Information Tribunal Appeal Number: EA/2005/0006

Freedom of Information Act 2000 (FOIA)

Heard at Nottingham
On 27, 28 and 29 June 2006
Reconvened hearing on 11 September 2006

Decision Promulgated
28th September 2006

Before

JOHN ANGEL

Chairman
And
Jenni Thomson and Marion Saunders
Lay Members

Between

DR PETER BOWBRICK

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

NOTTINGHAM CITY COUNCIL

Additional Party

Representation:

For the Appellant: In person
For the Respondent: Mr Timothy Pitt-Payne
For the Additional Party: Mr Clive Jones

Decision

1. A. The Tribunal finds that the Information Commissioner (IC) was wrong in law in upholding the Nottingham City Council's (the Council) Refusal Notice because the Decision Notice was based on a finding of fact which the IC now accepts is not correct and that the Decision Notice cannot stand.

The Tribunal substitutes a new Decision Notice requiring the disclosure of the following documents to Dr Peter Bowbrick (Dr Bowbrick) within 14 days of the date of this decision, namely

a. from the bundle of documents sent to the Tribunal in confidence following the December Hearing minutes of an Executive Board meeting of 22nd July 2003 and a report from the Director of Education headed "School Reorganisation Proposal Closure of Margaret Glenn-Bott School, Re-allocation of the Catchment Area an the Expansion of Bluecoat School" also dated 22 July 2003;
b. from the bundle of documents sent to the Tribunal in confidence on 3 August 2006:
    i. an undated document of objection from a parent as redacted in disclosure to the Tribunal at pages 188 to 192 of the bundle;
    ii. a letter of objection from a Councillor dated 3 July 2003 at page 193 of the bundle;
    iii. a letter of objection from Ellis Guildford School and Sports College dated 16 July 2003 at page 194 of the bundle.

B. The Tribunal further finds that:

c. the Council failed to confirm within 20 working days of Dr. Bowbrick's request that it held information falling within the scope of his request. It thereby failed to comply with its duty under s.1(1)(a) of the Act within the time limit prescribed by s. 10;

d. the Council failed to disclose to Dr. Bowbrick within 20 working days of his request the information that it held that fell within the scope of his request and that was not subject to any exemption under the Act. It thereby failed to comply with its duty under s.1(1)(b) of the Act within the time limit prescribed by s.10.

e. the Council failed to identify within 20 working days of the request the exemptions upon which it relied in respect of certain documents falling within the scope of Dr. Bowbrick's request. It thereby failed to comply within its duty under s.17(1) of FOIA within the time limit prescribed by that section.

C. The Tribunal further orders that Nottingham City Council shall pay the whole of Dr Bowbrick's costs as taxed as a litigant in person.

D. In addition, because of the unsatisfactory way that the disclosures have taken place, the Tribunal recommends that the Information Commissioner uses his powers under s.48 FOIA to make a practice recommendation to Nottingham City Council specifying steps which in the Commissioner's opinion the Council should take in order for it to conform with the codes of practice under ss.45 and 46 of FOIA. In relation to this recommendation we are mindful of the fact that Dr Bowbrick has made further requests of the Council and the Tribunal is anxious that these requests do not result in further prolonged litigation. We would suggest, therefore, that this exercise is undertaken expeditiously.

Reasons for Decision

Background

2. The initial request for information was made by Dr Peter Bowbrick (Dr Bowbrick) to Nottingham City Council (the Council) in an email to Mr Alan Stead (Mr Stead) a Service Manager and head of the team responsible for freedom of information at the Council on 8th January 2005 (the Request). The email was headed access to information request, Freedom of Information Act 2000, and asked for the following information to be provided:

> *Bluecoat School Wollaton Park Site*
> *All documents, electronic and other, including minutes of meetings concerning the handing over of the former Margaret Glenn Bott School to Bluecoat. This should include enquiries from members of the public and responses to them.*
> *This should include details of who was consulted.*
> *All contracts and other agreements between any public body (including Government, Nottingham City Council and the LEA) and Bluecoat, including, for instance,*
>
> 1. *Contacts of sale,*
> 2. *Leases,*
> 3. *Maintenance agreements and*

4. Agreements on the education of children

Informal agreements as well as formal are required.

Any agreements between Bluecoat School and the Council regarding the use of the land and buildings on the former Margaret Glen Bott site.

3. Dr Bowbrick offered to provide additional clarification of the request if required. This offer was not taken up.

4. Mr Tony McGovern (Mr McGovern) the Chief Risk Officer at the Council wrote to Dr Bowbrick on 7th February 2005 and referred to the request for information relating to the Bluecoat School Wollaton Park Site. The letter stated that the previously supplied information should answer the queries. It also stated that if not satisfied with the response, Dr Bowbrick could make a complaint and an information leaflet explaining the complaints procedure was enclosed. The letter also explained that if following a response to the complaint Dr Bowbrick remained dissatisfied, he could approach the IC.

5. On 8th February 2005 Dr Bowbrick both emailed and wrote to Mr McGovern stating that he had not received any information relating to his specific questions. On the same day Dr Bowbrick also wrote to the Customer and Information Services Division under the complaints procedure stating that he had made a freedom of information request and that he had been refused any information.

6. On 15th February 2005 Mr Tony Austin a Solicitor to the Council wrote to Dr Bowbrick informing him that schools are regarded as being separate public bodies under FOIA and would probably hold the information he had requested. The letter continued "Therefore the information you require is not held by the Local Authority other than that which has already been provided to you." He was also referred to a number of steering committee reports which could be obtained from the Education Department. Finally it stated that information relating to future proposals for the school were in draft form and therefore subject to an exemption at Section 22 of FOIA. This letter also referred again to the complaints procedure and reference to the IC. From here in onwards we will refer to this letter as the 'Refusal Notice'.

7. The information which had been provided was in response to a request made before FOIA came into effect and was a copy of the *Scheme for Financing Schools in the City of Nottingham Local Authority*. In the Tribunal's view this information had little or no relevance to the Request.

8. The IC issued a decision notice on 5th July 2005 in effect upholding the Refusal Notice. A revised decision notice was issued on 1st August 2005 correcting the name of the public authority involved (the Decision Notice).

