**IN THE FIRST-TIER TRIBUNAL** **Case No.** EA/2010/0080 & 81
**GENERAL REGULATORY CHAMBER**
**INFORMATION RIGHTS**

**ON APPEAL FROM:**

**The Information Commissioner's**
**Decision Notices No: FS50157702 and FS50203844**
**Dated:**

**Appellant:** Robin Makin

**Respondent:** Information Commissioner

**Date of oral hearing**: 4 November 2010
**Date of paper hearing:** 5 January 2011

**Before**
Melanie Carter
(Judge)

and

Rosalind Tatam
Richard Enderby

**Subject:**
FOIA: Public interest test s.2
Formulation or development of government policy s.35(1)(a)

**Cases:**
Office of Government Commerce v Information Commissioner [2009] 3 W.L.R. 67
Department for Education and Skills v Information Commissioner EA/2006/0006
Guardian Newspapers Ltd and Heather Brooke v The Information Commissioner and BBC EA/2006/0011 and 13
Department for Work and Pensions v Information Commission EA/2006/0040
Department for Communities and Local Government v Information Commissioner EA/2007/0069
Department for Business, Enterprise and Regulatory Reform v Information Commissioner EA/2007/0072
Scotland Office v Information Commissioner EA/2007/0128
Department of Work and Pensions v Information Commissioner EA/2010/0073

## DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal decided to uphold the appeal in part and to substitute the following Decision Notice for those of the Information Commissioner dated 22 March 2010 in relation to the Attorney General and Her Majesty's Treasury.

**Information Tribunal** **Appeal Number: EA/2010/080 & 81**

# SUBSTITUTED DECISION NOTICES

**Dated 24 January 2011**

**Public authority:** **Attorney General**

**Address of Public authority:**

20 Victoria Street
London, SW1H 0NF

**Public authority:** **Her Majesty's Treasury**

**Address of Public authority**

1 Horse Guards Road
London SW1A 2HQ

**Name of Complainant:** **Robin Makin**

**The Substituted Decision**

For the reasons set out in the Tribunal's determination, the Decision Notices FS50157702 and FS50203844 are upheld save that:

1. the Tribunal finds that the Attorney General ("AG") held, as at the date of the letter of request, 23 January 2007, an email exchange between the AG and a departmental lawyer, also dated 23 January 2007, which was not identified as part of the information held in its original deliberations on the request. It was identified during the course of these proceedings as having been both held as at the date of request and within scope.

2. the Tribunal finds a breach of section 1(1) of the Freedom of Information Act 2000 ("FOIA") in that the AG ought to have concluded that whilst the exemption under section 35 did apply to the information contained in a letter from the Church Commissioners dated 12 September 2004 the public interest in disclosure outweighed the public interest in maintaining the exemption; as such the AG should have disclosed this further to Mr Makin's letter of request dated 23 January 2007.

3. the Tribunal finds a breach of section 1(1) of FOIA in that Her Majesty's Treasury ("HMT") ought to have concluded that whilst the exemption under section 35 did apply to information contained in the document entitled "Note of GLS practising certificate options" as to the number of Government lawyers and therefore the putative costs to Government of practising certificates, the public interest in favour of disclosure outweighed the public interest in maintaining the exemption; as such it should have disclosed this further to Mr Makin's letter of request dated 9 March 2007.

As the information referred to above has already been disclosed to Mr Makin, this Tribunal does not order the public authorities to take any further steps.

Signed

Melanie Carter
Judge

Dated this 24 day of January 2011

## REASONS FOR DECISION

### Introduction

1. This appeal arises from two letters of request from Mr Makin under the Freedom of Information Act 2000 ("FOIA") to, respectively, the Attorney General ("AG") and Her Majesty's Treasury ("HMT"), dated respectively, 23 January 2007 and 9 March 2007 requesting information with regard to the Legal Services Bill (as it then was) and the proposal to continue the exemption of Government lawyers from professional regulation including the requirement to pay for a practising certificate.

2. Both departments refused disclosure of the information identified as within scope of the request ("the disputed information") relying upon section 35 of FOIA, the qualified exemption for information relating to the formulation or development of Government policy. The AG maintained this refusal on internal review by way of a letter dated 27 March 2007. HMT took almost a year to complete its internal review and wrote to Mr Makin on the 5 March 2008 upholding its decision not to release the disputed information under section 35.

3. Mr Makin complained to the Information Commissioner ("IC") who after an investigation issued Decision Notices on 22 March 2010. Both Decision Notices supported the decisions of the Government departments (albeit the IC was critical of HMT for the delay in carrying out the internal review).

