



NCN: [2024] UKFTT 00719 (GRC)

Case Reference: EA/2023/0341

**First-tier Tribunal
General Regulatory Chamber
Information Rights**

Heard by Cloud Video Platform

**Heard on: 5 March 2024
Decision given on: 8 August 2024**

Before

**JUDGE STEPHEN ROPER
MEMBER SUZANNE COSGRAVE
MEMBER PAUL TAYLOR**

Between

CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Representation:

For the Appellant: Craig Dunford KC of Counsel

For the Respondent: Christopher Knight of Counsel

Decision: The appeal is Dismissed

REASONS

Preliminary matters

1. In this decision, we use the following terms to denote the meanings shown:

Appellant:	Chief Constable Of The Police Service Of Northern Ireland.
Commissioner:	The Information Commissioner.
Duty to Disclose:	The duty of a public authority to communicate requested information which it holds, pursuant to section 1(1)(b) (set out in paragraph 27.).
Duty to Inform:	The duty of a public authority to confirm whether or not it holds information which is requested, pursuant to section 1(1) (a) (set out in paragraph 27.).

FOIA:	The Freedom of Information Act 2000.
Information Notice:	The Information Notice of the Commissioner dated 22 June 2023, reference IC-138416-N5F7, relating to the Withheld Information.
LPP:	Legal professional privilege.
LPP Material:	Material which is protected by LPP or (as the context may require) in respect of which LPP is asserted.
Request:	The relevant part of the request for information made to the Appellant under FOIA, dated 22 May 2020, as referred to in paragraph 6..
Requestor:	The person who made the Request.
Withheld Information:	The information falling within the scope of the Request which was withheld by the Appellant (and which was sought by the Commissioner by way of the Information Notice).

2. Unless the context otherwise requires (or as otherwise expressly stated), references in this decision:
 - a. to numbered paragraphs are references to paragraphs of this decision so numbered; and
 - b. to any section are references to the applicable section of FOIA.
3. We refer to the Information Commissioner as ‘he’ and ‘his’ to reflect the fact that the Information Commissioner was John Edwards at the date of the Information Notice, whilst acknowledging that the Information Commissioner was Elizabeth Denham CBE at the time of the Request and the Requestor’s subsequent complaint to the Commissioner.

Introduction

4. This is an appeal against the Information Notice, which (in summary) required the Appellant to provide to the Commissioner the Withheld Information.

Background to the Appeal

5. The background to the appeal is as follows.

The Request

6. On 22 May 2020, a multi-part request for certain information was made to the Appellant under FOIA. For the purpose of this appeal, the relevant part of the request, was: *“Is there a public record of talks between goldmine companies discussing security costs and can the public see them”*. There was a previous appeal in respect of the request, which resulted in a Consent Order¹, pursuant to which that part has been clarified as meaning: *“any record of talks between goldmine companies discussing security costs”*.
7. After that previous appeal, the Appellant issued a further response to the Request on 3 September 2021 followed by an internal review on 22 October 2021. The Appellant confirmed that he held information within the scope of the Request, but withheld that information on the basis of (amongst other exemptions) section 42(1) (legal professional

¹ Case reference EA/2021/0112, relating to the Information Commissioner’s Decision Notice reference IC-49770-T5Q7.

privilege).

8. The Requestor complained to the Commissioner about the Appellant's response to the Request, pursuant to section 50.
9. In considering that complaint, the Commissioner contacted the Appellant on 22 December 2022 asking for a full and unredacted copy of the Withheld Information.
10. The Appellant responded to the Commissioner on 13 February 2023. The Appellant agreed to provide the Commissioner with some of the Withheld Information, but stated that the remainder could not be provided because it comprised legal advice, stating:

"PSNI is not in a position to provide this legal advice to you as we consider it to be legally privileged to PSNI and outside the requirements of the FOIA to provide."
11. In further correspondence between the Commissioner and the Appellant, the Appellant confirmed that the legal advice (the Withheld Information) did fall within the scope of the Request. The Appellant informed the Commissioner again on 13 April 2023 that the Appellant was not willing to provide the Commissioner with the Withheld Information.