The process before the Tribunal

9. Dr Bowbrick appealed to the Tribunal on 10th July 2005 and the Council was ordered to be joined as a party on 12th August 2005 (the Joinder Notice) together with the following direction "that the Nottingham City Council provide to the Tribunal all documents and other information in their possession, including minutes of council meetings, in relation to the closure of Margaret Glen Bott School, Wollaton Park, in 2004 and/or its merger with Nottingham Bluecoat School, Aspley Lane in 2004 by 29 August 2005, indicating which documents and information are covered by the exemption claimed in the Information Commissioner's Decision Notice date 5 July 2005."

10. The Council did not comply with the direction by 29 August 2005. However at the Directions Hearing on 3 October 2005 (October Hearing) the Council appeared to be very helpful and as a result the Tribunal ordered

> "The Council agrees that between 3 October 2005 and 24 October 2005 it will use its best endeavours:
>
> a. To identify, in discussion with the Appellant, any documents in the possession of the Council falling within the scope of this request made under section 1 of the Freedom of Information Act 2000; and
>
> b. To provide to the Appellant any information that ought to have been provided to him in response to that request."

11. Also at the October Hearing the matter of exempt information was dealt with. The Council was ordered, in effect, to identify any information for which it was claiming an exemption and then to disclose this to the Tribunal in confidence. The issue of exemptions and confidentiality is dealt with by the Tribunal in its Practice Direction of March 2006 and Ruling in *Sugar v The Information Commissioner and the British Broadcasting Corporation* (12 May 2006, Case

Number EA/2005/0032). This has necessitated the Tribunal having private exchanges with the Council, even though the Tribunal still needed to determine whether exemptions claimed before the Tribunal which had not been disclosed previously, could in fact still be claimed. This important issue is dealt with later in this decision. The confidential exchanges have taken place with the knowledge of the other parties but without disclosing to them the contents of such exchanges, which would otherwise defeat the object of providing for exemptions under FOIA. Again this issue is more specifically dealt with later in this decision.

12. As a result the October Hearing was stayed pending this exercise taking place in hopeful anticipation that this would lead to Dr Bowbrick being provided with the information he had requested.

13. At the October Hearing it was envisaged in exchanges between Dr Bowbrick and Mr Stead that Dr Bowbrick would visit the Council's offices if necessary for several days to help identify the documents. This was recognised by Mr Stead's email to Dr Bowbrick of 7th October 2005 (email of 7th October 2005). Although there were some email exchanges following the October Hearing, no meeting or face to face discussion took place and it would appear that the Council took the unilateral decision that it was unnecessary as is again evidenced by the email of 7th October 2005. The Tribunal notes that, in evidence before the Tribunal at the full hearing in June 2006, Mr Stead denied that it had been envisaged that Dr Bowbrick would visit the Council's offices to help identify the information requested. This was not the recollection of the Chairman of this Tribunal, or as evidenced by the order, email exchanges and Dr Bowbrick in his evidence.

14. Around 20th October 2005 the Council sent information to Dr Bowbrick in relation to the order. On 23rd October 2005 Dr Bowbrick provided a detailed analysis of this information running to some 18 pages indicating what he regarded to be still missing and that he still wished to pursue the appeal as the information he had requested had not been provided.

15. The Council did not respond to this analysis and the Tribunal decided to reconvene the Directions Hearing on 9th December 2005 (December Hearing). A few days before the December Hearing the Council let it be known that it would be making further disclosures of approximately 1000 pages of information, but without giving a reasonable opportunity before

the December Hearing for Dr Bowbrick to consider these disclosures. At the December Hearing Dr Bowbrick was ordered

"By 31 January 2006…to lodge with the Tribunal, and serve on the other parties, his written response to the Council's most recent disclosure of information, explaining:

a. whether he considers that the Council has now made a full and proper response to his request under the Freedom of Information Act 2000; and
b. if not, in what respects he maintains that the Council's response is still defective."

16. Dr Bowbrick carried out this exercise and by letter dated 15th January 2006 to the Tribunal indicated there were still substantial gaps in the information supplied, and that there had not be an adequate response to his original analysis of 23rd October 2005.

17. At the December Hearing both the IC and Council admitted that the Decision Notice could not stand in view of the disclosures which had already taken place, which amounted to approximately 1000 pages of information and there was further information for which the Council claimed exemptions under FOIA. These exemptions were being claimed for the first time before the Tribunal. They had not been raised in the Refusal Notice or during the IC's investigation of Dr Bowbrick's complaint.

18. Other directions were made in order for the case to be prepared for the full hearing which eventually took place between 27th and 29th June 2006 (the Full Hearing). The Council made a further disclosure in March 2006..

19. Early on in the Full Hearing the parties were invited by the Tribunal to take the opportunity to agree among themselves what further information might be provided in response to the Request. They agreed to take up the opportunity and as a result the hearing was adjourned while these deliberations took place over approximately two days. What resulted was the production of a 36 numbered points document which the Council agreed to respond to under the terms of further directions dated 30th June 2006 (June Directions) and which also gave directions as to how the parties should respond to the Council's response.

20. The Council responded to the 36 points providing further limited disclosures to Dr Bowbrick and claiming further exemptions in relation to new information discovered. Dr Bowbrick considered this response and again found it did not finally satisfy his Request.

21. As a result the Tribunal reconvened the Full Hearing on 11th September to make its determination based on the papers before it, the parties having agreed that there was no further need for an oral hearing at this stage of the proceedings.

Jurisdictional point

22. At the commencement of the Full Hearing Mr Jones on behalf on the Council invited the Tribunal to substitute a decision notice that requires the Council to make a proper response to Dr Bowbrick's request. He argued that Part V of FOIA restricts the jurisdiction of the Tribunal to an appeal against the decision notice served by the IC pursuant to s.50 FOIA, and that there is no jurisdiction to deal with any other matter and certainly not acts, omissions or decisions of a public authority which are not the subject of the decision notice.

23. He further argued that the appeal process provides a filter to enable issues to be narrowed and reduce the need for and length and expense of appeals further up the ladder. In this case he proposed that we should allow the appeal which would have the effect of setting aside the decision notice and leaving it to the IC to make a fresh decision.

24. The difficulty with the course proposed by Mr Jones is that any substitute request would in effect cover the disclosure that has been made so far to Dr Bowbrick and therefore the question as to whether there is any further information that should be disclosed would be left unresolved. Mr Jones says that this issue could be dealt with by going through, first of all, an internal review and then a complaint to the Commissioner, and then a further appeal to this Tribunal. So in effect the whole procedure would go back to square one. Mr Jones contended that the Tribunal does not have jurisdiction to take any other course.

