IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2013/0127
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:
The Information Commissioner's Decision Notice No: FS50477229, dated 3 June 2013

Appellant: JONATHAN BRAIN

First Respondent: INFORMATION COMMISSIONER

Second Respondent: MINISTRY OF JUSTICE

Determined on the papers

Date of decision: 15 September 2014

Before

Andrew Bartlett QC (Judge)
Rosalind Tatam
Melanie Howard

Subject matter:
Freedom of Information Act 2000 – Qualified exemption – formulation or development of government policy

Cases:
Department for Education and Skills v IC and Evening Standard EA/2006/0006, 19 February 2007
Office of Government Commerce v IC [2008] EWHC 774 (Admin)
APPGER v IC and FCO EA/2011/0049-0051, 3 May 2012

DECISION OF THE FIRST-TIER TRIBUNAL

Our decision is to allow the appeal against the Information Commissioner's Decision Notice. The Decision Notice No: FS50477229 must be read subject to our decision.

After a proper search by the MOJ for documents responsive to the appellant's information request, the Information Commissioner should have decided that Documents 1-2, 4, 6-7, and 9-18 should have been released in response to the appellant's information request, on the ground that the public interest in disclosure outweighed the public interest in the maintenance of the exemption in FOIA s35(1)(a).

Action to be taken:
Within 35 days from the date of this decision, the MOJ shall release to the appellant, under FOIA, Documents 1-2, 4, 6-7, and 9-18, subject to any appropriate redactions of the names of junior civil servants in accordance with paragraph 75 below.

Status of the Confidential Annex to this decision:
In order not to prejudice the possibility of appeal from the Tribunal's decision, the Confidential Annex shall remain confidential to the MOJ and the Information Commissioner and is not to be disclosed to the appellant or to the public until the time for appeal has expired. If an appeal is made, disclosure must only be made in accordance with further order of the competent court or tribunal. If no appeal is made, the Annex ceases to be Confidential and may be released to the appellant and to the public.

REASONS FOR DECISION

Introduction

1. This appeal is concerned with the application of the Freedom of Information Act ('FOIA') exemption relating to formulation of government policy (FOIA s35) to information about the Government's consideration of and response to recommendations made by the Senior Salaries Review Body ('SSRB') regarding salaried Employment Judges.

2. We gave a preliminary decision in this appeal on 2 February 2014. By that decision we made findings of fact (paragraphs 17-42), determined the meaning and scope of the information request (paragraphs 44-57), made certain determinations about the application of FOIA s40(2) (paragraphs 58-62), and gave further procedural directions which included a requirement for further searches by the MOJ. Our decision required the disclosure of certain documents to the appellant. We reserved for future consideration:

   a. such further findings of fact as might arise from the parties' compliance with the directions;

   b. the application of s35(1)(a) to the material in the then current closed bundle, and the application of s35(1)(a) and any other exemption that might be relevant to further disputed information not contained in that bundle;

   c. the public interest balance, as between disclosure or maintaining the s35(1)(a) exemption and/or any other qualified exemption which might be relied on as a result of compliance with the directions.

3. The further searches made by the MOJ led to the identification of further documents falling within the scope of the information request. These comprised four documents which were disclosed to the appellant[1] and Documents 7-9 (described further below).

4. Document 8 is a submission dated 2 September 2011 to the Permanent Secretary and Lord Chancellor on the draft 2011 MOJ information document for the SSRB. The Information Commissioner took the view[2] that in relation to Document 8 the public interest balance did not favour the maintenance of the s35(1)(a) exemption. Subject to some redactions which, so far as we are aware, are uncontroversial, the MOJ decided to disclose Document 8 to the appellant.

5. In the light of what was said by the MOJ on 24 March 2014 concerning the further searches, the appellant sought orders for yet further searches and for recovery and preservation of documents. The MOJ agreed to make the additional searches and to provide witness evidence about them. The additional searches led to the identification of yet further documents falling

[1] As listed in the MOJ's email of 24 March 2014.
[2] In submissions dated 3 April 2014.

within the scope of the information request. These are now documents 10-18 in the enlarged closed bundle.[3]

6. As a result of the above, we now have the following further submissions and statements for consideration:

   a. MOJ's open submissions by email of 24 March 2014.

   b. Information Commissioner's open and closed submissions 3 April 2014.

   c. Appellant's submissions 17 April 2014.

   d. MOJ's open and closed submissions 5 June 2014, and the witness statements of Duncan Rutty and Shirley Hales of the same date.

   e. Information Commissioner's open and closed submissions 23 June 2014.

   f. Appellant's submissions 8 July 2014.

Facts

7. We take as read the background set out in paragraphs 4-15 of our preliminary decision and the facts as found in paragraphs 17-42 of that decision.

8. For ease of reference we set out again here the appellant's information request of 20 September 2012. He requested information regarding:

   > 1. Any decision not to implement the recommendations of the SSRB in their 33rd Report that the role of salaried Employment Judge be re-graded to judicial salary band 6.2.
   >
   > 2. Any decision not to implement the recommendations of the SSRB in their 34th Report that the role of salaried Employment Judge be re-graded to judicial salary band 6.2.
   >
   > 3. If no decision has yet been taken as to whether to implement the recommendations of either Report, considerations of the Reports to date and the outcome of those considerations, the process by which such decisions will be taken upon them, by whom such decisions will be made and when.
   >
   > 4. The government's policy and/or position on the difference (if any) between re-grading of a post to a higher salary band and a salary increase and the rationale for such policy and/or position.