The Information Notice

12. The Commissioner issued the Information Notice under section 51, stating that he required sight of the Withheld Information in order to assess the legality of the Appellant's response to the Request. The Commissioner did not accept the Appellant's position that FOIA does not require him to provide LPP Material to the Commissioner.
13. Pursuant to the Information Notice, the Commissioner required the Appellant to furnish the Withheld Information within 30 days of the date of the Information Notice.

The appeal

The grounds of appeal

14. The Appellant's grounds of appeal did not dispute any factual aspects of the background, as set out in the Information Notice. The Appellant also confirmed in his grounds of appeal that the Withheld Information fell within the scope of the Request and that he considered that the Withheld Information was subject to LPP.
15. The Appellant's grounds of appeal were based on his views that the Commissioner has no power under section 51 to require the provision of information which is subject to LPP. The Appellant contended that section 51 does not override, or reduce the scope and operation of, section 42. In particular, the Appellant argued that:
 - a. the language of section 51(5) makes it clear that it refers solely to any LPP arising in respect of a client's obligations, liabilities or rights under FOIA (including proceedings before the Tribunal);
 - b. section 51(5) is an adjunct to, and not a derogation from, the affirmation of LPP and its exemption in section 42.
16. The Appellant's position was that he had not waived LPP in respect of the Withheld Information and that section 42 does not (either by express words or by necessary implication) modify or undermine LPP.

The Tribunal's powers and role

17. The powers of the Tribunal in determining the appeal are set out in section 58. In summary, the Tribunal’s remit for the purposes of the appeal was to consider whether the Information Notice was in accordance with the law. In reaching its decision, the Tribunal may review any findings of fact on which the Information Notice was based and the Tribunal may come to a different decision regarding those facts.

Mode of hearing

18. The proceedings were held by the cloud video platform. The Tribunal panel and the parties joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way. There were no interruptions of note during the hearing.
19. The Appellant was represented by Craig Dunford KC of Counsel. The Commissioner was represented by Christopher Knight of Counsel.

The evidence and submissions

20. The Tribunal read and took account of a bundle of evidence and pleadings. We also received and took account of written skeleton arguments from both parties and a separate bundle of authorities.
21. The bundle included a witness statement on behalf of the Commissioner. The witness's statement was given in their capacity as a Group Manager in the Commissioner’s FOI Casework Department. It is not necessary for us to identify this witness personally in this decision - therefore we merely refer to them as “the witness” and we mean no disrespect to them in doing so. The witness did not give evidence orally at the hearing.
22. We heard oral submissions from Mr Dunford KC on behalf of the Appellant and from Mr Knight on behalf of the Commissioner
23. All of the contents of the bundle and skeleton arguments were read and considered, including all of the submissions from the parties, even if not directly referred to in this decision.

Outline of relevant issues

24. In accordance with the remit of the Tribunal which we have referred to, the fundamental issue which we needed to determine in the appeal was whether the Commissioner was entitled to require, by way of the Information Notice, the production of the Withheld Information.
25. In dealing with that fundamental issue, we will address the following points raised in the Appellant’s grounds of appeal:
 - a. whether section 51 overrides, or reduces the scope and operation of, section 42 (as referred to in paragraph 15.), which we shall call the ‘Exemption Issue’;
 - b. whether section 42 abrogates or overrides LPP, either by express words or by necessary implication (as referred to in paragraph 16.). We will also, for reasons we set out below (paragraphs 50. and 51.), address the wider principle of whether any provision of FOIA abrogates or overrides LPP. We shall call both the ‘Interpretation Issues’.
26. We address those issues in turn (under those headings) further below.

The relevant statutory framework²

² We acknowledge the Practice Direction dated 4 June 2024 (<https://www.judiciary.uk/guidance-and-resources/practice-direction-from-the-senior-president-of-tribunals-reasons-for-decisions/>) and particularly paragraph 9, which refers to the First-tier Tribunal not needing to specifically refer to relevant authorities. We include references to the applicable

General principles - FOIA

27. Section 1(1) provides individuals with a general right of access to information held by public authorities. It provides:

“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.”.

