Tribunals Service
Information Tribunal

**Information Tribunal Appeal Number: EA/2007/0052**
**Information Commissioner's Ref: FS501 36587**

**Decided in Chambers**
**On 3 and 23 January 2008**

**Decision Promulgated**
**15 February 2008**

**BEFORE**

**CHAIRMAN**

**Mr H Forrest**

**and**

**LAY MEMBERS**

**MR R CREEDON**
**MR D WILKINSON**

**Between**

**Mersey Tunnel Users Association**

**Appellant**

**and**

**INFORMATION COMMISSIONER**

**Respondent**

**and**

**Merseytravel**

**Additional Party**

## Decision

The Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 22 May 2007.

**Information Tribunal** **Appeal Number: EA/2007/0052**

## SUBSTITUTED DECISION NOTICE

**Dated 15 February 2008**

**Public authority:** **Merseytravel**

**Address of Public authority:** **24 Hatton Garden**

**Liverpool, L3 2AN**

**Name of Complainant:** **The Mersey Tunnel Users Association**

### The Substituted Decision

For the reasons set out in the Tribunal's determination, the substituted decision is that the public interest in maintaining the exemption for information subject to legal professional privilege is outweighed in this instance by the public interest in disclosing the information.

### Action Required

Merseytravel should disclose to the Mersey Tunnel Users Association the information requested, the advice given by counsel on 2 August 1994.

Dated this 15 day of February 2008

Humphrey Forrest

Deputy Chairman, Information Tribunal

## Reasons for Decision

Introduction

1. Merseytravel is the name used by the Merseyside Passenger Travel Authority and Executive, a statutory body, which, amongst other duties, runs the Mersey Tunnels using powers derived from a variety of statutory sources. The Mersey Tunnel Users Association (MTUA) is an unincorporated association set up to pursue the interests of its members, who are users of the Mersey Tunnels; it has been represented in these proceedings by its secretary, Mr John McGoldrick. They have campaigned about the level of tolls for tunnel users, and the uses to which that toll income is put by Merseytravel.

2. Over the years, local government has been reorganised and the bodies involved and their various powers have altered. From the late 1960s (and more specifically, from 1988) until the early 1990s the income from the tunnels was insufficient to cover operating costs and they operated at a loss. That deficit was made up by the tunnel operator (now Merseytravel) from a levy or precept on the five district councils of Merseyside.

3. A question arose over Merseytravel's powers to meet the losses made by the Mersey tunnels between 1988 and 1992 by adding them to the precept/levy on the district councils. It appeared that the power utilised, under a Debt Administration Order of 1988, was restricted to repaying debts that had arisen in connection with the original construction of the tunnels, rather than meeting operating costs. In August 1994 advice was received from a barrister. It was decided that the sums paid by the district councils should be treated as a loan, and the loan could be repaid when funds permitted, (subject to the other demands on tunnel income), through adjusting Merseytravel's levy on the district councils: in other words, the levy would be reduced to reflect any amount paid off in respect of the accumulated debt and interest.

4. After 1992, there were substantial increases in both traffic and tolls and the tunnels began to show an operating profit. Merseytravel began to repay the amount levied on the District Councils: some £28 million, which, with interest over the years, is likely finally to amount to nearly £70 million. The amounts involved have varied over the years. Currently, and for several years, it has been set at £3.6 million a year, and it is intended that repayments should remain at that level until 2014/15, when the debt will finally be extinguished.

5. The repayments have been dealt with in Merseytravel's accounts in a number of ways: sometimes they have not been separately identified at

all; in the 2005/06 accounts, the sum of £3.6 million is referred to as a levy repayment. Mr McGoldrick, on behalf of MTUA, has been trying for some years to find out what this levy repayment was, and why it had to be made. The underlying dispute, which has given rise to this request for information, is whether the tunnel surplus should be used to reduce tolls, and thus benefit tunnel users, or whether it should be used to repay district councils, and thus benefit a wider cross section of the Merseyside community. That dispute is not a matter for this Tribunal.

The request for information

6. The specific request for information, which lead to this appeal, was made by Mr McGoldrick on 15 January 2005. He refers to past correspondence about information and what had been made available; refers to the coming into force of the Freedom of Information Act (FOIA); and requests "to see all reports, agendas and minutes relating to the loan".

7. Merseytravel supplied some information in response. The barrister's advice was withheld under section 36 of FOIA (prejudice to effective conduct of public affairs) and section 42 (legal professional privilege). Merseytravel explained that in their view the public interest in maintaining these exemptions outweighed the public interest in disclosing the information sought. Subsequently, Merseytravel released further documents, but still withheld the legal advice.