9. Arising from the facts as previously found we highlight the following matters, which are germane to the issues remaining for us to decide:

   a. High quality and genuine independence of the judiciary are essential features of a modern well-functioning state. For this reason, effective arrangements for the protection of levels of judicial remuneration are of

[3] Our above brief description of documents 7-19 of the closed bundle is without prejudice to any question about specific parts of those documents falling outside the scope of the appellant's information request. We consider this separately below.

constitutional importance. In the UK the SSRB is part of those arrangements.

b. The SSRB's 33rd report in March 2011 expressed the view, based on job evaluation, that the role of salaried Employment Judge within the Tribunals Service should be re-graded from salary group 7 to salary group 6.2. The 33rd report accepted there could be delay in implementation, owing to the prevailing pay freeze, while inviting the Government to act sooner rather than later. In response, the Government decided that the pay freeze must prevail.

c. The 34th report in March 2012 expressed the view that, notwithstanding the pay freeze, the re-grading (and consequent increased remuneration) should be implemented immediately. In response, the Government again decided that the pay freeze must prevail.

d. The participants at the meeting of MOJ officials with representatives of the Council of Employment Judges in July 2012 knew of no prior instance of the Government not accepting a re-grading recommendation made by the SSRB, except for phasing it in. Mr Ian Gray of the MOJ said at the meeting that he would be very surprised if, at the next pay round, recommendations made by the SSRB were held over for consideration at a later date.

e. At the time of the information request (20 September 2012), the pay freeze was due to be ameliorated as from April 2013 to permit an average 1% per annum increase in the public sector pay bill for two years. About September 2012 the Government must have decided that the line it would take for the next SSRB review was that it would not be possible to implement the SSRB's review recommendations and stay within the stipulated 1% average increase.

f. The disappointment among Employment Judges that the Government regarded the pay freeze as impacting on and taking priority over the recommendation for re-grading was (and remains) profound.

10. The additional materials now available to us do not alter any of the facts previously found. They do, however, add to the picture.

11. Since our earlier decision Mr Gray of the MOJ has remained unwell and absent from work.

12. Mr Duncan Rutty (who is also mentioned in our earlier decision) was at the time of the information request a Judicial Reward Policy Officer (Band B) in the Judicial Reward and Pension Reform Team at the MOJ. He originally searched only for information falling within part 3 of the information request. In August 2013 he moved to the Home Office, at which time his email account was closed and emptied. However, the contents were retained in an archive, called E Vault. He returned to the MOJ in January 2014. After retrieval of his emails, he searched again (without restriction to part 3 of the request) and found an additional six documents falling within the request. These are now items 10-12 and 15-17 in the closed bundle.

13. The responsibilities of the Judicial Reward and Pension Reform Team include the formulation of policy positions on judicial pay and advising Ministers on the judicial pay process. As part of this process, and prior to making recommendations to Ministers, the Team requests and considers the

views of key stakeholders. A primary stakeholder for this purpose is HMCTS, which is an executive agency within the MOJ. While HMCTS provides its views on judicial pay, the responsibilities for formulating policy and making recommendations, for approval by Ministers, remain with the Judicial Reward and Pension Reform Team.

14. Ms Shirley Hales is employed by the MOJ as the Team Manager for Judicial Pay and Pensions and the Scheme Administrator for the Judicial Pensions Scheme (Band A/Grade 7). In March 2014 she undertook a further search in her own emails and in the MOJ's electronic document management system, known as TRIM, but found nothing fresh. She also searched Mr Gray's email inbox, where she found three relevant documents, which are now items 13, 14 and 18 in the closed bundle. (Her statement also provided information on the MOJ's policy on deletion of emails; it is not necessary for us to refer to this further here, but we append some remarks on it below, near the end of our decision.)

15. We described closed documents 1-6 in paragraphs 11 and 14 of our preliminary decision. Documents 7-18 of the enlarged closed bundle may be described, without revealing their confidential contents, in particular as to policy formulation, as follows[4]:

    Doc 7 – submission dated 2 March 2011 from Mr Rutty to Permanent Secretary and Lord Chancellor seeking approval for proposed response to the judicial aspects of the SSRB 2011 report (4 pages, marked 'Restricted – Policy').

    Doc 9 – submission dated 1 March 2012 from Mr Rutty to Permanent Secretary and Lord Chancellor seeking approval for proposed response to the judicial aspects of the SSRB 2012 report (3 pages, marked 'Restricted – Policy').

    Doc 10 – submission dated 23 April 2012 from Mr Rutty to Peter Handcock (Chief Executive of HMCTS) and Helen Edwards (Acting Permanent Secretary) (5 pages, marked 'Restricted', and a one page annex). This seeks clearance for a proposed judicial pay strategy following the pay freeze, prior to sending a submission to the Lord Chancellor (ie, prior to Document 1). It is possible that this is only a draft. See Document 13.

    Doc 11 – email chain dated from 20 to 27 April 2012 between Mr Rutty and Mr Gray (2 pages, unmarked). This relates to and attaches Document 10.

