



**IN THE FIRST-TIER TRIBUNAL  
(GENERAL REGULATORY CHAMBER)  
[INFORMATION RIGHTS]**

**EA/2013/0283**

**ON APPEAL FROM:**

**Information Commissioner's Decision Notice: FS50498837  
Dated: 28 November 2013**

**Appellant: STEVEN SANDERS  
Respondent: THE INFORMATION COMMISSIONER**

**Heard at: Field House  
Date of hearing: 14 May 2014**

**Date of Decision: 21 May 2014**

**Before  
Henry Fitzhugh  
Annabel Pilling (Judge)  
Marion Saunders**

**Subject matter:**

FOIA – Qualified exemptions – Prejudice to the administration of justice, s.31(1)(c)

FOIA – Absolute exemptions – Personal data, s.40(2)

FOIA – Qualified exemptions – Legal professional privilege, section 42(1)

**Representation:**

For the Appellant:

Steven Sanders

For the Respondent:

Julianne Kerr Stevenson, Adam Sowerbutts

**Decision**

For the reasons given below, the Tribunal refuses the appeal and upholds the Decision Notice dated 28 November 2013.

**Reasons for Decision****Introduction**

1. This is an appeal against a Decision Notice issued by the Information Commissioner (the 'Commissioner') dated 28 November 2013.
2. The Decision Notice relates to a request made by the Appellant under the Freedom of Information Act 2000 (the 'FOIA') to the Ministry of Justice ('the MOJ')<sup>1</sup> for the complaints handling manual and standard phrases recommended for use by complaints handlers at Her Majesty's Court Service.
3. After a deplorably long delay of over two years<sup>2</sup>, the MOJ provided some of the requested information but withheld parts on the basis that it was exempt under FOIA citing section 31(1)(c) (prejudice to the administration of justice), section 40 (unfair disclosure of personal data), and section 42(1) (legal professional privilege). It also initially cited section 41 (information provided in confidence) but withdrew reliance upon this exemption during the Commissioner's investigation.

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<sup>1</sup> The request was made to Her Majesty's Court Service (HMCS). HMCS no longer exists; it combined with Her Majesty's Tribunal Service (HMTS) on 1 April 2011 to create Her Majesty's Court and Tribunal Service (HMCTS). HMCTS is an agency of the Ministry of Justice and therefore it is the Ministry of Justice which is the relevant public authority in this appeal.

<sup>2</sup> The Appellant asserts that he first requested the information in 2009 and complains that the Commissioner has failed to consider the entirety of the handling of his request under FOIA.

4. The Commissioner found that the MOJ's handling of the Appellant's request for information was "deeply flawed" and inadequate. In particular, he found that it had contravened the requirements of sections 1(1)(a) and 10(1) of FOIA by failing to provide an adequate response within 20 days.
5. The Commissioner agreed that the MOJ is entitled to withhold some but not all of the information on the basis of the cited exemptions. He directed the MOJ to disclose information identified in a confidential annex to the Decision Notice within 35 days.

### **Background**

6. The Appellant has had a long course of dealing with the MOJ during which he has made a number of complaints about how he has been treated by court staff and about how those complaints have been handled.
7. The relevant request for information was contained in an email from the Appellant to the new Area Director with responsibility for Barnet County Court on 3 February 2010:

*"54. For this reason [regarding concerns about a named employee of HMCS] I would like you to provide a copy of HMCS's internal complaints handling manuals and guides along with a copy of all preset phrases your staff are equipped with, together with the instructions and guidance for the deployment of these phrases, so that I can decide whether [name] is deliberately breaching your own rules and guidelines or whether your staff are instructed to misdirect and shift the focus of complaints whilst evading or rewriting what the complaint is actually about."*

8. Initially the MOJ suggested that it would not provide the Appellant with the complaints handling manual as it was an internal document. The Commissioner described the initial responses as "wholly inadequate"

and we agree. The MOJ failed to treat the Appellant's request as a request for information under FOIA. As a result, the Appellant chased the MOJ for a response which complied with FOIA. There was a further significant delay of some seven months during which the Appellant and the MOJ were in dispute in respect of the preferred means of communication for the requested information; the MOJ requested the Appellant to provide his postal address so that it could send hard copies of the information, while the Appellant said that he preferred to receive the information by electronic means or that he would collect the information in person.