28. In essence, under section 1(1), a person who has requested information from a public authority is entitled to be informed in writing whether it holds that information. If the public authority does hold the requested information, that person is entitled to have that information communicated to them. However, these entitlements are subject to the other provisions, including some exemptions and qualifications which may apply even if the requested information is held by the public authority. Section 1(2) provides:

“Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”.

29. Accordingly, section 1(1) does not provide an unconditional right of access to any information which a public authority does hold, nor an unconditional right even to be told if the information is held by the public authority. The rights contained in that section are subject to certain other provisions of FOIA and we refer to the relevant aspects below.

Exemptions

30. Section 2(1) addresses potential exemptions to the Duty to Disclose and the Duty to Inform. Pursuant to that section, some exemptions to those duties are absolute and some are subject to the application of a public interest test. In broad terms, the public interest test involves assessing whether or not the public interest favours maintaining the applicable exemption.
31. Section 2(3) explicitly lists which exemptions in Part II of FOIA are absolute. Pursuant to that section, no other exemptions are absolute. Section 42 (legal professional privilege) is not included in that list and accordingly is an exemption which is subject to the public interest test.

Section 42 – Legal professional privilege

32. Section 42 provides:

“(1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.

(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.”.

Section 50 – Application for decision by Commissioner

33. Section 50 falls under Part IV of FOIA (which is headed “Enforcement”). Section 50 provides

legislative framework (which were prepared as part of this decision before the date of that Practice Direction) but have accordingly not set out details of the applicable case law.

for the right of a person requesting information from a public authority to complain to the Commissioner about the handling of their request by the public authority (specifically, whether the request has been dealt with in accordance with the requirements of Part I of FOIA).

34. In respect of any such complaint, the Commissioner may, pursuant to section 50(3)(b), issue a decision (referred to in FOIA as a “decision notice”).

Section 51 – Information notices

35. Part IV of FOIA also provides certain powers to the Commissioner in connection with his enforcement functions. Under section 51, the Commissioner has the power to issue an information notice. Section 51 provides, so far as is relevant:

“(1) If the Commissioner—

(a) has received an application under section 50, or

(b) reasonably requires any information—

(i) for the purpose of determining whether a public authority has complied or is complying with any of the requirements of Part I, or

(ii) for the purpose of determining whether the practice of a public authority in relation to the exercise of its functions under this Act conforms with that proposed in the codes of practice under sections 45 and 46,

he may serve the authority with a notice (in this Act referred to as “an information notice”) requiring it, within such time as is specified in the notice, to furnish the Commissioner, in such form as may be so specified, with such information relating to the application, to compliance with Part I or to conformity with the code of practice as is so specified.

(2) An information notice must contain—

(a) in a case falling within subsection (1)(a), a statement that the Commissioner has received an application under section 50, or

(b) in a case falling within subsection (1)(b), a statement—

(i) that the Commissioner regards the specified information as relevant for either of the purposes referred to in subsection (1)(b), and

(ii) of his reasons for regarding that information as relevant for that purpose.

(3) An information notice must also contain particulars of the right of appeal conferred by section 57.

(4) The time specified in an information notice must not expire before the end of the period within which an appeal can be brought against the notice and, if such an appeal is brought, the information need not be furnished pending the determination or withdrawal of the appeal.

(5) An authority shall not be required by virtue of this section to furnish the Commissioner with any information in respect of—

(a) any communication between a professional legal adviser and his client in connection with the giving of legal advice to the client with respect to his obligations, liabilities or rights under this Act, or

(b) any communication between a professional legal adviser and his client, or between such an adviser or his client and any other person, made in connection with or in contemplation of proceedings under or arising out of this Act (including proceedings before the Tribunal) and for the purposes of such proceedings.

(6) In subsection (5) references to the client of a professional legal adviser include references to any person representing such a client.”.

Section 57 – Appeal against notices served under Part IV

36. Under section 57(1), a complainant or a public authority has the right of appeal to the First-tier Tribunal against a decision notice issued by the Commissioner.
37. Section 57(2) provides that a public authority has a right of appeal to the First-tier Tribunal against an information notice issued to it by the Commissioner under section 51.