    Doc 12 – email chain containing email between John Pearson (HMCTS) and Kevin Sadler (HMCTS) dated 26 April 2012, and email between Mr Rutty and Mike Hirst dated 30 April 2012, attaching an internal HMCTS submission from Pearson to Sadler dated 26 April 2012 (1 page of emails, 3 page submission, both marked 'Restricted – Policy'). This concerns views from HMCTS on the recommendations made by the SSRB.

[4] In these descriptions we take our lead from and substantially follow the descriptions given in the open statements of Mr Rutty and Ms Hales.

Doc 13 – submission dated 3 May 2012 from Mr Rutty to Peter Handcock (Chief Executive of HMCTS) and Helen Edwards (Acting Permanent Secretary). This is a later version of Document 10.[5]

Doc 14 – emails of 14, 23 and 25 May 2012, headed 'Restricted – policy – SSRB major review recommendations – letter from the Council of Employment Judges'. These emails merely deal with clearance from the Lord Chancellor's Private Office for a letter to be sent; they contain no policy discussion or consideration of the SSRB reports (3 pages, including the letter).[6]

Doc 15 – email chain dated 16 and 17 July 2012 between Craig Robb (Head of Jurisdictional Support (Employment)) and Mr Rutty (2 pages, marked 'Protect – Policy'). These communications followed the meeting held with the Council of Employment Judges delegation on 13 July 2012. (The closed bundle does not include the attachments, which we have not seen, and which Mr Rutty's statement says are outside the scope of the information request.)

Doc 16 – email dated 31 July 2012 from Mr Rutty to Emma Lochhead (Human Resources Director, MOJ) (1 page), attaching and commenting on a draft of Document 17.

Doc 17 – minute dated 10 August 2012 from Mr Gray to Antonia Romeo (Director-General of the MOJ Corporate Performance Group) (2 pages, unmarked), attaching Document 1 and Document 4. This relates to the approach to judicial pay from April 2013 and the 2012 judicial remuneration evidence document for the SSRB.

Doc 18 – submission dated 18 September 2012 from Mr Rutty to the Permanent Secretary and the Lord Chancellor, seeking approval of MOJ response to the SSRB's request for evidence for its 2013 report (3 pages, marked 'Restricted'), with annexes (44 pages). The first 33 pages of the annexes (numbered as pages 119-152 in our bundle) correspond, with immaterial differences, to the final version of the evidence dated 16 October 2012 and published on 29 November 2012. The next four pages of annexes comprise the SSRB's two letters dated 20 July 2012, requesting evidence for its 2013 report. The last six pages of annexes comprise a copy of Documents 1 and 2.

16. The existence and nature of these documents confirms our understanding of the general process of consideration and decision-making, as set out in paragraphs 19, 26, 31 and 37 of our preliminary decision.

17. We accept Mr Gray's evidence in paragraph 10 of his witness statement in the sense that as at the date of his statement (1 November 2013), while there had been a consideration of the consistency of the impact of the suite of SSRB recommendations with the prevailing policy on public sector pay

[5] Between pages 43 and 44 of the Closed Bundle there was a page missing, which, following our request, was supplied to the Tribunal on 10 September 2014, marked as page 43A. Behind Document 13, at page 46 of the Closed Bundle, there is a copy of the first page of the letter from the Council of Employment Judges to the Lord Chancellor, dated 25 April 2012. This letter has already been disclosed to the appellant and need not be further considered.

[6] Pages 51-98 of the closed bundle are inserted after Document 14. They do not have a document number and are not described in the index. They consist simply of duplicates of Document 18 and its annexes. We therefore disregard them.

restraint, there had been no Ministerial consideration of the individual recommendations of the SSRB report concerning re-grading, and therefore no final decisions had been taken in relation to the recommendations. So far as we are aware, that remains the position.

18. We make further findings of fact, based on our examination of the closed documents, in the Confidential Annex to this decision.

Closed Documents: whether within scope of request and whether properly treated as 'closed'

19. Documents 3 and 8 have been disclosed and it is not necessary for us to say any more about them at this point.

20. As regards scope, we stated our views on Documents 1 and 2 in paragraph 56 of our preliminary decision. The same considerations apply to Document 4. The MOJ accepts that all of Document 6 is within the scope of the request.

21. Documents 7 and 9-18, as contained in the enlarged closed bundle, do not contain any markings indicating that any parts of them are claimed by the MOJ to fall outside the scope of the information request. The MOJ's submissions of 5 June 2014 similarly do not contend that any parts of those documents are outside scope. Ms Hales' statement describes Document 14 as 'relating to' policy discussion, though not containing any, and as being included 'for completeness'. Since she states that it is withheld under FOIA s35(1)(a), we infer that the MOJ accepts that Document 14 is within the scope of the request.

22. We give additional reasoning in relation to scope in paragraph 1 of the Confidential Annex to this decision. The general nature of the point made there is that the scope of information requested concerning consideration of the 33rd and 34th SSRB Reports is necessarily wide. It would be artificial and misleading to remove the remarks made concerning the position of salaried employment judges from their context. In our view the context is part of the consideration.

23. As we have indicated, the first 33 pages of the annexes to Document 18 (numbered as pages 119-152 in our bundle) correspond, with immaterial differences, to the final version of the evidence sent to the SSRB on 16 October 2012 and published on 29 November 2012. In the circumstances we see no sufficient reason for non-disclosure of this material to the appellant when the MOJ responded to his information request on 18 October 2012. But the question of disclosure is for practical purposes academic, since these pages contain no material information that is not now in the public domain.

