

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 26 February 2015

**Public Authority:** Certification Office  
**Address:** 22<sup>nd</sup> Floor, Euston Tower  
286 Euston Road  
London  
NW1 3JJ

#### **Decision (including any steps ordered)**

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1. The complainant has requested information held by the Certification Office in respect of a complaint which the complainant made to the Certification Office concerning a payment by the National Union of Journalists (NUJ) to its former General Secretary. After some confusion about the terms of its initial response, the Certification Office withheld the information in its entirety on the basis of Section 30(1)(b).
2. The Commissioner's decision is that the Certification Office was entitled to rely on Section 30(1)(b) to withhold some of the requested information. However, the Commissioner finds that the public interest balance favours disclosure of the identified non-sensitive parts of the withheld information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - a. Disclose copies of the non-sensitive parts of the withheld information (ie those which the Certification Office has confirmed it has no particular objection to disclosure).
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Background

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5. The complainant's request stems from a complaint which he made to the Certification Office (CO; this is used interchangeably for Certification Office and Certification Officer) on 11 October 2012 concerning a payment of £45,522 which was made by the National Union of Journalists (NUJ) to its former General Secretary, Mr Jeremy Dear, when he left office in 2011. The payment had attracted some controversy and was reported in the Press Gazette in September 2012. The NUJ had originally incorrectly described the payment as 'severance pay' in its financial statement but later confirmed that the payment was for untaken sabbaticals and in lieu of six months' notice and '*was made in accordance with his (Mr Dear's) contract*'.
6. The CO is an independent statutory authority appointed by the Secretary of State for Business, Innovation and Skills to perform certain functions under the Trade Union and Labour Relations (Consolidation) Act 1992. Under the 1992 Act, the CO is responsible for (amongst other areas), determining complaints concerning certain breaches of trade union rules, and overseeing the finances of trade unions and employers' associations.
7. Under Section 37B(1) of the 1992 Act, the CO may appoint one or more members of his staff or other persons as an inspector or inspectors to investigate the financial affairs of a trade union and to report on them in such manner as he may direct. Under Section 37B(2) of the 1992 Act, the CO may only make such an appointment if it appears to him that there are circumstances suggesting:
  - (a) that the financial affairs of the trade union are being or have been conducted for a fraudulent or unlawful purpose;
  - (b) that persons concerned with the management of those financial affairs have, in connection with that management, been guilty of fraud, misfeasance or other misconduct;
  - (c) that the trade union has failed to comply with any duty imposed on it by this Act in relation to its financial affairs, or
  - (d) that a rule of the union relating to its financial affairs has not been complied with.
8. In the CO's published (revised August 2013) '*The Approach of the Certification Officer in Exercising His Powers of Investigation*' with regard to financial irregularities in trade unions and employer associations, it is stated that the CO will consider the facts presented to him in each case together with any supporting evidence. He must then decide whether

he will take any further action, and if so, what it should be. If the allegations appear, at first sight, to have some substance, he may approach the trade union or employers' association for its comment and explanation. The reply may then be put to the individual for observations. The CO may decide that it is important that the individual be interviewed and, if so, this will be carried out by members of his staff. He may wish to have a meeting with officials from the organisation concerned and this may lead to an information gathering visit by his staff to the organisation's offices.

9. The CO has powers to appoint inspectors to investigate the financial affairs of an organisation if there are circumstances suggesting any of the situations specified in Section 37B of the 1992 Act. The approach of the CO differs in relation to allegations about the conduct of the financial affairs of a trade union and complaints about certain breaches of union rules (the latter requiring a written reasoned determination of the complaint as presented). With financial issues, his primary aim is to ensure compliance with the legislation rather than the determination of a member's complaint. For instance, with financial matters, if the CO decides not to exercise his statutory powers in respect of a member's approach, the CO must notify the complainant of his decision to take no action, but need only give his reasons if he thinks fit.
10. In his complaint to the CO of 11 October 2012, the complainant asserted that the payment to Mr Dear by the NUJ had been made, *'without the knowledge or the authority of the NUJ National Executive Council (NEC) of the union and was therefore in breach of the Rules'*. The complainant stated that *'the substance of my complaint concerns a financial irregularity'* involving the payment and he asked the CO to investigate his complaint, *'on the grounds that the financial affairs of the NUJ have, in this instance, been conducted for a fraudulent purpose; that persons concerned with the management of these financial matters have been guilty of fraud, misfeasance or other misconduct, and that the Rules of the NUJ relating to its financial affairs have not been complied with'*.
11. The CO investigated the complainant's complaint and wrote to the complainant on 30 May 2013 with the outcome. The CO confirmed that he had met with representatives of the NUJ on 23 May 2013. He advised that he had decided not to exercise his powers to appoint an inspector under Section 37B of the 1992 Act and addressed the complainant's concerns about the transparency of the payment to Mr Dear and the basis of his alleged entitlement to the same. The CO noted that the union had accepted fault in respect of the failure to report the payment agreement to the NEC and/or Finance Committee at the earliest opportunity and that it had, *'advanced a tenable case for having made the disputed payment within the terms of Mr Dear's contract of employment'*. However, there was no mention within the letter as to

whether the union had breached or failed to comply with, any of its rules.

