

IN THE FIRST-TIER TRIBUNAL
(INFORMATION RIGHTS)
BETWEEN:

RIGHTS AND ACCOUNTABILITY IN DEVELOPMENT (RAID)

Appellant

-v-

(1) THE INFORMATION COMMISSIONER
(2) HER MAJESTY'S TREASURY

Respondents

SECOND WITNESS STATEMENT OF PATRICIA FEENEY

I, **PATRICIA FEENEY**, of Rights and Accountability in Development (RAID), 1 Bladon Close, Oxford, OX2 8AD, **WILL SAY** as follows:

A. INTRODUCTION

1. I am the Executive Director of RAID. I make this second Witness Statement in support of RAID's appeal against the Information Commissioner's Decision Notice of 8 December 2014.
2. In my first Witness Statement ("PF1"), I outlined why RAID made requests for information from HM Treasury under the Freedom of Information Act ("FOIA") and why disclosure of the withheld information is important in terms of the public record and public accountability.
3. To recap briefly, the requests concerned information relating to two transactions engaging the Zimbabwean sanctions regime, including Council Regulation (EC) No 314/2004 of 19 February 2004, implementing restrictive measures in respect of Zimbabwe (the "EU Regulation"). The first transaction concerned the sale in April 2008 of a Zimbabwean platinum concession to a UK-registered and traded mining company, Central African Mining and Exploration Company plc ("CAMEC") ("the Platinum Mine Deal"). Money from this sale went to the Zimbabwe government regime of President Robert Mugabe. The second transaction concerned the later sale in autumn 2009 of CAMEC to Eurasian Natural Resources Corporation plc ("ENRC"), then a Main-market-listed mining company ("the CAMEC Sale Deal"). The takeover resulted in certain CAMEC shareholders, also on the Zimbabwe sanctions list, receiving payment for their shares.

4. I am responding to Mr Peter Maydon’s second Witness Statement (“PM2”), in his capacity as head of HM Treasury’s Sanctions and Counter-Terrorist Financing Unit.

5. My purpose in making this additional Witness Statement is:

(i) To demonstrate that there is a strong public interest in disclosing the Requested Information. I have already outlined the overarching public interest in the disclosure of the Requested Information (PF1, paragraphs 81 – 82) and provided an account of how there has been, and continues to be, a media and wider public interest in the Platinum Mine Deal and the CAMEC Sale Deal (paragraphs, 85 – 88). However, now that HM Treasury has advanced arguments to support exemptions that require a public interest test, I would add a number of further specific points.

(ii) To respond to the Treasury’s reliance on new exemptions (in the context of these proceedings), to its continued sweeping use of section 44 exemptions, and to certain points and assumptions made by Mr Maydon. In particular, I address, the basis and reasonableness of the qualified person’s opinion underlying exemptions under section 36 of FOIA, the safety of officials and other parties, the undermining of public confidence in the implementation regime, commercial confidentiality, and HM Treasury’s delay in responding to the Request

B. THE SPECIFICITY OF THE REQUESTS VERSUS HM TREASURY’S SWEEPING ASSERTIONS

The specific nature of the requests

6. Mr Maydon’s statement gives the impression that RAID is asking for extensive information – with implications for disclosure under the entire sanctions regime – which is politically, commercially, financially or personally confidential. It is therefore important to summarise the exact nature of RAID’s requests. As noted, we asked for information on two transactions under the Zimbabwe sanctions regime, involving companies and/or specific individuals that have been named publicly (listed in EU and American sanctions, as well as being the subject of extensive press coverage, public authority investigations and/or court cases). On the Platinum Mine Deal, we asked whether advice had been sought from HM Treasury before the transaction went ahead. On the CAMEC Sale Deal, we sought to establish whether an individual on the sanctions list (Muller Conrad (aka ‘Billy’) Rautenbach) had benefitted from the sale of shares in CAMEC when it was taken over by ENRC. RAID asked for details of

HM Treasury's licensing: whether licences were required and issued to buy the platinum assets in Zimbabwe, including the names of the entities concerned; whether licences were required and issued to sell and buy CAMEC shares, including the names of the entities concerned; the licensing of the release of certain frozen funds or economic resources to Rautenbach under Article 7 of the Regulation; the dates upon which any such licences were requested or issued.

The scope of the requests: only very limited personal data and information about companies/third party institutions is sought

7. Contrary to what is asserted or implied in Mr Maydon's statement, RAID is not requesting the personal details of government officials (UK or foreign), the identity of individual officials at banks or other financial institutions who may have supplied information under Article 8 of the Regulation, or the operational account details (for example, sort codes, account numbers) or amounts associated with the transactions (only information on whether CAMEC notified the Treasury of the quantity of shares held by Rautenbach in CAMEC). To the extent that any personal data is requested, this relates only to publicly identified sanctions targets or individuals publicly linked to such targets/the relevant transactions; even then, the information does not relate to the person's private life (for example, telephone numbers, residential addresses, family details, passport details etc.), but to material related to business transactions, the bones of which have already been reported in the public domain.

Using blanket exemptions to thwart an expectation of accountability

8. The gist of Mr Maydon's argument is that HM Treasury is entitled to an absolute and blanket exemption from disclosure under FOIA requests in respect of sanctions: there can be no such sweeping exemption. All government departments and their staff, including those within the Treasury working on sanctions, must already know and appreciate that the information they hold and process may be subject to disclosure under FOIA. The expectation is that major departments and government officials working in important areas of public policy would be robust in their approach and not cowed by the potential for transparency and accountability.
9. Whilst conceding that the prohibition on disclosure is no longer universal in respect of Article 8, HM Treasury continues to make extensive use (although the extent of that use is unknown to RAID) of exemptions under section 44(1)(b). I remain concerned that, with one or two

unspecified exceptions, this will continue to have a profound blanketing effect on the release of any information requested on the implementation of sanctions.

10. Moreover, I contend that HM Treasury is still adopting a blanket approach by arguing that the other exemptions, alongside Article 8-based exemptions, would apply to the implementation of *any* sanctions regime (see, for example, PM2, paragraphs 18 and 30). Mr Maydon presents his arguments on prejudice to the conduct of public affairs (PM2, paragraph 22 ff.), personal information (PM2, paragraph 31 ff.), legal privilege (PM2, paragraph 43), and the formulation of government policy (PM2, paragraph 44), in relation to the sanctions regime as a whole rather than the Zimbabwean regime *per se*, which is the subject of RAID's Request.
11. To accept these arguments, made in the context of the whole sanctions regime, would result in a closing down of *all* information requests under *all* sanction regimes and allow the implementation of all sanctions to proceed in an opaque and unaccountable manner. There is also no apparent time limit on the absolute exemption sought: the argument appears to be that so long as the UK continues to apply a sanctions regime, to any country or countries, information in relation to the development and application of all sanctions regimes should be withheld. No reference is made in HM Treasury's case to the fact that by the time it responded to the requests the information sought was years old. I am aware that the proper approach to FOIA requests is a matter of legal submission, but my understanding is that each of RAID's specific requests for information under the Zimbabwe sanctions regime should be considered on its merits and properly weighed in the light of the contents of the information and the particular public interests in favour or against disclosure of that information.
12. Crucially, exemptions under sections 27, 35, 36, 42 and 43 are not absolute exemptions and require a consideration of the public interest, and although sections 40 and 41 FOIA are 'absolute' exemptions, their application involves a similar public interest balancing exercise. The public interest test cannot be decided in the abstract for all requests relating to implementation of the whole sanctions regime, as Mr Maydon would seem to suggest in his approach, but the test must be applied exemption by exemption to each specific request. I set out below the public interest concerning RAID's Request as this relates to information sought on the Platinum Mine Deal and on the CAMEC Sale Deal.