24. We have no material which suggests that the SSRB's two letters dated 20 July 2012, which form the next four pages of the annexes to Document 18, are in the public domain, but from their nature they do not appear to us to be confidential or sensitive. They are simply the SSRB's requests for evidence. However, we consider them below on the assumption that s35(1)(a) applies to them.

25. The MOJ claims exemption under s35(1)(a) for all the information in the documents remaining in the enlarged closed bundle. We therefore turn next to the application of this exemption and the public interest balance.

Application of s35(1)(a) and the public interest balance

(1) Interpretation

26. Section 35 provides:

> Information held by a government department ... is exempt information if it relates to- (a) the formulation or development of government policy.

27. The proper application of this exemption depends in part upon the nature of the connection intended by the use of the statutory phrase 'relates to'. This phrase was discussed in the context of FOIA s23 by a First-tier Tribunal in *APPGER v IC and FCO* EA/2011/0049-0051, 3 May 2012, at [62], [64]-[65], [67]-[68].

28. The phrase 'relates to', read literally, is potentially capable of indicating a very remote relationship. But in s35, as in s23, the function of the phrase 'relates to ...' is to demarcate the boundary of a FOIA exemption. It is clear, therefore, that it should not be read with uncritical literalism as extending to the furthest stretch of its indeterminacy, but instead must be read in a more limited sense so as to provide an intelligible boundary, suitable to and conditioned by the statutory context.

29. In *APPGER* [2012] at [68] the First-tier Tribunal decided that in s23 the phrase 'relates to' was directed to the content of the information – what the information was about; a less direct relationship would not qualify. While s35 differs from s23, we consider that this conclusion is equally applicable to s35. A merely incidental connection between the information and a matter specified in s35(1)(a) would not bring the exemption into play; it is the content of the information that must relate to the matter specified in the sub-paragraph. We do not think that this interpretation is inconsistent with the Tribunal's remarks in *Department for Education and Skills v IC and Evening Standard* EA/2006/0006, 19 February 2007 at [52]-[54], but, if it is, we prefer it. We agree that the expression 'formulation or development of government policy' is reasonably broad, and in principle is to be contrasted with implementation of settled policy. We also consider helpful the valuable discussion of the nature and significance of the s35 exemption in the *Department for Education* case at [75], to which the parties drew our attention.

30. It has been held that the broadly worded exemption in s35(1)(a) is not an exemption which has an inherent or presumptive weight independent of the particular circumstances: *Office of Government Commerce v IC* [2008] EWHC 774 (Admin), [79]. We bear this in mind, but do not find it to be of real practical assistance. Even though extreme examples can be envisaged where s35 covers information which could not possibly be regarded as confidential, and which should certainly be disclosed to the public, in our view the general importance or desirability of a safe space for policy formulation and development is not in doubt, and the information of interest in the present appeal is not an extreme example of that kind.

(2) Extent to which s35(1)(a) is engaged

31. The appellant argues that s35(1)(a) is not engaged in relation to any information falling within the first or second parts of his request, because such information relates to decisions taken, and to implementation of an already formulated policy. We do not accept this argument. If information which is

recorded at a particular time relates to the formulation or development of government policy, it continues so to relate even after a decision is taken[7]. The relevance of the completion of policy formulation is to the public interest balance on the basis that, depending on circumstances, protection of the information may be less important and the need for the safe space may have reduced once the decision has been taken.

32. The appellant places emphasis on our finding that decisions on the question of whether to implement the SSRB recommendations in the short-term had already been taken prior to the date of his information request. But the taking of short-term decisions not to implement them immediately did not remove the need for a further decision on whether to implement them at all. As the MOJ submits, the question of whether to follow the SSRB's recommendations after the pay freezes ended remained to be finally concluded. Given this feature, and having considered the contents of the enlarged closed bundle, we agree with the MOJ and the Commissioner that s35(1)(a) is engaged in relation to Documents 1, 2, 4, 6, 7, and 9-18. The information in those documents relates to the formulation or development of Government policy. We understand the logic of the appellant's argument, but it presupposes that the information which he has requested is separate from information about consideration of the yet-to-be-taken ultimate decision. As the MOJ rightly observes, given the contents of the particular documents, it is not practicable to separate the information in those documents which relates to the decisions to defer consideration of re-grading until after the end of the pay freezes from the information which relates to the formulation of policy on whether ultimately to re-grade or not.

33. The appellant expresses concerns about the spectre of endless policy formulation, on the basis of assertions by a Government department that there might be a further decision taken in the future. In our view that extreme description does not fit this case. It is clear that at the time of the request a final decision on implementation of the SSRB recommendations had not been taken, whatever may or may not have been said in internal discussions below Ministerial level.

(3) The interests protected by s35(1)(a)

34. In brief, s35(1)(a) reflects the need for a safe space in which government policy can be formulated and developed in robust discussions where participants are free to 'think the unthinkable' in order to test and develop ideas, without fear of external interference or distraction, whether as a result of premature and lurid media headlines or otherwise. This short identification of the relevant interests served by the exemption may be supplemented by reference to the very useful discussion of arguments concerning safe space, chilling effect, record keeping, and protection of officials in paragraphs 194-204 and 211-212 of the Commissioner's published guidance titled "Government policy (section 35)" version 1, 18 March 2013. We agree with those paragraphs of the Commissioner's guidance.

