Neutral Citation Number

IN THE FIRST-TIER TRIBUNAL **Case Nos. EA/2017/0223**
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50672973

Dated: 13 September 2017

Appellant: Jason Loch

Respondent: Information Commissioner

Public Authority Ministry of Justice

Heard at: Fleetbank House, London

Date of hearing: 26 June 2018

Date of decision: 6 August 2018

Before

Angus Hamilton

Judge

and

Dave Sivers

and

Pieter de Waal

Subject matter: s 37 Freedom of Information Act 2000

Cases considered:

Re Sigsworth [1935] Ch 89
Adler v George [1964] 2 QB 7
R-v Smith [1975] QB 531
R v Crown Court at Sheffield ex parte Brownlow [1980] 1 QB 530
Pepper v Hart [1991] AC 593
Birkett v DEFRA [2011] EWCA Civ 1606
Evans v Information Commissioner and DBIS [2012] UKUT 313 (AAC)
UCAS v IC and Lord Lucas [2014] UKUT 0557 (AAC)
APPGER v IC and FCO [2015] UKUT 0377 (AAC)
Kennedy v Information Commissioner [2015] AC 455
Department of Health v IC and Lewis [2017] EWCA Civ 374
Cabinet Office v IC and Morland [2018] UKUT 67(AAC)

DFES v JC and Evening Standard (EA/2006/0006)
Brown v JC and Attorney General (EA/2011/0002)
Weiss v JC and Home Office (EA/201 l /019l)
APPGER v IC and FCO (EA/2011/0049)
Halligan v IC and MoD (EA/2015/0291)
Morland v IC and Cabinet Office (EA/2016/0078)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal finds that the exemption provided by s.37(1)(a) is engaged in relation to some of the disputed information and that the exemption provided by s.37(1)(b) is engaged in relation to all of the disputed information. Where s.37(1)(b) alone is engaged the Tribunal considers that on balance the public interest favours disclosure. The appeal is therefore allowed to this extent. The Ministry of Justice is required to respond anew to Mr. Loch's enquiry, taking into account the Tribunal's decision, within 28 days of the publication of this decision. This judgment stands as the substituted Decision Notice.

REASONS FOR DECISION

Introduction

1 Section 1 (1) of FOIA provides that:

Any person making a request for information to a public authority is entitled:

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

2 Section 37 (1) of FOIA provides that:

Communications with Her Majesty, etc. and honours.

(1) Information is exempt information if it relates to—

(a)communications with the Sovereign,

(aa)communications with the heir to, or the person who is for the time being second in line of succession to, the Throne,

(ab)communications with a person who has subsequently acceded to the Throne or become heir to, or second in line to, the Throne,

(ac)communications with other members of the Royal Family (other than communications which fall within any of paragraphs (a) to (ab) because they are made or received on behalf of a person falling within any of those paragraphs), and

(ad)communications with the Royal Household (other than communications which fall within any of paragraphs (a) to (ac) because they are made or received on behalf of a person falling within any of those paragraphs), or

(b)the conferring by the Crown of any honour or dignity.

3 By reason of s.2 FOIA the exemption under s.37(1)(a) is an absolute exemption and if it is engaged then there are no other issues to be considered. Conversely, the exemption under s.37(1)(b) is a qualified exemption and if it is engaged then consideration must be given to the 'public interest balancing test', namely, whether, *in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information:* S2(2)(b) FOIA.

Request by the Appellant

4 The Tribunal were of the view (and no party disputed) that the Commissioner had correctly set out the background of this matter and the Tribunal therefore adopted that description.

5 On 10 December 2010, Her Majesty the Queen established courtesy titles of 'Lord' and 'Lady' for Justices of the Supreme Court. The Commissioner's understanding was that the reason for this change was the appointment, in April 2010, of the first Justice of the Supreme Court who was not a life peer. This meant that not all Justices of the Supreme Court were addressed in the same way, and a concern arose that some litigants might consider that there was a hierarchy amongst the Justices.

6 On 22 January 2017, the Appellant wrote to the Ministry of Justice ("MoJ") and requested information in the following terms ("the Request"):

> *Please provide me with any correspondence, memorandums, or other materials documenting the decision to give Justices of the Supreme Court the courtesy title of 'Lord/Lady' in December 2010. I*

would be particularly interested in any relevant correspondence between the Ministry of Justice and:

1. *The Supreme Court or*

2. *The College of Arms.*

7 The MoJ responded on 15 February 2017. It confirmed that it held information within scope of the Request, but withheld it in reliance on s.37(1)(b) FOIA (conferring by the Crown of any honour or dignity). The MoJ's response actually mistakenly referred to s.37(b) FOIA.

8 The MoJ maintained its position on 16 March 2017 following an internal review. Although it continued to rely on s.37(1)(b) FOIA it also referred in its second letter to the Appellant to the protection of 'communications with others in the Royal Household' (the interest protected by s.37(1)(ad) FOIA)

9 The Appellant complained to the Commissioner on 17 March 2017. During the course of the Commissioner' s investigation, the MoJ relied in addition on s.37(1)(a) FOIA (communications with the Sovereign), and confirmed reliance on s.37(1)(ad) FOIA. The MoJ considered that each exemption applied to all of the information within the scope of the Request.

10 On 13 September 2017, the Commissioner served the Decision Notice ('DN'). She accepted that s.37(1)(a) applied to all of the withheld information. As s.37(1)(a) confers an absolute exemption, the DN did not consider issues of the public interest, and did not go on to consider the application of the other exemptions on which MoJ had relied.

<u>The Appeal to the Tribunal</u>

11 On 8 October 2017, the Appellant appealed. His initial Grounds of Appeal may be summarised as:

a) Ground 1: the Commissioner erred in taking a broad approach to the phrase 'relates to'. The exemption exists to preserve the political neutrality of the sovereign, whereas an overbroad approach would exempt information 'that is only remotely connected to The Queen's own views.' A narrow reading of an absolute exemption is also necessary to respect the presumption of disclosure created by s.1 FOIA.

b) Ground 2: some of the information was unlikely to fall within s.37(1)(a), in particular as the impetus for the change came from the Supreme Court, so that a portion of the information probably pre-dated the involvement of the Palace.

c) Ground 3: the Commissioner's approach was inconsistent with previous Decision Notices and with the voluntary release of similar material by the Government.