25. The Tribunal does not accept his argument about jurisdiction. Under s.58(1) FOIA the Tribunal can "allow the appeal or substitute such other notice as could have been served by the Commissioner." The question in this appeal is what, if any, substitute notice the Tribunal could serve, and in order to answer that question, the Tribunal needs to address the question as to whether the Council holds any further information other than the information that it has

disclosed or the information that it has identified in relation to which it has claimed an exemption. Therefore the Tribunal needs to engage with two questions. Firstly, is Dr Bowbrick correct when he says that there is yet further information that he has identified that has not been supplied? Secondly, is he also correct when he says that to the extent that the Council has relied on exemptions, it cannot do so because it has raised these exemptions too late. The Tribunal needs to resolve those two questions in order to decide what substitute notice it should serve, should the Tribunal decide to do so.

26. Moreover s.50(4), provides for what the Commissioner should do in a case where he considers that the public authority has failed to communicate information. In such a case the decision notice must specify the steps which must be taken for complying with the requirement. In other words, the decision notice does not simply require the public authority to go back and have another go at complying with the Act. The Commissioner's decision notice would require the disclosure of specified information within a time period. Similarly where the Tribunal serves a substitute decision notice, the substitute decision notice needs to set out the information to be disclosed within a time period. Alternatively, the substitute decision notice might acknowledge that all the relevant information has been communicated, but has been done so late, or that the public authority had failed to comply with other procedural requirements of FOIA.

27. Mr Jones also seems to be submitting that the Tribunal may only review the facts on which the notice in question was based. He says what has happened since this appeal was brought cannot possibly be part of the facts on which the decision was based. However both the IC and the Council have accepted that the findings of fact of the Commissioner, that the Council did not hold any relevant information, cannot stand. The Tribunal may review that finding of fact under s.58(2) FOIA in the light of evidence that has emerged since the Commissioner's decision. We are not confined to looking at the evidence that was before the Commissioner. Part of the process of reviewing a finding of fact is deciding what finding of fact should be put in its place. Then the choice for the Tribunal is to substitute a finding of fact that the information held by the Council is the information that has since been disclosed or, alternatively, to substitute a finding of fact that the information held by the Council is the information that has since been disclosed and certain further information in addition. Depending on which of those two findings of fact that the Tribunal substitutes, this will then feed into the decision that the Tribunal makes about what substitute notice, if any, the Tribunal should make.

28. Returning to the scope of the Full Hearing there are three possible options. The first is that the Tribunal could find that there has now been compliance with the Act but it is very late and we will allow the appeal because the Commissioner's decision notice cannot stand because it is based on an error of fact, but we do not need to go any further because, albeit the request has been complied with late, the Council has done what it was required to do. The second option is to find that the Council may have done what it was required to do but we, the Tribunal, think that we should substitute a decision notice that makes clear in what respects the Council failed to comply with the Act. The third option is for the Tribunal to find that the Council has taken certain steps but it still has not fully complied, and in order fully to comply it has to take the following steps.

29. In order to choose between those three options, the Tribunal needs to ascertain, firstly, does the Council hold any further relevant information. Secondly, can the Council in principle rely on exemptions which it has only raised in the course of the proceedings before the Tribunal. Thirdly, if it can, are the particular exemptions that it has invoked, rightly invoked in the particular circumstances of this case.

Whether the Decision Notice can stand

30. The IC and the Council have agreed the Decision Notice cannot stand. The Council admits that it did hold information the subject of the Request. The Refusal Notice was issued in breach of s.1 FOIA. The IC admits it was wrong in law in having upheld the Refusal Notice and dismissing Dr Bowbrick's complaint under s.50 FOIA because the Decision Notice was based on a finding of fact which the IC now accepts is not correct. Under s.58(1)(a) we find the Decision Notice was not in accordance with the law.

31. The next matter for the Tribunal to decide is whether to allow the appeal or issue a revised decision notice under s.58(1) FOIA, and if so on what terms. The decision on which option to take depends on whether or not the Tribunal should order the Council to disclose further documents to Dr. Bowbrick. Therefore the Tribunal needs to consider whether the Council hold further documents falling within the Request that it ought now to disclose to Dr. Bowbrick.

32. We accept that despite a long drawn out process the Council has now made extensive attempts to locate the relevant information. These have been set out at length in response to direction orders, the witness statements prepared by the Council and evidence given by those witnesses at

the Full Hearing, and in the detailed material prepared by the Council following that hearing. In the light of all of this material, which is now very extensive, the Tribunal concludes that the Council has now conducted the sort of investigations that it should have conducted at the outset, which would, in the Tribunal's view, have avoided the lengthy litigation in this case.

33. We appreciate that Dr Bowbrick is still not satisfied with the Council's investigations but we do not believe that if the Tribunal ordered, in effect, further investigations, bearing in mind the Tribunal has seen in confidence many other documents to which the Council has claimed an exemption that such investigations would result in further disclosures. The matter of exemptions is dealt with in detail below and the Tribunal does find that some of the documents claimed to be subject to exemptions should be disclosed.

Can exemptions be claimed for the first time before the IC

34. The Council has supplied certain documents to the Tribunal in relation to which it claims exemption under FOIA.

35. The Council is relying on exemptions in this appeal, which are exemptions that it did not invoke either in its initial reply to Dr Bowbrick or in the course of the IC's investigation. Therefore the Tribunal needs to decide whether the Council is debarred from relying on those exemptions because they are only raised at this late stage, that is to say, following the appeal to the Tribunal. If the Council is debarred from relying on those exemptions, then there is no need to consider whether they have been properly invoked in relation to the disputed information. This is an important general question for the Tribunal in terms of the scope of the Tribunal's enquiry.

36. If the Council can rely in principle on exemptions claimed at this late stage, then the next matter for us to decide is whether the particular information in question falls within the particular exemptions relied on. The principal exemption now being claimed is that of legal professional privilege (LPP) under s.42 FOIA. The Council has provided certain information to the Tribunal only. As stated earlier in this decision there has been a process of confidential written exchanges between the Tribunal and the Council in order to properly determine whether the material put before us in confidence is caught by the exemption being claimed, and if so whether the public interest balance has been correctly carried out. Inevitably these exchanges have to be confidential because, if they are made public at this stage and disclose the content of the disputed information, that would pre-empt the very question that is at issue, which is whether

that disputed information should be disclosed to Dr Bowbrick or not. If an appellant finds out the content of the information from what is said at the Tribunal appeal, then the Tribunal appeal would be rendered futile. This is a problem that recurs time and again before this Tribunal given the nature of our jurisdiction and the questions that we are trying to resolve and why the Tribunal have issued a Practice Direction on confidential information and issued a ruling on the subject in *Sugar* (cited above).