Discussion and findings

38. We first address some preliminary points before turning to the other issues in the appeal.
39. Both of the parties referred us to various authorities from case law relating to the nature and function of LPP. However, there was no relevant dispute between the parties on the question of LPP itself. The crux of the appeal was whether the Appellant can rely on LPP to refuse to provide LPP Material in respect of an information notice which is issued by the Commissioner pursuant to section 51.
40. The Appellant made it clear that he had not waived LPP in respect of the Withheld Information. The Withheld Information may or may not be protected by LPP, but establishing that was not the purpose of the appeal. Rather, as we have noted, the purpose of the appeal was essentially to determine whether the Commissioner has the power to require, by way of the Information Notice, the production of material in respect of which the Appellant has asserted LPP.

The Exemption Issue

41. The thrust of the Appellant’s contention regarding the Exemption Issue (as set out in his grounds of appeal) was, essentially, that section 42 was an exemption which the Appellant could rely on in order to exempt disclosure of the Withheld Information to the Commissioner
42. In that regard, the Appellant’s grounds of appeal sought to rely on the language of section 51(5), to the effect that such section was simply an adjunct to (and not a derogation from) the exemption in section 42 in respect of LPP. In support of this view, the Appellant stated that section 51(5) refers only to any LPP arising in respect of a client’s obligations, liabilities or rights under FOIA (including proceedings before the Tribunal).
43. Various submissions were made by both parties in respect of whether section 42 is overridden, or reduced in scope and operation, by section 51. However, we believe that the issue in question is a relatively straightforward one. It appears to us that the Appellant’s arguments relating to the interaction of section 51 and the exemption for LPP under section 42 were based on a fundamental misconception regarding the operation of those sections. This is because section 42 only relates to potential exemptions from the Duty to Inform and the Duty to Disclose, not exemptions relating to any request for information made by the Commissioner under section 51. Section 2 of FOIA, to which we have referred, is entitled “Effect of the exemptions in Part II”. Section 42 falls within Part II of FOIA and, in accordance with the relevant provisions of section 2, relates to exemptions from the Duty to Inform and the Duty to Disclose.

44. That interpretation is also supported by section 84, which sets out the rules of interpretation of FOIA. Pursuant to that section, “*exempt information*” means “*information which is exempt information by virtue of any provision of Part II*”. We recognise that applying that interpretation exactly can give rise to some regrettable results – specifically, that applying it to the use of the term ‘exempt information’ as set out in any section of Part II of FOIA where that term is used, including section 42(1), gives a circular meaning (effectively, ‘exempt information under this Part II means information which is exempt information under this Part II’). However, in our view, the clear intention is that references in FOIA to “exempt information” are to information which (pursuant to section 2) is exempt from the Duty to Inform and/or the Duty to Disclose pursuant to a provision within Part II of FOIA. Another relevant point worth noting is that section 51 does not use the term “exempt information”.
45. Accordingly, in our view the Appellant’s arguments about the nature and scope of section 42(1) pertaining to an exemption for LPP Material fall at the first hurdle – because section 42 does not apply to information which is requested by the Commissioner under section 51.
46. It follows from the above that the Appellant cannot rely on section 42 to refuse to provide the Withheld Information to the Commissioner.
47. We should note that Mr Dunford accepted in his submissions that section 42 refers to the provision of information to the requesting party, as opposed to the Commissioner. However, that was not the premise set out in the Appellant’s grounds of appeal. We deal further with Mr Dunford’s submissions on this point further below (paragraph 53. onwards).