12. The complainant wrote to the CO on 24 June 2013 and queried the absence of any reference to the rules of the NUJ in the CO's outcome letter. He stated that this was '*both surprising and unsatisfactory*' especially since he had laid specific complaints alleging that the rules of the union had been broken. Whilst acknowledging that the CO was acting within his powers in deciding not to appoint an inspector, the complainant was not clear why his formal allegation of breach of rules had not been dealt with, and asked for clarification on the point.
13. The CO wrote to the complainant on 8 July 2013 with information as to how he had approached the rules aspect of the complainant's complaint. The CO stated that, '*One of the grounds upon which the CO can appoint an inspector to investigate the financial affairs of a trade union under Section 37B(2) is "that a rule of the union relating to the financial affairs has not been complied with". It is in this context that the rules to which you referred were considered*'. There was some dispute between the CO and the complainant as to whether the correct process had been followed in making the breach of rules complaint.
14. The Commissioner is satisfied, having read the correspondence in this matter, that it was quite clear from the wording of the complainant's complaint that he was making allegations of breaches of rules. Furthermore, the CO was clearly mindful of the importance of the rules to the complainant's complaint because in his initial letter to the NUJ of 27 November 2012 in which he notified the union of the complaint, he stated that he was, '*particularly interested to understand the basis upon which the payment was made to Mr Dear with reference to the union's rules or other relevant factors*'. In any event, as was clear from the CO's letter of 8 July 2013 referenced above, the matter was considered in the context of Section 37B(2) of the 1992 Act, intrinsic to which is the allegation that a rule of the union relating to its financial affairs has not been complied with.

## Request and response

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15. On 6 August 2013, the complainant wrote to the CO and stated his concern that, '*in spite of specifically alleging to the CO that the rules of the National Union of Journalists had not been complied with in relation to the payment made to Mr Dear, I have not been provided with the CO's views on this issue*'. He confirmed that, '*what I have been seeking from the outset, and reiterated in my letter to you of 24 June 2013, was*

*the results of the CO's consideration of the non-compliance with the NUJ's rules that I brought to his attention'. At the end of his letter, the complainant requested information in the following terms:*

*'All documents or other recorded information held by the Certification Office in which any consideration is given to my complaint that a rule of the National Union of Journalists relating to its financial affairs has not been complied with;*

*A copy of the minutes or any other recorded information, in whatever form it is held, of what took place and what was said at the meeting between the Certification Officer and the representatives of the NUJ on 23 May 2013;*

*Copies of all correspondence, notes of telephone calls, emails and details of any other meetings between the Certification Officer or his staff and representatives of the NUJ that arose from my complaint to the Certification Officer about the financial irregularity surrounding the payment made to Mr Dear'.*

16. The CO responded on 22 August 2013. It advised that the request was refused on the grounds that if the CO held the information requested then it would be exempt from disclosure either under Section 30(1)(b) or 30(2) of the FOIA (investigations and proceedings conducted by public authorities) or alternatively, Section 31(1)(a) and/or (g) (law enforcement). It stated that the duty to confirm or deny whether the CO held the information requested did not arise, referring the complainant to Sections 30(3) and 31(3) of the Act. It stated that *'it would not be in the public interest to disclose the information to you'*.
17. The complainant wrote to the CO on 21 October 2013 and in a lengthy letter requested an internal review of the decision. The complainant contended that the refusal notice was flawed, as there did not appear to have been any consideration of whether the public interest in refusing to provide a confirmation or denial as to whether the information was held outweighed the public interest in providing such a confirmation or denial. *'Such discussion of the public interest as is described relates to the public interest in disclosing or not disclosing the information itself'*. The complainant argued that the CO's position was not sustainable as in previous correspondence he had already informed the complainant that he had met with representatives of the NUJ.
18. The complainant questioned what possible prejudice could be caused to the CO's law enforcement functions by confirming or denying whether any information was held which records what consideration was given to whether a rule of the NUJ relating to its financial affairs was or was not complied with. He contended that, *'the only purpose served by refusing*

*to confirm or deny in the present circumstances would be to throw doubt on whether the CO has taken any steps to investigate my complaint*'. The complainant contended that as his involvement in this matter was publicly known he could not be considered a confidential source and invited the CO to withdraw Section 30(2). In respect of both Section 30 and Section 31 the complainant contended that the exemptions had been applied in a blanket fashion to all the information relating to his request, and that no distinction had been made between information that the CO had generated himself, that which had been obtained from third parties, and that obtained from the complainant. *'There has obviously not been any consideration of whether the records contain any information at all whose disclosure would **not** be harmful*'. The complainant noted that both the Commissioner and the Information Tribunal had warned against public authorities adopting a blanket approach to exemptions.

19. The complainant advised the CO that although his initial and primary concern was with the conduct of NUJ officers, officials and NEC members, the refusal of the CO to provide information on the results of his inquiries into whether the union's rules were complied with, and the method of conducting such enquiries, had begun to raise a question in his mind about the *'quality and integrity of his investigation*'.
20. Following an internal review the CO wrote to the complainant on 26 November 2013. The CO was no longer maintaining a neither confirm nor deny response, and found that the public interest test had not been applied as it should have been. The CO found that having reconsidered the public interest test, it was *'necessary to conclude that it was in the public interest to confirm that the CO had the information requested to the extent already noted*'. As regards the first part of the request, the CO advised that the complainant's allegation had been considered under the procedure for purported financial irregularities, and not as a breach or rule complaint. As no separate consideration had been given to a breach of rule complaint, the CO confirmed that *'there is no information held in relation to that*'.
21. With regard to the second part of the request, the CO advised that, *'there is nothing which the CO relied on in reaching his decision arising out of the meeting with the representatives of the NUJ, referred to in my letter to you of 30 May 2013, which has not already been set out in that letter*'. In respect of the third and final part of the request, the CO stated that:

*'The salient facts of the case on which the CO relied in reaching his decision are set out in my letter to you of 30 May 2013. There is nothing in any correspondence, notes of telephone calls, emails or meetings between the CO or his staff and representatives of the NUJ*

*which raises a relevant issue suggesting that the CO ought to have taken a different decision. That much should be clear from the reasons for the decision provided to you, such that it is not necessary to disclose anything further to explain the course of action taken in respect of your allegations'.*

22. The internal review found that Section 30(1)(b) applied to the withheld information in its entirety and for that reason it was not necessary to consider any other exemptions, although the CO reserved its position to do so.
23. The review stated that, '*full reasons for the CO's decision*' had been set out in the letter to the complainant of 30 May 2013, and that letter '*is sufficient to satisfy the public interest in the circumstances of this case*'. The review noted that, '*if the documents requested disclosed a major flaw in the investigation or that the CO's decision was improperly made, there would of course be a public interest in that information being disclosed. But that is not the case*'.
24. The review expanded upon what had been noted in the refusal notice, explaining that it was the CO's practice to undertake initial investigations which engage trade unions on a voluntary basis. Part of the purpose of the initial enquiry was to establish whether the CO should exercise his formal powers, such as the appointment of inspectors, which can be a considerable expense to the public purse. It was the CO's judgement that routine disclosure of documents produced or provided in the course of such investigations would prejudice this process, since the CO may receive less, and less candid, cooperation from trade unions as a result. In other cases disclosure would be likely to mean that the CO would have to use his statutory powers at an earlier stage, which would be less efficient and more expensive for the tax payer, and would frustrate the purpose of the preliminary investigation.

## Scope of the case

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25. The complainant contacted the Commissioner on 25 February 2014 to complain about the way his request for information had been handled.
26. In his 18 page complaint, the complainant reiterated the points he had made in his internal review request and contended that it was '*doubtful*' that the CO could rely on Section 30(1)(b) to withhold the requested information because of the remoteness of the offences that the CO has the power to prosecute from the information which the complainant was seeking. In any event, the complainant stated that '*the public interest*

*lies in the CO adequately discharging his functions and being seen to do so, not in enabling him to deal with complaints on a voluntary basis'.*

27. The complainant argued that, *'the issue which is absolutely central to this case'* was the failure of the CO to provide the complainant with his (the CO's) assessment of whether the union's rules had been complied with in relation to the payment to Mr Dear. The complainant contended that, *'it would be in the public interest for the CO to reveal his assessment of the allegation regarding the union's rules, if only to restore my – and others' confidence in his office'*.
28. During the course of the Commissioner's investigation and following discussions with the Commissioner, the CO provided the complainant with an addendum letter to the original outcome letter of 30 May 2013. This letter of 21 October 2014 addressed the issue of the rules which had been missing from the original letter. However, the complainant subsequently contacted the Commissioner to confirm that the further information provided did not resolve his complaint and that he expected the Commissioner to require the CO to provide him with all the information requested.
29. The Commissioner considers that the scope of his investigation is whether the CO was entitled to withhold the information requested on the basis of the exemptions applied, primarily Section 30(1)(b), or (in the alternative) Section 31(1)(g) and Section 40(2), which were applied by the CO in submissions to the Commissioner.
30. In reaching his decision, the Commissioner has had sight of the withheld information and has fully considered the correspondence and detailed submissions which this matter has generated. The Commissioner has also been mindful that the CO is not a public authority which has much practical experience and familiarity with the FOIA (the current complaint being the first such complaint to the ICO).

## **Reasons for decision**

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31. Section 30(1)(b) of FOIA states that:

*(1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of –*

*(b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct'*



32. Section 30(1)(b) is a class-based exemption, which means that if the information described in the request matches the description of information set out in Section 30(1)(b) then the exemption is engaged and the information is exempt from disclosure. The exemption is qualified by the public interest test, which means that the information can only be withheld from disclosure if the public interest in maintaining the exemption outweighs the public interest in disclosure.
33. As noted above, in submissions to the Commissioner, the complainant advanced the argument that the CO was unable to rely on Section 30(1)(b) to withhold the requested information in this case. He explained that although the internal review had pointed to the CO's powers under Section 45 of the 1992 Act, the offences described in that section relate to the failure to maintain specified types of records, or the deliberate falsification of specified records, and the complainant argued that his complaint had not related to any such matters. The complainant contended that the powers in Sections 45(5) – 45(9) for example, were powers in relation to offences that, *'are clearly incidental to the kind of investigation that would have been carried out in this case'*.
34. The complainant further contended that the CO cannot institute criminal proceedings which stem from the purpose of any investigation, and in support of his claim, referred to Sections 37(B)(2)(a)-(d) of the 1992 Act (see paragraph 7 above) which list the purposes for which the CO may appoint an inspector to investigate allegations of financial misconduct, together with Section 37C(4)(a) which states that if, during the course of an investigation, matters have come to light which suggest that a criminal offence has been committed, then the CO may refer those matters to the appropriate prosecuting authority. *'In other words'*, the complainant contended, *'the information gathered during the course of a CO's investigation under Sections 37A-E of the 1992 Act is not gathered for the purpose of an investigation for which the CO has the power to conduct criminal proceedings, and the information cannot be exempt pursuant to Section 30(1)(b) of the FOIA'*.
35. In submissions to the Commissioner the CO directly addressed the points which the complainant had made about the application of Section 30(1)(b) to the request. The CO acknowledged that the complainant had correctly pointed out that some of the broad range of offences in Section 45 of the 1992 Act are incidental to an investigation by an inspector or the demand by the CO for the disclosure of documents. *'However, the vast majority of the provisions relate to specific statutory requirements on trade unions relating to their financial affairs'*. The CO listed the Section 45 offences and advised that in the issues raised by the complainant, *'essentially the wrongful payment to a Mr Jeremy Dear*