37. In order to deal with that question of principle about exemptions a good starting point is to turn back to the language of FOIA. Under s.1(1) the general right of access to information held by public authorities falls into two parts. The right to be informed, whether the authority holds information of the description specified in the request; and then the right to have the information communicated. From the point of view of the public authority, there is a duty to confirm or deny which corresponds to s.1(1)(a) and a duty to communicate which corresponds to s.1(1)(b).

38. The duty to confirm or deny is something that does not play a major part either in most of the IC's decisions or in most of the appeals so far to the Tribunal, because the duty in itself is a very limited duty. It is not a duty to provide a list of documents that the public authority holds falling within the scope of the request. It is a duty to say whether the public authority holds any relevant information or not. So in most cases that duty is relatively easy to comply with. The real issue is in relation to what is the duty to communicate. In other words the duty that corresponds to s.1(1)(b); the right for the requester to have information communicated to him or her. That duty exists, except in circumstances where there is a relevant exemption. S.2 provides that that duty does not arise either in respect of information that falls within an absolute exemption or within a qualified exemption provided in the latter case that the balance of the public interest is in favour of maintaining the exemption rather than disclosure.

39. S.2 FOIA is framed in terms that the duty to communicate does not arise if certain provisions apply. It is not framed in terms that if a public authority contends that an exemption is applicable and that contention is upheld by the IC or the Tribunal, then the duty to communicate does not arise. S.2 says that if an exemption applies, the relevant duty does not arise.

40. However, there are also procedural duties on the public authority in respect of exemptions under ss. 10 and 17 of FOIA. S.10 sets the time limit for compliance with requests, in general not later than the 20th working day following receipt. S.17 requires that where a public authority is

relying on an exemption, then within the same timescale for complying with the s.10 duty, it has to notify the requester in essence that it is relying on an exemption and why the exemption applies, if that is not otherwise apparent. Where a qualified exemption is relied upon, the public authority also has to set out its reasons for claiming that the balance of the public interest is in favour of maintaining the exemption.

41. S.17(1) requires the public authority to provide the applicant with a notice containing certain information within the time limit in s.10(1). S.10(3) allows an extension of time where qualified exemptions are being claimed in order to apply the public interest test, but at the end states that "this subsection does not affect the time by which any notice under section 17(1) is to be given." This would appear to mean that public authorities have to give the s.17(1) notice within the time limit specified in s.10(1), namely by the 20th working day following receipt, but under s.10(3) a potential extension of time for disclosure is given in cases where there is a qualified exemption at stake, and in those cases the public authority has "until such time as is reasonable in the circumstances." This means that authorities have at the most 20 working days to specify the exemptions that they rely on, but if they are relying on a qualified exemption, then they may be entitled to further reasonable time in order to decide where the balance of public interest lies and a further reasonable time to communicate the information in question, if the authority's decision is that the information ought to be communicated.

42. If a public authority does not raise an exemption until after the s.17(1) time period, it is in breach of the provisions of the Act in respect to giving a proper notice because, in effect, it is giving part of its notice late. However FOIA does not say that that failure to specify the exemption within the 20 working day time limit means that the authority is disentitled thereafter from relying on the exemption in any way. If the intention of FOIA had been that the exemption could no longer apply to the information in such circumstances then it would have been expected that the Act would say this in very clear terms, because otherwise it is a very draconian consequence of the failure to comply with the statutory time limit.

43. Where there is a complaint to the IC under s.50 the Commissioner has various obligations. Specifically under s.50(4), where the IC decides that there has been a failure to communicate or a failure to confirm or deny, then the effect of s.50(4)(a) is that the decision notice issued by the Commissioner has to specify what the authority must do and the period within which those steps

must be taken. Similarly, if there has been a failure to comply with the requirements of ss. 11 or 17, the decision notice must specify what should be done and when it should be done.

44. The interesting point about s.50(4) is that it is treating a failure to communicate or confirm or deny and a failure to comply with the time limits in s.17 as being two separate issues. There is the issue in relation to compliance with the s.17 time limit. Then there is the issue of compliance with the duty to confirm or deny under s.50(4)(a). If there has not been compliance then the IC must specify steps to be taken to comply. What the Commissioner is looking at is whether the request has been dealt with in accordance with the requirements of Part 1 FOIA - s.50(1). If there has been a failure by the public authority to identify a particular exemption that it relies on and that exemption has not been identified until the Commissioner's investigation is underway, then there has been a failure to comply with s.17 and the Commissioner should record that, and if that failure is ongoing, the Commissioner should require steps to be taken to rectify it.

45. There is a separate question as to whether there has been a failure to comply, not just with s.17 but with the s.1 duty to communicate. In order to determine whether there is a failure to comply with that duty to communicate, the IC has to decide whether this is information in relation to which the duty to communicate arises. In order to decide that, the IC has to take into account any exemption claimed, notwithstanding that the exemption is raised later than it should have been done in the process. The Commissioner needs to look at the information, to look at the exemption that has been claimed, to ascertain whether the exemption is properly applicable or not. If it is, then the duty does not arise in respect of that information, and so the failure to communicate the information was not in itself a breach of the requirements of the Act. A differently constituted division of this Tribunal in *Mitchell v The Information Commissioner* (10 October 2005, Case Number EA/2005/0002 at paragraph 16), supported this reasoning, although not having to decide the point.

46. However the IC does not have a positive duty to look for exemptions that might have been claimed by the public authority, but have not been claimed by the authority. If a public authority fails to invoke a particular exemption before the IC, and the Commissioner orders disclosure of the information, the public authority cannot then come to this Tribunal and say it was an error of law for the Commissioner to fail to put forward on our behalf a particular exemption which we did not put forward on our own behalf. If the public authority raises an

exemption, the Commissioner needs to consider whether that exemption is applicable, but if the public authority does not raise an exemption, the Commissioner does not have a positive duty to look for exemptions on which the public authority might rely.

47. If the Tribunal were to find differently, then the whole basis of FOIA would be undermined. FOIA is not drafted to find ways to withhold information.

48. Moreover public authorities have discretion as to whether they wish to claim an exemption. Even if information could be exempt the authority does not have to invoke an exemption. In general, it is the public authority that is in a position to identify reasons why particular information may give rise to particular exemptions. It is the public authority that in the first instance is expected to carry out the balancing exercise between the public interest and disclosure and the public interest in maintaining an exemption. It is not the scheme of the Act that the Commissioner should have a general duty to consider the application of any possible exemption, even if not raised by the public authority.