The Interpretation Issues

48. The basis of the Appellant’s argument (as set out in his grounds of appeal) that FOIA does not, either by express words or by necessary implication, abrogate or override LPP was underpinned by reliance on the operation of section 42.
49. As we have found in respect of the Exemption Issue, section 42 does not operate as an exemption in respect of information which is requested by the Commissioner pursuant to an information notice issued under section 51. On that basis, the Appellant’s grounds of appeal are exhausted.
50. However, submissions were also made on behalf of the Appellant (including in respect of an associated strike out application which was made by the Commissioner in connection with the appeal) regarding the broader premise of whether the Information Notice can require the production of LPP Material (aside from the operation of section 42). These submissions were based on the general principle that LPP is a fundamental right which may only be overridden in specific circumstances.
51. Whilst this was not a specific point raised in his grounds of appeal, the Appellant’s position was, in essence, that there was no provision in FOIA at all (not just in section 42) which overrode LPP and on that basis the Commissioner had no power under section 51 to require the production of the Withheld Information. Accordingly, for completeness (and given the potential importance of the issue) we also address the issues around this broader premise.
52. The parties were in agreement that LPP can only be disregarded or overridden in certain limited circumstances (including where it has been waived, which was not applicable in respect of the Withheld Information). The parties also made submissions in respect of the question as to whether a regulator (in this case, the Commissioner) generally had the power to require the production of LPP Material, including by reference to the *Sports Direct* case³ in

³ *Sports Direct International PLC v Financial Reporting Council* [2020] EWCA Civ 177 (also reported *sub nom. Financial Reporting Council v Sports Direct International plc* [2021] Ch 457).

which it was argued that there was ‘no infringement’ of LPP where the applicable LPP Material was required by a regulator. However, in our view it is not necessary to address this question (nor, indeed, the ‘no infringement’ principle generally) but rather to focus on the Commissioner’s statutory powers, given that the Information Notice was issued pursuant to section 51. We would also note that in the *Sports Direct* case, the regulator (the Financial Reporting Council) had relied on the ‘no infringement’ proposition because the relevant statutory power regarding the provision of information to it specifically excluded LPP Material.

53. As we have noted, Mr Dunford accepted that section 42 refers to the provision of information to the requesting party, as opposed to the Commissioner. However, he contended that section 42 is relevant and “important” in the context of the appeal, on the basis that it is a recognition and affirmation of the central principle and general application of LPP. He further submitted that this must inform the interpretation of section 51 - and hence FOIA generally, because it must be interpreted as a whole, having regard to its purpose (citing the *Barclays Mercantile Finance* case⁴).
54. We accept that section 42 has some relevance in recognising the general principle and application of LPP (given that it is a potential exemption to the Duty to Inform and the Duty to Disclose) but in our view there is a caveat to the premise that section 42 ‘affirms’ LPP. This is because that section is a qualified exemption, being subject to the applicable public interest test (as we noted in paragraphs 30. and 31.). Accordingly, there have been instances where a public authority has been required to disclose LPP Material which is requested under FOIA notwithstanding the engagement of section 42, because the balance of the public interest test has favoured disclosure of such LPP Material. This was a point which was also made by Mr Knight in his submissions.
55. Mr Dunford further submitted that section 51(5) also affirms the application of LPP in relation to material generated for specific advice on the operation of FOIA. He argued that the express words of section 51(5) are consistent with the “explicit centrality of the general exemption” in relation to LPP contained in section 42. As we have noted, the exemption in section 42 is a qualified exemption and the operation of section 42 in practice results in some LPP Material being disclosed by public authorities. Therefore (in the context of FOIA at least) LPP is not as inviolable as Mr Dunford was essentially seeking to argue.
56. It was also submitted by Mr Dunford that FOIA was able to operate “without access” to LPP Material, which we took to mean operating without the requirement for any public authority to provide LPP Material to a person requesting information, or to the Commissioner. We do not accept that argument, for the same reasons we have given above regarding the operation of section 42 (and for the reasons we also refer to below). Linked to that point, Mr Dunford also submitted that there was accordingly no basis for the doctrine of ‘necessary implication’ to apply to FOIA so as to abrogate or override LPP. As the latter point is also predicated on the basis that FOIA does not provide for the disclosure of LPP Material, it suffers from the same flaw as the preceding argument. Mr Dunford also submitted that FOIA itself “explicitly reaffirms LPP” but that is evidently not the case, again for the reasons we have given regarding the operation of section 42.
57. We acknowledge and accept, though, that where an information notice is issued under section 51(1), section 51(5) operates to preclude a public authority from being obliged to supply to the Commissioner any LPP Material which (in broad summary) relates to communications regarding legal advice given in respect of FOIA or in connection with proceedings, including before the Tribunal, under or arising out of FOIA.
58. Therefore, section 51(5) does mean that a public authority may withhold from the

⁴ *Barclays Mercantile Finance Ltd v Mawson* [2004] UKHL 51, paragraph 28.