12 In his initial Grounds of Appeal, the Appellant invited the Tribunal to consider s.37(1)(b) should it accept that s.37(1)(a) was not engaged. He further submitted that the public interest balancing test favoured disclosure.

The Questions for the Tribunal

13 Between the submission of the Appellant’s Grounds of Appeal and the final hearing of this matter the parties had refined their arguments and submissions in relation to the issues in this case. The Commissioner was consistent throughout in maintaining her position that the exemption in s.37(1)(a) was engaged in relation to all of the disputed information and, it being an absolute exemption, that it was not necessary to consider any other issues. This was a position initially supported by the MoJ, but the public authority subsequently refined its position contending that s.37(1)(b)

was engaged in relation to all of the disputed information but that s.37(1)(a) was engaged in relation only to some of the disputed information. Where s.37(1)(b) alone was engaged then the MoJ contended that the public interest balancing test favoured maintaining the exemption. Mr Loch adopted a similar position to the MoJ in arguing that only some of the disputed information was covered by the s.37(1)(a) exemption but he contended that where s.37(1)(b) alone was engaged then the public interest balancing test favoured disclosure. No party sought, ultimately, to refer to any exemptions other than those contained in s.37(1)(a) and (b) and no party contended, ultimately, that s.37(1)(b) was engaged in relation to all of the disputed information.

14 The Tribunal consequently decided that the questions for them were:

a) Having particular regard to the term 'relates to' in s.37(1) FOIA which, if any, of the disputed information was covered by s.37(1)(a) and s.37(1)(b) FOIA, and which was covered by s.37(1)(b) only?

b) In relation to the information covered by s.37(1)(b) only did the public interest balancing test favour disclosure of the disputed information or maintaining of the exemption?

Evidence & Submissions

15 The final hearing of this matter took place in London on 26 June. The Commissioner was represented by Mr Peter Lockley of counsel and the MoJ by Ms Catherine Callaghan QC. Mr Loch was not able to attend this hearing but helpfully agreed that it could proceed in his absence – with him relying on written submissions only. The Tribunal are very grateful to all the parties for the standard and quality of their written and oral submissions. Because of the high quality of the written submissions they are largely reproduced verbatim below as a way of setting out the various arguments that the Tribunal considered. However, this was a case where the parties

presented multiple written (as well as oral) submissions, and the Tribunal has sought to focus on the core arguments as they relate to the questions set out above rather than to reproduce exhaustively every single contention made by the parties.

Submissions on the correct interpretation of the phrase ‘relates to’ and the consequent ambit of s.37(1)(a) FOIA

16 The MoJ presented the following submissions:

a) *The phrase "relates to" appears in subsection (1) of section 37 ("Information is exempt information if it relates to -"). This is a stem provision which governs all of the sub- paragraphs in s.37(1). Therefore, the phrase "relates to" must have the same meaning in respect of each of the sub-paragraphs of s.37(1). It would also be expected to have the same meaning wherever it appears in the Act: see APPGER v IC & FCO [2015] UKUT 0377 (AAC); UCAS v IC & Lord Lucas [2014] UKUT 0557 (AAC).*

b) *However, s.37(1)(a) and (b) must be intended to catch different types or classes of information. Section 37(1)(a) is intended to catch information relating to "communications with the Sovereign". Section 37(1)(b) is intended to catch information relating to "the conferring by the Crown of any honour or dignity”. MoJ agrees with the Tribunal that s.37(1)(a) cannot be drawn so widely that any information relating to the conferring by the Crown of any honour or dignity would fall within s.37(1)(a), as that would deprive s.37(1)(b) of any purpose. MoJ also agrees that, given s.37(1)(a) is an absolute exemption and s.37(1)(b) is a qualified exemption, that suggests there should be information relating to the conferring by the Crown of honours and dignities, which is covered by (b) but not (a).*

c) *Some assistance can be derived from the recent Upper Tribunal. decision in* Cabinet Office v IC and Morland *[2018] UKUT 67 (AAC). That case concerned a request for minutes of a meeting of the Honours and Decorations Committee ("HDC") at which the HDC decided not to recommend the introduction of a National Defence Medal. The Cabinet Office withheld the minutes, relying on s.37(1)(b) and s.35(1)(a) of FOIA. The Cabinet Office did not rely on s.37(1)(a).*

d) *The core issue in that case was whether the s.37(1)(b) exemption was engaged in relation to the conferral of existing honours and dignities only, or also extended to the creation of a proposed new honour or dignity. That required the Upper Tribunal to consider the purpose of s.37 as a whole, the meaning and scope of the phrase "relates to", and the difference in scope between s.37(1)(b) and the other sub-paragraphs of s.37(1). The Upper Tribunal held that:*

   1) *the phrase "relates to" carries a broad meaning, and means that there must be "some connection" with the information or that the information "touches or stands in relation to" the object of the statutory provision.*

   2) *the purpose of s.37 itself is to protect the fundamental constitutional principle that communications between the Sovereign and her ministers are essentially confidential. Section 37(1)(a) specifically protects the actual communications with the Sovereign; s.37(1)(b) must be concerned with activities other than merely communications with the Sovereign. The logical purpose of s.37(1)(b) is to ensure candour and protect confidences in the entire process of considering honours, dignities and*

medals. Hence, s.37(1)(b) can apply even where consideration of a particular award or medal does not lead to any communication with the Sovereign.