9. The MOJ finally sent the Appellant a substantive response on 11 May 2012. It subsequently apologised for the length of delay, accepting that the extensive time it took to provide a response fell short of any reasonable standard of customer service. The explanation provided by the MOJ was that a member of the team responsible had left and the request was overlooked, there were delays in locating the information requested and ineffective communication between teams.
10. The Appellant does not accept this explanation and submits that the MOJ deliberately withheld the information. He has suggested that this amounts to an offence and that the Commissioner should have exercised his powers under section 77 of FOIA or taken some other course for criminal prosecution. Such a dispute is not a matter for this Tribunal; a Decision Notice issued following a complaint to the Commissioner under section 50 of FOIA may only deal with the question of whether or not the request for information has been dealt with in accordance with Part I of FOIA. An appeal to this Tribunal under section 57 of FOIA arises only in relation to findings of such a Decision Notice.

### **The appeal to this Tribunal**

11. The Appellant appealed to this Tribunal on 27 December 2013. He requested an oral hearing of the appeal at which the Commissioner did

not appear.

12. The grounds of appeal identified by the Appellant were as follows:

1. *The scope of the complaint was wider than set out by the Commissioner and should have considered the entire four year period the Appellant had been seeking the information from MOJ and not limited to the request of 2010.*
2. *The redacted internal complaints handling manual disclosed by the MOJ was poorly photocopied rendering certain sections unreadable.*
3. *The Commissioner failed to take account of the Appellant's numerous offers to the MOJ to collect the hard copy disclosure in person rather than to have it posted. The Commissioner should have found that the MOJ intended to cause delay by refusing to engage.*
4. *The Commissioner failed to take relevant considerations into account and erred in concluding that there was no evidence that the information was deliberately hidden to avoid disclosure.*
5. *The statutory limitation for bringing a prosecution under section 77 of FOIA is too short.*
6. *The Commissioner should have found that there was evidence of criminal intent in the four years of delay.*
7. *There has been a breach of natural justice as the Commissioner did not afford the Appellant an opportunity to make representations in response to submissions by the MOJ.*
8. *The Commissioner failed to investigate the MOJ's failure to provide its complete list of pre-formulated phrases scripted for staff to use.*
9. *The Commissioner did not properly consider the issue of delay and the Appellant did not have the opportunity to submit additional evidence or to review a draft decision notice.*
10. *The Commissioner erred in his conclusion in respect of the preferred means of communication.*
11. *"With regards to the exemptions at paragraphs 37-106 the Appellant contends the ICO have erred in part".*

*The Tribunal Registrar asked for clarification from the Appellant in letter dated 27 February 2014. The Appellant later indicated*

*that he was not in a position to say whether the exemptions claimed apply to the withheld information, as has never seen the material, but intended to contend that the public interest may favour disclosure.*

12. *The Commissioner erred in his assessment of when the Appellant received the MOJ's purported internal review.*

13. The Tribunal was provided in advance of the hearing with an agreed bundle of material, written submissions from the parties dated 6 May 2014 and a written reply to the Commissioner's written submissions from the Appellant which was emailed to the Tribunal on the day of the hearing. We were also provided with a small closed bundle which was not seen by the Appellant and which contains the withheld material.
14. The closed material mainly consists of the material withheld by the MOJ. The information requested by the Appellant falls into three categories (tranches) as described by the Commissioner :
- Category One - high level general information about the complaints handling process. The Commissioner decided that this information does not engage the exemptions relied upon by the MOJ and required the MOJ to disclose this, save for names of junior officials which are exempt under section 40 of FOIA (unfair disclosure of personal data)
  - Category Two - more detailed information about the complaints handling process including details of interactions with other agencies. The Commissioner found that the exemption in section 31(1)(c) of FOIA is engaged as disclosure would be likely to prejudice the administration of justice (the effectiveness of relationships between the different agencies involved in the administration of justice, and the effectiveness of the operational elements of the judicial system and legal profession) and the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
  - Category Three - information about how claims for compensation are handled. The Commissioner found that the

exemption in section 42(1) of FOIA (legal professional privilege) is engaged as the information had been created as a result of a real prospect or likelihood of litigation and the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