C. PUBLIC INTEREST IN THE IMPLEMENTATION OF SANCTIONS

RAID's work on accountability in the public interest

13. As encapsulated in our name (Rights and Accountability in Development), accountability is at the core of RAID's work. RAID advocates for binding corporate accountability frameworks, campaigning for stronger domestic and international mechanisms of regulation for business, and RAID seeks to hold companies to account for illegal and unethical practices by helping victims to obtain redress.
14. It is clear that this drive for accountability transfers to the actions of governments in areas that intersect with our core work: the Zimbabwean sanctions regime is a case in point, as its implementation concerns many of the business entities and persons that RAID has tracked in over a decade of work on the exploitation of natural resources in the Democratic Republic of Congo (DRC) and Zimbabwe.
15. RAID has filed more than dozen complaints in the UK and with authorities in other member states under the OECD Guidelines for Multinational Enterprises concerning the conduct of UK-based companies in war-torn DRC, including Rautenbach companies. RAID wrote a comprehensive report on the non-compliance of CAMEC with stock market rules and the failure of the London Stock Exchange to take appropriate action. RAID has submitted information to the Financial Conduct Authority ("FCA") and Serious Fraud Office ("SFO") on transactions concerning ENRC. RAID has submitted information to the United States ("US") Securities and Exchange Commission and to the Office of Foreign Assets Control ("OFAC") on the role of the US hedge-fund Och-Ziff Capital Management Group LLC ("Och-Ziff") in funding the Platinum Mine Deal. RAID's common concern across all these diverse forums and mechanisms is to place on the public record an account of what has happened when business conduct has fallen short of prescribed standards; or to learn lessons to improve regulation going forward in ways that can be publicly demonstrated.

Accountability and the public face of sanctions

16. Mr Maydon gives the impression that the implementation of sanctions, reliant on confidential information from unidentified third parties, occurs behind closed doors and is not a matter for the public domain. Indeed, Mr Maydon goes further by stating that disclosure of information

on the implementation of sanctions would mean that such third parties would cease to provide information. However, Mr Maydon does not deal with the very public side of sanctions: the effectiveness of the measures taken is dependent upon the identity of sanction targets being widely known and publicised. The EU openly publishes detailed annexes listing all persons and entities to which restrictive financial measures apply. The EU press office regularly publicises the adoption of, and any updates to, the EU sanctions regime.¹

17. Publication of the list of sanctions targets serves the public interest in ensuring that everyone knows which persons and entities are associated with a repressive regime in order that financial dealings and transactions with them can be stopped. This public interest must, likewise, extend to accounting for transactions (and their licensing) with those on the sanctions list which nevertheless occur. Unless the licensing of such transactions is publicly justified, the public, including those entities that may have dealings with sanctions targets, may perceive that sanctions are unevenly or not properly applied. Hence, not only is the implementation of a sanctions regime reliant upon the public identification of targets, but the continued supply of information on sanction targets depends upon demonstrating that the regime is robustly applied. Having publicly stated who is targeted, it is then untenable to remain silent in public when transactions ostensibly concerning those on the sanctions list are seen to proceed. This is exactly what appears to have happened in relation to the two specific transactions covered by RAID's requests.

18. Accounting for the implementation of sanctions in this instance is heightened by the seriousness of the consequence of the transfer of funds to the Mugabe regime, resulting in a campaign of electoral violence, which resulted in the death and maiming of many people and the subversion of democracy (see PF1, paragraphs 31 – 34, 37 – 40). The survivors of this violence, as well as their relatives or the relatives or dependents of those who were killed, are entitled to know why the Platinum Mine Deal was allowed to proceed and whether or not the transaction was licensed by the UK authorities. The people of Zimbabwe also have an interest in understanding how this deal proceeded, given that it potentially thwarted the defeat of Mugabe and the transfer of presidential power.

19. Likewise, under the CAMEC Sale Deal, there is a strong public interest in disclosing decision-making around the licensing of share trades and the release of funds, given the

¹ Available at: <<http://www.consilium.europa.eu/en/press/>>.

notoriety of the individuals and entities concerned (see PF1, paragraphs 8 – 9, 81(f) (on CAMEC), paragraphs 89 – 92 (on ENRC), paragraphs 8 – 9, 59, 81(f) (on Rautenbach)).

20. It should be stressed that the decision to impose financial sanctions against those comprising and associated with the Government of Zimbabwe was taken at the highest level by all member states of the EU. Indeed, if anything, the fact that two members of the United Nations Security Council (China and Russia) voted in 2008 against the imposition of UN sanctions on Zimbabwe heightened the publicity surrounding the decision of the EU states and other governments, including the United States, to push ahead with financial sanctions against Zimbabwe because of the Mugabe regime's violation of human rights.

The public and press/media interest in the proper implementation of sanctions

21. In broad terms, there is a profound, widespread and lasting press/media interest in publicising events surrounding the implementation of sanctions against Zimbabwe. This press/media interest reflects public interest and concern about the proper application of the Zimbabwe sanctions regime in the light of widespread concern about the human rights situation in that country.
22. Reference has already been made (PF1, references in footnotes 4, 7, 8, 9 and paragraphs 85 – 87) to the considerable media interest in the Platinum Mine Deal, both at the time of the transaction in 2008; and later in 2012 – 2014, when the role of Och-Ziff in providing finance for the deal became apparent. As recently as 5 August 2015, *The Wall Street Journal*, published 'U.S. Investigates Hedge Fund Och-Ziff's Link to \$100 Million Loan to Mugabe', demonstrating the continued press interest in the Platinum Mine Deal. The newspaper states:²

'U.S. investigators are scrutinizing a March 2008 trip to Zimbabwe taken by Och-Ziff's Africa director at the time, Vanja Baros, according to people familiar with the investigation. The people said Mr. Baros met several people involved in channelling the money to the Mugabe government, including Billy Rautenbach, a Zimbabwean businessman with close ties to the dictator.'