4. It was a particular feature of this case that Mr Makin had made further requests for the information in essentially identical terms on 9 April 2010 and that by the date of the hearing, it was said by the IC and the Departments, that Mr Makin had received all information held at the date of the original letters of request (either directly from the Departments or from the Ministry of Justice which had also received a similar letter of request). Unlike most appellants therefore who are at the disadvantage of not seeing the disputed information, Mr Makin was able, with the exception of a point in relation to documents post-dating the letters of request, to argue fully his case.

The appeals

5. Mr Makin appealed both Decision Notices to this Tribunal which decided, given their similarity in subject matter, to hear the two cases together.

6. Mr Makin argued in his Notices of Appeal that:

   a) some (if not all) of the disputed information may have been inappropriately categorised and did not relate to the formulation of Government policy;
   b) the policy had been formulated at the time of the letters of request;
   c) the "safe space" argument was misconceived;
   d) even if the "safe space" argument was appropriate, the balance of public interest ought to have been in favour disclosure.

7. Many of the detailed points in Mr Makin's grounds of appeal and subsequent written submissions relate to other FOIA requests (to the Ministry of Justice and related requests to the AG and HMT). As was explained at the hearing, this Tribunal's jurisdiction is solely in relation to the two Decision Notices and the letters of request dated 23 January 2007 and 9 March 2007.

8. Mr Makin wished the appeals to go ahead, despite the disclosure made, on the basis that there were issues of principle at stake, not least that by delaying disclosure the Government had, he claimed, achieved its aim of not disclosing the information during the passage of the Legal Services Bill.

9. Having seen the disputed information, Mr Makin sought to change his grounds of appeal to include an assertion that AG and HMT had not provided all the information held. This is considered below in addition to the grounds of appeal set out in paragraph 6 above.

10. On account of the disclosure of information, the lack of factual dispute and the nature of the issues in relation to section 35, the Tribunal decided that it was not necessary for the AG and HMT to be parties to the appeals or for evidence to be sought from those Departments. The Tribunal was satisfied that the IC was able to address the grounds of appeal without assistance from the Departments.

Evidence

11. The Tribunal was provided with a complete copy of the disputed information, which other than minor redactions for information out of scope and personal data, had been disclosed to Mr Makin. The Tribunal also had sight of a closed bundle containing information held by the Departments but which post-dated the letters of request.

12. Mr Makin provided two witness statements

The questions for the Tribunal

13. It appeared to the Tribunal that further to its role on appeal and taking into account Mr Makin's grounds of appeal, the following questions arose:

    a) Was more information held by the Government departments than had been identified?
    b) Was section 35 engaged ie: did the information relate to the formulation or development of Government policy?
    c) Did section 35(2) apply to any statistical information?
    d) In relation to the public interest test:
        i) when did the formulation or development of policy come to an end?
        ii) what is the relevant date in relation to which the public interest balancing test under section 2(2)(b) should be conducted?
        iii) to what extent did the disputed information contain factual information (see section 35(4))?
        iv) did the public interest in maintaining the exemption in section 35 outweigh the public interest in disclosure?

The Law

14. The Tribunal's jurisdiction in relation to appeals is pursuant to section 58 of FOIA. For the purpose of these appeals the Tribunal must consider whether the Decision Notices were in accordance with law. The starting point is the Decision Notices themselves but the Tribunal is free to review findings of fact made by the IC and to receive and hear evidence which is not limited to that before the IC. In cases involving the so-called public interest test in section 2(2)(b), as here, a mixed question of law and fact is involved. If the Tribunal

comes to a different conclusion under section 2(2)(b) on the same or differently decided facts, that will lead to a finding that a Decision Notice was not in accordance with the law.

15. Section 35, which is contained in Part II of the Act, provides an exemption for "information relating to the formulation or development of Government policy". Section 35 does not confer an absolute exemption and, under section 2(2)(b) of FOIA, the duty to disclose under section 1(1)(b) does not apply to the extent that "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information". Given the express terms in which the public interest test is put, it is clear that where the scales are level, then the information must be disclosed. In this way, it is right to say that there is a presumption in favour of disclosure.

**Consideration**

Did either Department hold more information than previously identified?

16. The Tribunal considered first whether the Decision Notices were not in accordance with law on the grounds that not all information held had been correctly identified. Mr Makin's essential assertion in this regard was that he does not accept "...*that what the Information Commissioner's Office have accepted as being the information sought under the requests was all the information held by the AGO and/or HMT. There appears to have been no consideration by the ICO as to whether what the AGO and HMT respectively indicated and provided to the ICO as being comprised in the respective requests adequately fulfilled those requests*."