Commissioner some LPP Material where it has been served with an information notice, provided that such LPP Material meets the criteria set out in that section. Whilst we have not seen the Withheld Information, the Appellant has confirmed (including in correspondence with the Commissioner in respect of the Request) that it is information falling within the scope of the Request and therefore we find that it does not meet such criteria. Consequently, we also find that section 51(5) is not engaged in respect of the Withheld Information.

59. We now turn to the wording of section 51(1) itself. Mr Dunford submitted that section 51 only empowers the Commissioner to seek, by way of an information notice, information which the Commissioner ‘reasonably requires’ to enable him to discharge an investigation regarding the operation of section 42 and the application of the associated public interest test. In this regard, Mr Dunford disagreed with the witness’s view that an information notice gives the Commissioner an overall entitlement to require the production of LPP Material.
60. We do not agree with Mr Dunford’s position on that issue. Section 51(1) clearly provides that the Commissioner may issue an information notice in two separate, alternative, scenarios – either (section 51(1)(a)) where he has received an application under section 50, or (section 51(1)(b)) where he reasonably requires information for the purposes set out in the sub-sections of section 51(1)(b)). It is only the latter scenario which has the qualification of reasonableness in respect of information which the Commissioner requires pursuant to an information notice.
61. The Information Notice was issued pursuant to section 51(1)(a), in connection with the application from the Requestor which was received by the Commissioner under section 50 regarding the Request (therefore, the first scenario of those referred to in paragraph 60.). Accordingly, as we have noted, there is no requirement that the information required by the Commissioner as set out in the Information Notice must be limited to information which is reasonably required. Rather, pursuant to section 51(1)(a), the Commissioner was entitled to require the Appellant to furnish the Commissioner with such information as may be specified in the Information Notice relating to the Requestor’s section 50 complaint regarding the Request. This was also explained by the witness and was the context within which the witness was referring to the Commissioner’s right to require the production of LPP Material.
62. We interpret section 51(1)(a) as also entitling the Commissioner to request such information as he may specify relating to compliance with Part I of FOIA (or to the code of practice referred to in that section), even if the information notice in question is issued pursuant to section 51(1)(a), as opposed to section 51(1)(b) which specifically refers to such information. However, that interpretation is immaterial to this decision, because the appeal concerns the Information Notice (which only required information relating to the Requestor’s section 50 complaint).
63. Sections 51(2) and 51(3) set out certain requirements as to what must be included in an information notice issued under section 51(1). Section 51(4) specifies requirements regarding the timeframe which is included in an information notice for the provision of information pursuant to it. We find (in accordance also with the witness’s statement on this point) that the Information Notice met all those requirements.
64. Various submissions were made by Mr Dunford and Mr Knight, in respect of the Information Notice and its requirement to furnish the Commissioner with the Withheld Information, regarding whether FOIA, either expressly or by ‘necessary implication’, operates to abrogate or override LPP.
65. Mr Dunford’s submissions on that issue were generally based on the premise, as we have already referred to, that LPP is a fundamental right of a basic constitutional character and that FOIA does not operate to reduce or override LPP. In contrast, Mr Knight’s submissions were

to the effect that FOIA does provide for exceptions to the general principle of LPP – either in the context of section 42 as a qualified exemption or in the context of the information which the Commissioner can request under section 51.