*and attempted concealment of the same, it was a possibility that a number of these offences could have been committed'.*

36. The CO gave the example of Section 28(2), which provides that, *'proper accounting records shall not be taken to be kept with respect to the matters mentioned in subsection (1)(a) unless there are kept such records as are necessary to give a true and fair view of the state of the affairs of the trade union and to explain its transactions'*. The CO advised the Commissioner that in addition to this offence, in the circumstances set out by the complainant it was possible that Section 45(7), (8) or (9) could be engaged, and confirmed that, *'in each of these examples should evidence of an offence have come to light the CO would have the power to prosecute with or without an inspector's report'*.
37. Setting out the grounds upon which the CO has the discretion to appoint an inspector (see paragraph 7), the CO contended that it was clear that an investigation of the issues raised by the complainant could well have uncovered that the union had failed to comply with a duty imposed by the 1992 Act. The CO also set out Section 37C(4) in full, and noted that this was, *'a permissive section and places no obligation on the CO'*. In practice the CO advised that should an inspector discover acts which suggested that a criminal offence such as theft had taken place, it is quite likely that these would be reported to the police for them to investigate whether to refer the case to the CPS. The CO stated that the Section 45 offences are not covered by this provision and, *'it in no way prevents the CO prosecuting any offences listed in Section 45'*.
38. The CO explained as follows:
- 'In practice when allegations of financial irregularity are made to the CO he has the power to investigate them. In commencing that investigation it is not sensible or possible for the CO to distinguish between matters which may or may not constitute offences listed in Section 45 of the 1992 Act. That is something that can only be done once the investigation has been conducted and conclusions can be drawn as to whether or not offences have been committed. The CO has the power to conduct prosecutions in relation to these sorts of allegations of financial irregularity, and does so. Specifically, with informal investigations the CO may, by way of a full and frank discussion discover offences. However, he may choose to require a union to make changes rather than exercise his discretion to prosecute'*.
39. The Commissioner notes that Section 30(1)(b) encompasses investigations where although a criminal offence is suspected from the outset, the matter can be dealt with in a number of ways, for example a

regulator could impose civil sanctions rather than resorting to criminal procedures. In submissions to the Commissioner, the CO confirmed that none of the withheld information was gathered after the decision was taken not to proceed to a full investigation or to a prosecution. Having considered the withheld information, and the supporting submissions provided by the CO, the Commissioner is satisfied that the information falls within the scope of the description set out in Section 30(1)(b) and that the exemption is engaged.

40. As previously noted, Section 30(1)(b) is subject to a balance of public interests test by virtue of Section 2 of the FOIA. This means that the exempt information must be disclosed unless the public interest in maintaining the exemption cited by the CO outweighs the public interest in disclosure. The Commissioner has considered the arguments of both parties in reaching a conclusion on this point.

### **Public Interest Test**

41. In his complaint to the ICO the complainant summarised what he considered to be the five strong public interest factors which favoured disclosure of the information which he had requested. These were as follows:

- To provide accountability for the CO's conduct of his enquiries;
  - To establish whether the public generally should have confidence in the CO competently discharging his duties;
  - To establish what the CO's assessment was with regard to the NUJ complying with its own rules relating to a financial matter;
  - To provide the underlying information that formed the reasons for the CO's decision not to appoint an inspector, and
  - To expose the wrongdoing which the complainant believes occurred when the NUJ made the payment to the outgoing General Secretary.
42. From the outset of his investigation the Commissioner made clear to the complainant that (subject to the observations of the Information Tribunal referred to in paragraph 69 of this notice) it was not his role or remit to judge or question the decision of the CO in his complaints function and that the Commissioner could not act as a point of appeal

for the complainant with regard to his clear dissatisfaction with the CO's decision. The complainant accepted this and advised the Commissioner that he was in no way *'seeking to have my complaint to the CO litigated via the back door'*. But he contended that it was, *'central to the ICO's consideration of the public interest in disclosure, that he should form a view on whether I should have been told exactly what view the CO had formed on the critical issue of whether the rules of the NUJ relating to its financial affairs had been complied with'*. The Commissioner would agree with this contention.