3) *A proposal to award a medal to a particular named individual would inevitably engage s.37(1)(b), but given that such information would in any event be covered by the absolute exemptions in s.40(1) and/ or s.41, that suggests s.37(1)(b) serves a wider purpose not limited to the circumstances of identifiable individuals, for example, a discussion about a proposal to create a new honour:*

4) *However, there are limits on the breadth of "relates to" and "any" in this context, so that information about the venue where the HDC meets could not be said to be information that "relates to ... the conferring by the Crown of any honour or dignity".*

e) *Thus, the Upper Tribunal held in Morland that the exemption in s.37(1)(b) covers both discussions about potential future honours as well as currently extant honours, provided that there is a connection of the subject-matter to the Crown.*

f) *This decision is binding on the First-tier Tribunal in this case, in so far as it relates to the meaning of the phrase "relates to" in s.37(1), and the meaning and scope of s.37(1)(b). Thus, any discussions about whether the Crown should confer a new honour or dignity, or whether an existing honour or dignity (namely, the courtesy title of 'Lord/Lady') should be conferred on a new category of persons (namely, Supreme Court Justices), will fall within the scope of the exemption in s.37(1)(b). The UT decision*

in Morland put beyond doubt that the s.37(1)(b) exemption is engaged in respect of all of the withheld material in this case (and the Appellant appears to accept that proposition in paragraph 40 of his final submissions).

g) *In relation to s.37(1)(a), the UT in Morland correctly observed, in obiter dicta, that the exemption specifically protects actual communications with the Sovereign. But the exemption plainly is wider than that, because of the use of the phrase "relates to" in s.37(1).*

h) *MoJ observes that "relates to" is an ordinary English phrase and that a "steer or guidance in general terms", beyond the point that it is used in a wide sense, "is impermissible and unhelpful": see APPGER. It follows that an exhaustive list of information falling within s.37(1)(a) cannot be given. With that caveat, MoJ submits that the following categories of information relating to the conferral by the Crown of honours and dignities would also fall within the scope of s.37(1)(a):*

1) *Communications to or from the Sovereign (or a person acting on the Sovereign's behalf);*

2) *Information intended for communication to or from the Sovereign (or a person acting on her behalf), irrespective of whether the communications were sent or took place;*

3) *Information referring to, or derived from, actual or intended communications to or from the Sovereign (or a person acting on her behalf),*

subject to a remoteness test. For example, a reference in a document to communications with the Sovereign, or a Royal Will.

i) *This approach does not deprive s.37(1)(b) of meaning. Where, for example, material simply discusses a proposal to confer honours or dignities upon a certain class of person but that material is not communicated or shown to the Sovereign (or a person acting on her behalf), is not intended to be communicated or shown to the Sovereign (or a person acting on her behalf), and does not refer to or derive from such communications, it will fall within the scope of s.37(1)(b) but would not fall within the scope of s.37(1)(a). That explains why the Cabinet Office in Morland did not seek to rely on s.37(1)(a) to withhold the requested HDC minutes. This is also the answer to Mr. Loch's example of a Bill: see paragraph 6 of his Further Written Submissions of 19 June 2018*

17 The Appellant presented the following submissions on the proper construction of ‘relates to’:

a) *Section 37 of the Freedom of Information Act 2000 is written very broadly. It reads:*

Information is exempt information if it relates to—

(1) communications with the Sovereign,
(2) the conferring by the Crown of any honour or dignity

There is a key distinction between the two exemptions: while section 37(1)(a) is an absolute exemption, section 37(1)(b) is a qualified exemption

b) *The Respondents have consistently argued that the phrase ‘relates to’ in section 37(1)(a) should be interpreted broadly. For example, the Ministry of Justice (MoJ) has argued that*

section 37(1)(a) applies, not just to direct communications between The Queen and Government ministers, but also to "material that has been shown or will be shown to the Sovereign for approval, and information intended for communication to the Sovereign irrespective of whether the communication was ever sent or received" (paragraph 20 of the MoJ's final submissions dated 19 March 2018). However, this approach violates the 'golden rule' of statutory interpretation.

c) *It is a well-established principle of statutory construction that, when a literal reading of an Act of Parliament would result in an absurdity, the courts should look for another meaning in order to avoid the absurdity. See, for example, Adler v George [1964] 2 QB 7 and Re Sigsworth [1935] Ch 89.*

d) *The broad approach to section 37(1)(a) favoured by the Respondents would result in an absurdity since it would undermine other portions of the FOIA. Section 37(1)(b) allows for the release of honours-related material if it is in the public interest to do so. However, The Queen's role as 'fount of honour' means that any honours-related material will likely be connected with a communication with Her Majesty in some manner. If the Respondents' interpretation of section 37(1)(a) is correct, the qualified exemption in section 37(1)(b) would be meaningless since the absolute exemption in section 37(1)(a) would preclude the release of all honours-related material. This cannot have been Parliament's intent.*

e) *A broad interpretation of section 37(1)(a) would undermine other parts of the FOIA as well. Given the Queen's role in the administration of government, there are many matters that will involve communication with Her Majesty at some point. Let us imagine that ministers debate a certain policy, which leads to the introduction of a Bill in Parliament. The Bill*

subsequently passes both Houses and is presented for Royal Assent. Under the Respondents' interpretation of section 37(1)(a), any information about that Bill (including the underlying policy debates), would seem to be absolutely exempt from disclosure since it is connected with "information intended for communication to the Sovereign" (i.e., the Bill). But this would be an absurdity given the existence of a specific exemption for material relating to the formulation of government policy (section 35).