The complaint to the Information Commissioner

8. On 6 September 2006, Mr McGoldrick on behalf of MTUA complained to the Information Commissioner about the way Merseytravel had handled his request for information and about their refusal to release the barrister's opinion.

9. In the Decision Notice, issued on 22 May 2007, the Information Commissioner found that Merseytravel had breached some of the procedural requirements in section 17 of FOIA, by not explaining clearly enough why the withheld information fell under section 42; or the reasons why it considered the balance of the public interest lay in maintaining the exemption; and by not giving details of its complaints procedure. No steps were required in relation to these breaches; and the Commissioner's findings on these points have not been disputed in this appeal.

10. Secondly, the Commissioner found that section 42 was engaged, and after examining the arguments, found that the balance of public interest in maintaining the exemption did outweigh the public interest in disclosure, and that therefore Merseytravel were acting properly in withholding the information. In the light of that finding, the Commissioner did not go on to consider the application of section 36.

The appeal to the Tribunal

11. Mr McGoldrick appealed against that decision to the Tribunal on 18 June 2007. The question for the Tribunal was identified at a Directions hearing on 24 September 2007 as "whether the Commissioner erred in concluding that the public interest arguments weighed against disclosure in the present case". That has been the main issue in the case. However, MTUA were given leave to add a further ground of appeal: whether legal professional privilege had been waived by prior publication of part of the advice. No one has sought to argue, in the alternative, that we should consider the application of section 36, and we have not done so.

12. The information in dispute was disclosed to the Tribunal during the appeal process, as it had been to the Commissioner, but was not disclosed to the appellant, MTUA. Both the IC and Merseytravel have made closed submissions to us about the contents of the barrister's opinion. Mr McGoldrick protested against the unfairness of this procedure., which denied him the opportunity to see or reply to the arguments advanced by the other parties; moreover, in the unusual circumstances of this case,(where Mr McGoldrick had in fact seen the disputed information, since it had earlier been released to him in confidence by the District Auditor), it denied him the opportunity to use that information. The Tribunal accepted the principle of his objection, but ruled that the element of unfairness was inevitable given the particular nature of the Tribunal's jurisdiction: if, as fairness requires, the information were to be disclosed as part of the appeal process, the entire point of the proceedings would be nullified, since disclosure would have been achieved, whatever our eventual decision.

Evidence

13. Having considered the agreed bundle of documents submitted and the witness statements from Mr McGoldrick and Mr Barclay, the Director of Resources for Merseytravel, the tribunal makes the following findings of fact. In doing so, we have of course had the advantage of seeing the disputed opinion. Any references to it are taken from documents already disclosed, or from Mr Barclay's witness statement, or from the open submissions of Merseytravel. The general factual background has been set out above in paragraphs 1 to 4.

14. In a "Report of the Clerk" dated 11 February 1994, disclosed to Mr McGoldrick, the Clerk sets out the legal background to the Tunnels' finances, explaining that the operating deficit of the Tunnels from 1988 to 1992 had been met by the Passenger Transport Authority (PTA) from its general fund (since toll income was insufficient); and the general fund was raised by a precept or levy on the district councils. It continues:

> "some doubt was expressed as to whether the PTA had power to provide for the tunnels expenditure in this way and the matter was raised with the Department of Transport. Legal counsel expressed the view that in these circumstances there would be a lawful overriding obligation on the part of the Passenger Transport Authority to finance the deficit on the tunnels account as banker and in such circumstances might expect repayment.
>
> However, in the event, the Government made a Debt Administration Order, which whilst mainly designed to cover wider issues, provided an express power for the Authority to fund the tunnels and the Authority took advantage of this power …. .
>
> The order was silent on the question or repayment but in any event the matter was not thought about at the time because there was no immediate possibility of payment back arising."

15. It appears from the date of this Report that there must have been an earlier legal opinion on the subject, given before February 1994, and therefore preceding the opinion in dispute. This has not been disclosed by Merseytravel, though it would appear to be covered by Mr McGoldrick's request. Merseytravel say that they have conducted a search for any earlier legal advice and now have no record of it. No such advice can be found. We consider this further at paragraph 29.

16. The Report went on to "summarise the legal position" including:

> "(e) subject to the above obligations and as a subservient priority there is an obligation to repay the Authority's General Fund on a basis to be annually agreed …. ."
>
> One of the advantages of doing this was that it would enable "the aspirations of District Councils to see some repayment in respect of substantial earlier support for the Tunnels [to be] fulfilled".

17. The report was evidently accepted and the advice of the Clerk implemented: annual repayment of the sums advanced earlier by the District Councils commenced.

18. However, as Mr Barclay explained, "shortly after this period it was recognised that the [Debt Administration] Order did not appear to contain the powers to meet the losses in this way." It was to meet this problem that Counsel's opinion was again sought. It is this second opinion that Merseytravel seek to withhold from MTUA under section 42 as legally professionally privileged, and that is the subject matter of this appeal.