43. The complainant informed the Commissioner that it was his belief that the CO had exercised his legitimate discretion not to provide reasons for deciding not to appoint an inspector, *'because the information I have requested will show that he did reach the conclusion that the relevant rules had not been complied with, but he nevertheless did not wish to appoint an inspector to commence a more formal investigation'*. The complainant contended that the CO had no discretion whether or not to comply with the FOIA, *'when one of the key bases for doing so under the 1992 Act has been established; the rules of the NUJ had not been complied with; that is, they had been breached'*.
44. In his complaint the complainant stated that he did not believe that the information disclosed by the CO to date satisfies the public interest in the CO being open about the conclusions he reached on the key aspect of the complaint to him (ie the position of the payment in respect to the union's rules), and did not provide the complainant with sufficient information to make an informed judgement about the quality and conduct of the CO's investigation of his complaint.
45. In its responses to the request the CO put forward a number of arguments why the public interest supported maintaining the Section 30(1)(b) exemption to the withheld information. The Commissioner would note that the arguments advanced were of a generalised rather than information specific nature and some were put forward when the CO initially provided a neither confirm nor deny response to the request, which, as noted, was not maintained at internal review.
46. The CO explained that it was the CO's practice to undertake initial investigations into such matters with trade unions on a voluntary basis and that trade unions' had, for the most part, readily complied with this approach. The CO contended that such co-operation would be jeopardised by the release of information obtained during initial investigations, thus prejudicing further investigations. The CO argued that there was a general and strong public interest in ensuring that the CO, as a public authority, is able to carry out investigations effectively

and therefore any disclosure which would undermine his ability to carry out such functions properly would run counter to such interest.

47. The CO was concerned that disclosure would prejudice future investigations by the CO, including where preliminary enquiries could assist in establishing whether more formal procedures needed to be undertaken. *'In particular, disclosure of information provided in confidence or otherwise in the context of the CO performing his functions may lead to unwillingness on the part of trade unions to participate in enquiries, making it more difficult for the CO to perform his functions effectively and use up scarce resources'*.
48. At internal review, the CO fully accepted that, *'there is of course a public interest in ensuring that financial irregularities within trade unions are properly investigated and remedied. It follows that there is a public interest in ensuring that the CO exercises his powers as respects allegations of financial irregularities properly and effectively'*. The CO also recognised that *'that public interest is most pressing where, as in this case, the CO has decided not to proceed with an investigation'*.
49. The CO also argued that there was a public interest in protecting the CO's internal processes so that communications of CO staff could remain full and frank without fear of being made routinely available to the public. The CO contended that it was in the public interest that there should be no hindrance to the deliberative process in future cases, *'and routine disclosure of internal documents may cause such a hindrance as it could lead to staff being less candid in recording their views in future'*.

### **Balance of the Public Interest**

50. In assessing the public interest factors specific to this matter the Commissioner considers that it is necessary to put the withheld information into context. The information comprises approximately 370 pages, of which approximately 45 pages comprise internal notes and advice memos between the CO and his staff, including assessments of the information and evidence and confidential information provided to the CO by the NUJ. The majority of the remaining information (some 320 pages) mainly consists of information provided to the CO by the NUJ (such as minutes of various union committees, financial statements and historical union agreements). Much of this information may already be in the public domain and since the CO has advised the Commissioner that it has *'no particular reason'* for objecting to its disclosure, can be presumed not to be sensitive.
51. Having considered all the withheld information, the Commissioner considers that the actual investigative material (that which is of

particular interest to the complainant) is largely restricted to the approximately 45 pages identified by the CO as being sensitive. This distinction in the sensitivity of the withheld information is an important one, in light of the legitimate concerns which the complainant has raised about the blanket application of the exemption in this case.

52. As noted earlier in this notice, it was clear from the complainant's original complaint to the CO that he was of the view that in making the payment to Mr Dear, the NUJ had not complied with/breached its rules and that the complainant duly expected the CO to investigate this allegation and provide his assessment of the same. It is also clear from the CO's correspondence to the NUJ of 27 November 2012 and indeed from the contents of the withheld information that the CO was aware of and applied his attention to the issue of the rules in respect of the complaint received. In its internal review the CO stated that, *'full reasons for the CO's decision'* were set out in the outcome letter to the complainant of 30 May 2013. However, as the complainant correctly asserted to the Commissioner, *'nowhere in that letter did the CO tell me what his finding was on whether the rules of the NUJ relating to a financial matter were complied with'*. Indeed the letter of 30 May 2013, whilst detailed on other matters, did not contain any reference to the union's rules.
53. In correspondence with the CO, the complainant had referenced *The Principles of Good Complaint Handling*, published by the Parliamentary and Health Service Ombudsman, that states that public bodies should be, *'open and honest when accounting for their decisions and actions. They should give clear, evidence-based explanations, and reasons for their decisions'*. In his complaint to the ICO, the complainant explained that, *'the reason for my request for information of 6 August 2013 was because his letter did not explain what consideration the CO had given to my complaint that the rules of the NUJ relating to a financial matter had not been complied with. The CO has still not explained in any of his correspondence with me what view he reached on this matter'*.
54. During the course of his investigation the Commissioner explained to the CO that the absence of any mention of the rules in the outcome letter of 30 May 2013 was not satisfactory or acceptable from a transparency and accountability perspective. In light of the previous complaint correspondence the omission of any reference to the rules in the outcome letter was striking and the complainant's concerns on this key point were entirely understandable and reasonable. Without confirmation of the CO's view on this central aspect of the complainant's complaint to him, there was a clear shortfall in terms of transparency and accountability of the CO's findings. It therefore was not the case,

as stated in the internal review, that the letter of 30 May 2013 was *'sufficient to satisfy the public interest in the circumstances of this case'*.