f) *When trying to decide how section 37(1)(a) should be interpreted, the Tribunal should consider the provision's legislative history. As Lord Browne-Wilkinson observed in Pepper v Hart [1992] UKHL 3, "[i]n my judgment…reference to Parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity."*

g) *Unfortunately, the section 37(1)(a) exemption appears to have received little attention during the FOIA's progress through Parliament beyond a few drafting amendments. However, when the section 37(1)(a) exemption was changed from a qualified exemption to an absolute exemption in 2010, the Government briefly addressed the underlying principle behind it.*

h) *The change was accomplished by means of a Government amendment to the Constitutional Reform and Governance Act 2010. Moving the amendment in the House of Commons, the then-Lord Chancellor and Justice Secretary, Jack Straw, spoke of the need to "protect the political impartiality of the monarchy, the sovereign's right and duty to counsel, to encourage and to warn the Government." He went on to say that this convention relied on "well established and respected conventions of confidentiality".*

i) *Mr. Straw's emphasis on the Sovereign's right to counsel, encourage, and warn the Government is telling. It suggests that Parliament was primarily concerned with preventing the disclosure of communications that might reveal the Sovereign's personal views. It is unlikely that Parliament intended for wider discussions of policy within Government to fall under section 37(1)(a) since such matters are already covered by other provisions of the FOIA.*

j) *Despite the Information Commissioner's approach to section 37(1)(a) in this case, past ICO decision notices have followed a narrower interpretation of the exemption. The Tribunal has already seen the material that the Commissioner ordered the Cabinet Office to release in the Kerslake peerage case (pp. 38-42 of the Open Bundle). All of those documents are undoubtedly "information intended for communication to the Sovereign" (indeed, the documents on pp. 39-40 would have been submitted directly to The Queen), yet the Commissioner nevertheless ordered their release. Significantly, the Commissioner's Decision Notice in the Kerslake case (pp. 58-64 of the Open Bundle) focused almost exclusively on section 37(1)(b), with section 37(1)(a) only mentioned in passing. The fact that the Cabinet Office did not appeal against the Decision Notice suggests that they did not think the Commissioner's approach was flawed. The Commissioner's handling of the Kerslake peerage case is hard to reconcile with her present approach to section 37(1)(a), and it lends credence to the notion that section 37(1)(a) should be interpreted narrowly.*

k) *I also note that the Government itself has adopted a narrower interpretation of section 37(1)(a) in the past. I have already discussed how the Foreign and Commonwealth Office provided me with a considerable amount of material relating*

to the decision to give the Commonwealth of Australia a copy of their Constitution. Those disclosures included material that would unquestionably fall under the Respondents' interpretation of section 37(1)(a), including drafts of royal Letters Patent and several briefings that were submitted to the Palace (along with various Government departments) for informational purposes. There is no indication that the FCO felt that section 37(1)(a) was engaged by any of this material. Furthermore, its release was not some act of grace on the part of the FCO; it was a standard disclosure under the FOIA.

l) *In a similar vein, the Cabinet Office recently provided me with information about the decision to transfer the Stone of Scone from Westminster Abbey to Scotland in 1996. This was also a matter that involved communications with The Queen since the decision to transfer the Stone was formally made by Her Majesty, but the Cabinet Office only withheld a limited amount of material under section 37(1)(a). According to the ICO's Senior Case Officer, Jonathan Slee, the section 37(1)(a) material included letters to The Queen via Her Private Secretary, as well as some incidental passages in other material that the Cabinet Office nevertheless released in redacted form. Mr. Slee noted that he believed that the section 37(1)(a) exemption was applied correctly in this case.*

m) *The Cabinet Office has demonstrated an eminently sensible approach to section 37(1)(a). While the Cabinet Office's decision is not legally binding, it provides a suitable paradigm for interpreting section 37(1)(a) since it neatly balances the need to protect Her Majesty's constitutional position against the need to ensure transparency in government.*

n) *Section 37(1)(a) has received little judicial scrutiny. The leading case appears to be the First-tier Tribunal's decision in Robert Brown v The Information Commissioner and*

Attorney General (EA/2011/0002). While it is true that the Tribunal supported a broad interpretation of the section 37(1)(a) exemption, a closer analysis of Brown reveals that the Respondents' reliance on it is problematic.

o) *Brown was decided before the Constitutional Reform and Governance Act 2010 changed the section 37(1)(a) exemption from a qualified exemption to an absolute exemption. This is significant because the Tribunal's broad interpretation of the phrase 'relates to' in Brown was based on another First-tier Tribunal decision, namely Department for Education and Skills v The Information Commissioner and The Evening Standard (EA/2006/0006) (see paragraph 44 of Brown). DFES concerned section 35(1)(a), which is a qualified exemption. The nature of the exemption is important because the Tribunal held in DFES that a broad interpretation of the phrase 'relates to' was appropriate "mainly because this is a class of information enjoying a qualified, not an absolute exemption" (see paragraph 53 of DFES). In other words, a broad interpretation was justified for qualified exemptions because the public interest test would serve as a check against overbroad applications of the exemption. But that does not apply in this case. Section 37(1)(a) is now an absolute exemption, so the public interest test cannot act as a safeguard. Therefore, the Tribunal's reasoning in Brown is no longer applicable.*

p) *The Respondents have cited other cases in support of their argument that the phrase 'relates to' should be interpreted broadly, including the First-tier Tribunal's decisions in The All Party Parliamentary Group on Extraordinary Rendition v The Information Commissioner (EA/2011/0049) and the Upper Tribunal's decisions in The University and Colleges Admission Services v The Information Commissioner and*

Lord Lucas [2014] UKUT 557 (AAC). But the logic of those cases is inapplicable here because it would result in the absurdities I highlighted earlier.

q) *The Upper Tribunal's decision in The Cabinet Office v Information Commissioner and Morland [2018] UKUT 67 (AAC) does not help the Respondents establish a broad interpretation of section 37(1)(a), either. Although the withheld material involved information destined for communication to the Sovereign (e.g., the decisions of the Honours and Decorations Committee), neither the First-tier Tribunal nor the Upper Tribunal held that section 37(1)(a) applied to the material. Instead, both Tribunals treated it solely as a section 37(1)(b) matter. Although the Upper Tribunal endorsed a broad reading of the phrase 'relates to' in section 37(1)(b), it does not follow that the phrase should be given the same construction with section 37(1)(a) for the reasons I have already stated……*

r) *For the reasons I have set out above, I respectfully submit that the Tribunal should adopt a narrow interpretation of the term 'relates to' in section 37(1)(a).*

18 The Commissioner's initial submissions on the issue of the construction of 'relates to' were as follows:

a) *The words 'relates to ' are to be construed broadly as a matter of their ordinary English meaning. In R v Smith (1975] QB 531 at 542B, Lord Denning said:*