15. The closed bundle contains the information falling within categories two and three which have been withheld, amounting to 149 pages. We have therefore examined each document carefully to assess whether the exemption is engaged and to consider the public interest balancing exercise.
16. Aware of the guidance from the Supreme Court in *Bank Mellat v HMT (no.1)* [2013] UKSC 38, which was not a case about FOIA, and in *Browning v Information Commissioner and Department for Business, Innovation and Skills* [2013] UKUT 0236 (AAC), in which the Upper Tribunal issued similar guidance about the use of closed material and hearings in FOIA cases, we kept the issue of the closed material under review throughout the proceedings. The other document in the closed bundle was the original version of a letter from the MOJ to the Commissioner dated 10 October 2013. A redacted version was included in the agreed bundle seen by the Appellant. At page 7 of this letter, the last three lines of the answer to point 9 have been redacted. The first six words of the first line of redaction should not have been removed in order to remain consistent with similar information on page 6 which was left in the version provided to the Appellant. Although they provide no additional information, these words should be disclosed to the Appellant.
17. Although we cannot refer to every document in this Decision, we have had regard to all the material before us.
18. At the start of the hearing, we discussed with the Appellant the limitations on the Tribunal in respect of our jurisdiction. As indicated above, an appeal to this Tribunal under section 57 of FOIA arises only in relation to the findings of the Commissioner contained in a Decision

Notice issued following a complaint to the Commissioner under section 50 of FOIA; this will only deal with the question of whether or not the request for information has been dealt with in accordance with Part I of FOIA.

19. In particular, we have no power to direct the Commissioner to conduct his investigation in a particular way, or to redefine the scope of his investigation which had been agreed, or to direct that he allow representations or comments to be made upon submissions from another party, or to direct that he provide an opportunity for the parties to review the decision notice in draft form before it is issued.
20. The Appellant does not accept the explanation in respect of the lengthy delay in dealing with his request for information which was provided by the MOJ and accepted by the Commissioner. He maintains that the MOJ deliberately withheld the information and referred to the history of his dealings with the MOJ as evidence to support his position. He has suggested that the MOJ's handling of his request amounts to an offence and that the Commissioner should have exercised his powers under section 77 of FOIA or pursued some other criminal prosecution.
21. The grounds of appeal relating to these matters are areas about which the Appellant remains dissatisfied but not areas where this Tribunal is able to offer any redress. The focus of the hearing was therefore in respect of the application of section 11 of FOIA (means by which communication to be made), whether the exemptions claimed by the MOJ are engaged in respect of the withheld information and, if so, whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

### **The Issues for the Tribunal**

22. Under section 1(1) of FOIA, any person making a request for information to a public authority is entitled, subject to other provisions of the Act, (a) to be informed in writing by the public authority whether it



holds the information requested, and (b) if so, to have that information communicated to him.

23. The section 1(1)(b) duty of the public authority to provide the information requested will not apply where the information is exempt by virtue of any provision of Part II of FOIA. The exemptions provided for under Part II fall into two classes: absolute exemptions and qualified exemptions. Where the information is subject to a qualified exemption, it will only be exempt from disclosure if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information (section 2(2)(b)).

### **Section 11 – Means by which communication to be made**

24. Section 11 of FOIA provides as follows:

*“(1) Where, on making his request for information, the applicant expresses a preference for communication by any one or more of the following means, namely*

*(a) the provision to the applicant of a copy of the information in permanent form or in another form acceptable to the applicant,*

.....

*the public authority shall so far as reasonably practicable give effect to that preference.”*

25. In his original request of 3 February 2010, the Appellant did not directly express a preference for communication by any particular means. The MOJ provided some information to the Appellant in hard copy to a postal address and on 28 October 2011 the Appellant stated that he preferred to receive the information by email. The Commissioner submits that once the public authority has started to deal with a request and to prepare information for communication in a particular form, it is not required to give effect to a preference expressed later.