19. In a document dated 25 September 2003 headed "To whom it may Concern", which was sent to Mr McGoldrick, the then Director of Resources for Merseytravel, explained what happened next:

> "Counsel's opinion was sought on this issue, and it confirmed that the wording of the 1988 Order was flawed and that it failed to provide the necessary powers to precept/levy for the tunnel losses. The opinion also indicated that the sums involved should be treated as a loan to be repaid to District Council's in the same manner they were obtained, i.e. through Merseytravel's levy. Clearly it was not feasible to refund the debt in full immediately, so repayments were arranged in instalments with interest. The arrangements were agreed with the Treasurers of the five District Councils.
>
> Council also advised that the repayments should be kept under review, implying that they should be equitable to District Councils and seek to discharge the debt at the earliest opportunity. The repayments have varied as follows: "and then there is set out a table showing annual repayments from 1994/5 to 2001/02, rising from £1.9 million to £3.6 million.

20. Mr Barclay confirms that the repayments have continued at the rate of £3.6 million a year, and are expected to continue until 2014/15, when the debt should be finally extinguished. The repayment is effected through reducing the amount that would otherwise be levied on the District Councils.

21. The disputed opinion was also referred to in 2002 in a document headed Mersey Tunnel Tolls – Common Misunderstandings, which was published on Merseytravel's website. This included: "Merseytravel has though a legal duty to use toll income to repay District Councils for financing the Tunnel losses which occurred between 1988 and 1992." Indeed, it was this reference which prompted Mr McGoldrick to make his initial query to Merseytravel, asking for the source of this "legal duty".

22. In 2003/04 Merseytravel promoted a private Bill in the House of Lords, the Mersey Tunnels Bill. The Bill was accepted without amendment. The Mersey Tunnel Act 2004 repeals earlier provisions which had set out the purposes on which toll income should be spent, substituting an amended set of purposes, including a power to apply tolls to make payments "to [Merseytravel's] general fund for the purpose of directly or indirectly facilitating the achievement of polices relating to public transport in its local transport plan, or for other purposes". MTUA had objected to the Bill; and the House of Lords required Merseytravel to give an undertaking restricting the uses which could be made of this power to apply tolls "… for other purposes". The restricted powers include "directly or indirectly repaying to the Merseyside district councils, by whatever means

[Merseytravel] considers appropriate, the money precepted and levied by Merseytravel between 1988 and 1992 to fund the tunnels' operating losses (originally £28 million)". The legal basis for making repayments to the district councils is therefore on a statutory footing since the passage of the Bill, which gives a clear power (though it does not impose a duty) to make the repayments.

23. In June 2005 Mr McGoldrick made a formal objection to the District Auditor querying the inclusion of the loan repayment in Merseytravel's accounts for 2002/03. His argument was that there was no power to make toll repayments for this purpose. The District Auditor rejected the objection, and signed off the accounts. In his reply to Mr McGoldrick, the Auditor allowed him to see a copy of counsel's opinion of August 1994 (the disputed information), which was relied on by Merseytravel to show why the repayment was properly made. Mr McGoldrick was warned that the disclosure was made in confidence, for the purposes of the objection only, and that to reveal its contents would expose Mr McGoldrick to criminal sanctions. Mr McGoldrick has therefore seen the disputed information, but can make no use of the information disclosed in that way: he cannot disclose it, for example, to the members of MTUA, nor use his knowledge in this appeal.

Submissions and analysis

a) Prior disclosure by the auditor.

24. The relevance of this earlier disclosure can be shortly dealt with. In our view the fact that Mr McGoldrick has in fact already seen the information requested is irrelevant to the questions before us, given the particular, restricted circumstances in which it was disclosed. Disclosure under FOIA is disclosure, in effect, to the public, an entirely different matter to a restricted disclosure for the purposes of audit. Nor do we accept any argument that disclosure in such restricted circumstances could amount to a waiver.

b) Waiver

25. Both the Commissioner and Merseytravel resist any suggestion that privilege has been lost because of earlier disclosure. Mr McGoldrick argued that the various references to the legal opinion or advice quoted above were sufficient to amount to a waiver of the claim for privilege. Certainly, once legal advice has been published, privilege can no longer be claimed. None of the references above reveal the full advice, or anything approaching that, or quote directly from it. However, there is also a doctrine of partial disclosure. A party revealing part of a privileged document cannot thereafter claim privilege for the remainder.