17. The IC's representative explained to the Tribunal that the IC generally proceeds with his investigations on the only reasonable basis possible, namely that he can assume the authority in question will disclose to him all the information it holds within the scope of the request and to which it has applied any relevant exemptions before deciding how the request will be handled. The IC will only question the amount and nature of the information offered up in the course of his investigations if it appears to him that there is an obvious lacuna, for example where a disclosed document reveals the

existence of another relevant document that has not been disclosed and there is no explanation for its absence.

18. The Tribunal noted that the IC had not explicitly stated in either Decision Notice that he had considered whether the information provided represented full compliance with FOIA in terms of the information held. It was satisfied however, given that this had not been an issue raised by Mr Makin during the course of the investigation, or indeed in his original grounds of appeal, and, for the reasons given below, there had not been any "obvious lacuna", that it had been reasonable of the IC not to have questioned the AG and HMT's assertions that the disputed information represented the totality of the information held by those Departments relevant to the requests.

19. Mr Makin developed a number of detailed arguments arising from the documents he had seen to assert that this gave rise to a significant doubt whether the searches had been adequate and a suspicion that more information had been held.

20. Dealing with Mr Makin's main points raised, the first grounds for suspicion arose, he said, from the fact that a document had been disclosed during the course of these proceedings which the AG now accepted as within scope. This was an email exchange between the AG himself and his lead lawyer. It was dated 23 January 2007, the same date as the letter of request to the AG. The Tribunal was told by the IC that the Department had overlooked this document on account of its date but on a further review had identified this as within scope. The Tribunal accepted this explanation as entirely plausible given the dates involved. This did not of itself indicate a lack of a robust search. Technically, of course, this did mean that the AG Decision Notice was not in accordance with law in that it, understandably, omitted any mention of this document. As a result, the Substitute Decision Notice attached to this decision refers to the non-identification of this document at the correct time.

21. Mr Makin, in this regard, also pointed to the fact that one of the documents considered by the IC was not the exact same version of the document as subsequently disclosed by the Ministry of Justice, the Department leading on the Legal Services Bill. Given the relatively minor nature of the differences

between the versions of this document, the Tribunal did not consider this an indication that any documents had been withheld or that the searches undertaken had been inadequate.

22. The next main point in relation to whether all documents held had been identified and disclosed to the IC, arose from a document dated 27 March 2007 in which AG officials in an internal note set out that which it held as at that date (that is, three months after the date of the letters of request). Mr Makin pointed out that he had not, in the subsequent disclosure had sight of certain of the documents mentioned in that internal note. The Tribunal were shown these documents in a closed bundle (that is, not available to Mr Makin) and accepted that these all post-dated the letters of request. Similarly, the AG had voluntarily disclosed an undated note prepared by Treasury Solicitors Department in 2008 on the requirements to hold practising certificates. This was not, according to the IC held by the AG as at the date of the letter of request. The Tribunal considered that there was nothing on the face of the information to indicate it was held at the relevant date and its voluntary disclosure at a later date also did not in anyway indicate that it had been previously held.

23. Mr Makin claimed that there must have been in existence statistical and/or financial information which gave rise to the policy considerations and 'lines to take' supporting the exemption of Government lawyers from practising certificates. Mr Makin pointed to a reference in a letter that had been sent by HMT to IC on 18 November 2009 and was disclosed to him as part of this Appeal, to the *"putative costs"* of paying practicing certificates as being *"below any threshold at which departments might seek additional funds from HMT"*. He argued that this must indicate that HMT had other financial/statistical information which it held and upon which it came to this conclusion. The Tribunal noted however that the only other such information was to be found in a submission entitled "Note on GLS practicing certificate option" referring to the number of Government lawyers and the possible cost of their practicing certificates (see paragraph 66 below in relation to this information). The source of this information was said, in that submission, to be the Law Society. The Tribunal accepted that this information taken together with the generic financial information as to each Department's budgets which the Treasury would be bound to hold (and which would fall outside of the scope of the

letters of request) would suffice to give HMT the necessary background information it needed. As such, Mr Makin's suspicion was, in the Tribunal's view, ill founded. The Tribunal did take the view however (on which see below) the information in the submission referred to above was not exempt under section 35 and ought to have been disclosed.

24. The Tribunal was sympathetic to Mr Makin in relation to this particular issue however as he might reasonably have expected more information to be held by the Departments, either as background factual information or statistics, and for this eventually to have been disclosed. There were however no substantive grounds upon which the Tribunal could reasonably infer that the searches had been inadequate and/or that more information had been held.

Was section 35 engaged?

25. As mentioned above, the Tribunal and indeed Mr Makin had by the date of the hearing had the benefit of seeing the disputed information (other than those parts that had been redacted on account of being out of scope or representing personal data).