23. Journalists, where they has been able to access information, have published articles on the alleged breach of sanctions against Zimbabwe, reflecting the public interest in ensuring that measures are properly enforced. In 2007, *The Observer* and *The Sunday Times* reported on

² Scott Patterson and Michael Rothfield, 'U.S. Investigates Hedge Fund Och-Ziff's Link to \$100 Million Loan to Mugabe', *The Wall Street Journal*, 5 August 2015.

the role of Barclays bank in funding the Mugabe regime.³ Norman Lamb, MP, subsequently raised in parliament the issue of the enforcement of sanctions against Zimbabwe:⁴

'After seeing the reports in The Sunday Times and The Observer, I took up the matter with the Foreign Office. I wrote to the Foreign Secretary at the end of last year and had a reply dated 7 December from Lord Malloch-Brown, the Minister of State. It confirmed that the Foreign Office was "currently looking at one specific case to assess if there has been a breach of Article 6" of the EU regulation that I have referred to. It appeared that an investigation was under way. I wrote again, asking for an update. The second letter that I received was far more general and evasive, and said nothing about that apparent investigation. I was left completely unclear whether any process to discover whether there had been a breach was continuing.'

24. In June 2008, *Africa Confidential* reported further on alleged breaches by three high-profile financial institutions – Barclays, Standard Chartered and Old Mutual – a story picked up by *The Independent*.⁵ The coverage led to a parliamentary question by Norman Lamb, MP, on EU representations and cooperation on the implementation of sanctions.⁶ *Africa Confidential* reported further in November 2010 on Standard Chartered's use of local banks to circumvent sanctions.⁷

25. In February 2013, *The Observer* ran a story on the exploitation, founded on human rights abuses, of diamond fields in Zimbabwe by the Mugabe regime, which had proceeded with alleged backing from UK investors.⁸ The newspaper quoted Kate Hoey MP, the chair of the all-party parliamentary group on Zimbabwe, who called for an investigation into Old Mutual 'for a potential breach of sanctions'. According to Ms Hoey, as a shareholder in Mbada Diamonds, the firm 'was therefore effectively in a joint venture with a sanctioned entity – the Zimbabwe Mining Development Corporation [ZMDC]. We cannot allow a British company to behave like this.'

³ 'Barclays' millions help to prop up Mugabe regime', *The Observer*, 28 January 2007, <<http://www.theguardian.com/money/2007/jan/28/accounts.Zimbabwe>>; Christopher Thompson, Jonathan Calvert and Jonathan Ungood-Thomas, 'Barclays bankrolls Mugabe's brutal regime', *The Sunday Times*, 11 November 2007, <http://www.thesundaytimes.co.uk/sto/news/uk_news/article75147.ece>.

⁴ *Commons Hansard*, 29 April 2008: Column 3WH – 4WH.

⁵ Respectively, *Africa Confidential*, 'Sanctions and standards', Vol. 49, No.12, 6 June 2008 and; David Connett, 'Standard Chartered at centre of Zimbabwe sanctions inquiry', *The Independent*, 15 June 2008, <<http://www.independent.co.uk/news/business/news/standard-chartered-at-centre-of-zimbabwe-sanctions-inquiry-847312.html>>.

⁶ *Commons Hansard*, 17 June 2008: Column 814W.

⁷ 'Sanctions fraying fast', *Africa Confidential*, Vol. 51, No.22, 5 November 2010.

⁸ Simon Goodley, 'Death, sanctions and big business in the struggle for Zimbabwe's diamonds', *The Observer*, 17 February 2013, available at: <<http://www.theguardian.com/business/2013/feb/17/zimbabwe-death-sanctions-business-diamonds>>

26. Following the government-orchestrated campaign of violence and intimidation against white farmers in Zimbabwe, which intensified in 2008, *The Telegraph* and *Investigative Africa* and the media also covered the supply of dairy equipment by German and Swedish firms to Grace Mugabe, an EU sanctions-target and the wife of President Robert Mugabe, who had acquired agricultural land at a knock-down price.⁹ *Africa Confidential* wrote:¹⁰ ‘A German firm has been supplying them for four years, even though the couple are under EU sanctions.... Nor could the EU explain why no action had been taken.’
27. Leading publications have also debated the morality of doing business in Zimbabwe, for example through Zimbabwean incorporated entities.¹¹

Openness in the implementation of sanctions

28. The implementation of sanctions need not occur in secret, but may proceed in a public and accountable manner. For example, in the US, there have been a number of high-profile legal cases where the US authorities have publicised settlements with a number of named banks for sanctions violations.
29. In December 2012, the US authorities announced a \$1.9 billion ‘deferred prosecution agreement’ reached with HSBC Holdings plc, for permitting narcotics traffickers to launder hundreds of millions of dollars through the bank.¹² The total agreement included a \$375 million settlement with OFAC.¹³ HSBC admitted conducting transactions on behalf of customers in Cuba, Iran, Libya, Sudan and Burma, all countries subject to US sanctions. Also in December 2012, OFAC reached a \$132 million settlement with Standard Chartered Bank for apparent violations of multiple sanctions programs (Burma, Iran Libya, and Sudan) through the processing wire transfers worth \$133 million.¹⁴ In December 2013, The Royal

⁹ Sebatién Berger, ‘Dairy firm may have breached Robert Mugabe sanctions’, *The Telegraph*, 20 September 2009, <<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/zimbabwe/6243969/Dairy-firm-may-have-breached-Robert-Mugabe-sanctions.html>>; ‘S. African Unit Of German Firm Said To Equip Mugabe-held Zimbabwe Dairy Plant’, *Investigative Africa*, 26 March 2010, <<http://iaafrica.com/s-african-unit-of-german-firm-said-to-equip-mugabe-held-zimbabwe-dairy-plant/>>.

¹⁰ ‘Mugabe’s farm in sanctions row’, *Africa Confidential*, Vol. 54, No.24, 22 November 2013.

¹¹ See, for example, ‘Pressure in Zimbabwe’, *The Economist*, 21 July 2008, <<http://www.economist.com/node/11777011>>.

¹² Department of Justice, Office of Public Affairs, *News Release*, ‘HSBC Holdings Plc. and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit \$1.256 Billion in Deferred Prosecution’, 11 December 2012, <<http://www.justice.gov/opa/pr/2012/December/12-crm-1478.html>>.

¹³ OFAC, Enforcement Information for December 11, 2012, <http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/121211_HSBC_posting.pdf>.

¹⁴ OFAC, Enforcement Information for December 10, 2012, <http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/12102012_scb.pdf>.

Bank of Scotland plc agreed to pay OFAC \$33 million for apparent violations of sanctions concerning Cuba, Burma, Sudan and Iran.¹⁵ OFAC determined that the violations, which involved the processing of wire transfers totalling \$34 million, were egregious. The payment to OFAC was part of a wider \$100 million settlement with other US authorities.¹⁶

30. In early 2010, a leading law firm advised its clients of a forthcoming change in OFAC policy on the disclosure of information:¹⁷

'The U.S. Treasury Department's Office of Foreign Assets Control has begun the process of systematically releasing to the public pursuant to Freedom of Information Act requests records of applications to do business with countries subject to U.S. economic sanctions. To be released also, are the licenses themselves. Until recently, it was assumed that a request for and the issuance of such licenses would be confidential.'