26. Reliance on the doctrine of partial disclosure is resisted by the Commissioner and Merseytravel on both the facts of the case and the law. Legally, they cite a number of authorities dealing with the issue, and point out that all are concerned with claims for privilege in the context of litigation. Here, no legal proceedings are contemplated, let alone underway. They argue that the doctrine of partial waiver has no application until proceedings are at least in contemplation. Factually, they point out that the Report of the Clerk, dated February 1994, cannot disclose anything of the later advice in dispute, since that was not received until August 94. The 2003 document To Whom It May Concern at most provides a brief summary of the conclusion of the disputed advice, but reveals nothing of the reasoning or other options considered. The website contains an even briefer reference. It would be unfortunate if through such partial references privilege were lost, since that result would tend to discourage authorities from revealing even that much.

27. We accept the arguments of Merseytravel and the Commissioner, on both points. Legally, like the Tribunal considering the appeal in Kessler v Information Commissioner and HM Commissioners for Revenue and Customs, EA/2007/0043, we do not consider it necessary to go through the detailed legal authorities on the point. We agree with their conclusion: "that the rule that by relying upon part of a privileged document before a court the party doing so waives privilege in the whole document does not apply to partial disclosure of privileged information outside the context of litigation". In any event, on the facts, we are not persuaded that the limited references to the conclusions of the advice, set out in paragraph 18 above, could amount to a partial waiver in any event. The factual situation as regards waiver was very different in Kirkaldie v the Information Commissioner and Thanet District Council, EA/2006/001, and on that basis, even if we had agreed that the doctrine of partial waiver could apply in these circumstances, we would still have reached a different conclusion.

<u>The legal background</u>

28. Section 1 of FOIA sets out a general right to information held by public authorities:

*1(1) Any person making a request for information to a public authority is entitled –*

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

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

29. Pausing there, it follows from the wording of section 1 that the right in 1(1)(b), to have information communicated, only applies if the public authority *holds* the information. It clearly applies therefore to the legal advice received in August 1994, since that is held by Merseytravel. However, it appears it does not apply to the earlier advice apparently received from counsel before February 1994 (referred to in the Clerk's Report of February 1994) since that advice is no longer held by Merseytravel. In an email to the Tribunal on 21 December 2007, copied to Mr McGoldrick, Merseytravel's solicitors state: "Merseytravel has reviewed its files and does not hold any other legal advice concerning this issue, other than that which is the subject of this appeal." Mr Mcgoldrick expresses his "amazement" at this statement. We can understand his surprise, given the apparent importance of the advice: as summarised by the Clerk, it establishes "the lawful overriding obligation on the part of the Passenger Transport Authority to finance the deficit on the Tunnels' account as banker and in such circumstances might expect repayment". Given the underlying dispute, which relates to the obligation to repay, as well as the propriety of the repayment, we might have expected the authority to retain a copy. However, on the limited information before us, it appears that they have not done so, and therefore the duty to disclose in section 1 cannot apply to this earlier advice.

30. Turning to the advice which is held by the authority, section 42 of FOIA provides:

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

Having seen counsel's opinion in dispute, it is clear that a claim for legal professional privilege could be maintained in legal proceedings for it. Section 42 is therefore engaged.

*31.* However, section 42 is a qualified exemption. Under section 2(2) of FOIA, the duty to disclose information in "*section 1(1)(b) does not apply if or to the extent that*

> *(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.*

32. The application of section 42 has been considered a number of times in the relatively short life of this Tribunal, from Bellamy (EA/2005/23) through to Pugh (EA/2007/0055), the most recent decision. Pugh contains a most helpful review of these cases, which we gratefully adopt:

Legal Professional Privilege

26. What is LPP? In *Bellamy v ICO and Secretary of State for Trade and Industry* [2006] UKIT EA 2005 0023 a differently constituted Tribunal after reviewing the judicial authority in relation to LPP found:

*9. In general, the notion of legal professional privilege can be described as a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communications or exchanges come into being for the purposes of preparing for litigation. A further distinction has grown up between legal advice privilege and litigation privilege. Again, in general terms, the former covers communications relating to the provision of legal advice, whereas the latter, as the term suggests, encompasses communications which might include exchanges between those parties, where the sole or dominant purpose of the communications is that they relate to any litigation which might be in contemplation, quite apart from where it is already in existence.*

27. This Tribunal adopts the definition of LPP in *Bellamy*. Having considered the disputed information, the written submissions and all other evidence before us the Tribunal finds that it is covered by LPP and therefore agrees with the Commissioner's finding in the Decision Notice that the exemption is engaged.