26. The Appellant disagrees that he did not express a preference in his original request. He submits that as his request for information was sent by email, did not provide a postal address or express a preference for any other means of communication, it was implicit that this expressed his preference to have the information communicated electronically by email.

27. We consider that the wording of section 11 of FOIA is clear; unless the applicant expresses a preference for the means by which communication of the information should be made there is no obligation on the public authority to comply with a preference expressed later. This is to prevent a public authority preparing the information in one format and then having to undertake further work to alter the format. We do not agree with the Appellant that he either did or could express a preference by implication.

28. The MOJ did not contravene section 11 of FOIA in the handling of this request.

**Section 31(1)(c) – prejudice to the administration of justice**

29. Section 31 of FOIA is a qualified exemption and the relevant parts provide as follows:

*“(1) Information .... is exempt information if its disclosure under this Act would, or would be likely to, prejudice-*

*...*

*(c) the administration of justice.”*

30. This is a prejudice-based, qualified exemption. There are essentially two issues for the Tribunal to decide:

- i) would disclosure of the information be likely to prejudice the administration of justice; and
- ii) if so, does the public interest in maintaining the exemption

outweigh the public interest in disclosing it?

31. The approach to the prejudice-based exemptions is well established. Both matters are for the Tribunal to determine for itself in light of the evidence. We are aware of the decisions in Secretary of State for the Home Department v Rehman [2001] UKHL 47, R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs [2010] EWCA Civ 65 and All Party Parliamentary Group on Extraordinary Rendition (APPGER) v Information Commissioner and The Ministry of Defence [2011] UKUT 153 (AAC). Appropriate weight needs to be attached to evidence from the executive branch of the government about the prejudice likely to be caused by disclosure of particular information.
32. The prejudice relied on must come within the terms of the exemption. It must be real, actual or of substance. In order for the 'would be likely to' threshold to be met, there must be a significant and weighty chance of that prejudice arising, even if falling short of being more probable than not. There must be a causal link between the disclosure of the disputed information and the envisaged prejudice.
33. The risk of prejudice protected by this exemption in this case involves prejudice to the effectiveness of relationships between the different agencies involved in the administration of justice and prejudice to the effectiveness of the operational elements of the judicial system and legal profession.
34. The Appellant has not seen the withheld information that is said to engage this exemption and has asked us to review the Commissioner's finding.
35. The Commissioner found that the exemption was engaged in respect of the second category of information as described above, that is the more detailed information about the complaints handling process including details of interactions with other agencies. We have looked at this information which appears at pages 120-149 of the closed

bundle.

36. This information addresses in detail part of the stages of the complaint process and, in particular, how other agencies, such as Treasury Solicitors, the Police, the Crown Prosecution Service, the Parliamentary Health Service Ombudsman and the Office for Judicial Complaints, may be connected with the complaint process in relation to claims for compensation. The Appellant has not put forward any basis upon which he challenges the Commissioner's decision to find the exemption engaged, and we are satisfied that the Commissioner was correct in his analysis of the MOJ's submissions in respect of this information.

37. We are satisfied that the exemption in section 31(1)(c) is engaged in respect of all this information.

38. Having found the exemption engaged in respect of this information, we must go on to consider whether in all the circumstances of the case the public interest in maintaining the exemption at section 31(1)(c) outweighs the public interest in disclosing the information.

#### **Public interest test**

39. As the exemption is engaged, we must carry out our own assessment as to where the balance of public interest lies in relation to the disputed information.

40. The following principles are material to the correct approach to the weighing of competing public interest factors and the matters that we should properly take into account when considering the public interest test, reminding ourselves that each case must be decided on its own facts.

- (i) The "default setting" in FOIA is in favour of disclosure: information held by public authorities must be disclosed on request unless the Act permits it to be withheld.