31. In a landmark decision at the end of 2010, and as a result of a request from *The New York Times* under the Freedom of Information Act ("US FOIA"), OFAC agreed to provide information on licences (10,000 in total) granted to US companies to allow them to trade with Iran and other blacklisted under the sanctions regime. The newspaper states:¹⁸

'...after The Times filed a federal Freedom of Information lawsuit, the government agreed to turn over a list of companies granted exceptions and, in a little more than 100 cases, underlying files explaining the nature and details of the deals. The process took three years, and the government heavily redacted many documents, saying they contained trade secrets and personal information. Still, the files offer a snapshot — albeit a piecemeal one — of a system that at times appears out of sync with its own licensing policies and America's goals abroad.'

32. The material released to *The New York Times* is extensive, including details of who applied for the licence, details of the goods or services to be licensed, and when the licence was granted. Examples of the licenses illustrating the extent of the information release can be viewed at: <http://www.nytimes.com/interactive/2010/12/24/world/24-sanctions.html>. These examples, as summarised by *The New York Times*, are provided in the bundle.

¹⁵ OFAC, Enforcement Information for December 11, 2013, <<http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/12112013.pdf>>.

¹⁶ The other two agencies were the Federal Reserve and New York State Department of Financial Services.

¹⁷ Bryan Cave LLP, 'Public Release of U.S. Treasury License Requests', *International Regulatory Bulletin*, No. 458, 26 January 2010, <<https://www.bryancave.com/en/thought-leadership/public-release-of-u-s-treasury-license-requests-irb-no-458.html>>.

¹⁸ Jo Becker, 'U.S. Approved Business With Blacklisted Nations', *New York Times*, 23 December 2010, <http://www.nytimes.com/2010/12/24/world/24sanctions.html?hp&_r=0>.

33. Following other US FOIA requests from individuals, journalists and NGOs – notably on license applications to do business with North Korea, the request and approval allowing the entertainers Beyoncé and Jay Z to travel to Cuba, and the release of the OFAC licensing database of individuals and companies – OFAC has a webpage dedicated to FOIA requests and the information disclosed.¹⁹ Significantly, this includes data in the form of *Excel* files of the OFAC licensing database for 2008, 2009 and 2011. The 2011 database, released after a request from a freelance journalist, lists, *inter alia*, the parties holding the licenses, details of the attorneys or the companies that applied for the licenses on behalf of the license holders, the date of application for the license and its date of issue, the type of license.²⁰

34. In an August 2011 article, contrasting the stance of the UK authorities when refusing to disclose the names of businesses licensed to sell goods with a potential military use to Iran, *Bloomberg* was told by a legal expert that:²¹

‘[the US] Treasury’s Office of Foreign Assets Control, in response to freedom of information requests, routinely releases names of companies applying for licenses to export agricultural products, medicine and medical devices to Iran under a congressional exemption passed in 2000.’

35. In October 2013, *Bloomberg* obtained information under US FOIA on the amount of holdings belonging to Japanese criminal gangs frozen by the US Treasury.²² In March 2015, *The Wall Street Journal* obtained mandatory reports from financial institutions to the US Treasury under US FOIA detailing the worth of assets frozen in the US as a result of financial sanctions against Russia.²³ The information includes the names of major international banks and how amount of money frozen in individual accounts.

¹⁹ <<http://www.treasury.gov/FOIA/Pages/ofac-index.aspx>>.

²⁰ The database is available at: <<http://www.treasury.gov/FOIA/Documents/2011-10-044%20resp.xls>>. See also Erik Ferrari, ‘OFAC’s Licensing Database Released,’ *Sanctions Law*, 11 February 2012, <<http://sanctionlaw.com/ofacs-licensing-database-released/>>.

²¹ Erik Larson, ‘Companies Trading With Iran Hidden by U.K. to Avert U.S. Law’, *Bloomberg Business*, 4 August 2011, <<http://www.bloomberg.com/news/articles/2011-08-04/british-companies-trading-with-iran-hidden-by-u-k-to-avert-u-s-sanctions>>.

²² Terje Langel and Takahiko Hyuga, ‘Yakuza Bosses Whacked by Regulators Freezing AmEx Cards’, *Bloomberg Business*, 23 October 2013, <<http://www.bloomberg.com/news/articles/2013-10-22/yakuza-mobsters-whacked-by-regulators-freezing-amexs>>.

²³ Philip Shiskin, ‘U.S. Sanctions Over Ukraine Hit Two Russian Banks Hardest’, *Wall Street Journal*, 5 March 2005, <<http://www.wsj.com/articles/u-s-sanctions-over-ukraine-hit-two-russian-banks-hardest-1425597150>>.

D. INFORMATION PROVIDED OR RECEIVED IN ACCORDANCE WITH EU REGULATION 314/2004 (SECTION 44(1)(b) FOIA)

Conceding that Article 8 of the EU Regulation does not apply to all Requested Information

36. While HM Treasury cited other exemptions in respect of some of the information sought, in refusing the request it applied the exemption under section 44(1)(b) – a prohibition on the disclosure of information arising from Article 8 of the EU Regulation – to *all* the Requested Information. The Information Commissioner’s Office (“ICO”) therefore relied upon this blanket exemption in its ruling. However, HM Treasury now concedes ‘that some of the information is not covered in its entirety by Article 8 of the EU Regulation’ (PM2, paragraph 8; also PM1, paragraph 7).
37. HM Treasury’s ‘re-review’ and acknowledgement that some information is not covered by Article 8 and section 44(1)(b) has occurred very late in the day: the Treasury’s original use of this absolute exemption across the board resulted in a narrowing of scope of the ICO’s consideration of RAID’s complaint.
38. HM Treasury continues to apply the exemption under section 44(1)(b) to some of the Requested Information.
39. RAID cannot know which parts of the Requested Information HM Treasury now considers exempt from disclosure under section 44(1)(b) and which parts it does not – although RAID has attempted to infer the line being drawn so that it can advance its appeal. However, HMT’s continuing failure to explain when it considers Article 8 applies, and why it amounts to a prohibition on disclosure, puts RAID at a real disadvantage in these proceedings.
40. It would be helpful if HM Treasury could provide : (a) a table, as it did in Annex A to the Treasury's Internal Review of 1 November 2013 (‘Internal Review’), showing which exemptions it believes apply to each specific request, updated in light of its withdrawal of certain section 44(1)(b) exemptions and its reliance upon other (including recently introduced) exemptions; and/or (b) a summary or outline of the types of information and/or situations in which it considers Article 8 bites.

41. In the absence of specificity over which exemptions apply to which requests, I would draw the Tribunal's attention to the relevant paragraphs in my previous Witness Statement dealing with section 44(1)(b) and Article 8:

- Disclosure under FOIA of information covered by Article 8 is not a further 'use' of that information by the Treasury. (PF1, paragraph 98; see also Appellant's Reply, 27 March 2015, paragraphs 6 – 8)
- Much of the information we have requested – for example, on the Treasury's licensing of share transactions and information relating to Article 7 of Council Regulation 314/2004 on the release of frozen funds – manifestly falls outside the scope of Article 8 (PF1, paragraph 99).