> *'The words 'relating to' are very wide. They are equivalent to 'connected with' or 'arising out of'.*

b) *The phrase 'relates to 'appears in a number of FOIA exemptions Tribunals have consistently held that the*

phrase should be broadly interpreted. In APPGER v JC and FCO (EA/2011/0049), the Tribunal, considering s. 23 FOIA (information relating to security bodies), considered that:

> *'Applying the ordinary meaning of the words 'relates to' it is clearly only necessary to show some connection between the informat1on and a s.23 security body, or that it touches or stands, in some relation to such a body. Relates to does not mean 'refers to', the latter is a far narrower term.'*

c) *This passage was cited with approval in UCAS v IC and Lord Lucas (2014] UKUT*

d) *It is plain from the authorities cited above … that the phrase 'relates to' should be given a broad meaning. Furthermore, its meaning must be consistently applied across the different exemptions in which it occurs; there is no warrant for reading the phrase broadly in one context and narrowly in another.*

e) *This is so even though the phrase occurs in both qualified exemptions (such as s.35) and absolute exemptions (such as s.23 or s.37) Where Parliament has chosen to make an exemption absolute, this reflects Parliament's view of the importance of the interests which that exemption protects. It is not the role of those charged with interpreting FOIA to recalibrate the exemption by reading words narrowly where their ordinary meaning is broad.*

f) *The exemption at issue in this appeal, s.37(1)(a), exists to protect the convention that the Sovereign is politically neutral. As this is a constitutional principle of the utmost*

importance, it is unsurprising that the exemption protecting it should be both strong (absolute) and broad: it is a class-based exemption for which no prejudice is required, and it is broadly drawn by use of the phrase 'relates to'.

g) *The Commissioner is fortified in her view that Parliament attaches great importance to the interests protected by s.37(1)(a) by the fact that it was recently changed from being from a qualified to an absolute exemption.*

h) *The Commissioner accepts that s.37 (1)(a) should not be construed so broadly that it encompasses information that has only a very remote connection to communications with the Sovereign. However, this is not the same as excluding information from the scope of s.37{1)(a) if it has only a remote connection with the Queen's <u>own views</u>. as the Appellant suggests. The provision covers information relating to <u>any</u> communication with the Sovereign; it is not limited by reference to the content of those communications. Information relating to wholly banal or administrative communications with the Sovereign would be caught, in just the same way as information relating to communications in which the Sovereign expresses personal opinions. In the absence of a public interest test, it may well be that this sometimes results in the withholding of anodyne information, but in the Commissioner's submission, this is unquestionably the balance that Parliament has chosen to strike.*

i) *Applying the true, broad meaning of 'relates to', the Commissioner submits that all of the withheld information relates to communications with the Sovereign.*

j) *The conferring of courtesy titles is a matter within the remit of the Sovereign and the decision to confer the titles in question was executed by a Royal Warrant, a highly formalised communication from the Sovereign which itself refers to representations having been made to the Sovereign on the issue of the courtesy titles. Plainly, the final phase of the process of creating the courtesy titles is actually comprised of communications to and from the Sovereign: representations to the Monarch on the need for the titles, followed by the Royal Warrant itself.*

k) *In this context, all of the prior negotiation between bodies such as the Supreme Court, the Ministry of Justice, and the College of Arms 'relates to' the envisaged end product of communications to and from the Sovereign. This is what those promoting the measure are seeking to achieve. Such information is 'connected with' the ultimate communications with the Sovereign (to use the one of the formulations in R v Smith); alternatively, it stands in a tangible relationship to those communications, because a communication from the Sovereign is the aim of those engaging in the correspondence that forms the withheld information.*

19 The Commissioner presented the following final submissions:

a) *The Appellant argues that 'relates to' should not be construed broadly in the context of s.37(1)(a) FOIA, because it is an absolute exemption. The Commissioner draws the Tribunal's attention to the recent case of Cabinet Office v Information Commissioner and Morland (2018) UKUT 67 (AAC). In that case, the Upper Tribunal confirmed (at paragraph 18) that in the context of s.37(1)(b) FOIA, the phrase had a broad meaning. This*

case adds further to the weight of binding authority on the point, and in a context closely related to that in the present Appeal.

b) *It is true that s.37(1)(b) provides a qualified and s.37(1)(a) an absolute exemption, and the Appellant seeks to draw a distinction between the two. But this cannot be correct:*

   a. *The words 'relates to' occur in the overarching text of s.37(1) that governs both s.37(1)(a) and s.37(1)(b). They cannot mean one thing as they relate to one provision and something different as they relate to another; and*

   b. *There is in any event binding authority that 'relates to' should be construed broadly where it occurs in absolute exemptions, such as s.23 FOIA: UCAS v IC and Lord Lucas [2014] UKUT 0557 at paragraph 46, as cited in Morland at paragraph18.*

c) *The exercise the Appellant advocates, namely that the information should 'carefully parsed to determine which portions might actually affect the Queen's political neutrality', is not an application of the statutory language, which is the exercise that determines whether the exemption is engaged Rather, it is the public interest balancing exercise by the back door - but no such exercise falls to be performed for an absolute exemption such as s.37(1)(a).*

The Tribunal's Decision on the term 'relates to' and the consequent engagement of s. 37(1)(a) and (b)

19 The Tribunal carefully considered these submissions (and earlier submissions made by the parties) and made the following preliminary decisions:

20 The ‘guidance’ provided by the Upper Tribunal and other higher courts was not, in the Tribunal’s views particularly helpful. This is epitomised by the Upper Tribunal judgment in APPGER at para 25 – *‘ … apart from the steer given in earlier cases … to the effect that in s. 23(1) “relates to” is used in a wide sense we agree … that a steer or guidance in general terms is impermissible and unhelpful’.* This Tribunal struggled to see how guidance from a higher court that could be applied by a lower one might be considered ‘unhelpful’. It is the lack of clear guidance that is more likely to be ‘unhelpful’.