55. The Commissioner suggested to the CO that this transparency deficit could be remedied by the provision of further information to the complainant which clearly and accurately reflected the CO's findings on the rules issue.
56. The CO agreed to proceed as advised and wrote to the complainant on 21 October 2014. This letter, which was intended as an addendum to the outcome letter of 30 May 2013, addressed the rules aspect of the complainant's complaint. The CO confirmed to the Commissioner that the information disclosed in the letter of 21 October 2014 was made in response to the complainant's information request and was correspondingly regarded as non-confidential and a disclosure to the world at large.
57. The CO cited the union rules which the complainant had alleged breaches of in his complaint to the CO. The CO emphasised the test against which he had considered the alleged breaches, this two-fold test essentially being:
  - (i) are the rules referred to *'a rule of the union relating to its financial affairs'*, and
  - (ii) were there circumstances suggesting that such a rule had not been complied with.
58. Should both parts of the test be satisfied then under Section 37B(2) of the 1992 Act the CO has discretion whether to appoint or not appoint an inspector. The CO informed the complainant as follows:

*'in relations to your allegations of financial irregularity the CO did indeed consider whether you had referred to rules relating to the financial affairs of the union and whether there were circumstances suggesting that such rules had not been complied with. On the information before him the CO did not accept that it was clear that the payment to Mr Dear was not compliant with the rules of the union. In essence the CO took the view that none of the rules you referred to placed a requirement on the trade union that any such payment be approved by the NEC prior to it being made. In essence the rules you referred to set out the powers and discretion that the NEC had in relation to the financial affairs of the union. The CO's enquiries did not lead him to a view that any other rule of the union placed any such requirement on the NEC'*.

59. The CO went on to explain that it was against the above background that he had gone on to consider more broadly the allegations which the complainant had made regarding the payment to Mr Dear and the CO's discretion whether or not to appoint an inspector. The CO stated that that outcome had been communicated to the complainant in the letter of 30 May 2013 and that, *'the essence of that letter and the CO's decision contained in it was that he did not accept that there was sufficient evidence that a rule relating to the financial affairs of the union had not been complied with'*. In actual fact, as noted previously, that letter had contained no reference to or comment on the rules and this was only rectified by the later addendum letter of 21 October 2014.
60. In the addendum letter the CO confirmed that his consideration of the other circumstances, the existence of which would have given him the discretion to appoint an inspector under Section 37B of the 1992 Act, did not lead him to the view that there was sufficient evidence to accept that such circumstances had existed. In deciding whether to exercise his discretion to appoint an inspector, the CO advised that he had been mindful of the following factors:
- The acceptance of the union of fault in respect of the failure to report the agreement evidenced by a letter to Mr Dear of 25 January 2011;
  - The union's tenable case that the disputed payment was within the terms of Mr Dear's contract of employment;
  - That the issues had been investigated and considered within the union's democratic process by the NEC, its Finance Committee and the ADM;
  - That the appointment of an inspector would not be an appropriate or proportionate use of public funds.
61. The Commissioner is satisfied that the information provided to the complainant in the CO's addendum letter of 21 October 2014 concerning his assessment of the union's rules is an accurate and fair reflection and summary of the withheld information. It provides the complainant with what he was reasonably seeking in making his information request (and what was noticeably absent from the original outcome letter of 30 May 2013), the view of the CO as to the allegations made by the complainant about the breaches of/non-compliance with, the union's rules.



62. In correspondence with the Commissioner dated 28 October 2014, the complainant contended that the CO's letter, *'simply does not explain the basis for his conclusion that, "none of the rules you referred to placed a requirement on the trade union that any such payment be approved by the NEC prior to it being made"'*. The Commissioner considers that the explanation for the CO's conclusion is clear from the information provided (none of the rules imposed a requirement). The complainant proceeded to question the CO's interpretation of the union's rules in respect of Mr Dear's legal entitlement to the payment made. The complainant (or indeed anyone else) is of course entitled to question or disagree with the CO's findings, but as the Commissioner had made clear from the beginning of his investigation, it is not the role or remit of the Commissioner to question or judge the decision of the CO and the complainant would need to pursue such concerns through the appropriate channels (eg judicial review).
63. The complainant contended that there remained a strong public interest in disclosure of the information which he had sought in parts two and three of his request, in which, *'the CO would have been heavily focused on the question of whether the payment to Mr Dear was something to which he was contractually entitled, or was a severance payment'*. However, the issue of Mr Dear's entitlement to the payment (as opposed to the union's rules) had been clearly and openly addressed by the CO in his original outcome letter of 30 May 2013 in which he stated that:
- 'The Certification Officer has noted the lack of contractual documentation relating to the period of Mr Dear's employment and to the relationship between his elected and his employed positions, which gives rise to uncertainty as to the precise legal position and hence the concern you have expressed. Whilst not expressing any view on the precise legal analysis of this situation, the Certification Officer observes that the union's position is a tenable one which may or may not be upheld in any legal proceedings'*.
64. The complainant stated that the public interest in disclosure of the information he had requested was not restricted solely to facilitating transparency about the CO's findings on the NUJ's rules but that there was *'a public interest in providing me with an opportunity to respond to the comments made to him by the NUJ officials – a basic principle of natural justice and administrative fairness in decision making'*. The Commissioner notes that the complainant was provided with a copy of the NUJ's original reply to his complaint by the CO.
65. The Commissioner notes that allowing the complainant further right of reply within his complaint is a private and not a public interest. The public interest is in the CO ensuring that sufficient information is

provided about his decisions on complaints to satisfy due transparency and accountability. Some of the arguments made by the complainant tend to suggest that he has conflated the legitimate (for FOIA purposes) public interest factors arising in this case with his own clear personal disagreement with the CO's findings. The complainant is entitled to take issue with the CO's decision, but would need to pursue such private concerns through the appropriate channels.