26. Mr Makin sought to argue that the AG and HMT were merely lobbying for a particular stance in relation to the Government policy, which had been formulated at a much earlier date. The Tribunal considered it important however to remember that section 35 concerned "government policy", not the policy of individual departments. Whilst the Ministry of Justice was the lead Department for the Bill, the Government's policy was arrived at by virtue of the interaction and testing of views that came from the different stances of the different Departments.

27. In the Tribunal's view, moreover, Ministers will self-evidently require support from officers by way of briefings and 'lines to take' and these will routinely develop and change during the passage of legislation through Parliament. In the Tribunal's view during the passage of the Legal Services Bill through Parliament Government's thinking would necessarily be in flux on account of the ongoing challenges to its provisional policy (ie: that set out in the Bill). It was significant that section 35 was couched in terms of information that "related to" the formulation or development of Government policy. This was therefore necessarily broad and took in information which was indirectly

involved in the policy formulation or development. On this basis the Tribunal had no hesitation in concluding that the section 35 exemption was engaged in relation to all the disputed information.

Statistical information

28. In forming this view, the Tribunal considered whether the effect of section 35(2) was such that any statistical information should have been disclosed. Section 35(2) provides:

*"(2) Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded—*

*(a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or*

*(b) for the purposes of subsection (1)(b), as relating to Ministerial communications."*

The Tribunal did not however consider that there was any statistical information in the disputed information. Mr Makin pointed to various places in which figures were cited (including that referred to in paragraph 23 above). The Tribunal was not satisfied however that the mere reference to factual information which contained figures amounted to "statistical information" pursuant to section 35(2). The Tribunal accepted as a working definition of "statistical information" that put forward by the IC and contained in Ministry of Justice guidance (dated 14 May 2008) on section 35. That is:

*"…the outcomes of mathematical operations performed on a sample of observations or some other factual information. …Statistical information is therefore distinguished by being (i) derived from some recorded or repeatable methodology, and (ii) qualified by some explicit or implied measures of quality, integrity and relevance."*

29. Thus, there being only the simplest of mathematical operations underlying the figures in question (and even then the Tribunal could not establish to what extent they had been approximated), the Tribunal found no substance in Mr Makin's arguments that section 35(2) applied. In any event, as explained below, the Tribunal took the view that the policy in question had been

formulated by the date of Royal Assent. The appearance of the figures in question in the disputed information all pre-dated this.

30. Having determined that section 35 was engaged in relation to all the disputed information, the Tribunal moved on to consider the public interest balancing test under section 2(2)(b) – did the public interests in maintaining the exemption outweigh the public interests in favour of disclosure.

The date at which policy formulation or development is complete

31. As a preliminary issue to the public interest balancing test and of critical importance to section 35 is the date by which the policy formulation or development may be said to have come to an end. The public interest factor against disclosure that arises from the Government's need for "safe space" within which to formulate and develop its policy will either have dissipated altogether or continue only with minimal weight after this date.

32. Mr Makin argued that the correct date by which the IC and therefore the Tribunal should view the policy formulation or development as having come to the end is at the latest 12 October 2006 as, he says, the Government had by then decided that the exemption was to be maintained and a fall back position had been developed. The IC concluded in the Decision Notices that the relevant date for these purposes was the date of Royal Assent of the Legal Services Bill, 30 October 2007.

33. In this regard, the Tribunal considered the principles helpfully set out by a differently constituted Tribunal in Department for Education and Skills v Information Commissioner, 19th February 2007, EA/2006/0006 (paragraph 75):

*"(iv) The timing of a request is of paramount importance to the decision. We fully accept the DFES argument, supported by a wealth of evidence, that disclosure of discussions of policy options, whilst policy is in the process of formulation, is highly unlikely to be in the public interest, unless, for example, it would expose wrongdoing within government. Ministers and officials are entitled to time and space, in some instances to considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as*

*agreed policy. We note that many of the most emphatic pronouncements on the need for confidentiality to which we were referred, are predicated on the risk of premature publicity....*

*(v) When the formulation or development of a particular policy is complete for the purposes of (iv) is a question of fact. However, s. 35(2) and to a lesser extent 35(4), clearly assume that a policy is formulated, announced and, in many cases, superseded in due course. We think that a parliamentary statement announcing the policy, of which there are examples in this case, will normally mark the end of the process of formulation. There may be some interval before development. We do not imply by that that any public interest in maintaining the exemption disappears the moment that a minister rises to his or her feet in the House. We repeat – each case must be decided in the light of all the circumstances."*

34. The Tribunal is satisfied that the Government's policy position was not in fact fixed at the time the requests were made on 23 January 2007 and 9 March 2007. At these points, the Bill's passage through Parliament was still to be completed. It is clear that the relevant policy was under debate right through to the end of the Parliamentary journey (although the Tribunal accepted that there would have been a short period between the last formal steps and Royal Assent when it would have been unlikely that Bill would have been reopened). It is in the nature of the legislative process that provisions remain under review through this process, particularly where they are actively under challenge. It was clear moreover that the Law Society was raising points on this issue throughout the legislative passage of what went on to become the Legal Services Act.