(4) The nature of the public interests potentially served by disclosure

35. The general philosophy of FOIA is that disclosure is generally in the public interest because it promotes good government through transparency, accountability, increased public confidence and public understanding, the

[7] The express statutory exception to this, in s35(2), is not relevant here.

effective exercise of democratic rights, and other related public goods. In general, the potential benefits of disclosure include the pressure to make governmental decisions and use governmental resources in ways that will withstand public scrutiny. They also include the enabling of constructive public debate, which in effect enlists the help of responsible members of the public in fostering good government.

36. The MOJ acknowledges[8] the following public interest considerations favouring disclosure in the present case:

    a. The information relates to the SSRB recommendations for judicial pay, which are a matter of public interest.

    b. There is a public interest in increasing the transparency of the workings of Government in relation to considerations which inform judicial pay policy.

    c. Disclosure would perform an educative function concerning formation of Government policy in regard to SSRB recommendations and interaction between MOJ and stakeholders, including those lobbying for a particular response.

    d. Access to information about how policy decisions are reached, what options are being considered and why some are excluded and others preferred potentially generates meaningful participation between Government Departments and the public. Giving people access to information that will allow informed participation in the development of government proposals or decisions which are of concern to them is a key driver of the FOI legislation.

    e. Disclosure would promote accountability of the MOJ to the general public.

37. It is striking that this list prepared by the MOJ contains no express recognition of the public interest in the preservation of an independent and high quality judiciary or of the constitutional significance of the protection of judicial remuneration through a mechanism such as the SSRB. We would have expected the MOJ, of all Government Departments, to have had a particularly keen appreciation of these considerations and of their potential relevance to the public interest balance. What is even more striking is that the MOJ continued to leave them out of account, even after the appellant had expressly drawn attention to them in his letter of 9 November 2012 requesting internal review. The internal review re-examined only the public interest considerations included in the original refusal notice. Mr Gray's witness statement for the appeal covered the issue of the public interest balance without making any express reference to the possible relevance of disclosure in showing the public whether issues of judicial remuneration were being handled in a manner which would safeguard the quality and independence of the judiciary. It is a matter both of surprise and of concern that the MOJ's Deputy Director, Judicial Reward and Pension Reform, in post since November 2009, exhibited no appreciation that these were relevant points to consider. These facts seem to indicate within the MOJ a degree of collective blindness to, or unconcern with, the constitutional significance of the arrangements for the protection of appropriate judicial remuneration.

38. The appellant drew attention in addition to the following further matters:

[8] Principally in its refusal notice 18 October 2012 and/or in its letter to the Commissioner 12 April 2013 and/or in Mr Gray's witness statement.

a. The wholesale failure to implement SSRB recommendations for several years, with no finite resolution in sight, is a departure from previous practice and undermines its standing and credibility, both in relation to the judiciary and in relation to the other groups within its remit. Appropriate transparency requires that the public should know the full reasons for this failure.

b. The public is entitled to know why scarce resources are spent on the SSRB and on evaluation studies, when the results and recommendations are ignored. This is a matter of accountability for expenditure of public funds.

c. The 'significant injustice' (as he termed it) to Employment Judges, by their being under-graded and hence required to make a disproportionate and unfair contribution to the financial crisis, is contrary to their legitimate expectations. The impact on judicial morale is a matter of public interest.

d. The Government's failure to acknowledge the real difference between a salary increase and the correction of the grading undermines the work of the SSRB across the public sector and is therefore a matter affecting the public interest. Without disclosure of the information, the public remains in ignorance of the reasoning by which the Government concluded that the pay freeze was relevant to and took precedence over the re-grading recommendations.

39. The appellant also contended that accountability in regard to Government decision-making is of increased importance where the approach of the MOJ has been confusing, misleading, or unclear. In this case the CEJ was told at the July 2012 meeting that the SSRB's recommendations were under consideration and that no decisions had been taken, which, he said, gave a rather misleading impression.

40. We consider that all these matters are of potential relevance, but we think it important to make one qualification and one comment:

a. It is necessary to distinguish between the public interest and the private interests of Employment Judges. The appellant submitted in eloquent terms that the group of about 130 individuals affected by the failure to implement the recommendations was entitled to know the reasons for it. While this is a reasonable point, it is no part of our function to say how the Government ought to behave towards particular groups as a good employer. The 'injustice' to the Employment Judges, if such it be, is only relevant in so far as it impacts on the general public interest that the judiciary should be properly treated by Government.

b. We agree that the MOJ's position has at times been less than clear, and that the effect of things said or written to the CEJ or the appellant may have been confusing. In part this may be explained by the officials concerned being constrained in what they were able to say. We do have concerns in relation to this aspect, which we record in the Confidential Annex to our decision.

(5) Impact of disclosure on the interests served by the s35(1)(a) exemption

41. The MOJ's refusal notice stated that disclosure would result in civil servants being less inclined to consult with stakeholders on the risks and implications

of policy options. We would understand the potential relevance of this to a situation where stakeholders were consulted on a sensitive subject in confidence. This is a valid factor in the present case in relation to the consultations with internal stakeholders, but as regards external stakeholders, it does not seem to us to apply to a material extent in the circumstances of the present case. The principal consultations with those who might be regarded as external stakeholders, of which we are aware in the present case, are (a) the correspondence with the CEJ and the appellant, and the meeting with the CEJ, and (b) consultations with senior judiciary. As to (a), these contacts do not appear to us to have been in circumstances of confidence. As to (b), this is a reference to the expressions of views by senior judiciary, such as the Lord Chief Justice, which were set out as a matter of public record in their submissions to the SSRB.