49. The Commissioner, however, would be entitled to look for an appropriate exemption in some exceptional cases. This could happen where a public authority claims a particular exemption and the Commissioner considers that the authority has mis-identified the correct exemption. For example, there is a close relationship between the exemptions in s.30 (investigations) and s.31 (law enforcement). The information can only be within s.31 if it is outside s.30 and sometimes there is an issue as to where the particular information falls.

50. Another example would be where the exemption may have been claimed under the wrong jurisdiction and it would make sense to consider any similar exemption under the correct jurisdiction. This is what happened in *Kirkaldie v The Information Commissioner* (4 July 2006, Case Number EA/2006/0001) where a differently constituted division of this Tribunal found that the Commissioner had wrongly considered the complaint under FOIA when the request was for environmental information under the Environmental Information Regulations 2004. The public authority claimed the LLP exemption under s.42 FOIA, which the Tribunal held could, in effect, be considered under a similar exemption under Regulation 12(5) of the 2004 Regulations.

51. A further example of such an exceptional case could be where the personal data exemption is claimed under s.40. The IC is in the position of being the guardian of both the rights of data subjects under the Data Protection Act 1998 (DPA) and of the rights of people seeking information under FOIA. If the Commissioner considered that there was a s.40 issue in relation to the data protection rights of a party, but the public authority, for whatever reason, did not claim the exemption, it would be entirely appropriate for the Commissioner to consider this data protection issue because if this information is revealed, it may be a breach of the data protection rights of data subjects. Otherwise it would put the Commissioner in a very strange position where the Commissioner is responsible for both freedom of information compliance and data protection compliance. S.40 is designed to ensure that freedom of information operates without prejudice to the data protection rights of data subjects. Therefore it would be a very curious situation if the Commissioner had to forget about his data protection enforcement role when he had his freedom of information hat on.

52. The Tribunal would reiterate that there is no suggestion that there is a general duty on the Commissioner to seek potentially relevant exemptions if those had not been invoked by the public authority before the Commissioner. If there was a general duty on the Commissioner to seek relevant exemptions, then a public authority could sit back and do absolutely nothing during the Commissioner's investigation, making no submissions to the Commissioner as to why information was exempt, but then come to this Tribunal and argue that the Commissioner's decision is wrong in law because the Commissioner failed in his legal duty to seek relevant exemptions that might apply.

Can exemptions be claimed for the first time before the Tribunal

53. We next need to consider the situation of the Tribunal in an appeal under s.57 FOIA. The Tribunal must consider whether a decision notice is not in accordance with law or involves a wrong exercise of discretion. If the answer to both question is no then the appeal must be dismissed: s.57(1). If the public authority appeals against an IC's decision requiring disclosure, and the only basis for the appeal is that the Commissioner ought to have found that the information fell within a particular exemption, then if the exemption was not raised by the public authority in the course of the Commissioner's investigation, then the appeal is bound to fail. There can be no basis for suggesting that the IC erred in law or wrongly exercised his discretion, merely by failing to raise the point on the public authority's behalf.

54. However, the present case is different. In this case it is the complainant who appeals. It is accepted by the Council and the Commissioner that the Decision Notice cannot stand. The Tribunal thus has the choice between merely allowing the appeal, or substituting a revised Decision Notice. If the Tribunal does the latter then it needs to decide what should be the terms of the revised notice. In deciding whether there should be a revised notice, and if so on what terms, it is relevant for the Tribunal to take account of a claim by the public authority that an exemption applies in respect of particular information. The Tribunal is in effect exercising the powers of the Commissioner at this point. We ought not to ignore the public authority's claim that an exemption applies, just as the Commissioner ought not to ignore a similar claim if it is raised during his investigation. If the claim is well-founded then the Tribunal ought not to order disclosure, just as in comparable circumstances the Commissioner ought not to order disclosure.

55. The consequences of any other approach to the Tribunal's powers might well be seriously unjust. Mr Pitt-Payne provides the following hypothetical case. One of the items of information that falls within the scope of a particular request is a piece of legal advice. Unfortunately the public authority overlooks the existence of the advice until after an appeal has been lodged with the Information Tribunal arising out of the way in which the request was dealt with. The public authority discloses the existence of the advice but contends that it is exempt under s.42 FOIA. Must s.42 be disregarded merely because the existence of this particular item of information was previously overlooked? The Tribunal considers it is in a similar position to the Commissioner as set out above, namely that we are obliged to consider any exemption claimed, even if it is claimed for the first time before the Tribunal as in this case.

56. However the Tribunal finds, in the same way as for the IC, that it does not have a general duty to consider whether there are any relevant exemptions and to apply them if it considers that there might be, even if no party has raised any relevant exemptions. In a situation like the present case, where the public authority says there is a relevant exemption, the Tribunal needs to decide whether there is such an exemption, because that is a step on the way to deciding whether this Tribunal is going to order disclosure by way of variation of the decision notice, and if the Tribunal is going to make a substituted order then what will be the terms of that order.

57. The Tribunal then needs to decide, whether the particular exemptions relied upon in relation to the disputed information, are properly applicable.

Findings in relation to exempt information

58. The Tribunal has thoroughly reviewed the confidential information which has been disclosed to the Tribunal in this case principally in two tranches, one before the Full Hearing and one during the Full Hearing. The confidential disclosure not only identifies the document and the exemption claimed but also explains how the Council has applied the public interest test (PIT) in favour of non disclosure. The Tribunal comments that the two bundles of confidential information duplicate some documents which has made it confusing at times for the Tribunal to consider.

59. The Tribunal finds that all the confidential information with five exceptions is subject to the LPP exemption under s.42 FOIA. The exceptions include minutes of an Executive Board meeting of 22nd July 2003 and a report from the Director of Education headed "School Reorganisation Proposal Closure of Margaret Glenn-Bott School, Re-allocation of the Catchment Area an the Expansion of Bluecoat School" which have been claimed to subject to LLP. This is clearly wrong and these documents should be disclosed. We understand from the evidence that these documents may have already been provided to Dr Bowbrick. The other exceptions relate to documents where another exemption has been claimed but without showing how the PIT has been applied by the Council.

60. In relation to the other confidential documents to which the LLP exemption has been claimed we are satisfied that the Council has applied the PIT correctly and that the Council is entitled to withhold the documents.