The public interest test and LPP

28. The Tribunal has considered the public interest test (PIT) in relation to the s.42 exemption in a number of decisions. *Bellamy* undertook a review of the case law on LPP and concluded at paragraph 35

*As can be seen from the citation of legal authorities regarding legal professional privilege, there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest. ... it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case, of which this case is not one.*

29. This finding has been largely adopted by this Tribunal in other decisions - *Shipton v Information Commissioner* (EA/2006/0028), *Kitchener v Information Commissioner & Derby City Council* [2006] UKIT EA 2006 0044 and more recently, in *Adlam v Information Commissioner* (EA/2006/0079) where the Tribunal said at paragraph 63:

*The real debate between the Appellant and the other parties concerns whether the public interest in maintaining the exemption in section 42 in this case outweighed any public interest in disclosure of the particular information. The exemption is a qualified one. However, the Tribunal in Bellamy v Information Commissioner (EA/2005/0023) made it clear especially at paragraph 35 that there was what it called "a strong element of public interest inbuilt into the privilege itself" and that "at least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest.*

30. In *Shipton* at paragraph 14 the Tribunal having recognised that s.42 was not an absolute exemption stated that if the qualified nature of the exemption is to have any meaning
*There will be occasions when the public interest in disclosure will outweigh the public interest in maintaining privilege. This may arise, for example, when the harm likely to be suffered by the party entitled to legal profession privilege is slight, or the requirement for disclosure is overwhelming.*

The harm may be slight where the privilege holder no longer has a recognised
interest to protect. However where the particular issue raised by the legal advice sought remains “live” this would render it particularly sensitive – see *Kitchener* at [18].

31. Also recently In *Gillingham v Information Commissioner* EA/2007/0028 at paragraph 16 after reciting most of the above decisions on LPP the Tribunal

*.....noted that, generally speaking, the public interest reasons for maintaining
the legal professional privilege exemption are particularly strong. This is
because the purpose of the privilege is to serve the administration of justice and
to safeguard the right of any person to obtain entirely frank and realistic legal
advice. The privilege is a fundamental human right long established in the
common law and now supported both by European law and by Article 8 of the
Convention for the Protection of Human Rights and Fundamental Freedoms.
Nevertheless the balance of public interest must be assessed in each case to
see whether in the particular circumstances the public interest in maintaining
the exemption outweighs the public interest in disclosure.*

32. At paragraph 8 the Tribunal stated that

*A person seeking disclosure of material protected by legal professional
privilege could argue that Parliament, by making the exemption in the Act
qualified and not absolute, intended that legal professional privilege could be
overridden without any particular difficulty. We do not consider that this is what
Parliament intended. The test which we must apply is that laid down in s2(2)(b),
namely, that in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the*

*information. This wording does not give any guidance as to the degree of*
*importance of the public interest in maintaining a particular exemption. On the*
*inherent importance of the exemption we take our cue from the decisions*
*mentioned.*
*For the public interest in maintaining legal professional privilege not to outweigh*
*the public interest in disclosure, the public interest in disclosure needs to be*
*particularly strong, because proportionate reasons are required for not upholding a fundamental human right.*

33. Most recently in *Kessler v Information Commissioner and HM Commissioners for Revenue & Customs (*EA/2007/0043) the Tribunal found in relation to *Bellamy* at paragraphs 53 to 56

*53. This was an early decision from this Tribunal on the exemption under*
*section 42 of FOIA and it is clear from the approaches taken in subsequent*
*decisions that although there will be powerful reasons for maintaining the*
*exemption because of its very nature as a protection from disclosure, it is not an*
*absolute exemption, and care should be taken not to accord it higher status.*
*There will be occasions when the public interest in disclosure will outweigh the*
*public interest in maintaining the exemption.*

*54. We adopt what was said in Burgess v The Information Commissioner and*
*Stafford Borough Council (EA/2006/0091) at paragraph 44;*
*"The Tribunal wants to make it clear that legal privilege is not an absolute*
*[exemption] and furthermore, it is not enough in each case simply to assert*
*that the Tribunal's previous decision in Bellamy effectively makes the*
*[exemption] an absolute one: that is not correct."*

*55. We agree with the Appellant's assertion that by making section 42 a*
*qualified exemption subject to the public interest test in section 2(2)(b),*

*Parliament clearly rejected the view expressed in some judgments that the public interest in obtaining legal advice in confidence automatically prevails over almost any other interest. By the enactment of FOIA, Parliament has done exactly what the House of Lords in R v Derby Magistrates Court, ex parte B [1995] 4 All ER 526, per Lord Taylor, said was required to change the absolute nature of legal privilege, it has added a public interest balancing exercise.*

*56. As to the application of that public interest balancing exercise, we again agree with the Appellant's assertion that FOIA puts no onus on an applicant to show that the public interest in disclosure outweighed the public interest in maintaining the exemption. The Additional Party points out that "there is no suggestion anywhere within the section that any legal burden of proof is applicable at all." The Information Commissioner did not, in our opinion, place any burden on the Appellant to show that the public interest lay in favour of disclosure.*

31. In Pugh, the Tribunal went on to approve the development of the LLP exemption set out above; and it rejected the argument that there had to be exceptional factors for the public interest in disclosure to outweigh the public interest in maintaining the exemption, emphasising the test set out in section2(2)(b) FOIA, whether "*in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information*". However, in considering that balance "*the weight of judicial opinion referred to in the cases above gives the exemption itself greater weight and to that extent may be described as having an "inbuilt" weight requiring equally weighty public interests in favour of disclosure, if the exemption is not to be maintained*."