42. The refusal notice also stated that disclosure 'could be detrimental to the extent that internal stakeholders would be prepared to make representations and provide advice on matters on which they are often experts, to the overall detriment of the policy development process in this instance'. The reference to internal stakeholders is not explained. We take it to refer to civil servants, such as HMCTS officials, Treasury officials, or officials with relevant responsibilities in other parts of the United Kingdom. They would be expected to contribute their views to the internal policy debate. In principle this seems to us to be no different from the safe space argument for the MOJ's policy officials' own deliberations.

43. The MOJ's main point is that, given the timing of the request, and in the absence of any final decision having been taken, disclosure would intrude on the safe space for policy-making and hence lead to less candid and robust policy discussions.

44. Mr Gray's evidence on this is partly specific and partly generic. His specific evidence is that it would be 'impossible' for officials to offer Ministers advice on choices if the information were subject to full and early disclosure. It would prejudice the formulation of public sector pay policy, of which judicial pay policy is part, and which is yet to be developed. We understand this to be his view, but we consider it to be overstated, for reasons that appear below and in the Confidential Annex.

45. His generic evidence is a recitation of six public interest considerations against disclosure which he says were taken into account[9]:

46. (1) 'Disclosure while a policy is in its infancy may be misleading as the final policy may look very different.' While this could be relevant on different facts, it does not appear to us to be relevant to the matter in hand.

47. (2) 'Early disclosure of information makes it very difficult to discuss ideas and share thinking. Government is still considering policy options ... ... It is at this point that the public interest in preserving the safe place for policy making is at its highest.' We agree with Mr Gray and with the Commissioner that this is a consideration which has significant force.

48. (3) 'Early disclosure may mean a need for MOJ officials to defend everything said to date whether ultimately proceeded with or not, and would hinder the development of actual and effective policy making'. In the particular

[9] We assume that we should understand that he agrees with them, although his statement is not explicit on this.

circumstances of the present case this appears to us to be a marginal consideration. The pay grading and pay rates of Employment Judges are hardly exciting front page material for the Press. Anything said to date[10] which was obviously unsuitable to be taken forward would fall away. In so far as disclosure generated communications relating to viable options, this would involve an additional burden on officials, but this could well be more than compensated for by the benefits to be derived from fuller and franker engagement with responsible external stakeholders.

49. (4) 'Sharing information and views confidentially across a department is essential to ensuring all relevant policy considerations are taken into account.' This merely repeats an aspect of consideration (2).

50. (5) 'Early disclosure of inter-ministerial and senior official discussions has the potential to undermine the collective responsibility of Government Ministers, particularly where this is before a final policy is adopted.' In the present case this seems to be a purely theoretical point. The general pay freeze policy had already been announced. Section 35(1)(b) is not relied on.

51. (6) 'The need for Ministers and officials to be able to discuss all policy options in an unrestricted and imaginative way, engaging relevant stakeholders if necessary, and without fear of the list of options being restricted due to public criticism – to do otherwise would be detrimental to the public interest in effective policy making.' We regard this as effectively a repeat, in different words, of consideration (2).

52. In the circumstances we consider that there are no special or peculiar impacts in the present case; the impact of disclosure on the interests served by the s35(1)(a) exemption boils down to the core point that it would normally be expected that policy regarding the ultimate implementation or otherwise of the SSRB recommendations for re-grading can be more effectively and efficiently made in a safe space away from public view.

53. In its submissions of 8 June 2014 the MOJ states: "The question of public interest must be asked in the round: is there a public interest in withholding the relevant material because its disclosure would have the effect of placing policy deliberations in the public domain before the policy question to which they relate has been resolved?" Having considered the closed materials, the clear answer to this question is in the affirmative, but the critical aspect is the question of the weight of this interest, as compared with the public interest served by disclosure.

(6) Impact of disclosure on the interests served by disclosure

54. We have set out above the interests that would potentially be served by disclosure. They can conveniently be gathered into two groups. First, there are the ordinary matters of transparency and accountability of Government, and education and engagement of the public, on the topics in question. These would be materially advanced by disclosure. We understand the MOJ's position to be that there is no particular need for these ordinary interests to be served during the period when policy is still being formulated. We are inclined to agree.

55. Second, there are the special features which are particular to the present case, which concern the important public interests in the proper functioning

[10] meaning up to the time the request was made and dealt with

and preservation of the system for judicial remuneration. In relation to the second group, considerations of transparency and accountability could have a particular resonance and force, depending on the view one takes on the extent to which the Government's conduct, of which the appellant complains, raises questions about the role of the SSRB and the future quality and/or independence of the judiciary.

56. The MOJ submits in its skeleton argument dated 28 November 2013:

> Notwithstanding the general, indeed constitutional, significance of the importance of the independence of the judiciary, there is no sense in which judicial independence is threatened by the consideration of the SSRB recommendation to date.