35. In the Tribunal's view, for all practical purposes the date by which the Government's formulation or development of the policy in question was ended, was the date of Royal Assent, 30 October 2007.

36. The IC Decision Notice in relation to the HMT request addressed this issue at paragraph 49, stating that although Royal Assent was given in October 2007, there remained the *"potential for the issue regarding exemption of government lawyers to surface and become live again. In view of this the*

*Commissioner is satisfied that the requirement for safe space had not waned significantly".*

37. The Tribunal found no evidence to support this assertion and to the extent that this was material in the HMT Decision Notice, the Tribunal was of the view that it was not in accordance with law.

Timing of public interest balancing test

38. Another important issue before the Tribunal was the relevant date in relation to which the public interest balancing test should be carried out. The Tribunal considered the following options:

a) the date of the letter of request;
b) the date by which the public authority ought, under the Act, to have taken their decisions under section 1(1);
c) the dates on which the Departments actually took their decisions.

39. The IC argued that the relevant date for these purposes was the date of the letters of request or at the latest, the date by which the public authority *ought to have taken their decisions*. Mr Makin argued that the relevant date for these purposes was the date that the decisions were *actually taken*.

40. A review of previous Tribunal cases indicates the basic approach that the timing of the public interest balancing test, is to be determined at the date of request or at the latest by the time of any internal review. Different formulations of this proposition are to be found in Department for Business, Enterprise and Regulatory Reform v Information Commissioner EA/2007/0072 (paragraphs 104-111) and Department of Work and Pensions v Information Commissioner EA/2010/0073 (paragraph 87) . These cases are of course not binding on this Tribunal and to a significant degree turned on their own particular facts.

41. The reason this was a key factor in this appeal was the delay in HMT concluding its internal review. It will be recalled that the letter of request was dated 23 January 2007, the refusal decision for HMT was 30 April 2007. The date of refusal on internal review by HMT was 5 March 2008. The date of Royal Assent was 30 October 2007 – that is after the original refusal but before the decision on internal review.

42. As will be seen below, the Tribunal has taken the end date by which the policy in question was formulated and developed as the date of Royal Assent, 30 October 2007. Thus, if HMT were to be considering the public interest factors as they applied as at 5 March 2008, the date the internal review decision was actually taken, the public interest against disclosure would necessarily be considerably diminished. Conversely, in the Tribunal's view and as explained below, taking the public interest factors as they applied as at the either the date of request or when the decision to refuse *ought to have been taken*, these would pre-date the date of Royal Assent, such that the public interest against disclosure would be correspondingly increased.

43. It was important to clarify at the outset of this analysis that the importance of this issue is the setting of the cut-off date for the facts that may properly be taken into account in the public interest balancing test. In the Tribunal's view, this issue as to the factual matrix is a separate one to the circumstances in which, as often happens, a public authority develops its reasons for deciding for or against disclosure and/or when seeking to rely upon new exemptions after the original decision to refuse and on internal review. Thus, the actual evaluation of the balance of public interest factors may, quite properly, take place long a material amount of time after the cut-off date for the facts that may be taken into account in that evaluation.

44. The Tribunal considered at what date, in its view, the decision on internal review should have been taken by HMT. Where a 'complaints handling procedure' (as the internal review procedure is referred to in the Act) is provided by a public authority, the Tribunal would be guided on the question when the decision ought to have been taken by the provisions of the Code of Practice under section 45(1) and the IC's recommendations. Paragraph 39 of the Code requires "a prompt determination of the complaint". The IC's Good Practice Guidance suggests a normal target of 20 working days from the date of request for a review and, in exceptional circumstances, a longer period that is not, in any event, to go beyond 40 working days.

45. In light of this the Tribunal took the view that it could not sensibly be argued that HMT was justified in not completing the internal review by the date of Royal Assent, 30 October 2007 (that is over six months from the date of the

request for a review). Thus, in the Tribunal's view the decision in the HMT case, should have been taken prior to Royal Assent.

46. The Tribunal reminded itself that its function under section 58 is to consider whether the Decision Notices were "in accordance with law". As such, it was clearly scrutinising the decision of the IC taken under section 50(1), which in turn is a consideration whether the "request *has been dealt with* in accordance with the requirements of Part I of the Act" [emphasis supplied]. A line of Tribunal cases has noted that this test, being couched in the past tense, clearly indicates that the IC, and therefore the Tribunal in turn, are not considering the relevant public interest factors as they apply at the date of the Decision Notices or appeal hearing (see Department for Communities and Local Government v Information Commissioner, EA/2007/0069, paragraph 14).