The nature of the information provided by third parties vis-à-vis the Requested Information

42. Mr Maydon states that HM Treasury is 'heavily reliant on third parties to provide information – which is often commercially sensitive, personal or confidential – in order to ensure that the sanctions regimes work effectively' and how 'it would adversely affect HMT's relationship with the organisations or individuals that originally provided the information (in particular those within the financial sector).'

43. Mr Maydon's account goes to the heart of the purpose of Article 8, which is to require such financial entities to 'supply immediately any information which would facilitate compliance with this Regulation, such as accounts and amounts frozen'. Yet the requests do not seek the disclosure of account numbers, nor the amounts frozen.

44. To the extent that any part of RAID's request would result in the disclosure of operational account details (sort codes, account numbers) and amounts (though not the quantification of certain Rautenbach shareholdings, as already referred to), the Treasury could redact such confidential information. It should also be noted that Mr Maydon acknowledges that third party information is 'often' – and therefore not always – confidential.

Assumptions about opposition to disclosure and non-cooperation

45. There is an underlying assumption in the Treasury's arguments that financial entities providing information are adverse to any disclosure of information provided under the sanctions regime and would therefore become uncooperative should any disclosure occur.
46. I would argue, provided certain safeguards such as justified redaction are used (including withholding the names of sources), that those financial institutions acting with probity and integrity have an interest in ensuring that there is transparency and accountability in the implementation of sanctions. Third parties, in common with the public at large, need to see that the information they provide is being acted upon. Indeed, any perceived failure of the relevant authorities to act upon information provided could prove a disincentive to third parties to provide further information.
47. Other financial institutions and third parties might prefer to operate in a culture of secrecy. However, such entities are legally obliged to cooperate and provide information under Article 8 and cannot choose to withhold information or cooperation, even if they disagree with any subsequent disclosures made in accordance with the law. They face criminal sanction if they do not comply. Accordingly, it is difficult to understand why it is claimed that institutions and companies will simply stop cooperating.

E. OTHER APPLICABLE FOIA EXEMPTIONS

HM Treasury's generalised approach lacking in specific tests

48. HM Treasury nonetheless maintains that all requested information falling outside of Article 8 still falls under one exemption or another.
49. Certain of these exemptions were mentioned, although the reasons for the reliance upon them were not developed, in HM Treasury's initial refusal and in its Internal Review of RAID's request: section 42(1) (Legal professional privilege), section 27(1)(b) (International relations), section 36(2)(c) (Prejudice to effective conduct of public affairs) and section 43(2) (Commercial interests). Other exemptions were introduced later in HM Treasury's letter of 6 June 2014 to the ICO (of which RAID has seen a redacted copy) and in Mr Maydon's second Witness Statement: section 35 (Formulation of government policy); section 36(2)(b)(ii) (subsection on 'the free and frank exchange of views for the purposes of deliberation');

section 40 (Personal information); and section 41(Information provided in confidence). Moreover, the actual opinion of a qualified person, necessary to apply an exemption under section 36, is referred to for the first time in Mr Maydon's second Witness Statement.

50. Mr Maydon states 'Where Article 8 applies, other exemptions may also apply in the alternative' and continues '[t]his is clearly marked in the bundle that has been prepared for the appeal hearing' ("the Bundle")' (PM2, paragraph 8).

51. Hence, even were it the case that Article 8-based exemptions and alternative exemptions marked in the Bundle are the same as those which RAID has had sight off by virtue of Annex A to the Treasury's Internal Review, RAID remains none the wiser as to which parts of the request the Treasury now considers are covered by only the alternative exemptions and which the Treasury considers to be still covered by Article 8.

52. Indeed, because HM Treasury, in its latest submissions to the Tribunal, has introduced new exemptions not previously cited in respect of the Requested Information, both the exemptions marked against Requested Information in the Bundle, let alone exemptions indicated in the Annex A to the Internal Review, must be incomplete.

53. To the extent possible, I comment below on each of the other exemptions outside of Article 8 and section 44 of FOIA, referred to by Mr Maydon.

Section 36 – Prejudice to the conduct of public affairs

54. HM Treasury has provided some detail, for the first time, about exemptions under section 36 FOIA. In purported compliance with the requirements of section 36(2), the Treasury has only very recently obtained the reasoned opinion of a qualified person (Harriett Baldwin MP, Economic Secretary to the Treasury (City Minister)). At the time of its 6 June 2014 letter to the ICO, the Treasury admitted that it had not sought such an opinion.

55. RAID is, however, placed at a disadvantage when considering exemptions under section 36 in respect of the Requested information because:

- We have not been provided with a copy of Ms Baldwin's opinion. There is a requirement under FOIA that such an opinion be reasoned and we have not had sight of the reasoning in this instance. The qualified person's opinion should be disclosed, at least in redacted form, to enable us to comment further as a matter of evidence.

- We have no sight of the ‘certain parts of the Requested Information (marked in green in the Bundle)’ provided to Ms Baldwin and so do not know to which parts of the Request section 36 is being applied.
- Mr Maydon also makes reference to providing Ms Baldwin with ‘relevant background information’ and ‘a hard copy of relevant documents’, but we do not know what this information and documentation constitutes in detail and how it fits with the requests for information; nor have we had the opportunity to provide other information which may be relevant to Ms Baldwin in reaching her opinion.
- We do not know what reference date was used by Ms Baldwin in assessing whether disclosure would cause prejudice.

56. The requests were made in early July 2011, relating to events in April 2008 (the Platinum Mine Deal) and autumn 2009 (the CAMEC Sale Deal), but the decision to withhold information (the relevant date) was not taken until 25 July 2013.

57. Hence a considerable amount of time had elapsed between internal and external discussions and policy formulation at the time of the events and the decision to withhold.

58. Such a 3-5 year gap would, in my view, significantly diminish the likelihood of prejudice: ‘the free and frank exchange of views for the purposes of deliberation’ (section 36(2)(b)(ii)) would already have occurred within HM Treasury, without any inhibiting effect arising from the possibility of pending disclosure; likewise, prejudice or likely prejudice to ‘the effective conduct of public affairs’ from such delayed disclosure would have limited effect as policy and its implementation under the Zimbabwean sanctions regime would have already run its course by the time the Requested Information was considered under FOIA.

59. Moreover, the fact that HM Treasury neither sought the necessary opinion under section 36 at the time of the RAID’s original request, nor in July 2013 when reaching its initial decision to withhold information, must make it difficult for the qualified person to place themselves in the prevailing context of discussion, policy and public conduct at the time in question. Indeed, this difficulty may thwart the requirement under section 36 that the opinion be reasonable. I am aware that HM Treasury’s ability to rely on the qualified opinion in this case will be a matter for legal submission.

