are of particular note. Firstly, *'Accountability: Holders of public office are accountable for their decisions and actions and must submit themselves to whatever scrutiny necessary to ensure this.'*<sup>52</sup> Secondly, *'Openness: Holders of public office should act and take decisions in an open and transparent manner. Information should not be withheld from the public unless there are clear and lawful reasons for doing so.'*<sup>53</sup> See also HM Government's *'Principles of Managing Risk to the Public'* which provides five principles, the first of which is:

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<sup>52</sup> Committee on Standards in Public Life, 'Guidance: The 7 Principles of public life' (31 May 1995) (CB/C/301-303).

<sup>53</sup> Id.

*“Openness and Transparency - the Government will be open and transparent about its understanding of the nature of the risks to the public and about the process it is following in handling them”<sup>54</sup>.*

- (7) That public interest is even greater in the context of the COVID-19 pandemic as the Government has expressly recognised. The Department of Health’s *“Principles of effective communication – Scientific Evidence Base Review”* refers to the importance of maintaining trust in Government decision-making during a pandemic, noting that *“lack of trust can therefore have very detrimental effects in terms of controlling the disease”* and *“issues of trust can be especially important in situations which are uncertain, such as how the course of a pandemic will develop”<sup>55</sup>*. On 27 April 2020, and in the context of discussing the future decisions and *“difficult judgments”* that the UK Government will need to make in responding to the pandemic, Prime Minister Johnson *“serve[d] notice ... that these decisions will be taken with the maximum possible transparency”<sup>56</sup>*. That commitment was then put in writing. In its plan on the easing of lockdown restrictions, the Government stated that transparency was a *“guiding principle”* and it *“will continue to be open with the public and parliamentarians, including by making available the relevant scientific and technical advice. The Government will be honest about where it is uncertain and acting at risk, and it will be transparent about the judgments it is making and the basis for them”<sup>57</sup>* (emphasis supplied).
74. There is a clear public interest in the immediate publication of the Cygnus Report to allow the UK public to test the veracity of the statements being made by the Government, to examine the lessons and recommendations that are set out in the Cygnus Report, to understand and assess references to the Cygnus Report by Government and the steps said to have been taken in response to the recommendations therein. This public interest has only increased in light of what appears to be a partial publication of the findings of

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<sup>54</sup> HM Treasury, *‘Managing risks to the public: appraisal guidance’* June 2005, p.45 (CB/C/304-308).

<sup>55</sup> Department of Health, *‘Principles of effective communication – Scientific Evidence Base Review’*, §58 (CB/C/309-314).

<sup>56</sup> Prime Minister’s Office, 10 Downing Street, and the Rt Hon Boris Johnson MP, *‘Speech: PM statement in Downing Street: 27 April 2020’* <https://www.gov.uk/government/speeches/pm-statement-in-downing-street-27-april-2020> (CB/C/470-473).

<sup>57</sup> HM Government, *‘Our Plan to Rebuild: The UK Government’s COVID-19 recovery strategy’*, May 2020, CP 239, pp.17-18 (CB/C/458-463).

Exercise Cygnus and the growing understanding around a risk of a ‘second wave’ (see §30 above).

***(iii) Role of the applicants***

75. The First Claimant seeks access to the Cygnus Report in his role as an NHS doctor who has felt the effects of the COVID-19 pandemic, and who has a background in campaign work relating to the healthcare sector (Qureshi §§8-17) (**CB/B/3-5**). His campaign work has included work with 54000doctors.org, a public advocacy group that campaigns for patient safety and whistleblowing protections for junior doctors within the NHS (Qureshi §§10-11). Particular weight should be given to the First Claimant’s role in this context.<sup>58</sup>

76. The Second Claimant seeks access to the Cygnus Report in his role as a journalist who is interested in and has previously reported on NHS whistleblowing and transparency in governance and management of the health service and who is reporting on the ongoing COVID-19 pandemic (Greene §§6-10) (**CB/B/37-40**). Particular weight should be given to the Second Claimant’s role in this context in light of the essential role played by the press in a democratic society and the special position of journalists in this context.<sup>59</sup>

***(iv) Information ready and available***

77. The Cygnus Report is “*ready and available*” in that it does not necessitate any further preparation on the part of the UK Government.<sup>60</sup> The various references to such a Report being in existence (summarised at §25 above) show that the findings, conclusions, recommendations or lessons arising from Exercise Cygnus exist and are readily identifiable and, indeed, are being used and relied upon by the Government.