32. It is clear from the wording of section 2(2)(b) that those seeking to maintain the exemption must persuade the Tribunal that the factors they rely on outweigh those in favour of disclosure. If the balance rests equally, the Tribunal should order disclosure.

33. In considering the balance, the Tribunal can reach its own view, on the evidence and submissions before it, both of which are fuller and more detailed than that before the Commissioner. The Tribunal is not restricted to looking for errors in the Commissioner's Decision Notice.

34. Finally, we accept and adopt the four principles set out in paragraph 53 of Pugh:

> a. There is an assumption built into FOIA that disclosure of information by public authorities on request is in the public interest in order to promote transparency and accountability in relation to the activities of public authorities. The strength of that interest and the strength of competing interests must be assessed on a case-by-case basis.
>
> b. The passage of time since the creation of the information may have an important bearing on the balancing exercise. As a general rule, the public interest in maintaining an exemption diminishes over time.
>
> c. In considering the public interest factors in favour of maintaining the exemption, the focus should be upon the public interests expressed explicitly or implicitly in the particular exemption provision at issue.
>
> d. The public interest factors in favour of disclosure are not so restricted and can take into account the general public interests in the promotion of transparency, accountability, public understanding and involvement in the democratic process.

The Balance of Public Interest

35. What then are the factors that favour disclosure in this case? Mr McGoldrick urges a number of points: in support of the general argument for transparency and accountability, he argues "If [the opinion] is kept secret from the general public then people cannot take an informed view on what has been done and why it has been done." He argues "it is in the public interest that people know whether the actions and motives of an elected body are consistent with the facts. … If a public body can take actions that appear to be against the law and then justify them by

reference to an unpublished "opinion", then this is not democratic. There are very few people with the financial resources to try and take on a public body or the District Auditor in court."

36. He points out that the opinion has had "material" effects: "On the basis of what the Authority said that the Opinion said, they were able to take substantial sums from the toll income … forecast to reach about £70 million. This had a major effect on the finances of the Tunnels. It was material to whether a toll increase was required or not. It was probably also crucial in the Mersey Tunnel Bill becoming law in 2004 despite wide opposition from the local public, many local MPs and local newspapers".

37. We do not have to accept the specifics of what Mr McGoldrick says to accept that these are weighty arguments. The IC points out, in answer to the argument about lack of democracy, that Mr McGoldrick did in fact challenge the accounts before the District Auditor, who has confirmed that the payments were properly and lawfully made. The availability of alternative methods of challenge lessens the argument for public accountability. However, while a factor, we note that the District Auditor's remit is limited: he rules on legality and propriety, that what was done was done properly; but he does not rule on the merits or desirability of what was done, or whether alternative courses of action may also, properly, have been available. (For completeness, we repeat our earlier view that the fact that Mr McGoldrick has seen the opinion, on conditions of secrecy imposed by the District Auditor, has no bearing, either way, on the public interest test. It is simply irrelevant to FOIA.)

38. The IC also argues that because some of the opinion has been published, the public interest in seeing it is diminished. This seems to us an argument that cuts both ways: to the extent that it is already in the public domain, then the argument for keeping the remainder confidential is weakened. It will inevitably, as it has in this case, give rise to suspicion that some material and significant point is being held back.

39. An issue on which all parties addressed us is whether the opinion can be described as stale: Mr McGoldrick says that in view of its age, 10.5 years in January 2005, the date of the request, the argument for preserving legal privilege is much weaker. Both The IC and Merseytravel rebut this. As Mr Barclay's evidence clearly shows, the opinion is still relied on as the justification for treating the original levy on the district councils as a loan, which must now be repaid: the opinion is still instrumental in the annual repayments of £3.6 million, continuing to 2014/15. We agree that the opinion is still live; the advice is currently being implemented.

40. Nor are we persuaded by Mr McGoldrick's arguments that the issues addressed in the opinion have been rendered academic by the passage of the Mersey Tunnels Act, with its clear power to make the repayments. We

accept Merseytravel's argument, in their submission, on this point: "neither the 2004 Act nor the Special Report [of the House of Lords] says anything about whether the payments made by District Councils between 1988 and 1992 are to be treated as loans. Merseytravel continue to treat those payments as loans, not because the 2004 Act or the Special Report require it to do so, but in reliance on the…. 1994 advice. ".