60. Under section 36, HM Treasury presented its request for an opinion to the qualified person specifically in relation to the Requested Information, which pertains to events under the Zimbabwean sanctions regime (see PM2, paragraph 12). I do not consider it to be appropriate or valid, certainly in respect of the opinion obtained (which was based upon a consideration of requests for specific information under a specific regime) for the Treasury to argue that the section 36 exemptions judged by the qualified person to cover the specific information presented to her would apply to all requests under all sanctions regimes, i.e., that disclosure would always be prejudicial to internal and external discussions and the conduct of public affairs. Yet this is precisely what HM Treasury does: most of Mr Maydon's discourse on prejudice under section 36 is future-oriented and geared towards the perceived general consequences of disclosing information under any and all sanctions regimes and does not relate to the Requested Information *per se* nor to the Zimbabwean sanctions regime. He seems to seek an indefinite absolute exemption (despite the qualified nature of section 36, which requires the engagement of the exemption and the public interest balance to be considered in each case) for sanctions-related information. For example:

'In my view, if this information was released it would have a chilling effect both in regard to discussions between HM Treasury and non-government, or foreign entities and on discussions within government.' (PM2, paragraph 24)

'Third parties will become aware that these conversations [with HM Treasury] may be disclosed to the public in the future, with the result that cooperation with HM Treasury would cease and/or be seriously affected.' (PM2, paragraph 27)

'In my view, it is also important for the sanctions regime as a whole that internal government deliberations are not released to the public.' (PM2, paragraph 30)

61. I am concerned that to accept such reasoning would have a blanketing and stifling effect on the disclosure of sanctions-related information, which cannot be in the public interest. The requests at issue in this appeal are focused on two transactions, which occurred many years ago – but were and are of overwhelming public interest. The section 36 exemptions are not absolute, but require a public interest test, which itself undermines the notion that there can be a general exemption for sanctions information. In respect of the specific Requested Information, there is no evidence that this test has been conducted by the Treasury; or, if such a test has been conducted, RAID has not been provided with the reasoning behind it.

62. Mr Maydon argues that Treasury staff need a 'safe space to consider how to resolve difficult issues' (PM2, paragraph 28) and that 'officials may disagree over whether a particular activity should be considered a breach of sanctions rules or not'. Mr Maydon concludes that information about the internal decision-making process should not be disclosed under any

sanctions regime because ‘it is important that the public (and those individuals who are actually affected by any decisions) have faith in the final decisions reached’.

63. I would make a number of points:

- (i) Factors weighing in favour of disclosure in the public interest include the need for openness and transparency and the highlighting of any institutional failures to implement regulations or legal requirements.
- (ii) A ‘safe space’ could be perceived as insulating decision-making from wider accountability, which could result in a less rigorous process. Not least here where the department is seeking an indefinite safe space – without any regard to the age of the information and whether the decision-making process is live or not. The information at issue in this appeal does not relate to a live process.
- (iii) Disagreement over whether or not a sanctions breach has occurred heightens rather than diminishes the need to be able to justify the view that prevails.
- (iv) In the current case, both the Platinum Mine Deal and the CAMEC Sale Deal have proved highly controversial, with considerable disquiet in the public domain over why the transactions were allowed to proceed. In such circumstances, withholding information does not reassure the public nor inspire confidence. Rather, the opposite is true: faith in final decisions is undermined, unless and until such decisions - which are being openly questioned - are openly justified. If decisions cannot be justified, it is likewise important that there is openness and accountability, so that lessons can be learned.
- (v) RAID appreciates that the immediate disclosure of information relating to active, operational decision-making may be prejudicial. But even then the public interest balance must be weighed, and, as I have noted above, in relation to the Requested Information in this case, considerable time has elapsed between the events in questions and the FOIA decision, mitigating any such operational constraints.

Section 40 – Personal information

64. In the case of section 40 (Personal information), subsection 40(2) relating to the personal information of a third party is relevant to RAID’s requests. However, to satisfy the exemption, disclosure must breach the Data Protection Act (DPA). According to the Ministry of Justice:²⁴

“The principle most likely to be relevant to the disclosure of information under the Freedom of Information Act is the first principle. This requires personal information to be:

processed ‘fairly’

processed ‘lawfully’

not processed at all unless one of the ‘conditions’ for fair processing is met”

65. RAID appreciates that determining whether these requirements are met before disclosing information on third parties requires careful consideration, whilst the Treasury once more appears to rely on an exemption without any evidence of such careful consideration. Mr Maydon notes a range of personal information contained within the Requested Information, with reference to ‘government staff’, ‘third parties engaging with HM Treasury’ and ‘individuals actually linked to underlying sanctions issues’. HM Treasury’s stated view – ‘that releasing any of this personal information would amount to a breach of the Data Protection Act 1998’ (PM2, paragraph 32 and ff.) – represents an undifferentiated approach, which fails to specifically relate and consider RAID’s actual requests to the exemption under section 40.

66. For example, in the case of Mr Rautenbach (the sanctions target connected to both the Platinum Mine Deal and the CAMEC Sale Deal), the information requested by RAID concerns matters already in the public domain and of public interest.

67. At the time of the request, Mr Rautenbach was already listed by the EU (see PF1, paragraph 17) and the US as a sanctions target (and described under the US designation as a ‘Mugabe crony’).²⁵ It was also publicly known that companies connected to the Platinum Mine Deal (Lefever) and the CAMEC Sale Deal (Harvest View and Meryweather) were confirmed or suspected Rautenbach-controlled entities (see PF1, respectively, paragraphs 28, 51 – 57). It was public knowledge that Mr Rautenbach faced fraud charges in South Africa and that he had reached a plea bargain arrangement with the South African authorities over these charges (PF1, paragraph 59). Moreover, the United Nations had also confirmed Mr Rautenbach’s role in the illicit acquisition of mining assets in the Democratic Republic of Congo (DRC) and had highlighted a lack of due diligence over the role of Mr Rautenbach and CAMEC when reporting on implementation of an arms embargo on the DRC (PF1, paragraphs 9, 81(f)).

²⁴ Ministry of Justice, *Freedom of information guidance, Exemptions guidance: Section 40 – Personal information*, p.7.

²⁵ US Department of the Treasury, ‘Treasury Designates Mugabe Regime Cronies’, *Press Release HP-1295*, 25 November 2008, <<http://www.treasury.gov/press-center/press-releases/Pages/hp1295.aspx>>.