- (ii) The balancing exercise begins with both scales empty and therefore level. The public authority must disclose information unless the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
- (iii) Since the public interest must be assessed in all the circumstances of the case, the public authority is not permitted to maintain a blanket refusal in relation to the type of information sought.
- (iv) The assessment of the public interest in maintaining the exemption should focus on the public interest factors associated with that particular exemption and the particular interest which the exemption is designed to protect.
- (v) The public interest factors in favour of maintaining an exemption are likely to be of a general character. The fact that a factor may be of a general rather than a specific nature does not mean that it should be accorded less weight or significance.
- (vi) Considerations such as openness, transparency, accountability and contribution to public debate are regularly relied on in support of a public interest in disclosure. This does not in any way diminish their importance as these considerations are central to the operation of FOIA and are likely to be relevant in every case where the public interest test is applied. However, to bear any material weight each factor must draw some relevance from the facts of the case under consideration to avoid a situation where they will operate as a justification for disclosure of all information in all circumstances.
- (vii) The “public interest” signifies something that is in the interests of the public as distinct from matters which are of interest to the public.

41. The public interest in maintaining the exemption in section 31(1)(c) is to

avoid prejudice to effective relationships between partner agencies in the administration of justice. The withheld information identifies the roles played by some of these other agencies as part of the complaints handling process.

42. In favour of disclosure, there is public interest in assurance that a complaints handling procedure was in place and in understanding the full complaints handling procedure of this part of the MOJ.

43. The Appellant submits that there is public interest in disclosing the information as it would show that the MOJ has not followed its own complaints handling procedure in respect of his individual complaint and therefore probably in respect of other complaints. As this is the MOJ, the public would be concerned that despite its role in resolving disputes for the public, it cannot resolve complaints about its own actions. In his view, the complaints handling guide is merely a public relations exercise and does not reflect the reality of how the MOJ handles complaints. The public should therefore know how members of the MOJ staff are told to handle complaints so that they can be held to account if they fail to follow that guidance.

44. The Complaints Handling Guide is just that; it is guidance and not a mandatory framework within which staff must operate when handling a complaint. It offers suggested ways of dealing with complaints which could arise in a variety of circumstances, relate to a range of matters and from a number of sources. All of these factors will influence the way with which a complaint is dealt. There may be a number of “correct” ways of dealing with a complaint.

45. We are not persuaded that there is any real public interest in disclosing this part of the withheld information. As set out above, the “public interest” signifies something that is in the interests of the public as distinct from matters which are *of* interest to the public. Disclosure of the information withheld from the Complaints Handling Guide might be interesting reading but it would not provide any insight into how the

MOJ has handling any individual complaint or complaints. We agree with the Commissioner in his analysis of the balance of the public interest test and are satisfied that the need to avoid prejudice to the effectiveness of relationships between the different agencies involved in this process to be compelling. We are satisfied that the public interest in maintaining the exemption outweighs any public interest in disclosure. The MOJ is entitled to withhold this information.

#### **Section 40 - Unfair disclosure of personal data**

46. Within the requested information is a document containing names of officials at MOJ. These names have been redacted under section 40(2) of FOIA.

47. The exemption provided for in section 40 FOIA is an absolute exemption. The exemption in section 40(1) is engaged if the information constitutes personal data of which the applicant is the data subject. The exemption in section 40(2) is engaged if it is shown that disclosure of the personal data of third parties would contravene one of the data protection principles set out in Schedule 1 of the Data Protection Act 1998 (the "DPA").

48. The data protection principles regulate the way in which a "data controller" (in this instance, the MOJ) must "process" personal data. The word "process" is defined in section 1(1) of the DPA and includes:

*"disclosure of the information or data by transmission, dissemination or otherwise making available."*

49. The first data protection principle provides:

*Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –*

- (a) at least one of the conditions in Schedule 2 is met, and*
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.*

50. There is no dispute that the redacted names are those individuals' personal data.

51. There is an inherent tension between the objective of freedom of information and the objective of protecting personal data. It has been observed that section 40(2) of FOIA is a "complex provision"<sup>3</sup>. There is no presumption that openness and transparency of the activities of public authorities should take priority over personal privacy. In the words of Lord Hope of Craighead in *Common Services Agency v Scottish Information Commissioner*<sup>4</sup> (referring to the equivalent provisions in the Freedom of Information (Scotland) Act 2002 (the 'FOISA')):