57. We see the force of this submission, which is directly contrary to the submissions made by the appellant. We do not understand the Lord Chief Justice, or the SSRB itself, to have taken the view that the failure to implement the recommendations in 2011-2012 and 2012-2013 has directly threatened or would directly threaten judicial independence. Nor, as at September 2012, had it directly threatened to undermine the quality of the Employment Judiciary in the short term. However, we do accept (going part of the way with the appellant) that the Government's decisions not to secure the appropriate value of judicial salary in accordance with recommendations of the independent body appointed to advise on such remuneration raise important questions about possible erosion of the constitutional separation of powers and about the level of the MOJ's and UK Government's continued commitment to the Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government (2003). Disclosure would help to answer or at least ventilate these questions. In particular, disclosure would enable the public to know whether or not, or the extent to which, these matters were actively weighed or prominently considered as part of the process of deciding not to implement the recommendations for 2011-2012 and for 2012-2013.

58. On the evidence, the failure to implement SSRB recommendations for several years, or even to promise to implement them as soon as financial conditions permit, is a very significant departure from previous practice, which in our judgment tends to undermine the standing and credibility of the SSRB. This is a serious matter. Recommendation 2 of the 33rd Report was explicit. We acknowledge the qualifications made in Recommendation 9 of the 33rd report, but the view of the SSRB was that the pay freeze did not provide a sufficient reason for non-implementation of the re-grading, as the SSRB complained in paragraph 4.3 of its 34th Report. Appropriate transparency would involve revealing to the public the full reasons for the course of action taken by the Government in this regard. At the time of the request there had been very little by way of public explanation (and this remains the case).

59. Moreover, there is a public interest in fully exposing for public discussion the issue arising from the spending of scarce resources on the SSRB and on evaluation studies, when the results and recommendations are seemingly side-lined by Government. This is a matter of proper accountability for expenditure of public funds.

60. The Government's practical failure to acknowledge the real difference between a salary increase and the correction of the grading, with the consequent de-motivating impact on a large group of judges, is also

something that requires explanation to the public. Disclosure would tend to serve this interest.

(7) The public interest balance

61. The question which we have to answer is whether in all the circumstances of the case, at the period when the request was made and the MOJ responded to it, the public interest in maintaining the s35(1)(a) exemption for the disputed information outweighed the public interest in disclosing the information.

62. The MOJ's own view, supported by Mr Gray's evidence, is that the balance favours the maintenance of the s35(1)(a) exemption. Given the MOJ's almost total failure to engage with the constitutional and public interest issues concerning the role of the SSRB and the Government's response, we can give little weight to the MOJ's view on where the balance of public interest lies.

63. The Commissioner's view, as expressed in his Decision Notice, was that the timing of the request was a crucial factor. Because of the timing, a significant need for safe space for policy making was demonstrated. This could only be overcome by a compelling public interest in favour of disclosure. The Commissioner accepted that the particular issues related to government pay policy towards the judiciary were of significant public interest, but he considered that they were not sufficiently compelling to overcome the need for safe space. His judgment was that the public interest in enabling the Government to develop its pay policy without significant disruption was the overwhelming factor. Thus the public interest in maintaining the exemption outweighed the public interest in disclosure. On the appeal, the Commissioner originally submitted 'it was open and reasonable for him to conclude that the public interest favoured maintaining the exemption', and he invited us to dismiss the appeal. These views related to Documents 1-6.

64. The Commissioner's position changed upon sight of some of the further documents identified in the further searches. He is now of the view that the public interest favours disclosure of some documents and favours maintenance of the exemption in relation to others, depending upon the particular contents of each document. We have dealt with Document 8 in paragraph 4 above. His position on the other more recently identified documents in controversy may be summarised as follows:

Doc	*Maintain or disclose*	*Reasons*
7	Maintain exemption	Balance favours maintenance of exemption
9	Maintain exemption	Balance favours maintenance of exemption
10	Maintain exemption	Similar to Doc 1
11	Disclose	Because of content, balance favours disclosure
12	Disclose part / Maintain exemption for part	For emails, balance is equal, so disclose. For HMCTS submission, balance favours maintenance of exemption
13	Maintain exemption	Similar to Doc 10
14	Disclose	Balance favours disclosure, both for the emails (2 pages) and the letter of May 2012 (1 page)
15	Maintain exemption	Balance favours maintenance of exemption
16	Maintain exemption	Balance favours maintenance of exemption

17	Maintain exemption	Balance favours maintenance of exemption
18	Disclose, subject to a redaction	Balance favours disclosure of the first 33 pages of annexes (letter and evidence to go to SSRB), and the 4 pages of letters from the SSRB requesting that evidence, because final version of letter and evidence was published, being in 2012 the same kind of information as was in Doc 8 in 2011. Balance favours disclosure of the submission dated 18.9.12 because the corresponding submission in 2011 was disclosed in Doc 8 and because the submission sets out the approach to be taken in the letter, the final version of which has been published. Redact paragraphs 15 and 16 of the submission.

65. In relation to Documents 11 and 18 the Commissioner has provided specific reasoning in support of his views. Unfortunately, in relation to the other documents, the Commissioner's position is expressed in terms of conclusions, without any specific supporting reasoning, so we are not able to give much weight to his views in those instances.

66. As regards Document 18, we agree with the Commissioner that there is no justifiable ground for maintaining the s35(1)(a) exemption in relation to the first 33 pages of annexes or the 4 pages of letters from the SSRB: see paragraphs 23-24 above.