21 Having said that, the one clear guiding principle from the higher courts which was binding upon the Tribunal is that the term ‘relates to’ is to be used in a wide sense, See, for example, UCAS v IC & the Lord Lucas at para 46 – ‘in the context of FOIA … ‘”relates to” has been accorded a similar broad construction, e.g. “some connection between the information” and the relevant body or that it “touches or stands in relation to such a body” (quoting APPGER).

22 Although the Tribunal accepted that this principle was binding upon them the Tribunal found the reasoning provided by the Upper Tribunal as to <u>why</u> “relates to” should be given a wide or broad construction hard to follow. The Tribunal also speculated whether the terms ‘wide’ and ‘narrow’ were particularly helpful in this context and whether a better approach might not be simply to say that the phrase should be given its ‘ordinary meaning’. Certainly, the attempts at providing a definition of the phrase referred to in the preceding paragraph appear simply to provide an ‘ordinary’ definition rather than a ‘broad construction’. However, the principle that the term “relates to” should be given a broad construction is binding upon this Tribunal and must be applied. If it is to be successfully challenged, then that would have to be before a higher court.

23 The second point that the Tribunal embraced is that the phrase "relates to" should be given a similar construction within the same statute. It is important to consider this principle because the phrase appears many times in FOIA both in relation to absolute and qualified exemptions e.g. s.23 s.30 s.35 and of course s.37. It also appears in sections 4, 7 and 15 – sections that have no connection to exemptions. It is important to consider this principle as authorities considering the phrase may only be considering it in relation to a specific provision and, without making a decision on this principle, it would be unclear whether authorities on specific FOIA provisions containing the phrase 'relates to' had a wider application. Not only did this principle appear to be the correct approach in the opinion of the Tribunal but it would also appear to be the subject of binding authority – for example in the UCAS case the Upper Tribunal stated at para 46 – *"it would be surprising if the same words were to be subject to a very different construction".* The Tribunal acknowledged that the term 'a very different construction' did appear to allow the application of slightly different constructions to different provisions but considered that the preferred course was to seek to give the phrase 'relates to' the same or a broadly similar construction throughout FOIA.

24 The Tribunal did consider that there was a certain attractiveness in Mr Loch's submission that 'relates to' should be given a narrow construction in relation to an absolute exemption which did not have the additional consideration or, arguably, 'safety net' of the public interest balancing test to take into account. However, for the reasons given the preceding paragraph the Tribunal felt unable to adopt Mr Loch's reasoning or his basic contention that "relates to" should be construed narrowly in relation to the s. 37(1)(a) exemption. The Tribunal also considered that in relation to this point Mr Loch relied too heavily in his submissions on the decisions of public authorities and the Commissioner (in Decision Notices) which were not in any way binding upon the Tribunal and conversely rather 'glossed over' the impact of those authorities that were binding on the Tribunal.

25 Conversely, the third preliminary point or principle which the Tribunal decided was that the term “relates to” should not be given so wide a construction in relation to the s. 37(1)(a) exemption that it deprived the s.37(1)(b) exemption of all purpose. A very wide construction of ‘relates to’ in respect of information that ‘relates to’ ‘communications with the Sovereign’ ran the risk, in the Tribunal’s view, of encompassing entirely information that ‘relates to’ ‘the conferring by the Crown of any honour or dignity’ since the conferring of honours and dignities by the Crown is an activity with which the Sovereign is essentially involved. The Tribunal could not accept that it could ever have been the intention of the legislation to render a specific qualified exemption redundant by it being effectively entirely covered by another absolute exemption – although the Tribunal fully accepted that exemptions can and do overlap. It must therefore have been the intention of the legislation that subsection (b) should cover information that was not also covered by (a). This was an argument accepted unequivocally by the Appellant and the MoJ.

26 For this principal reason, the Tribunal could not accept the (particularly) broad construction of ‘relates to’ urged by the Commissioner since this did run the considerable risk of s.37(1)(b) thereby being made redundant. The Tribunal considered that the Commissioner struggled to provide clear examples of what type of information would be covered by s.37(1)(b) but not s.37(1)(a) if the Commissioner’s construction of ‘relates to’ was adopted - which brought into question the validity of the Commissioner’s particularly broad construction of the phrase.

27 The fourth preliminary point that the Tribunal decided was that it was appropriate to consider a ‘remoteness’ test in relation to what information was caught by the term ‘relates to’. This was the approach implicitly approved by the First Tier Tribunal in *Brown v JC and Attorney General* (EA/2011/0002). Arguably, this is the same point as made at paragraph 25 above but in a different guise. It would mean that the term ‘relates to’ would catch more than communications directly to and from the Sovereign (or, more likely, her private secretary) but should not catch communications

where, although that might be some argument that there was a relationship or potential relationship with the Sovereign, that relationship was tenuous or tangential rather than real.

28 The fifth preliminary point that the Tribunal decided was that the approach to the term 'relates to' ought, in individual cases, to be based on comprehensible principles. This was effectively the approach argued by the MoJ (see Paragraph 16 h) above). The Tribunal considered that to contend otherwise risked shrouding the refusal to disclose information in mystery and obfuscation rather than clarity. The Tribunal acknowledged that this principled approach ran some risk of falling foul of that part of the judgment in APPGER which indicated that *a steer or guidance in general terms is impermissible and unhelpful.* However, the Tribunal considered that a principled approach was the more useful and preferable approach. The Tribunal also considered that the appropriate set of principles might well vary from case to case and would thus not be of general applicability or fall foul of APPGER. The Tribunal thus found the principles suggested by the MoJ at paragraph 16 h) to be useful although the Tribunal did not embrace them uncritically. For example, the MoJ proposed that the term 'relates to' would 'catch' *Information intended for communication to or from the Sovereign (or a person acting on her behalf), irrespective of whether the communications were sent or took place.* The Tribunal doubted, whilst not finding it necessary to make a final determination on the issue, whether, after a decision had been made <u>not</u> to send a particular communication to the sovereign, it would still, in all cases, be caught by the term 'relates to' in the context of the s.37(1)(a) exemption. As a further example the Tribunal also considered that an expression of <u>willingness</u> to communicate with the Sovereign was distinct from an <u>intention</u> to communicate with the Sovereign and that the former was unlikely to be 'caught' by s.37(1)(a).