66. We favour the submissions of Mr Knight. This is partly because of the reasons we have already given regarding the operation of section 42 in respect of LPP Material. This is also because we find that the mechanism for information notices under section 51(1) must, of necessity, include the power for the Commissioner to require the production of LPP Material when it is relevant to the section 50 application in respect of which the applicable information notice is issued.
67. Our finding in the preceding paragraph is based on the rationale that it would defeat the relevant purposes of FOIA if the Commissioner was unable to have sight of pertinent information in order to determine whether a public authority has validly applied any of the exemptions set out in Part II. By saying the ‘relevant purposes’, we mean the duty of the Commissioner to make applicable decisions pursuant to section 50 and the need for the Commissioner to be able to assess pertinent information in order to properly make any such decision.
68. That finding is also based on the need, where applicable, for the First-tier Tribunal to make its own decisions pursuant to section 58 in respect of appeals made under section 57. The First-tier Tribunal has often been required to make determinations on the application of section 42 and in most (if not all) cases it could not properly do so without sight of the relevant material in respect of which LPP is asserted by the public authority.
69. Indeed, in this case we initially considered whether we would need to have sight of the Withheld Information but we concluded that it was not necessary because it was not relevant to the appeal, for the reasons we referred to in paragraph 40.. Had the appeal concerned the application of section 42 in respect of a decision notice issued by the Commissioner pursuant to section 50(3) regarding the Withheld Information, we consider that it would have been necessary for us to see the Withheld Information – this is because we would not be able to assess whether or not it was indeed LPP Material without having sight of it. This links back to our earlier comments to the effect that we do not know whether or not the Withheld Information is indeed subject to LPP.
70. We should clarify that, when we use the term ‘necessity’ in paragraph 66., we do not mean the approach to statutory interpretation of “necessary implication” which was referred to by the parties in their submissions. This is because we find that section 51(1) - in the context of an information notice issued under section 51(1)(a) - expressly covers the entitlement of the Commissioner to seek LPP Material from a public authority. We form this view for the following reasons:
 - a. Section 51(1) uses express words to the effect that the Commissioner may serve an information notice requiring a public authority to furnish him with ‘such information as he specifies in the information notice’ relating to an application under section 50.
 - b. Those express words are not qualified in any way, such as by reference to reasonableness (as is the case, in contrast, for an information notice which is issued under section 51(1)(b)).
 - c. There is specific recognition of certain LPP Material being excluded from the scope of an information notice issued under section 51(1) - namely in section 51(5) regarding the specific criteria for LPP Material we have referred to (paragraph 57.) relating to LPP in connection with advice and proceedings relating to FOIA itself. Therefore had Parliament intended that the scope of an information notice would not extend to any

other LPP Material then it would have specified so, rather than referring only to LPP Material meeting that specific criteria.

- d. Accordingly, it is clear that the only potential applicable exclusion under FOIA to the duty of a public authority to furnish the Commissioner with any information specified by him in an information notice is that set out in section 51(5) covering only the LPP Material meeting the specific criteria in that section.
 - e. It follows that there is no other basis for a public authority to refuse to provide any other information, including any LPP Material falling outside of section 51(5), which is specified by the Commissioner in an information notice.
 - f. That interpretation is consistent with construing FOIA as a whole, in accordance with the views expressed in the *Barclays Mercantile Finance* case we have referred to, and having regard to the relevant practical implications of the operation of FOIA which we address below.
71. Even if our analysis about the express words of section 51(1) is flawed, then the only feasible alternative must be the “necessary implication” approach to statutory interpretation, for the same fundamental reasons we have given. Applying that alternative approach would result in the same outcome – namely that the Commissioner can, pursuant to section 51(1), compel a public authority to produce LPP Material (other than any LPP Material which falls within the scope of section 51(5)).
 72. Part of the rationale behind our conclusions above is that any other finding would make a public authority the sole arbiter of its own compliance with FOIA insofar as it considered that any requested information involves LPP Material. In that alternative scenario, it would follow that the Tribunal itself would also be prevented from making any adequate determination of any such compliance (as the public authority would seek to also preclude the Tribunal from having sight of the LPP Material). In our view, such a state of affairs cannot have been intended by Parliament, as this would mean that whenever section 42 was relied on by a public authority then the Commissioner and the Tribunal could not have sight of the applicable LPP Material in order to determine whether section 42 was engaged, or in turn to properly consider (where applicable) the application of the public interest test. Indeed, if the Appellant was correct that there is no scope under FOIA to require a public authority to produce LPP Material, that would effectively thwart the role and responsibilities of the Commissioner (in making relevant decision notices under section 50) and of the Tribunal (in determining appeals under section 58) in cases where the public authority relied on section 42 to withhold requested information.
 73. Linked to the above, in light of the principles in the Upper Tribunal’s decision in the *Corderoy* case⁵, it is incumbent on the Commissioner to be satisfied that information which is withheld by a public authority following a request under FOIA is properly exempt from disclosure and not to just accept the assurance of the public authority. This would necessarily require the Commissioner to have sight of the relevant withheld information – which, in the context of section 42, would mean having sight of the applicable LPP Material.
 74. Mr Dunford proposed an alternative method pursuant to which, he submitted, compliance with the Information Notice could be achieved; this set out various steps, which the Appellant was “ready, willing and able to take”, regarding disclosure of certain details related to the information which was sought by the Commissioner in the Information Notice. Crucially, that proposed method excluded the provision of the Withheld Information. In our view, therefore, that proposed method did not achieve compliance with the Information Notice as propounded by Mr Dunford. In addition to the other reasons we give in this decision