61. The Tribunal observes that whether an exemption applies depends on the nature of the information at issue and not on the behaviour of a public authority holding that information. The fact that an authority has failed to discharge its substantive obligations under the FOIA, in terms of identifying and providing information, does not alter the nature of the information it holds and the application of the exemptions must still be considered on the facts of each request.

62. The Tribunal observes that it has recently examined the s.42 exemption. In *Bellamy v Information Commissioner and Secretary of State for Trade and Industry (May 2006, Case Number EA/2005/0023)* the Tribunal characterised LPP as "*a fundamental right at least insofar as the administration of justice is concerned*". Privilege can of course be waived, and the Tribunal can make a finding that it has in fact been waived, subject of course to the proviso that

the embargoed material is legitimately the subject of a claim to LPP - see *Kirkaldie (cited above)*

Non compliance with time limits

63. A differently constituted division of this Tribunal has already considered whether the time limits in the Act have teeth – see *Harper v The Information Commissioner (15 November 2005, Case Number EA/2005/0001).* A number of the early decision notices of the IC were decisions where a public authority had failed to comply with the s.10 time limit and recorded those failures but did not require any further action. If that is how such failures are handled by the IC why should a public authority that wants to delay matters not simply hold on to information until a complaint is made to the Commissioner? As soon as a complaint is made to the IC, the authority then discloses the information, it receives a decision notice, which is in effect a slap over the knuckles and nothing more and with no practical consequences.

64. In *Harper* we set out what the Commissioner can do with the public authority that is deliberately delaying compliance with the time limits in ss.10 and 17 in order to delay the moment when it has to give disclosure under the Act. Briefly, s.49 reports can be laid before Parliament in effect entitling the Commissioner to name and shame public authorities that behave in this way. Where there is a cynical or persistent or deliberate breach of time limits, the IC could serve an enforcement notice under s.52 requiring proper compliance with the time limits in the future, which could then lead to the failure being certified to the court under s.54 and dealt with as for a contempt of court. Finally under s.48, a recommendation as to good practice can be made which we will refer to again later in this decision.

Tribunal's finding in relation to the Decision Notice

65. Under s.58(1) FOIA where the Tribunal finds that decision notice is not in accordance with the law, the Tribunal has power to "allow an appeal or substitute such other notice as could have been served by the Commissioner." As indicated above the Tribunal finds that the Decision Notice is wrong in law, which is accepted by both the Council and the IC because the Decision Notice was based on a finding of fact which the IC now accepts is not correct.

66. The Tribunal has already concluded above that the Council has now conducted the sort of investigations that it should have conducted at the outset and that as a result significant disclosures have taken place. The Tribunal considers that any further investigation is unlikely to

result in new disclosures and therefore has reluctantly decided to limit the extent of the revised decision notice as follows.

Substituted Decision Notice

67. The Tribunal orders that the Council provide the following documents, for which exemption has been claimed, to Dr Bowbrick within 14 days of the date of this decision:

    a. From the bundle of documents sent to the Tribunal in confidence following the December Hearing minutes of an Executive Board meeting of 22nd July 2003 and a report from the Director of Education headed "School Reorganisation Proposal Closure of Margaret Glenn-Bott School, Re-allocation of the Catchment Area an the Expansion of Bluecoat School" also dated 22 July 2003;
    b. From the bundle of documents sent to the Tribunal in confidence on 3 August 2006:
        i. An undated document of objection from a parent as redacted in disclosure to the Tribunal at pages 188 to 192 of the bundle;
        ii. A letter of objection from a Councillor dated 3 July 2003 at page 193 of the bundle;
        iii. A letter of objection from Ellis Guildford School and Sports College dated 16 July 2003 at page 194 of the bundle.

68. The Tribunal should make the point that we have not considered any information disclosed to us only in confidence by the Council which is dated after the date of the Request because it is not part of this appeal.

69. The Tribunal also makes the following findings:

    a. That the Council failed to confirm within 20 working days of Dr. Bowbrick's request that it held information falling within the scope of his request. It thereby failed to comply with its duty under s.1(1)(a) of the Act within the time limit prescribed by s. 10;

    b. That the Council failed to disclose to Dr. Bowbrick within 20 working days of his request the information that it held that fell within the scope of his request and that was not subject to any exemption under the Act. It thereby failed to comply with its duty under s.1(1)(b) of the Act within the time limit prescribed by s.10.

c. That the Council failed to identify within 20 working days of the request the exemptions upon which it relied in respect of certain documents falling within the scope of Dr. Bowbrick's request. It thereby failed to comply within its duty under s.17(1) of FOIA within the time limit prescribed by that section.

70. Because of the unsatisfactory way the disclosures have taken place, as is reflected in our findings on costs below, we would recommend that the IC uses its powers under s.48 FOIA to make a practice recommendation to the Council specifying steps which in the Commissioner's opinion the Council should take in order for it conform with the codes of practice under ss.45 and 46 of FOIA. In relation to this recommendation we are mindful of the fact that Dr Bowbrick has made further requests of the Council and we are anxious that these requests do not result in further prolonged litigation. We would recommend that this exercise is undertaken expeditiously.

Costs

71. During this case the Tribunal has had real difficulty in understanding how the Council could have issued the Refusal Notice in the form it did. It is difficult to imagine circumstances where a public authority transferring a school to another organisation holds no information relating to that transfer. This is why the Tribunal joined the Council to this appeal and not surprisingly soon after the October Hearing, information materialised. It took another directions hearing for further information to be provided and at this hearing yet further information has been disclosed.

72. What worries this Tribunal is that soon after the Request, Jeremy Lyn-Cook sent an internal memo in relation to information held by the Education Department only, to Mr Stead dated 25th January 2005 indicating that Dr Bowbrick's "enquiry is very wide and could run into 6-7 lever arch files relating to the consultation on the closure of MGB and the expansion of Bluecoat." He continued "it will probably take more than 2 days to extract information from the files and therefore, I think he needs to be more specific about what he wants." There is no evidence that Mr Stead enquired of any other department at this stage. This indicates to us that the Council always knew that they held information relating to the Request. Dr Bowbrick on his own

initiative offered to help the Council locate the information but his offer was not pursued. What followed was the Refusal Notice stating, in effect, that no information was held.

73. Quite frankly the Tribunal is dismayed at the way the Request has been handled and the conduct of the Council since the commencement of this appeal. The Council appears to have misled Dr Bowbrick and then the IC during his investigation.