*"In my opinion there is no presumption in favour of the release of personal data under the general obligation that FOISA lays down. The references which that Act makes to provisions of DPA 1998 must be understood in the light of the legislative purposes of that Act, which was to implement Council Directive 95/46/EC. The guiding principle is the protection of the fundamental rights and freedoms of persons, and in particular their right to privacy with respect to the processing of personal data...."*

52. The Commissioner submits that we should first consider whether disclosure would breach the first data protection principle, that is would be unfair, and has set out the range of factors to be taken into account.

53. With respect to the Commissioner, we consider that as one of the requirements of the first data protection principle is that personal data should not be processed unless at least one of the conditions in Schedule 2 is met it would be more appropriate to consider these conditions first.

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<sup>3</sup> *Blake v Information Commissioner and Wiltshire County Council* EA/2009/0026

<sup>4</sup> [2008] UKHL 47



54. The Schedule 2 conditions are as follows:

*1. The data subject has given his consent to the processing.*

*2. The processing is necessary –*

*(a) for the performance of a contract to which the data subject is a party, or*

*(b) for the taking of steps at the request of the data subject with a view to entering into a contract,*

*3. The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.*

*4. The processing is necessary in order to protect the vital interests of the data subject.*

*5. The processing is necessary –*

*(a) for the administration of justice,*

*(aa) for the exercise of any function of either House of Parliament,*

*(b) for the exercise of any functions conferred on any person by or under any enactment,*

*(c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or*

*(d) for the exercise of any other functions of a public nature exercised in the public interest by any person.*

*6(1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of*

*prejudice to the rights and freedoms or legitimate interests of the data subject.*

*6(2)The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.*

55. The Appellant did not specifically request this personal data and does not suggest that he has any legitimate interest to pursue which would fulfil condition 6(1). None of the other conditions apply in this case. The Appellant accepted that while *he* may already know some of the redacted names due to his prolonged dealings with the MOJ, disclosure under FOIA would not be limited but would amount to disclosure “to the whole world.”

56. We are not satisfied that one of the Schedule 2 conditions is fulfilled and therefore disclosure of the personal data would breach the first data protection principle. The exemption in section 40(2) of FIOA is therefore engaged. The MOJ is entitled to withhold the redacted names.

### **Section 42(1) – legal professional privilege**

57. Section 42(1) of FOIA is a qualified exemption and the relevant parts provide as follows:

*“(1)Information in respect of which a claim to legal professional privilege....could be maintained in legal proceedings is exempt information.”*

58. There are two types of legal professional privilege; litigation privilege and advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. To be covered by litigation privilege, the information must have been created for the dominant, that is main, purpose of giving or obtaining legal

advice, or for lawyers to use in preparing a case for litigation. It can apply to a wide variety of information, including advice, correspondence, notes, evidence or reports. Advice privilege applies where no litigation is in progress or contemplated. To be covered by advice privilege, the information must have been advice given in a legal context.

59. The MOJ submitted that both litigation and advice privilege applies to the disputed information in question. The Complaints Handling Guide was produced with advice from departmental lawyers and it sets out how the MOJ acts in response to claims for compensation.
60. The MOJ attempted to rely on this exemption in respect of the entirety of the withheld information. The Commissioner found that only the information falling within category three, that is, information about how claims for compensation are handled, is exempt under section 42(1) of FOIA. The information was created as a result of a real prospect or likelihood of litigation, rather than just a fear or possibility. It is a detailed guide as to how the MOJ approaches claims for compensation. The information has remained confidential and not been disclosed.
61. The Appellant submits that as the Complaints Handling Guide will have been seen by employees of MOJ, past and present, it is not of a sufficient level of confidentiality to warrant protection under legal professional privilege. We are not persuaded by this argument; the information has not been disclosed beyond those for whom the guidance is intended and we consider that privilege has not been waived.
62. The Appellant has not put forward any basis upon which he challenges the Commissioner's decision to find the exemption engaged, as he has not seen the disputed information, and submits that we should satisfy ourselves whether the Commissioner was correct in his analysis of the MOJ's submissions in respect of this information.