⁵ *Corderoy v Information Commissioner, Attorney General’s Office & Cabinet Office* [2017] UKUT 495 (AAC).

(including, in particular, in paragraph 73. regarding the *Corderoy* case), we form this view because:

- a. that proposed method would not actually provide the Commissioner with the information which was specifically sought by way of the Information Notice;
- b. there is nothing in FOIA (other than section 51(5)) which fetters the discretion of the Commissioner regarding the information sought pursuant to the Information Notice; and
- c. accordingly, it is not open to the Appellant to propose alternative means of providing the information requested by the Commissioner and/or to provide lesser information than was requested by the Commissioner.

75. Mr Dunford commented on the *Boyce* case⁶ (which had been referred to by the witness in the context of the public interest test for section 42) and argued, in essence, that that case supported the Appellant's position that the production of LPP Material to the Commissioner was not necessary in order for the Commissioner to make a decision regarding the engagement of section 42. However, in our view, that argument was self-defeating because Mr Dunford also acknowledged that the Tribunal in the *Boyce* case reached its conclusion following its examination of the closed material furnished in that case. It is evident from the decision in that case (paragraph 81 onwards) that the closed bundle which the Tribunal had sight of included the LPP Material in question. That case also serves to demonstrate how the Tribunal can reach a decision on LPP Material which differs from the view of the public authority (see paragraphs 84 and 85 of that case). This, essentially, illustrates the point we are making above – namely that sight of the information is required to make the necessary determination by the Commissioner and, where applicable, the Tribunal.

76. We would also note that the Appellant has not provided any case law in direct support of its argument that a public authority can refuse to provide LPP Material when issued with an information notice from the Commissioner under section 51(1)(a). Neither has the Appellant been able to refer to any provision of FOIA which expressly negates the duty of a public authority to provide LPP Material which is requested pursuant to any such information notice, other than section 51(5) which, as we have found, is not applicable to the Withheld Information.

77. As we have mentioned (paragraph 40.), the Withheld Information may or may not be protected by LPP. Following production of it to the Commissioner pursuant to this decision, it will then be for the Commissioner to determine whether or not the Appellant can rely on section 42(1) to withhold it in respect of the Request. The Commissioner's resulting decision in that regard (which would be made pursuant to section 50(3)) would of course then be afforded the right of appeal pursuant to section 57(1).

Final conclusions

78. For all of the reasons we have given, we find that the Information Notice was lawful and accordingly that the Commissioner was entitled to require the Appellant to furnish the Commissioner with the Withheld Information. Therefore the Appellant was not entitled to refuse to provide the Withheld Information to the Commissioner.

79. We therefore dismiss the appeal.

Signed: Stephen Roper

Date: 6 August 2024

⁶ *Boyce v Information Commissioner & Parliamentary and Health Service Ombudsman* (EA/2019/0032).

Judge of the First-tier Tribunal

Promulgated:

Date: 08 August 2024