74. The Chairman of this Tribunal has sought assurances from the IC at the October Hearing that future complaints would be investigated with more diligence than this case and has received those assurances in a letter to the Chairman of the Tribunal dated 21st October 2005 and in the witness statement of Mr Gerrard Tracey, Assistant Commissioner, dated 28th February 2006 . Also from the moment that it was clear that the Council held information the subject of the Request the Commissioner has accepted that his Decision Notice could not stand and has co-operated with the Tribunal.

75. The same cannot be said of the Council following the Joinder Notice. The Council did not comply with the direction in the notice. Following the disclosures in October 2005 it did not respond to Dr Bowbrick's analysis of the disclosure which clearly indicated that further investigation was necessary, which then necessitated holding the December Hearing. The Council then made further disclosure but not in a timely way so that it could be considered at that hearing, so a further response was required from Dr Bowbrick after the December Hearing. The Council did not seek to take any further action in relation to this response before the Full Hearing some 6 months later, when it did eventually properly co-operate through the good offices of its Counsel, Mr Jones, after which further disclosures have been made. In the meantime there have been substantial claims for exemption of information, the most recent being after the adjournment of the Full Hearing. In addition there has been duplication of disclosures, giving cause for confusion. It has taken nearly 21 months since Dr Bowbrick's request to undertake anything like a proper investigation and only after various Tribunal orders and prompting.

76. Dr Bowbrick has applied for costs against both the IC and the Council. The Tribunal's power to make a costs order is set out in rule 29 of the Information Tribunal (Enforcement Appeals) Rules 2005 ("IT Rules"), which provide as follows:

> *"(1) In an appeal before the Tribunal ... the Tribunal may make an order awarding costs -*

(a) against the appellant and in favour of the Commissioner where it considers that the appeal was manifestly unreasonable;

(b) against the Commissioner and in favour of the appellant where it considers that the disputed decision was manifestly unreasonable;

(c) where it considers that a party has been responsible for frivolous, vexatious, improper or unreasonable action, or for any failure to comply with a direction or any delay which with diligence could have been avoided, against that party and in favour of any other.

(2) The Tribunal shall not make an order under paragraph (1) above awarding costs against a party without first giving that party an opportunity of making representations against the making of the order.

(3) An order under paragraph (1) may be to the party or parties in question to pay to the other party or parties either a specified sum in respect of the costs incurred by that party or parties in connection with the proceedings or the whole or part of such costs as taxed (if not otherwise agreed).

(4) Any costs required by an order under this rule to be taxed may be taxed in the county court according to such of the scales prescribed by the county court rules for proceedings in the county court as shall be directed by the order."

77. Costs are defined in rule 3(2) of the IT Rules to include "*fees, charges, disbursements, expenses and remuneration*".

78. The Tribunal can only award costs against a "party". Party is defined in rule 3(3) of the IT Rules to mean '*the appellant, or the Commissioner, or a person joined to an appeal in accordance with Rule 7 ...*". The Council has been a party to the appeal proceedings following the Tribunal's rule 7 Joinder Notice at the outset of the proceedings. The Tribunal is therefore authorised to make a costs award against it as well as the IC.

79. Rule 29(1)(3) authorises the Tribunal to make an award of costs against a party and in favour of any other in three circumstances:

    (1) where "*it considers*" that the party has been "*responsible for frivolous, vexatious, improper or unreasonable action*" or;

    (2) for "*any failure to comply with a direction*" or;

    (3) for "*any delay which with diligence could have been avoided*".

80. On the facts of this case, the Council's failure to conduct a reasonable search for documents and to consider and discharge its obligations under FOIA at the time the request was first submitted by Dr Bowbrick has, at the very least, "*caused delays which with diligence could have been*

avoided". The subsequent piecemeal provision of information in our view justifies further criticism of the Council's behaviour.

81. The Council has clearly failed to "*comply with a direction*". There have been a number of orders where it has failed to meet the date by which the order should have been complied with.

82. In relation to the first circumstance in rule 29(1)(3) this has, in analogous situations, been considered by tribunals with similar provisions to rule 29. The Financial Services and Markets Tribunal, in a written decision from April 2006 (*Baldwin v FSA, Case Number Fin/2005/0011),* stressed that it could and should be distinguished from an administrative court charged with applying the Wednesbury unreasonableness test (that is the test formulated for the purpose of determining whether a public authority has acted outside its statutory powers). According to Andrew Bartlett QC, Chairman of the FSMT, "*the Tribunal, unlike the court in the Wednesbury case, is expressly directed by paragraph 13 to make its own judgment of what is reasonable: "(1) If the Tribunal considers that a party ... has ... acted unreasonably*".

83. The FSMT, following a review of the facts, concluded that, in its opinion, the investigation at issue in the proceedings had not been unreasonable and made no order for costs against the FSA. Its approach to the application of its power to award costs contained in the Financial Services and Markets Act 2000 Schedule 13 paragraph 13 is summed up in its conclusion at paragraph 27 of the decision:

> "*Taken analytically item by item, and with the benefit of hindsight, it might be possible to characterise some of the elements of conduct ... as unreasonable. But we think it important in this case to keep in mind also the broader picture and not to over-emphasize the significance of any individual feature of the investigation. We also remind ourselves that a wrong view or approach is not necessarily an unreasonable view or approach ...*"

84. In an earlier case, a differently constituted FSMT appeared to have been guided by the basic, if elusive, principle of "fairness". In *Davidson v the FSA (30 July 2004)* (the notorious "Plumber case"), the FSMT, although recognising that it could only make a costs order if a party acted unreasonably, noted that "fairness" had been a consideration in its review of the facts and its decision of how much the party should be ordered to pay. (There it made an order that the FSA pay 50% of the costs.)

85. The EAT has made costs orders against parties where it has determined that the party's conduct was unreasonable. For example, the EAT has awarded costs against an appellant where the facts indicated that the appellant delayed in withdrawing or abandoning proceedings, or proceeded with unmerited actions contrary to legal advice, or failed to fully engage with the proceedings once the proceedings had commenced.

86. The Tribunal finds that Council, through the offices of Mr Stead, purposefully chose not to carry out a proper investigation, despite being aware that there was a likelihood that the Education Department alone held substantial amounts of information in relation to the Request.

The Tribunal considers this amounts to "*improper or unreasonable action*". However we are mindful of the considerations taken by other tribunals as set out above in relation to similar powers. The Request was a very early request under FOIA and the Council was no doubt getting to grips with its obligations under the Act and therefore we are not prepared to go so far at to find that the action taken was also *"frivolous or vexatious"* under rule 29(1)(3).