**Disclosure at common law**

78. In *Kennedy*, the Supreme Court emphasised that disclosure of information can be provided by public authorities outside FOIA and refusals to publish information can be challenged on common law grounds.

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<sup>58</sup> *Magyar Helsinki*, §§164, 166-168.

<sup>59</sup> *Magyar Helsinki*, §§164-165.

<sup>60</sup> *Magyar Helsinki*, §169.

79. The Claimants submit in this case that there is an extremely powerful indeed overwhelming case for publication. On the other side of the scales, there is nothing. The only reasonable decision is publication.
80. It is a striking feature of the factual backdrop to this judicial review claim that there have been repeated vociferous calls for disclosure of the Cygnus Report. Yet the Government has provided no reasons for not doing so, beyond the Secretary of State saying that he believes he is not required to by statute. That is no justification in the true sense. It does not provide the reasons why he does not want it to be disclosed.
81. As to any possible concerns about public fear regarding the content of the Cygnus Report, even if they had any merit, this has plainly evaporated in light of the fact that the public is now engaged in a tackling a pandemic. What were once hypothetical fears that might never materialise have become reality.
82. The population is in lockdown and the NHS is on a war footing.

**Ground 4: Irrational/vitiated by a failure to provide reasons**

83. This Ground raises the following question:

Is the Secretary of State's refusal to disclose and/or publish the Cygnus Report unreasonable at common law and/or vitiated by a failure to provide any or any adequate reasons as to why the report has not been published?

84. The Claimants submit the answer is "yes".
85. The Secretary of State's position appears to be that the question of whether he ought to exercise his powers to disclose the Cygnus Report is answered by whether he is *obliged* to disclose that report under FOIA.
86. By adopting that position, the Secretary of State has acted irrationally. The Secretary of State has entirely failed to consider adequately, or at all, whether to disclose the Cygnus Report, having regard to the strong *prima facie* case for disclosure in the public interest, the Claimants' Article 10 rights, the common law principles of accountability and transparency, the particular public interest in those principles applying to exercises of

ministerial power and the Government's commitment to transparency as regards its ongoing COVID-19 response.

87. FOIA does not occupy the field as regards the Secretary of State's duty of disclosure, the relevant considerations and what weight they should be accorded: see *Kennedy*.
88. Alternatively, insofar as the Secretary of State contends that he did properly consider whether he should exercise his power to disclose in light of the relevant factors outlined above, the Secretary of State has failed to provide any or any adequate reasons for refusing to disclose or publish the Cygnus Report.
89. This is plainly a context in which a reasoned decision should be given. Indeed, the Government Legal Department has confirmed that the decision was taken personally by the Secretary of State. There must therefore be a record of a submission made to him, at the very least, setting out the considerations. His decision appears to be flatly contradictory to the Government's express policy of maximum transparency regarding its COVID-19 responses (§§73(6)-73(7) above). This is a context in which there is a clear and manifest responsibility for a reasoned decision to be taken and for those reasons to be given so that the decision is rendered intelligible: see, e.g. *R (Oakley) v South Cambridgeshire DC* [2017] EWCA Civ 71; [2017] 1 WLR 3765.
90. This ground is closely related to the common law ground of challenge because where a decision-maker fails to give any reasons for a decision, the court will infer that the decision maker had no rational reasons for the decision. Lord Upjohn in *Padfield* [1968] AC 997 stated,

“... a decision of the Minister stands on quite a different basis; he is a public officer charged by Parliament with the discharge of a public discretion affecting Her Majesty's subjects; if he does not give any reason for his decision it may be, if circumstances warrant it, that a court may be at liberty to come to the conclusion that he had no good reason for reaching that conclusion and order a prerogative writ to issue accordingly. The Minister in my opinion has not given a single valid reason for refusing to order an inquiry into the legitimate complaint (be it well founded or not) of the South-Eastern Region; all his disclosed reasons for refusing to do so are bad in law.” (1062)

91. The absence of reasons compels the conclusion that there are no good reasons for withholding the report.

**E. ALTERNATIVE REMEDY**

92. It appears that the Secretary of State's principal defence to this judicial review is his contention that the Claimants must first pursue an alternative remedy before commencing judicial review proceedings, namely make a request under the FOIA. The Secretary of State has sought to rely on a permission decision in which he persuaded the Administrative Court that FOIA provided an alternative remedy in another case. However, permission decisions are no authority and should not be cited.<sup>61</sup> In any event that case involved entirely different facts and had nothing to do with the current public health emergency or the CCA 2004.