47. It seems to this Tribunal that section 1(1) (the general right of access to information) which is expressed in the present tense, is an indication that it is the date of the public authority's decision which counts for the public interest balancing test. Contrary to the question of what information is held, in relation to which express provision is made in section 1(4) that the relevant date is the date of request, there is nothing on the face of the legislation to indicate that the public authority may not take into account all those factors pertaining at the date of decision, regardless of whether they arose after the date of request. Indeed, the absence of express provision in this regard, given that Parliament considered it a necessity in relation to the question of what information is held, displacing what would otherwise be the most obvious interpretation, lends support to the date of decision being the relevant date.

48. The Tribunal considered the IC's proposed approach to this matter, that the test should be carried out at the latest by the date when the decision ought to have been made. The Tribunal noted that this approach would allow a change in the factual matrix between the date of request and the date by which the decision ought to have been taken. This would avoid the public authority having to disclose information in circumstances in which, by the date of the decision (provided it had been taken in good time), it would clearly not be in the public interest to do so – for instance where the disclosure of information might prejudice a criminal investigation or trial which had only

begun after the date of the letter of request. In these circumstances it would seem to the Tribunal quite wrong that the public authority would be obliged to make disclosure. Albeit not the circumstances here, the desirability and need for flexibility in circumstances such as those supported the IC's suggested approach.

49. It was noted that this would mirror the flexibility of the IC who, it is accepted by this Tribunal, may find in favour of disclosure but decide nevertheless not to order release of the information on account of the fresh circumstances that have arisen since the decision of the public authority (on the basis that disclosure as at the date of the Decision Notice had become undesirable). This flexibility was expressly supported, obiter, by the High Court in Office of Government Commerce v Information Commissioner [2009] 3 W.L.R. 67 at paragraph 98.

50. The Tribunal considered it inherently unlikely that Parliament would have intended the Act to operate in such a way that a public authority's inaction (deliberate or otherwise) should be a determinant of this issue. In most cases, if the Act and the Code are being complied with, the decision will have been taken promptly and the facts underlying the public interest test will not vary significantly between the date of the letter of request and the date of the finalised decision (which as noted above may be on internal review). There will, however, be a minority of cases in which the effect of the passage of time between those dates, as here, can be significant. Whilst, in this case, the passage of time would have worked in the requester's favour, it was not difficult to imagine circumstances in which it would favour a public authority wishing to resist disclosure or where it would be contrary to the public interest (as suggested in the example of criminal proceedings in paragraph 48).

51. An equally undesirable effect of taking the relevant date as the actual date of the finalised decision (where outside the prescribed time limit) would be that an unscrupulous public authority could either delay the original refusal decision, or choose to delay their completion of the internal review and thereby benefit from a change in circumstances that strengthened the case against disclosure. Conversely the Tribunal noted that where a change of circumstances would favour disclosure there was nothing to stop the requester avoiding any prejudice by making a fresh request.

52. Given the above, the Tribunal was attracted to the IC's argument that the latest relevant date for these purposes should be the date when the decision ought to have been made. The provisions regarding time limits, both in statute and by way of guidance, (see paragraph 44 above) provide a degree of legal certainty in this process.

53. Thus, where, as in the HMT appeal, the date of the internal review was significantly delayed, it would, in the Tribunal's view, be the date that the internal review decision ought to have been taken that will be the relevant date for the public interest balancing test. The Tribunal agreed with the IC that the six month delay from request for a review was not supportable and the decision should have been taken at the latest by the date of Royal Assent in October 2007. It is therefore this date at the latest that this Tribunal has decided is the relevant one for the purposes of fixing the factual matrix for the public interest balancing test. It is no matter that the actual evaluation was actually carried out at a later date, on internal review, as the Decision Notice shows that HMT carried out this exercise by reference to the facts which pertained at the date of request (ie. prior to the Royal Assent).

Public interest factors in favour of maintaining the exemption

54. A particular point of contention in this appeal was the assertion of the need for "safe space" for the formulation or development of Government policy. The ability for this need to justify maintaining the exemption in section 35 FOIA has been affirmed by the Tribunal on several occasions: see for example the cases of Department for Education & Skills and Evening Standard v Information Commissioner (EA/2006/0006) and Scotland Office v Information Commissioner (EA/2007/0128) cited in the Decision Notice.