63. We have seen the information identified in the Confidential Annex to the Decision Notice as falling within this exemption. This consists of some pages which have been removed from the main body of the Complaints Handling Guide as disclosed to the Appellant and a number of Annex documents.
64. We are satisfied that the Commissioner was correct to find that the exemption is engaged in respect of all the information. This is a detailed guide as to how the MOJ approaches and handles claims for compensation.
65. Having found the exemption engaged in respect of this information, we must go on to consider whether in all the circumstances of the case the public interest in maintaining the exemption at section 42(1) outweighs the public interest in disclosing the information.

#### **Public interest test**

66. As the exemption is engaged, we must carry out our own assessment as to where the balance of public interest lies in relation to the disputed information, reminding ourselves of those matters listed in paragraph 43 above.
67. In considering the public interest in respect of material covered by the exemption in section 42(1) of FOIA, it is not necessary to analyse the authorities that have established the correct approach for us to take. The High Court has accepted that we must recognise that there is a strong public interest in non-disclosure built into legal professional privilege, due to the importance of safeguarding openness between client and lawyer to ensure access to full and frank legal advice. However, this remains a qualified exemption; Parliament envisaged there being circumstances in which the public interest in disclosing particular information will outweigh this strong public interest in maintaining the exemption. In respect of the withheld information in the present appeal, a compensation claim against the MOJ would be a claim from the public purse. We agree with the Commissioner that

there is additional strong public interest in the MOJ being able to handle such claims in a manner as advised by its lawyers without exposing that approach to public scrutiny.

68. The MOJ had argued that there was public interest in maintaining the exemption in order to protect the public purse for frivolous or fraudulent claims which might arise. Like the Commissioner, we consider this argument to be without real merit; a claim for compensation will fall or succeed according to its strengths.

69. The MOJ accepted that there is public interest in accountability of the MOJ and transparency of its decision making; disclosing the information would inform the public that it had devised and operated its procedures on the basis of good quality legal advice.

70. The Appellant submits that if we accepted his contention that the MOJ's complaints process was not being followed in accordance with the Guide, this could be a factor in favour of disclosure. He is particularly concerned that the information he had requested was not disclosed for many years during a time at which he was complaining about the way in which the MOJ was dealing with his complaints.

71. While we have sympathy for the Appellant in respect of the way in which he appears to have been treated by the MOJ, as we have said above, the Complaints Handling Guide is a guide and not a mandatory procedure with sanctions for non-compliance. This is his complaint against the MOJ and does not amount to a public, as opposed to private, interest in disclosing the information.

72. We are not persuaded that there are any real public interest factors in favour of disclosure that would weigh against the strong public interest in maintaining this exemption. We are satisfied that the public interest in maintaining the exemption in section 42(1) of FOIA in respect of this information far outweighs any public interest in its disclosure.

### Conclusion

73. For these reasons, we are satisfied that the Decision Notice issued by the Commissioner is in accordance with the law.

74. We therefore unanimously refuse this appeal.

### Other matters

75. It is not clear whether the MOJ has complied with the Commissioner's direction that they disclose the information identified in the Confidential Annex to the Decision Notice of 28 November 2013 within 35 calendar days. The Appellant says that he received misnamed documents and implies that he has not received all the documents identified. For completeness, the MOJ should confirm to the Appellant whether it has now complied with the Commissioner's direction.

76. The Appellant has complained that certain pages of the Complaints Handling Guides disclosed to him are illegible. This may be due to poor photocopying rather than the MOJ only holding the information in an illegible condition. We request the MOJ to provide the Appellant with legible copies of the pages 18, 24 and 30 from the 2010 version of the Complaints Handling Guidance.

77. Pages 53, 54 and 63 appear to have small portions redacted but we cannot find these corresponding parts in the withheld information. If nothing has been redacted the Appellant should be informed. If something has been redacted in error, the Appellant should be provided with those parts.

Judge Annabel Pilling

21 May 2014