41. What of the arguments in favour of maintaining the exemption? Merseytravel's submission sets out clearly and powerfully the "inbuilt public interest that is inherent in legal professional privilege itself. There is a strong public interest in ensuring that everyone is able to take legal advice about their rights and obligations, from fully informed legal advisors. Parties should not be deterred by the fear that information they provide to their legal advisors may be made public; or that the advice itself may come into the public domain and may reveal weaknesses or difficulties in the client's legal position. It is submitted that these considerations have particular force where the client is a public authority. The maintenance of legal professional privilege for advice given to public authorities helps to ensure that those authorities act within the law. Ultimately, this contributes to the maintenance of the rule of law."

42. We accept, consistent with the earlier tribunal cases referred to above, the weight that must be given to legal professional privilege, but we have reservations about the full force of some of the points argued. We question whether a public official, concerned to see that his authority acted within the law and therefore seeking advice, would really be inhibited from spelling out the full picture for fear that publication might eventually ensue. We have certainly seen no evidence to that effect, and it would seem self-defeating from the client's point of view. The very points that, on this argument, they might feel inhibited from revealing, are presumably the very points on which they most wish to seek advice. It is hard to see how an officer could be criticised, even if the weak points are later revealed, for seeking advice to help put them right, to ensure, as Merseytravel put it, "that those authorities act within the law". We discount the possibility that a public official might seek advice to help his authority act outside the law; and if that were to occur, it would be hard to see the public interest in keeping such advice confidential. Nor can we see that any professional lawyer would temper their advice for fear of later publication: that would again be self defeating, to both client and lawyer, to say nothing of the lawyer's professional obligations.

43. We can see such reservations would be a factor in the context of litigation, anticipated or actual, if only because legal advice will often involve not just merits, but also tactical considerations; disclosure at a time when litigation is in prospect would upset the delicate balance, evolved by the courts over centuries, of fairness between adversaries. It would be wholly unfair if one side, a public authority, could be obliged to reveal their legal advice,

while their private opponent was not. But on the facts of this case, we are reassured by Merseytravel's assertion to Mr McGoldrick (24 February 2005) : "first, it may be that you propose to mount a legal challenge. However, any such claim would almost certainly be time barred and would, in any event, be bound to fail on the basis that the decisions challenged are non-justiciable". In fact, so far as we can see, no one has at any time suggested that litigation was ever even remotely in prospect.

44. FOIA is of course purpose blind. That none of the parties propose litigation is neither here nor there: publication of the advice to MTUA would be publication to the world, and its use in litigation can never be ruled out. But the age of the advice does become significant here. We do not know what the limitation period might be for any legal action, but whether it has passed or not, the fact that the actions taken by the authority in reliance on the opinion for some 10 years (at the time of the request) have not faced any legal challenge does reinforce the view, apparently of all parties, that litigation is unlikely; certainly, it is not in prospect.

45. We are left with the central argument of the inbuilt weight that must be given to legal professional privilege. Given the importance of the principle, it is perhaps surprising, at least to lawyers, that Parliament did not make the exemption an absolute one. But it has not, and we should be careful not to erect a qualified privilege into, in practice, an absolute one, through deference to the importance of legal privilege. Any breach in the principle of privilege by the Tribunal will involve, if the IC and Merseytravel are right, the inhibiting effects of possible future disclosure which they describe. They are serious consequences and a Tribunal could never, in all probability, order disclosure if their argument is given full force. One way of squaring this circle is to accept the way the point was put in paragraph 25 of the Decision Notice by the IC, quoting Merseytravel's argument: "it also argued that legal advice must be fair, frank and reasoned and be able to highlight both strengths and weaknesses of an authority's position and possible courses of action. If legal advice was routinely disclosed public authorities would be reluctant to seek advice as it could damage their position; this in turn would lead to a poorer quality of decision making by public authorities rendering them less capable of complying with their legal obligations." *Routine* disclosure might lead to those consequences (though even then we are sceptical, as discussed above.) But disclosure under FOIA can never be routine. The public interest test balance, with its inbuilt weight in favour of maintaining the exemption, must be struck in the particular circumstances of each case. We are not persuaded that there will be a significant inhibiting effect from disclosure in this case; nor from the next case, nor from others that may follow. Each will have to be decided on its individual merits and disclosure will only occur if a heavy hurdle – the inbuilt weight - is overcome.