55. As the Decision Notices record, the issue of timing is likely to be very important when considering the need for a "safe space". Mr Makin stated that because the government's policy of maintaining the exemption for its lawyers from holding a practising certificate had been formulated by the time they published the Legal Services Bill, the need for a "safe space" could not arise at the time the departments were responding to his requests. Thus, the central argument was that the policy had been formulated by the date of the

requests, or secondly it had been formulated in any event at definable points during its parliamentary course.

56. The Tribunal, being satisfied that the Government's policy on these matters had not been formulated at the date of the requests and that, as explained above, this did not cease until Royal Assent, could appreciate why a "safe space" for the development of this policy was required. It agreed that the policy on Government lawyers being exempt had been largely determined before the introduction of the Bill, but accepted that albeit the need for safe space might be said to have diminished it remained to a significant degree.

Public interest factors in favour of disclosure

57. As regards the general operation of the FOIA regime, Stanley Burton J in the *OGC* case expressed his agreement (paragraph 71) with the following statement of the Tribunal at paragraph 29 of Department for Work and Pensions v Information Commission (EA/2006/0040):

"*It can be said...that there is an assumption built into FOIA, that the disclosure of information by public authorities on request is in itself of value and in the public interest, in order to promote transparency and accountability in relation to the activities of public authorities. What this means is that there is always likely to be some public interest in favour of the disclosure of information under the Act. The strength of that interest, and the strength of the competing interest in maintaining any relevant exemption, must be assessed on a case by case basis: section 2(2)(b) requires the balance to be considered 'in all the circumstances of the case'*."

58. A differently constituted panel of this Tribunal stated in Guardian Newspapers Ltd and Heather Brooke v The Information Commissioner and BBC (EA/2006/0011 and 13):

*"While the public interest considerations in the exemption from disclosure are narrowly conceived, the public interest considerations in favour of disclosure are broad-ranging and operate at different levels of abstraction from the subject matter of the exemption. Disclosure of information serves the general public interest in the promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and*

*informed and meaningful participation by the public in the democratic process.*

*There is, in our opinion, considerable public interest in disclosing information about decisions that have already been made. Such information is capable of, inter alia, encouraging participation in and debate about future decisions; informing people of which considerations were taken seriously, which were, and, may routinely be, ignored; the weight that is, or appears to be, given to particular factors; which 'tactics' are successful and which are not; revealing more about the role of the civil servant and the 'negotiations' that take place; and confirmation that the democratic process is working properly."*

59. Further to the above observations the Tribunal accepted the other public interests in favour of disclosure referred to in the Decision Notices. Notably, the Tribunal acknowledged that the release of certain factual background information may inform the public and thereby stimulate debate. In addition, the Tribunal gave weight to Mr Makin's cogent submissions and supporting evidence with regard to the importance of the question of the exemption of Government Lawyers under the Legal Services Bill and therefore the attendant lack of regulation of their activities.

Factual information

60. Section 35(4) provides:

"*In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking".*

61. Clearly the effect of this provision is that where information is "factual information which has been used, or is intended to be used, to provide an informed background to decision-taking" then the public interest factors in favour of disclosure in relation to that particular information are increased.

62. Interestingly the Decision Notices make no reference to the IC's view on this and the IC's position before the Tribunal was neutral (he offered no views on Mr Makin's detailed submissions). Mr Makin argued that a large portion of the

disputed information was factual information falling under section 35(4) thereby increasing the case for disclosure.

63. The Tribunal failed to understand how it could have been correct for the IC to make no finding on this issue. It seemed to the Tribunal that whenever section 35 is under consideration it will be incumbent on public authorities and the IC in turn to consider whether section 35(4) applies and if so what affect it has on the public interest balancing test. It may have been that the public authority had formed the view that section 35(4) did not apply to any of the disputed information but this was not reflected in the Decision Notice.

64. The Tribunal found it difficult to separate out what was opinion, advice, recommendation and factual information. It was guided however by the useful consideration of this issue in the case of Department for Work and Pensions v Information Commission (EA/2006/0040). That Tribunal noted that *"...information can be characterised within a spectrum where pure advice was at one end of the spectrum and straight forward factual information at the other end of the spectrum*" (paragraph 73) and also that *"…where the information is firstly, so inextricably connected to the deliberative material that it is difficult to distinguish and secondly, where the vast weight of material is non factual information, we consider Parliament did not intend the sub-section to apply"* (paragraph 74).

65. The Tribunal took the approach accordingly that section 35(4) should apply where it was relatively obvious that what was being provided was factual information for the purpose of informing the decision–taker on the background. Most of what could be called factual information, as opposed to opinion, advice and recommendation, in the disputed information, was either so inextricably linked with deliberative material that no meaningful separation could be carried out or it was not clearly provided for the purpose of informing the decision-taker as to the background.