93. FOIA is not an alternative remedy for the following reasons:

94. First, this judicial review raises a number of important issues of law which are not capable of being resolved within the FOIA machinery (see §8(1) above). This is essentially a complete answer to the Secretary of State's point. The Claimants make the further points for completeness only.

95. Second, the Department for Health's position is that FOIA is not available to address the Claimants' request. It has refused the FOIA request on the basis that it is too complex and exceeds the costs exemption. That is an absolute exemption and is not subject to public interest balancing. The Secretary of State cannot on the one hand contend that the request is outside FOIA and on the other that FOIA is an adequate remedy.

96. Whist the Department has suggested that the Claimants refine their request, this is a standard form of wording that does not detract from the fact that the request has been refused.

97. Thirdly, in the present context it is clear that a decision has been taken not to disclose the Cygnus Report at Ministerial level. Requiring the Claimants to exhaust any internal

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<sup>61</sup> *Practice Direction (Citation of Authorities)* [2001] 1 WLR 1001 at §§6.1-6.2.

complaints procedure before applying to the Information Commissioner would be absurd since the decision not to disclose has been made at the highest levels. Any internal complaints procedure cannot be expected to overturn the Minister's decision. Indeed, at the present time, it would confirm the application of the costs exemption.

98. Fourth, timing. The FOIA refusal could be challenged but this would take a very long time. The Department of Health is itself delaying the process as long as it can – it responded to the FOIA request after 10pm on the last day for responding only to say the request was too expensive to be dealt with. If that refusal is challenged by way of internal complaints procedure there will be a further period of delay. Proceedings before the commissioner and the tribunal would follow. Even if a challenge was successful, that would only mean that the costs exemption did not apply and the request could be refused on substantive grounds – the Claimants would be back at the beginning again months down the line. That is not a suitable alternative to judicial review of a Ministerial decision.
99. But in this case this is a particular problem. The Government is making ongoing and rapidly evolving policy and public health decisions on how to respond to the COVID-19 pandemic. Imminent decisions are expected regarding the potential for easing of the lockdown. There are real fears that a second wave of the pandemic is likely. Even in the absence of a second wave, there is an ongoing health crisis in which tens of thousands have died and hundreds are losing their lives each day. Disclosure of the Report, and public scrutiny of Government decision-making in light of it, will play a vital role in ensuring the public are protected from or during any such 'second wave' or other continuation of this pandemic. There have been extensive calls for, and public debate concerning, the publication of the Cygnus Report.
100. Fifth, more generally, there is nothing even remotely unusual about a statute which imposes positive duties of disclosure on a public authority that are different from those imposed by the FOIA machinery and that these are enforceable by judicial review. This was precisely the issue addressed in *Kennedy*.
101. That is particularly so in circumstances in which the Supreme Court in *Kennedy* declined to adopt a Convention-compatible reading of FOIA on the basis that separate and freestanding routes to disclosure existed in parallel with FOIA, namely the Charity

Commissions’ statutory disclosure powers which fall to be exercised compatibly with individual rights. The Supreme Court stated that if the applicant *had* sought disclosure pursuant to those powers, and been unsuccessful in that regard, “*the response could have been tested by judicial review on ordinary public law principles*”.<sup>62</sup> That is clearly right. It is made explicit in s.78 of the FOIA, which specifies that nothing in it “*is to be taken to limit the powers of a public authority to disclose information held by it*”.

**F. REMEDIES**

102. The Claimants seek the following remedies or one or more of them:

- (1) A declaration that the Secretary of State’s decision to refuse to disclose to the Claimants and/or publish the Cygnus Report<sup>63</sup> is unlawful.
- (2) A quashing order in relation to that decision.
- (3) An order that the Secretary of State disclose to the Claimants and/or publish copies of the Cygnus Report, alternatively an order remitting the decision as to whether to do so for reconsideration in light of the Court’s judgment.
- (4) A mandatory order requiring the Secretary of State’s reasons for not disclosing and/or publishing the Cygnus Report.
- (5) A mandatory order requiring the Secretary of State to put in place arrangements for the disclosure of information and advice during and relating to the emergency, including the criteria by which information will be disclosed.

**G. CONCLUSIONS**

103. For all of the reasons set out above, the Court is invited to grant permission and, in due course, to grant the relief set out at §102 above.

**TOM HICKMAN QC**

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<sup>62</sup> *Kennedy*, §8.

<sup>63</sup> As defined above in fn 1.

**JASON POBJOY**

**HOLLIE HIGGINS**

**Blackstone Chambers**

**LEIGH DAY SOLICITORS**

**1 June 2020**