46. The circumstances here are striking. A public authority has pursued a settled course over a period of many years, involving tens of millions of pounds, and in effect preferring one sector of the public over another in circumstances where legitimate and serious questions can readily be asked about both the power to make the payments and the obligation to do so. In making those remarks we are not to be taken as expressing any view, or questioning in any way, the propriety or legality of Merseytravel's actions. Our concern is in the public interest in transparency. It is striking that, when Merseytravel addressed that public concern, on their website in 2002, and stated "Merseytravel has though a legal duty to use toll income to repay district councils for financing the Tunnel losses which occurred between 1988 and 1992", they were unable to answer clearly Mr McGoldrick's simple question: "which act refers to this legal duty?" Their reply came down to counsel's opinion. Hence this appeal.

47. We have found counsel's opinion is still live; it is still relied on. However, it is not recent. It seems to us that different considerations apply to a request for a recent opinion, a request made before it can be said, as in this case, that the authority has clearly embarked on a settled course of action. There would be tactical questions involved, and the prospect of challenge through other routes (legal, the ombudsman, the auditor) is more real when action is first taken, than when it has continued for years. We do not have to lay down a benchmark for "recent"; but 14 years is enough to take this opinion out of that category. In Kitchener, a barrister's opinion, which was 6 years old, was described by the Tribunal as "still relatively recent". But the facts of that case were very different. It involved childcare proceedings, where there is huge sensitivity over publication: very different to the situation here, which is one of public administration, with no personal overtones at all.

48. In Kessler, the legal advice in dispute was provided sometime between January and March 2006, the policy to which the advice related was announced in March 2006, and the request made in April 2006. Mr Kessler's argument was that once the policy decision had been taken,

> "*73 … disclosure would not impair any decision making process. [The Tribunal] agree with the general principle that where legal advice has served its purpose there may be a stronger public interest argument in favour of disclosure, particularly, if, in fact no harm would be created. We do not consider however that to be the position here. … having seen the advice it is clear that it may be relevant to other issues.*
>
> *74. The passage of time is one factor we identified above as being a factor in favour of disclosure, but we have concluded that it is not one that has much weight attached in this case bearing in mind the relatively recent decision and possible further developments."*

If nothing else, that quotation emphasises how fact specific the balancing exercise is. Weeks was "relatively recent" in Kessler; 6 years was in Kitchener. In our case, the passage of time favours disclosure; that the opinion is still live favours maintaining the exemption.

49. The context of this case seems significant to us in applying the public interest test. The doctrine of legal professional privilege is at its most important perhaps in the criminal context, such as Gillingham, where prosecutions were under consideration. Childcare cases must follow a close second. Can we say that the doctrine has less "inbuilt weight" in some situations than others? Certainly, it is always important for the maintenance of the rule of law; but there do seem some situations where the human rights aspects of the doctrine, stressed in Gillingham, are less striking. This is one such case. If it is permissible to differentiate between the weight given to privilege in different contexts – and we think it is, given that the balance must be struck "in all the circumstances of the case" – then a question of pure public administration, such as the one in this case, where no significant personal interests are involved (we discount the cost to the individual of any increase in tolls from the loan repayments: MTUA are a representative body) is at the opposite end of the spectrum of importance to, for example, legal advice in a criminal or childcare case.

50. In reaching that conclusion, we reject Merseytravel's argument, quoted above, that the doctrine of privilege is particularly important for public authorities. We are not persuaded that they would suffer a significant inhibiting effect from seeking advice by the fear of eventual, possible publication. We have also considered the view of the tribunal in Pugh, at paragraph 36: "The Ministry of Defence submits that the reasons why there is a strong public interest in maintaining the exemption under section 42 are clear, and having regard to those reasons, there is no basis for drawing any distinction between the position of natural persons, and the position of bodies that are FOIA public authorities. With this the Tribunal agrees." Our position is slightly different: we accept that public authorities are entitled to the protection of legal professional privilege on the same basis as natural persons (so the local authority in Kitchener, or the CPS in Gillingham, could rely on the doctrine attracting its full inbuilt weight when seeking to maintain the exemption), but that if the issues addressed in the advice do not affect individuals significantly, there is less inbuilt weight attaching to the exemption.

51. Finally, we come to strike the balance in the particular circumstances of this case. Weighed in the round, and considering all the aspects discussed above, we are not persuaded that the public interest in maintaining the exemption is as weighty as in the other cases considered by the Tribunal; and in the opposing scales, the factors that favour disclosure are not just equally weighty, they are heavier. We find, listing just the more important factors, that considering the amounts of money

involved and numbers of people affected, the passage of time, the absence of litigation, and crucially the lack of transparency in the authority's actions and reasons, that the public interest in disclosing the information clearly outweighs the strong public interest in maintaining the exemption, which is all the stronger in this case because the opinion is still live. To quote Bellamy : "there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that public interest". In our judgement, the countervailing considerations adduced here are not equally strong; they are stronger. The opinion should be disclosed.

52. Our decision is unanimous.

Signed

Humphrey Forrest

Deputy Chairman Date 15 February 2008