67. We are unable fully to endorse his reasoning in relation to the submission dated 18.9.12 which forms the first three pages of Document 18. In our view it does not necessarily follow from the disclosure of the submission contained in Document 8 that the similar submission contained in Document 18 should be disclosed. Nor does this necessarily follow from the fact that the submission sets out the approach to be taken in the letter to the SSRB. While these are matters to take into consideration, the sensitivity of Document 18 has to be considered primarily by reference to its own terms. We note in particular that the contents of the submission contained in Document 18 are less anodyne than the contents of the submission contained in Document 8.

68. The Tribunal has received more evidence than was before the Commissioner when he made his decision, and is entitled to reach its own conclusions as to the facts.[11] We have set these out above, and in the Confidential Annex, together with our assessment of the weight of the factors for or against disclosure. These findings go somewhat beyond the matters set out by the Commissioner in his Decision Notice. The public interest balance is a question of mixed law and fact, on which it is for the Tribunal to form a view.[12] In reaching our view, we take into account our assessment of all the factors for or against disclosure and compare the weight on each side of the balance.

[11] FOIA s58(2).

[12] For the nature of the Tribunal's jurisdiction on appeal, we refer to *Guardian Newspapers Ltd and Brooke v IC and BBC* EA/2006/0011 and 0013, 4 January 2007, at [14].

69. It seems to us that the real weakness of the MOJ's case on this appeal is that it has relied mainly on generic considerations about the need for a safe space for policy-making without giving sufficient consideration either to the particular contents of the documents falling within the scope of the appellant's information request or to the appellant's weighty points about the particular public interest considerations which are in play. As regards the contents of the documents, this is not a case where the documents contain 'blue sky thinking' or specially robust discussion, or where the subject matter registers particularly highly on the scale of possible sensitivity.[13] As regards the points made by the appellant, the matters relating to the constitutional and public interest issues concerning the role of the SSRB and the Government's response are special features which we are persuaded are very weighty. The result is that in the particular and unusual circumstances of the case we find the public interest in disclosure to outweigh the ordinary need for safe space for policy making. This conclusion applies to all the documents to which the s35(1)(a) exemption applies.

70. We give further explanation of our views on the public interest balance in the Confidential Annex.

Loss of documents

71. The routine deletion of Mr Rutty's emails from his email account when he left the MOJ in August 2013 has given rise to some concerns. Ms Hales stated in relation to these:

> 'When a member of staff leaves or moves to another department, their email account is emptied. As they will have filed all key documents on TRIM, this is considered to be sensible in order to free up space on the system, and appropriate. At the present time, deleted emails are held in abeyance in a special holding system called E Vault. This is a temporary email holding facility and emails will start to be deleted from this permanently from September 2014. ... Eventually, emails will be permanently deleted upon a member of staff's departure six weeks after they leave or transfer.

72. The appellant submitted that the risk of loss of evidence, evident from Ms Hales' statement, was a powerful reason for disclosure in the public interest.

73. In our assessment of the balance of public interest we have not taken this submission into account, because we do not consider it to be well founded. As regards the short term, if information should properly be kept out of the public domain pursuant to a FOIA exemption, the fact that the information may be destroyed is not a good reason for disregarding the exemption. As regards the long term, if information should properly be revealed after its sensitivity has faded, the appropriate answer to this is proper record-keeping, not premature disclosure. If TRIM is properly used, disclosure of key documents in the long term should normally be possible.

74. Where we have a concern in this case is that deletion of Mr Rutty's emails proceeded even though they were relevant to a current information request

[13] We would not wish to be misunderstood as implying that these factors are preconditions for the maintenance of the s35(1)(a) exemption. They are not. We are here concerned with the weighing of a relative balance. Separately, we observe, for what it is worth, that the lines adopted pursuant to the officials' submissions did not raise any Parliamentary handling concerns or any requirement for Press Office involvement.

which had progressed to the Commissioner and the Tribunal and remained unresolved. If the system of permanent deletion six weeks after leaving had been in operation in August 2013, material information would have been lost. The MOJ needs to adjust its procedures for the future so as to ensure that information relevant to unresolved information requests is not deleted, and so as to ensure that none of its employees commits an offence under FOIA s77.

Personal data

75. We considered the application of FOIA s40(2) in paragraphs 58-62 of our preliminary decision. None of the parties has made any submissions about the applicability of FOIA s40(2) to the additional Documents 7-18. As before, in the circumstances of the case and for the reasons given we consider it appropriate for the MOJ to redact the names of junior civil servants. This does not include those whose names have been mentioned above in the present decision.

76. We wish to add to the reasoning in paragraph 60 of our preliminary decision. Given the extent to which the legal understanding of what constitutes personal data has developed, we acknowledge that paragraph 19 of Document 1 could be regarded as personal data. If it should be so regarded, we nevertheless remain of the view that paragraph 19 should not be protected by s40(2), because of the legitimate public interest in transparency regarding remuneration of judges and the lack of any expectation that matters concerned with a judge's salary would remain confidential.

Conclusions

77. We conclude for the reasons set out above and supplemented in the Confidential Annex that the appeal should be allowed.

78. After a proper search by the MOJ for documents responsive to the appellant's information request, the Information Commissioner should have decided that Documents 1-2, 4, 6-7, and 9-18 should have been released in response to the appellant's information request, on the ground that the public interest in disclosure outweighed the public interest in the maintenance of the exemption in FOIA s35(1)(a).

Signed on original:

/s/ Andrew Bartlett QC

Judge of the Tribunal