87. In contrast the Tribunal finds that none of the circumstances set out under rule 29(1)(3) apply to the IC's conduct.

88. In view of the above findings the Tribunal has decided not to make an order for costs against the IC, but that we will make a cost order against the Council in favour of Dr Bowbrick.

89. Rule 29 provides that the Tribunal can make an order that one party or parties pay "*the whole or part of such costs as taxed (if not otherwise agreed)*". The Tribunal therefore can direct that the public authority should pay only a portion or part of the costs if it, in its discretion, considers it appropriate to do so following its review of the evidence. Rule 29 requires that parties be given an opportunity to make representations on the award of costs before the Tribunal makes its order. It is open to the parties to agree on the amount of costs and there is no reason why the Tribunal should not encourage them to do so. The Tribunal has already given the opportunity for the parties to do this in the June Order and they have so obliged. The Tribunal has taken these representations into account in coming to its decision set out in the previous paragraph. The Tribunal considers that the parties are so far apart in relation to the amount of costs that there is no point in inviting them to seek agreement and that therefore the matter should go immediately for taxation.

90. It is not necessary for the Tribunal to make any finding on the amount of costs before it orders taxation but it may direct that the public authority should pay only a portion of the applicant's costs. In the *Davidson* decision, [cited above], the FSMT first directed, following its review of the facts, that "fairness" required that the FSA pay only half of the applicant's costs but it expressed no view as to the amount of such costs to be awarded preferring to leave it to be assessed on the standard basis by a costs official.

91. In this case the Tribunal directs that the Council should pay the whole of Dr Bowbrick's costs.

92. On the issue of taxation, rule 29(4) provides that:

> "*Any costs provided by an order under this rule to be taxed may be taxed in the county court according to such of the scales prescribed by the county court rules for proceedings in the county court as shall be directed by the order.*"

93. The county court scales have been replaced by the CPR. CPR 47 sets out the procedure for detailed assessment of costs. According to CPR 47, proceedings are commenced when the receiving party serves on the paying party a notice of commencement and a copy of the bill of costs (CPR 47.6). The receiving party has three months from the date of the Tribunal's order to

commence proceedings (CPR 47.7). In addition, the costs recoverable by a LIP are set out in CPR 48.6 and as indicated below, these make provision for the recovery of financial loss.

94. The Tribunal directs that Dr Bowbrick's costs be taxed as a litigant in person (LIP).

95. Alternatively according to rule 29(3), the Tribunal could have made an order:

> *"to the party or parties in question to pay to the other party or parties either (1) a specified sum in respect of the costs incurred by that party or parties in connection with the proceedings; or (2) the whole or part of such costs as taxed (if not otherwise agreed)."*

96. The Tribunal has decided not to make such an order for a specified sum but for future guidance sets out the basis upon which such an award could be made and also other matters to take into account when considering an award for costs.

97. The Tribunal is authorised to order the payment of a "specified" or lump sum to the applicant but only in "*in respect of the costs incurred ... in connection with the proceedings*". The limitation of the award to costs "incurred in connection with the proceedings" is important. "The proceedings" in this context means the appeal before the Tribunal and it does not automatically include costs incurred by the applicant as a result of the public authority's conduct prior to the proceedings or petitioning the IC prior to the commencement of the appeal.

98. This issue was also considered by the FSMT in *Baldwin* (cited above). The relevant provision in the Financial Services and Markets Act 2000 provides that " ... *it may order [a party] ... to pay ... the costs and expenses incurred ... in connection with the proceedings*". In this case the FSMT was asked to consider whether 'conduct' before the proceedings could be considered in the determination of costs against a party. The FSMT concluded that had the intention been to limit the conduct referred to in the course of the proceedings, the statutory wording would have said so expressly. It concluded that it was entitled to take account of conduct which took place before the reference was made and the proceedings commenced (paragraph 23 of the decision). However, the FSMT also noted at paragraph 26 that its:

> *"conclusion does not mean that conduct prior to the proceedings is necessarily relevant to the incidence of costs ... to be relevant under paragraph 13(1), it must have some bearing on the proceedings. It follows from the very nature of the decision to be taken on costs that our judicial discretion must be exercised on the basis of facts connected with or leading up to the proceedings, as contrasted with conduct wholly unconnected with the proceedings".*

99 .Although rule 29 clearly provides that the Tribunal may order the payment of costs where the conduct of another party has been such that an award against it is merited, rule 3(2) defines costs to include fees, charges, disbursements, expenses and remuneration. There is no provision for "punitive" damages or other means of "punishing" the offending party.

100. Therefore, should the Tribunal elect to award a specified sum in respect of the costs incurred by an applicant, it is clear that its order must relate to the categories of costs defined in rule 3(2) and as required by rule 29, and its order must be limited to those costs incurred by the applicant *in connection with the proceedings*.

101. The Tribunal should require an applicant to provide it with a schedule of costs incurred in connection with the proceedings which it can then use to inform its decision of what it considers to be an appropriate "sum" to award, given the specific circumstances of the case and with a view to ensuring a balanced and fair process for all parties. The Civil Procedure Rules 1998 ("CPR") requires litigants in person to evidence their costs and it would seem reasonable, and indeed fair in the circumstances, for the Tribunal to require some evidence of the applicant's costs in proceedings before it. In addition, the party against which costs are being sort has a right to make representations against the making of the order and the amount of such costs and this includes an opportunity to comment on an applicant's schedule of costs..

102. Rule 3(2) permits the Tribunal to include remuneration in its award of costs but it is not clear if it permits the Tribunal to compensate an applicant for lost earnings or to "remunerate" the applicant's work in connection with the proceedings. The recent decision of the Costs Judge, Master Simons, in *Knight v Maggioni (10 April 2006, Case Number 0503654)* in an application for costs by a LIP, reaffirmed the position as set out in the CPR that an applicant claiming financial loss must quantify that loss with some degree of specificity. In this case, the applicant could not prove financial loss. He was therefore only compensated at a rate of £9.25 per hour for time spent preparing for and attending the proceedings, as prescribed by section 52 of the CPR Practice Direction about Costs Directions. Where it is exercising its discretion to award a specified sum to a party, the Tribunal is not bound by the provisions of the CPR but there is no reason why it cannot look to it as a guide to its own awards under rule 29, should it think it appropriate to make provision for remuneration in its costs award against a party.

Signed

Date

28th September 2006

John Angel
Chairman