29 The sixth preliminary point that the Tribunal decided was that a reference to the Sovereign, or communicating with the Sovereign, did not necessarily 'fatally taint' a communication in the sense of it irrevocably engaging the

exemption in s.37(1)(a) and that if a document could be redacted so that that exemption was not engaged then that was a desirable approach to adopt. This was an approach supported by the MoJ but not, apparently, the Commissioner. It was not an approach that Mr. Loch was able to comment on as he had no access to the disputed information to allow him to suggest such redactions.

30 Finally, the Tribunal considered that the application of the six preliminary points set out above should result in consistent decision-making. The Tribunal found it necessary to make this point as it considered that the MoJ, in seeking to apply its proposed principles, did not appear to be making consistent decisions in relation to virtually identical communications. This resulted in the Tribunal finding that both more and less of the withheld information was covered by s.37(1)(b) alone – when compared to the submissions on this point from the MoJ.

31 The Tribunal then sought to apply the six preliminary points, plus the need for consistency, to the withheld information and in doing so concluded that the following communications within the closed bundle were covered by the exemption in s.37(1)(b) but not the exemption in s.37(1)(a):

The document at p.29
The document at p.30
The document at p.31
The document at p.32
The document at p.33 – save that paragraph 1 and the last sentence of paragraph 4.
The document at p.34
The document at pp.35-40 including Annex F save for the final phrase of paragraph 2 (beginning ‘and asking …’; the last phrase of paragraph 4; and the whole of paragraphs 16 and 18
The document at p.41
The document at p.42 – save the last sentence of paragraph 4. The parties may wish to note that this was one point where the Tribunal sought to be

consistent – applying the same approach as they did to the document at p.33.

The document at pp.49-50

The document at pp.68-69

The document at p 70

The documents at pp.71-74

The document at p 75-76 – save for the phrase in the second paragraph beginning 'with the agreement of …'

The documents at pp 77-83 save for the second asterisked point on p.81 and the phrase 'with the agreement of …' towards the bottom of p.82

The Public Interest Balancing Test

32 Having made its decision as to which of the disputed information engaged the exemption in 37(1)(a) and which (b) alone it then fell to the Tribunal to consider whether, in relation to the s.37(1)(b) material, the public interest balancing test favoured the maintenance of the exemption or disclosure.

33 The Commissioner did not present any submissions on this issue. This flowed from the fact that the Commissioner considered that all of the disputed information was covered by s.37(1)(a) – the absolute exemption.

34 The Ministry of Justice presented the following submissions on the point:

While it is acknowledged that there is a public interest in clarity and transparency concerning the criteria for conferring awards and reassurance that honours are conferred on merit, these factors are outweighed by the following matters:

(1) There is a continuing need for a safe space in which to discuss the sufficiency of the honorific titles conferred on UK Supreme Court Justices, as to the relative standing of these honorific titles as they relate to other titles, and the ongoing confirming of honours to individuals. The issue of the Royal Warrants on 10

December 2010 has not concluded the matter. The witness statement of Charles McCall explains the extent to which the honours conferred on Supreme Court Justices remains a live issue. He explains that, as recently as December 2017, there has been discussion of the question whether Supreme Court Justices should be made life peers.

(2) Second, disclosure of the information requested would adversely affect the principle of confidentiality, in respect of the views of individual judges, government ministers and the Sovereign on the conferral of courtesy titles and would be likely to lead to a chilling effect whereby the participants in the communications would be less willing to express their free and frank opinions in future. Disclosure of the requested information would reveal the personal views of the participants as to the advantages or disadvantages of different types of honour, in circumstances where those individuals would have had a reasonable expectation of confidentiality.

(3) There is a particularly strong public interest in maintaining the independence of the judiciary. In fact, the Lord Chancellor and all other Ministers of the Crown with responsibility for matters relating to the judiciary are under a statutory obligation to uphold the independence of the judiciary: see s.3 Constitutional Reform Act 2005. Some judges are named in the documents requested. Disclosure of the information therefore has the potential to affect or undermine judicial standing, integrity and therefore independence.

35 The Appellant responded as follows:

The MoJ argues that the issue of Supreme Court Justices' courtesy titles is still a live issue. In support of this contention, they have introduced a

witness statement by Charles McCall, who argues at para. 3 of his statement that:

> *There are ongoing policy discussions within the Ministry of Justice and with other Government Departments including Cabinet Office, the Prime Minister's Office and The Palace concerning in respect of the Supreme Court both the effective operation of the honours system overall. and the conferment of such honours on individuals and classes of individuals.*

Mr. McCall also highlights the recommendation contained in the report of the Lord Speaker's Committee on the Size of the House whereby it was suggested that Supreme Court Justices might in future receive life peerages upon their appointment. Mr. McCall argues that this supports the MoJ's contention that the titles borne by Supreme Court Justice are still under active consideration, and therefore it is necessary to preserve a 'safe space' around the issue. However, as Mr. McCall himself admits in the final paragraph of his statement:

> *Consideration of the honorific titles conferred on Supreme Court Justices is likely to be subject to the wider reforms of the House of Lords.* ***Such reform Is not led by the Second Respondent and resolution of this*** *issue is not* ***anticipated*** *to be resolved within the life of this* ***Parliament*** *(emphasis mine).*

….. With Brexit looming, it is probably safe to say that the Government has more important things on its plate. This, coupled with Mr. McCall's admission that the matter is unlikely to be resolved during the present Parliament, suggests that any discussions within Government on the issue of Supreme Court Justices' titles are likely to be rather speculative at this point.

….it may be helpful to consider the application of the section 35(l)(a) exemption when evaluating the MoJ's safe-space arguments. In

Department/or Education and Skills v The Information Commissioner and The Evening Standard (EA/2006/0006) ('DFES'), the Tribunal noted at para. 75(iv) that one of the underlying reasons for the section 35(1)(a) exemption was the need to avoid the risk of "premature publicity" (emphasis in original). But that is hardly the case here, as Supreme Court Justices have had courtesy titles since 2010, and any material from present-day discussions would fall outside the scope of my request.