66. The exception to this, in the Tribunal's view, was in relation to a document within the HMT's appeal disputed information, a paragraph in a document entitled "Note of GLS practising certificate options" which contained information as to the number of practising certificates held by Government Lawyers and the cost to the Government. Various versions of this document

were before the Tribunal, but the relevant information remained essentially the same whichever version was considered. In the Tribunal's view the information was both easily and meaningfully separable from the remainder of the document which was predominantly advice on the options before the Government. The Tribunal took the view that section 35(4) did apply to this paragraph and that, therefore, the public interest in disclosure of this information was increased.

67. The only other document which the Tribunal considered might fall within section 35(4) was, in relation to the AG appeal, a letter from the Church Commissioners stating that their in-house lawyer paid for a practising certificate and, in effect, that they did not support the exemption. The Tribunal considered that insofar as there was factual information contained within that letter, it was inextricably linked to what was, overall, information sent in with a view to influencing Government policy. The Tribunal took the view that this did not fall within the scope of section 35(4).

Balance of public interest factors

68. The Tribunal considered the Government's need for a safe space in the context of these appeals was essentially aimed at the public interest in the development of legislation that is fit for purpose and which is efficiently steered through Parliament. It was undoubtedly important that members of both Houses were fully able to challenge the Bill and that members of public were able to engage in public debate alongside the legislative process. The Tribunal took the view that the efficacy of the Parliamentary legislative process took precedence in this context – it was after all, at the time of the letters of request, the appropriate public forum for debate on the issues underlying the Bill. Whilst section 35 was not aimed directly at protecting the role of Parliament, insofar as Government policy in relation to legislation underpins this particular role of Parliament, they were intertwined.

69. Section 35(4) should operate in such a way that the relevant background information is available to the public. The IC should be criticised for, seemingly, passing over the significance of section 35(4) in its investigation and Decision Notices. Assuming that section 35(4) has had its proper effect

on the public interest balancing test, then this should preserve the safe space for Government without a disproportionate disadvantage to the public.

70. The Tribunal accepted that disclosure of the disputed information at the relevant time (see paragraph 38-53 above) could have led to a significant distraction from the course of the Bill through Parliament and the Government's ability therefore to formulate and develop its policy in this regard. It did not accept, other than in relation to the two documents mentioned in paragraph 71 below, that release of the disputed information would have materially enhanced the ability of the opponents or indeed proponents to the exemption to raise issues in Parliament.

71. The Tribunal found however that the public interest in favour of disclosure outweighed the public interest in maintaining the exemption in relation to two documents – first, the note referred to in paragraph 66 above and, second, the Church Commissioner letter referred to in the same paragraph. In relation to the former information, the Tribunal considered that given the application of section 35(4) and thereby the heightened public interest in favour of disclosure, the IC should have held that this information should have been disclosed. In relation to the latter, the Church Commissioner letter, the Tribunal took into account the date of the letter (12 September 2004) and that it related to early public consultation on the policy which gave rise to the Legal Services Bill. Given this, it was hard to fathom in what way its disclosure would have been against the public interest or would have undermined in anyway the exemption under section 35.

72. Both pieces of information should, in the Tribunal's view, have been disclosed and to that extent the Decision Notices in relation to the HMT and the AG, respectively, were not in accordance with law. The Substituted Decision Notice at the beginning of this decision makes reference to this but orders no steps to be taken as the information has already been disclosed.

73. In relation to the remaining disputed information, the Tribunal found that the public interest in maintaining the exemption outweighed the public interest in disclosure.

**Conclusion**

74. It might have been said that these appeals were pointless on the basis that the disputed information had been disclosed in response to later FOIA requests. The Tribunal accepted however that there had been matters of principle at stake, as obtaining the information at the original time had been more important to Mr. Makin than a much later disclosure when the information was considerably less significant. In addition, the HMT appeal was, in part, predicated on the actual date of the internal review which had been completed only after an unacceptable delay. The Tribunal could understand why Mr Makin would feel that his requests had not been expeditiously or rigorously handled.

75. That said, the Tribunal had had little hesitation in finding that section 35 was engaged and that (other than in relation to the two pieces of information) the balance of the public interest was not in favour of disclosure at the material time. Thus, the Department's overall handling of the requests and in turn the IC's Decision Notices on the complaint had been in accordance with the law.

76. Our decision is unanimous.

77. An appeal against this decision may be submitted to the Upper Tribunal. A person seeking permission to appeal must make a written application to the Tribunal for permission to appeal within 28 days of the date of this decision. Such an application must identify the error or errors of law in the decision and state the result the party is seeking. Relevant forms and guidance for making an application can be found on the Tribunal's website at www.informationtribunal.gov.com

Signed

Melanie Carter
Judge

Date: 24th January 2011