66. Whilst the Commissioner considers that some of the public interest arguments made by the complainant following the CO's provision of the addendum letter do not stand scrutiny, for the reasons noted above, the complainant did make the valid argument that given that the CO's investigation was over at the time of his request, and there was no prospect of the matter being re-opened, the public interest case for withholding the requested information on grounds of confidentiality was correspondingly weaker. *'In these circumstances, there is no reason to assume an inherent public interest in upholding the Section 30 exemption'*.
67. In correspondence with the Commissioner the complainant suggested that the Commissioner had stated that the public interest in maintaining the Section 30 exemption *'can only be overturned'* where there is wrongdoing or illegality. However, in his correspondence to the complainant of 16 July 2014, the Commissioner had referenced such factors as being *'the type'* of public interest that could provide a compelling case for disclosure and not the only such factors. What is clear from the withheld information, and the additional information provided to the complainant by the CO, is the complainant's assertion that, *'the information I have requested will show that he (the CO) did reach the conclusion that the relevant rules had not been complied with, but he nevertheless did not wish to appoint an inspector to commence a more formal investigation'* was entirely incorrect and suggests a pre-conceived opinion on the part of the complainant.
68. In considering the public interest in maintaining Section 30(1)(b), the Commissioner has focused upon what the exemption is designed to protect. Broadly, the exemption exists to ensure the effective investigation and prosecution of offences and the protection of confidential sources. It recognises the need to prevent disclosures that would prejudice either a particular investigation or set of proceedings, or the investigatory and prosecution processes generally, including any prejudice to future investigations and proceedings.
69. In *Alan Digby-Cameron v the Information Commissioner and Bedfordshire Police and Hertfordshire Police (EA/2008/0023 and 0025)*, the Information Tribunal summed up the relevant factors to be

considered when assessing where the public interest balance lies in Section 30(1) cases. These are as follows:

- a) the stage a particular investigation or prosecution has reached;
  - b) whether and to what extent the information is already in the public domain;
  - c) the significance or sensitivity of the information requested, and
  - d) whether there is any evidence that an investigation or prosecution has not been carried out properly which may be disclosed by the information.
70. Taking the above factors in turn the Commissioner would note as follows. He accepts the complainant's contention that due to the CO having concluded his investigation of his complaint at the time of his information request, and there being no realistic prospect of the matter being re-opened, the public interest in maintaining the exemption, in order to provide a private thinking space for the CO in respect of the complainant's complaint, was significantly diminished. The public interest would clearly have been stronger, if the CO's investigation had been ongoing at the time of the request.
71. The Commissioner considers the extent to which the information was already in the public domain to be crucial on the facts of this specific case. Prior to his request the complainant had been provided with the CO's outcome letter of 30 May 2013. As previously noted, whilst this letter provided the findings of the CO on the issue of Mr Dear's entitlement to the payment made to him by the NUJ, it was entirely silent on the main aspect of the complainant's complaint; whether, in making the payment, the union had breached or not complied with its rules. The Commissioner has observed, in view of this transparency deficit, that it was both reasonable and foreseeable that the complainant would express concerns/dissatisfaction about this omission.
72. The information provided to the complainant in the CO's addendum letter of 21 October 2014 is a fair and accurate summary of the most sensitive parts of the withheld information (the approximately 45 pages of internal notes and advice memos between the CO and his staff, and confidential information provided to the CO by the NUJ). There is nothing of significance in the withheld information that has not been reflected or recorded in the CO's letters of 30 May 2013 and 21 October 2014. The Commissioner considers that the information which the CO has now made available (albeit belatedly) about his findings on the

complaint referred to him, substantially reduces the public interest value and weight of the approximately 45 pages.

73. The Commissioner recognises that the information provided to the complainant by the CO is not the same as that which was requested, but it is clearly extremely similar, since it provides confirmation of the CO's assessment and findings and essentially condenses and confirms these.
74. The significance of the information relates to both the subject of the investigation and what the information reveals about the probity or integrity of the investigative process. In submissions to the Commissioner, the complainant acknowledged that, *'it is not inconceivable for someone to argue that, regardless of the number of members of the NUJ (over 31,000), this is a private interest for the membership and employees of the NUJ'*, but he advanced a number of reasons why he believed that the governance of a trade union like the NUJ was *'a matter of public concern and interest beyond the organisation's paying membership'*.
75. The Commissioner would not disagree with this proposition, and recognises that the complainant may not be the only individual (NUJ member or otherwise) to have concerns or criticisms of the payment made to the outgoing General Secretary. However, the Commissioner's role is confined to the information held by the CO relevant to the complainant's request, rather than the governance or conduct of the NUJ.
76. Had the CO not provided the complainant with the further information about his assessment and findings on the breach of rules matter, then the significance of the withheld information would clearly have been greater, since it would have been the only source of information shedding light upon the CO's findings on that matter, providing due transparency and accountability of the CO's decision.
77. As previously noted, contrary to what has been implied by the complainant, the Commissioner is satisfied that the withheld information reveals nothing which would question the probity or integrity of the CO's investigation. In correspondence to the Commissioner, the complainant expressed his amazement *'if a regulator such as the CO had not recorded contemporaneously, in one form or another, the view formed on whether there had been a failure to comply with a rule relating to the union's financial affairs'*. Yet the Commissioner had already made clear to the complainant that the CO's view as confirmed in his letters of 30 May 2013 and 21 October 2014 was an accurate reflection and summary of the recorded parts of the *contemporaneous* withheld information.