This passage from paras. 54-55 of the Commissioner's guidance on the section 35(l)(a) exemption seems particularly relevant to Mr. McCall' s claims:

> *Not every decision or alteration made after an original policy was settled will amount to the development of that policy...By contrast, minor adjustments made in order to adapt to changing circumstances, avoid unintended consequences, or better achieve the original goals might more accurately be seen as decisions on implementation.*

Under that interpretation, any discussion about whether Supreme Court Justices should be given life peerages instead of the courtesy titles they currently enjoy would seem to fall into the category of policy implementation. The proposals highlighted by Mr. McCall would not represent a substantive change from the status quo. Whether the Justices hold their titles individually as life peers or hold them ex-officio by virtue of the current Royal Warrant, they will still be lords or ladies so the Government's original decision to give the titles will remain unchanged for all practical purposes.

….. The MoJ maintains that the release of this information would have a chilling effect within government and discourage individuals from expressing their opinions freely and frankly. That is always a possibility when government information is disclosed, yet in passing the FOIA,

Parliament has decided that the benefits of greater transparency outweigh the possibility of a chilling effect.

The MoJ contends that the release of this information would undermine the independence of the judiciary … I would remind the Tribunal that some of the Justices' views on this matter have already entered the public domain. Furthermore, the issue could be addressed quite simply by redacting the names of individual Justices from the information.

36 The Appellant also put forward the following positive arguments in favour of disclosure:

The decision to give Supreme Court Justices courtesy titles was an abrupt shift in policy. The Supreme Court came into existence on 1 October 2009, yet the Justices did not receive courtesy titles until 10 December 2010. There was plenty of time to address the issue before that point. Parliament spent over a year debating the legislation which established the Supreme Court … and over four years elapsed between Royal Assent and the Court's first sitting.

…. *This suggests that the lack of courtesy titles was a deliberate policy choice on the part of the then Labour government. The legal commentator Joshua Rozenberg seems to have come to the same conclusion. In a blog post published on 23 March 2010, he noted that he had been told "long ago" that future members of the Supreme Court would receive the courtesy title of ' lord/lady. But in a follow-up post on 16 April 2010, Mr. Rozenberg claimed that the then-Lord Chancellor, Jack Straw, had effectively vetoed the Supreme Court Justices' courtesy titles.*

If this is true, it could explain why the titles were not conferred until after the Conservative/Liberal Democrat coalition government took office in May 2010. But it would be enormously helpful if the public could see the decision-making process which led to the change. Did the Supreme Court Justices actually request courtesy titles? What advice did Ministers receive

from civil servants? What role did the College of Arms play? Did anyone express reservations about this proposal? Did they consider any alternative titles?

The fact that there are arguably several issues with the Justice's courtesy titles emphasizes the need for public scrutiny of the decision. Perhaps the most notable issue is the fact that, while the wives of male Justices receive the style of 'lady,' the husbands of female Justices and the same-sex spouses of Justices of either gender receive no such honour Whilst this approach is consistent with tradition, one could argue that it was inappropriate for the Government to adopt such a discriminatory approach when creating a new title in 2010.

….. Finally, it should be noted that there was no public consultation ahead of the decision to confer the titles, and the whole process took place through private discussions. Now, almost eight years later, it is time to reveal the process to the public.

The Tribunal's Decision on the Public Interest Balancing Test

37 The Tribunal did not consider, on balance, that there was a great deal of merit in the MoJ's 'safe space' argument. It appeared to the Tribunal that the current policy in relation to the honorific titles conferred on UK Supreme Court Justices had been settled in 2010 and it was highly speculative for the MoJ to suggest that this policy needed to be and was being kept under constant review. Furthermore, the Appellant was seeking disclosure of information that led up to the settling of that policy in 2010 and was not seeking the disclosure of any information relating to any claimed ongoing review of that policy.

38 The Tribunal also considered that there was not a great deal of merit in the MoJ's contention that the maintenance of the exemption was required to preserve judicial independence. Indeed, the Tribunal considered that the

converse was true. Under the doctrine of separation of powers, the governance of a state is traditionally divided into three branches each with separate and independent powers and responsibilities: an executive, a legislature and a judiciary. The distribution of power in this way is intended to prevent any one branch or person from being supreme and to introduce ‘checks and balances’ through which one branch may limit another. According to a strict interpretation of the separation of powers, none of the three branches may exercise the power of the other, nor should any person be a member of more than one of the branches. The conferring of honours on the judiciary by the executive ran the risk of being seen as an attempt by the executive to influence members of the judiciary. One of the ways to avoid this possibility or indeed the inference of this possibility was to open the decision-making process, by which the executive decided to confer an honour on members of the judiciary, to public scrutiny. The Tribunal noted that the MoJ itself referred to the element of openness in relation to the policy of conferring a knighthood or damehood on <u>all</u> High Court judges. All such judges received this honour specifically, so it could not be claimed that the executive was seeking to influence any single High Court judge.

39 The Tribunal considered that there was greater merit in the MoJ’s argument in relation to the need to maintain confidentiality. However, the public interest balancing test is precisely that – a balancing test – and the Tribunal considered that, for the reasons set out above, the public interest in disclosure prevailed over the public interest in maintaining the exemption. The Tribunal also considered that the issue of confidentiality could, if necessary, be addressed through the appropriate redaction of communications.

40 The Tribunal thus concluded that the public interest balancing test, in relation to the exemption in s.37(1)(b) FOIA, favoured the disclosure of the communications listed at paragraph 31 above to the Appellant. The Tribunal accepts that redaction of these documents may also be required to comply with the personal data exemption in FOIA – particularly in relation to the names of junior civil servants in accordance with usual policy.

Signed:

Angus Hamilton DJ(MC)

Tribunal Judge Date: 6 August 2018