68. Beyond the Platinum Mine Deal and CAMEC Sale Deals *per se*, there have been numerous articles in the media detailing the concerns raised by the business practices and activities of Mr Rautenbach. To cite just a few examples of media coverage: for a brief overview of Rautenbach's dubious business activities to 2009, see the *Mail & Guardian's* 'Rautenbach's fast and furious ride to riches';²⁶ on the collapse of his Wheels of Africa Group and fraudulent dealings in South Africa, see 'The motiveless murder and Napoleon of Africa', published in December 1999 in *The Guardian* and *Business Day's* September 2009 report of his conviction on fraud charges in South Africa;²⁷ on his exploitative role in DRC, see *Moneyweb's* 'Zimbabwe's pale barons', published in June 2008;²⁸ on his payment of bribes to south Africa's a former police commissioner, see *Africa Confidential's* 'Jackie Selebi on trial' and reporting of the same trial by the *Mail & Guardian*;²⁹ on Rautenbach's controversial ethanol project in Zimbabwe and the displacement of local farmers, see the *Mail & Guardian's* 2014 article 'Zanu-PF's Green Fuel dilemma'.³⁰
69. It is in the context of this existing public information on Mr Rautenbach that RAID requested corroborating information, rather than information on the private life of Mr Rautenbach: *inter alia*, confirmation that licences had been granted to trade in known and suspected Rautenbach-controlled entities and the date of issue of any such licences; confirmation that funds had been licensed for release to Mr Rautenbach, in the light of existing public concern that proceeds arising from the CAMEC Sale Deal would benefit Mr Rautenbach as a proxy for the Mugabe regime.
70. The Ministry of Justice advises:³¹

“Generally speaking, the more private the information, the greater the weight which will attach to the public interest in maintaining the exemption from the Freedom of Information Act for the purpose of the public interest test.”

²⁶ Sam Sole, 'Rautenbach's fast and furious ride to riches', *Mail & Guardian*, 20 November 2009, <<http://mg.co.za/article/2009-11-20-rautenbachs-fast-and-furious-ride-to-riches>>.

²⁷ Chris McGreal, 'The motiveless murder and Napoleon of Africa', *The Guardian*, 16 December 1999, <<http://www.theguardian.com/world/1999/dec/16/chrismcgreal>>; Anthony Sguazzin and Brett Foley, 'Billy Rautenbach to fork out R40m in fines to settle legal battle', *Business Day*, 22 September 2009, <<http://www.bdlive.co.za/articles/2009/09/22/billy-rautenbach-to-fork-out-r40m-in-fines-to-settle-legal-battle>>.

²⁸ Barry Sergeant, 'Zimbabwe's pale barons', *Moneyweb*, 28 June 2008, <<http://www.moneyweb.co.za/archive/zimbabwes-pale-barons/>>.

²⁹ 'Jackie Selebi on trial', *Africa Confidential*, Vol. 50, No. 23, 20 November 2009. On testimony of bribes paid by Rautenbach, see also, for example, Ilham Rawoot, 'Agliotti 'was quite a salesman'', *Mail & Guardian*, 20 November 2009, <<http://mg.co.za/article/2009-11-20-agliotti-was-quite-a-salesman>>; and Adriaan Basson and Ilham Rawoot, 'Agliotti paid to 'sort out' Rautenbach's problems', *Mail & Guardian*, 7 October 2009, <<http://mg.co.za/article/2009-10-07-agliotti-paid-to-sort-out-rautenbachs-problems>>.

³⁰ Jason Moyo, 'Zanu-PF's Green Fuel dilemma', *Mail & Guardian*, 18 July 2014, <<http://mg.co.za/article/2014-07-18-we-dont-want-you-here>>

³¹ *Exemptions guidance: Section 40*, op. cit., p.9.

The corollary must be that the more public the information, the less weight will attach to maintaining the exemption. In Mr Rautenbach's case, his notoriety, arising from his business conduct and criminal activities, has meant that information about him and his business activities was already public.

71. I have explained above that RAID is not seeking personal data of other individuals, such as government officials. The personal data sought relates to named targets of sanctions (such as Mr Rautenbach, for example) or individuals publicly linked to such targets/transactions involving such targets (for example, individuals operating in an executive or administrative role in respect of the companies named in the transactions, such as Mr Philip Enoch, in his capacity as CAMEC company secretary).

Personal safety

72. Mr Maydon expresses the concern that the release of personal information would expose government staff, non-government third parties and 'individuals actually linked to sanctions matters' to harm, unwarranted attention and retribution (PM2, paragraphs 33 – 35). Whilst RAID fully understands the importance of protecting individuals, RAID believes that, in this instance, this concern over safety is misplaced and something of a 'red herring' when carefully considered in respect of the information actually sought and the confirmation provided above in respect of what is and what is not sought.

73. At no time has RAID requested the names, e-mail addresses, job titles or the disclosure of any identifying details of officials within the Treasury, or of any third parties. In meeting RAID's requests, the Treasury, where warranted, can redact any such details that appear alongside the information sought.

74. In respect of sanctions targets: (i) as noted above, RAID's requests relate to the corroboration of existing public information on Mr Rautenbach and HM Treasury's issuing of licences, not to details about his private life, place of residence or contact details; (ii) it is difficult to see how such information, if disclosed, could expose the individual concerned to harm or unwarranted attention given his pre-existing public profile. Mr Maydon fails to explain, even in general terms, how the information sought by RAID would jeopardise Mr Rautenbach's safety if disclosed or any other target of the sanctions regime.

Section 41 – Information provided in confidence

75. HM Treasury asserts that ‘much of the information provided to it under the EU Regulation’ is also covered by exemptions under section 41 (Information provided in confidence). Again, no attempt is made to specify which of the Requested Information is covered, and only a limited explanation has been provided as to why the Treasury believes the exemption applies.

76. Whilst section 41 is an absolute exemption, the ICO advises:³²

“The common law duty of confidence contains an inherent public interest test which must be considered in order to decide if the information is exempt. However, some public authorities have assumed that because section 41 is an absolute exemption there is no consideration of the public interest at all when deciding to apply this exemption.”

77. I understand that whether section 41 FOIA is engaged will be a matter for legal submission. I focus on whether there is an overriding public interest in disclosure. I appreciate that ultimately determining where the public interest lies in each instance is a matter for the courts, but arguments in favour of disclosure include the promotion of openness and transparency so that the reasons behind decisions can be demonstrated. Given public concern in the UK, US, South Africa and Zimbabwe (please see PF1, paragraphs 85 – 87) over the implementation of sanctions related to the Platinum Mine Deal and the CAMEC Sale Deal, the public interest arguments must be carefully considered. In my view, the public interest in disclosure overwhelmingly outweighs the public interest in withholding any confidential information held within the scope of the information RAID is seeking.

Section 42 – Legal privilege

78. Mr Maydon states that ‘some of the withheld information is covered by legal privilege’. RAID cannot know to which parts of the Requested Information this exemption applies.

79. Section 42 exemptions are subject to a public interest test. Whilst accepting the strong public interest in withholding such legally privileged information, it is important that there is rigour in ensuring that only that information which is fully covered by legal privilege is exempt and

³² Information Commissioner’s Office, *Freedom of Information Act: The duty of confidence and the public interest*, 17 November 2008, p.1.

that other information attached to or supplementing legal advice or discussion does not get miscategorised.