78. In submissions to the Commissioner, the complainant questioned the claims by the CO that disclosure of information obtained from trade unions on a voluntary basis would jeopardise the cooperation usually provided to the CO by the trade unions and thus prejudice future investigations. The complainant cited a number of ICO and Information Tribunal decisions in which it had been noted that there was often an incentive for organisations to cooperate with regulators so as to mitigate any steps taken against them and avoid enforcement action.
79. The Commissioner does not consider that the disclosure by the CO of information voluntarily provided to him by trade unions would necessarily undermine his ability to carry out investigations in the sense that he would still have recourse to his formal powers if necessary. However, the Commissioner does not discount the possibility that not all trade unions/employers' associations would be so forthcoming with the voluntary provision of information if they knew that such information would be routinely disclosed. There would clearly be very real resource implications if the CO were required to use his enforcement powers on a more frequent or routine basis. As a public authority with scarce resources (currently a common feature of many public authorities), the Commissioner considers that any action which could lead to avoidable or disproportionate expenditure of the CO's limited resources could limit the effectiveness and scope of the CO's investigations.
80. The complainant contended that the CO's arguments about protecting the internal processes of his staff were, *'irrelevant to the interests protected by Section 30'* and noted that the Information Tribunal has been clear that public interest factors should focus on the particular public interest which an exemption is inherently designed to protect.
81. The Commissioner would agree that the arguments advanced by the CO on this point would fit more comfortably with the Section 36(2)(b) exemption (the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation) and the CO has not applied this exemption to the request. However, the Commissioner considers that there is clearly an overlap between the two exemptions in respect of the public interest which each is designed to protect. The effective investigation of offences (particularly those of a regulator) will often involve internal discussions and deliberations of the public authority's staff, and the obtaining of information, some of which will be made and provided on the understanding and in the context of confidentiality.
82. The Commissioner considers that there is a legitimate and important public interest in protecting a public authority's internal investigative processes so that the most candid and useful information/advice can be

provided and discussed. Although this public interest may lessen in an individual case once an investigation has concluded or there is no prospect of further investigation, the Commissioner considers that there remains a general public interest in protecting the internal confidentiality of a public authority's processes so as not to undermine or constrain the effectiveness of its investigations in future cases.

83. Having considered all the circumstances and factors in the present case, the Commissioner is satisfied that in respect of the approximately 45 pages of internal deliberations of the CO, and confidential information provided to the CO by the NUJ, the public interest favours maintaining the Section 30(1)(b) exemption. Taken together, the information contained in the CO's letters of 30 May 2013 and 21 October 2014 accurately and appropriately reflects and records his assessment and findings as contained in the internal deliberations. The information now disclosed by the CO remedies the previous transparency deficit in respect of the CO's findings on the rules aspect of the complainant's complaint. The Commissioner is satisfied that due and necessary transparency and accountability of the CO's findings and decision has been met by the information disclosed.
84. The Commissioner considers that any additional public interest (as opposed to the private interest of the complainant) which would be served by disclosure of the internal/confidential documentation would be minimal, and is outweighed by the public interest in ensuring that the effectiveness of the CO's investigations is appropriately protected.
85. In respect to those parts of the withheld information which the CO has advised the Commissioner he has '*no particular reason*' to withhold (the bulk of the withheld information), the Commissioner considers that the public interest balance lies in favour of disclosure. Minutes of various union committees, financial statements and historical union agreements, many of which will be in the public domain, are clearly less sensitive than confidential or internal deliberative documentation. The Commissioner has been mindful of the complainant's concerns about the blanket use of Section 30(1)(b) in this case and it is apparent that not enough attention was given to the sensitivity and provenance of the individual documentation comprising the withheld information when the request was originally considered and responded to.
86. The Commissioner recognises that the complainant may already have had sight of some of this non-sensitive information and it will not be the information of most interest to him, but the FOIA is a public rather than private information access regime and information cannot be withheld unless exempt by virtue of an appropriate exemption(s) correctly applied.

## **Other matters**

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87. Although the responses of the CO to this request were misconceived in several respects and inadequate, particularly the initial approach to the public interest test, the Commissioner acknowledges and recognises that unusually amongst public authorities the CO has had little practical experience of the FOIA. The Commissioner would commend the CO for the full cooperation and helpful engagement which it provided in this case, particularly the provision of the further information to the complainant as to the rules aspect of his complaint which remedied the transparency deficit which had prompted the complainant's original request.
88. This case has demonstrated that the CO's previous appreciation and awareness of the transparency requirements of the FOIA, particularly in the context of a regulator's decisions, was not as ready as it should have been. The Commissioner hopes that the CO will use this case as a learning tool to incorporate (as much as possible and proportionate) improved transparency into its complaint responses/decisions. The CO will also need to increase its familiarity with the requirements of the FOIA, especially the operation of the public interest test attached to exemptions such as Section 30.

## Right of appeal

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89. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

90. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
91. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Gerrard Tracey**  
**Principal Adviser**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**