Section 43 – Commercial interests

80. HM Treasury asserts that information provided under the EU Regulation is covered ‘in certain cases’ by exemptions under section 43 (Commercial interests). Obviously, it is difficult to comment on whether the information in question would or would be likely to prejudice commercial interests without seeing it or understanding, broadly speaking, the nature of the information to which it is being applied. Unless HM Treasury openly provides further details on its use of the exemption, RAID will be reliant on the Tribunal and ICO to assess the issue of prejudice.
81. Exemptions under section 43 are subject to a public interest test. Yet HM Treasury has not clarified what type of commercial interests are at stake and in what way those interests, even in general terms, would be adversely affected by disclosure of specific information.
82. There is a difference between genuinely commercially sensitive information and information that a company would rather not make public. If the commercial interests are those of CAMEC, ENRC or Rautenbach-controlled entities, then due weight must be given to their track-record of poor governance, dubious transactions, exploitative deals and allegations of fraud (in the case of ENRC – see PF1, paragraphs 90 – 91). Moreover, as explained above, RAID is not seeking information about amounts of money involved in a transaction – which have, in any case, often been publicly reported. We do specifically ask whether CAMEC notified the Treasury of the quantity of shares held by Rautenbach in CAMEC.
83. Given that a considerable amount of time has elapsed between the transactions in question and HM Treasury’s decision to withhold the Requested Information, I would argue that the commercial sensitivity of the information is likely to have diminished. This is especially true in this instance, because of the widespread investigative reporting of the deals concerned.
84. In its Internal Review, HM Treasury cites section 43 no less than 23 times in Annex A in relation to the Requested Information. Yet it is difficult to see how the Requested Information deemed to be covered by section 43 could genuinely constitute commercially sensitive information at the time, let alone 3 – 4 years after CAMEC’s sale to ENRC. To give just two

examples (out of the many which could be cited), I find it difficult to understand how disclosure of the information asked for could be commercially damaging given reporting of both transactions at the time and/or disclosure in ENRC's offer document (see, respectively, PF1, paragraph 27, footnote 4 and paragraphs 46 – 52):

- Did CAMEC at the time of the transaction [the Platinum Mine Deal] (Lefever): Notify or otherwise seek the advice of the Treasury as to whether its proposed acquisition complies with the sanctions then in force; require a licence or other permission from the Treasury to make loan finance via Lefever available to the Zimbabwean government?

- Did ENRC require and apply for a licence to purchase any Rautenbach-controlled direct or indirect shareholdings in CAMEC [the CAMEC Sale Deal]? What date was any application for a licence made by ENRC? If so, on what date was it refused or granted?

85. I would urge the members of the Tribunal to ask themselves whether disclosure of the specific part of the Requested Information linked by the Treasury to a section 43 exemption would genuinely have an adverse or telling commercial impact.

Section 27 (International relations) and Section 35(Formulation of government policy)

86. It is difficult for me to comment on either section 27 exemptions (as this part of Mr Maydon's second Witness Statement is extensively redacted) or section 35 exemptions (as no further information is provided beyond an assertion that 'parts of the Requested Information may be exempt under section 35 FOIA'). In both instances, RAID cannot know to which parts of the Requested Information the exemption in question applies.
87. Both section 27 exemptions and section 35 exemptions are subject to a public interest test, but RAID has not been provided with further details about how this test has been applied under either section. Previously, in its Internal Review, HM Treasury has asserted that section 27(1)(b) 'is also engaged as disclosing such information when listings and delistings are an ongoing international concern would prejudice relations with the EU and European Court of Justice'. In its 6 June 2014 letter to the ICO, HT Treasury states in respect of section 27(1)(b): 'there is a very strong public interest in the maintenance of relations between HMT and other states to enable co-operation in this area [sanctions] and to support the achievements of the government's objectives in implementing asset freezing' (paragraph 41).
88. To the extent that it is possible to comment in the abstract, in the absence of further specificity and concrete information from the Treasury, many of the points I make above in relation to the Treasury's use of section 36 exemptions may also apply to exemptions under section 27 and section 35: the mitigating effect of time elapsed between the events in question and the decision under FOIA; the need for openness to account for government policy when questions about why the Platinum Mine Deal and CAMEC Sale Deal were allowed to proceed remain unanswered in the public domain.

F. THE DELAY IN RESPONDING TO THE REQUEST

89. Mr Maydon (PM2, paragraph 4 ff.) argues that RAID's original requests for information were not considered FOIA requests because of: (i) who they were sent to (they were sent to the Asset Freezing Unit and were not sent to the Correspondence and Enquiries inbox) and; (ii) the nature of RAID's correspondence (characterised by Mr. Maydon as alleging breaches of sanctions and pertaining to individual sanctions cases).

90. The clear and unequivocal purpose of our July 2011 memorandum was to request information from HM Treasury. Explicit and specific requests for information were made, each clearly delineated within the text using distinctive bullets, shading and indentation. Given the nature of the requests – concerning the freezing of assets and the licencing regime to allow the transfer of such assets – it was entirely appropriate for RAID to submit its request to the AFU. Moreover, there is no requirement under FOIA that those seeking information address their request to a public body through a designated channel. This notwithstanding, in the case of HM Treasury in 2011 and 2012, a dedicated FOIA inbox did not exist, only a Correspondence and Enquiries inbox. Indeed, HM Treasury’s subsequent inclusion of a dedicated FOIA inbox is a tacit admission that previous arrangements lacked clarity.

91. Mr Maydon’s evidence on HM Treasury’s handling of RAID’s Request appears at odds with the Treasury’s 6 June 2014 letter to the Information Commissioner’s Office (ICO):

'We recognise that it is not necessary for individuals to refer to the Freedom of Information Act in order to assert their statutory rights under the Act and that questions fall to be considered under the Act if authorities hold information that answers the questions put to us. We have learned lessons regarding the handling of requests to the AFU.' (Paragraph 48)

92. Mr Maydon further maintains (PM2, paragraph 4) that the nature of our requests on individual cases meant that it was appropriate for HM Treasury neither to comment nor treat RAID’s correspondence as a FOIA request ‘due to issues of confidentiality, public policy...and, in many cases, international relations’. However, the very issues cited are all factors with clear and obvious relevance to FOIA requests. In other terms, Mr Maydon’s defence of HM Treasury’s position not to treat RAID’s requests under FOIA is to cite the very criteria that ought to alert a public body to the fact that the request in question should be considered a FOIA request.

G. CONCLUSION

93. In the light of media coverage and public disquiet over the Platinum Mine Deal, the CAMEC Sale Deal and the alleged breach of sanctions, it is of the utmost importance to allow public scrutiny of whether the correct view prevailed within the Treasury on the implementation of sanctions in this instance and/or the application of the Zimbabwe sanctions regime to the two transactions. The expectation must be that HM Treasury officials should not be cowed by such a request, falling back upon blanket, generalised arguments for refusal, but should be

robust in providing information to show how decisions were taken, in a publicly accountable and transparent manner.

94. RAID's view is that accountability and transparency is essential to maintain faith in the sanctions regime, especially when uncomfortable questions have arisen. The victims of abuse in Zimbabwe and their surviving relatives, who suffered from Mugabe's violent campaign funded by the Platinum Mine Deal, are also entitled to know how sanctions decisions on this transaction were reached. There may also be valuable lessons going forward, either on the robustness or otherwise of the sanctions regime *per se* or upon how such a regime is implemented.

I believe the contents of this statement are true.

Signed:

Dated: