IN THE FIRST-TIER TRIBUNAL GENERAL REGULATORY CHAMBER (INFORMATION RIGHTS)

AND

IN THE MATTER OF AN APPEAL UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

Appeal No. EA/2011/0084

BETWEEN:

STEPHEN WYNN

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

THE SERIOUS FRAUD OFFICE

Second Respondent

BEFORE

DAVID MARKS QC (Tribunal Judge)
ANDREW WHETNALL
NIGEL WATSON

For the Parties:

The Appellant in person
Robin Hopkins (Counsel) for the Information Commissioner
Oliver Sanders (Counsel) and
Matthew Flinn (Counsel) for the Serious Fraud Office

Subject Matter and Statutory Authorities Cited:

Freedom of Information Act 2000, sections 12, 30, 42 & 44; Financial Services and Markets Act 2000, section 348

Cases Cited:

Taylor v SFO [1999] 2 AC 177; *DTI V IC* (EA/2006/007); *Alcock v IC* (EA/2006/0022); *Armstrong v IC* (EA/2008/0026); *Breeze v IC* (EA/2001/0057); *Guardian Newspapers v IC* (EA/2006/0017); *Public Prosecutor of Northern Ireland v IC* (EA/2010/0109); *Morris v Director of SFO* [1993] Ch 772; *Department of Business etc v O'Brien* [2009] EWHC 164 (QB); *Appger v IC* [2011] UKUT 153 (AAC); *Bellamy v IC* (EA/2009/0070); *Calland v IC* (EA/2007/0136); *FCO v IC* (EA/2007/0092); *Slann v IC* (EA/2005/0019); *FSA v IC* (EA/2007/0093 & 0100); *Birkett v DEFRA* [2001] EWCA Civ 1606; *IPCC v IC* (EA/2011/0222).

Decision

The Tribunal dismisses the Appellant's Appeal and upholds the Decision Notice of the Information Commissioner (the Commissioner) dated 3 March 2011, Ref. FS50297498

Reasons for Decision

Background

1. The collapse of the Equitable Life Assurance Society (Equitable Life) was by any standards, adopting the description afforded to that event by Counsel for the public authority and the Commissioner on this appeal, an exceptional event, at least by the standards of the time. Equitable Life was established in 1762. It later became one of the largest mutually owned life insurers in the world with about 1.5 million policyholders. Its collapse was well documented in the press and generally across the public domain. As the Commissioner's Decision Notice points out, after a ruling made in July 2000 by the House of Lords regarding the honouring of Equitable Life's commitments to certain policyholders, coupled with the failure of an attempt to find a buyer for the existing business, Equitable Life chose to close its doors in December 2000. It effected reduced payments to existing members. At the request of HM Treasury the closure was investigated by Lord Penrose who published his report in March 2004.

2. More pertinently for present purposes, on 19 December 2005, the public authority in this case, namely the Serious Fraud Office (SFO), formally announced its conclusion that it would not conduct or commence an investigation under section 1 of the Criminal Justice Act 1987 into Equitable Life.

3. On 1 November 2009, the Appellant made the following written request of the SFO in which he asked for:

"… all written information you have about the Equitable Life collapse which is not already public, especially anything about the reinsurance treaty and written by the SFO."

Initially the SFO in its response of 30 November 2009 relied on two exemptions under the Freedom of Information Act 2000 (FOIA), namely section 30 which deals with investigations and section 31 which deals with law enforcement.

4. As will be seen, the appeal has concentrated largely on the first of these two exemptions, although an important issue about the costs of complying with such a self-evidently wide ranging request was also addressed in some detail on the appeal, entailing considerations regarding section 12 of FOIA. All these issues will be reverted to in fuller detail below.

5. Following upon an internal review, the SFO confirmed its initial response. At about the same time, it formally clarified the matters with regard to the second part of the request which might on one reading have suggested in some way that the SFO had "played some kind of part in relation to a reinsurance treaty involving Equitable Life, to the effect that it did not hold any "documents" … which are written by the SFO and referred to the reinsurance treaty". Subsequently, the SFO referred to and relied upon section 40 (personal information) and section 42 (legal professional privilege) of FOIA.

6. Although this matter will be revisited below, at the time of the Appellant's complaint to the Commissioner in February 2010, the Appellant claimed that it was "unreasonable" for the SFO not to disclose information on the basis that the same would prejudice a future inquiry or prosecution when there had been no criminal proceedings in the 10 years or so since the original closure of Equitable Life. The Appellant further contended that there was no apparent interest in doing so, i.e. in conducting a further preliminary review of the scope for criminal prosecution, let alone bringing a prosecution to court.

7. The Commissioner's Decision Notice in effect confirms the SFO's reliance on sections 30 and 42. As the Decision Notice itself expressly pointed out, on 14 December 2010, the Commissioner had issued an Information Notice to the SFO in accordance with the Commissioner's powers under section 51 of FOIA. The Commissioner by that Notice requested the SFO to furnish the Commissioner with particular information regarding the original complaint and, in particular, to respond by setting out key pieces of information falling within the scope of the request. The Commissioner was especially concerned that certain critical documents, otherwise covered by the withheld information and not identified by the SFO, had not been located. The upshot was that a document which has come to be called a Vetting

Note setting out a general account of the investigation and related steps taken by the SFO was directed by the Commissioner to be produced by the SFO.

8. The Tribunal pauses here to set out the nature and scope of the Vetting Note since it is in many ways a critical component of the appeal. The Note is dated 3 December 2005. It is a 19 page document provided and drafted by the SFO itself. It refers to the fact that the SFO had received a referral from the Penrose Inquiry team and had been given access to drafts of the Inquiry Report as well as the documents used by that team. The SFO also had a copy of the Penrose Report. At paragraph 13, the Note stated that in the light of the collapse of Equitable Life:-

"… there are some grounds for beginning an investigation under s1 Criminal Justice Act 1987 although I do not believe they are strong grounds."

9. The author of the Note was a Mr Stephen Low, who was at all material times the SFO's Head of Accountancy. The Note was circulated to the then Director of the SFO, Robert Wardle. Later at paragraph 15, Mr Low states:-

"I believe that there is no realistic prospect of obtaining any convictions in this matter …"

Nine specific detailed reasons are given, the major one being that there had been close "oversight" by the respective regulators who were said to have "had access to large amounts of data from Equitable and throughout the material period", the said regulators being "aware of what the Society was doing" and on some occasions "condoning" it.

10. In paragraph 15.8, it was said that the case "could be clearly presented by a well prepared prosecution but there would be many areas of very considerable complexity which would be very difficult for a jury to cope with". Mr Low added that "any prosecution will have to rely on expert evidence which would be unlikely to be clear or unequivocal."

11. At paragraph 16, Mr Low stated:

"Counsel has advised that there is no realistic prospect of a conviction even if an investigation were commenced."

A conclusion in similar terms then follows, coupled with the recommendation that the decision of the Director be made public "due to the considerable public interest which this case has attracted and because of the number of private applicants who have contacted the Office."

12. At paragraph 19, Mr Low concluded by recommending that the Director's decision be "notified to FSA, DTI, FOS, HM Treasury, the Law Officers and Lovells (solicitors to the Society) before being released to the press".

13. At paragraphs 77 to 81 of the Vetting Note there is a section headed "Re-insurance contract". It refers to the fact that in 2000, one of the former officers of Equitable Life and its former Appointed Actuary, Chris Headdon, negotiated a reinsurance agreement "the effect of which was to allow the Society to decrease the amount of financial reserves needed to satisfy the regulator as to its solvency." It was also noted that "in practice, on reading the documents, the contract does not appear to me [i.e. Mr Low] to be one of reinsurance". At paragraphs 80 and 81, the following passages appear, namely:

> "80. It could be argued that Mr Headdon misled the regulators. It could be argued that he obtained permission from the regulator to hold too low a level of reserves in ELAS [Equitable Life] by dishonestly withholding the side letter from them. However, it could also be argued that the regulator did not understand the agreement in any case and should not have allowed it to influence them in determining the level of reserves they required the Society to hold. In other words the regulator cannot have been deceived by the agreement since they did not understand it correctly.
>
> 81. In any case, the Financial Services Authority have investigated this matter and have told Mr Headdon that he will not be prosecuted. I can see no justification for SFO to prosecute him even it were proper to do so once the more appropriate prosecutor (the FSA) has told Mr Headdon he will not be."

14. As will be seen in further detail below in considering the relevant evidence, the Appellant has contended during the appeal that the meaning and import of those passages and in particular paragraph 80, if not their necessary implication, was that the SFO should have instituted criminal proceedings against the regulator or regulators in question, i.e. the FSA, or at least have instituted an investigation into the FSA's actions in that respect. In the circumstances, the Appellant claims that this constitutes a clear failure by the SFO to conduct a proper inquiry. The SFO's position is, and in the evidence of their witnesses remains, that the FSA had conducted a thorough review of the reinsurance issue, and although both the FSA and the SFO would have had powers to prosecute, the SFO accepted that it would have been inappropriate for it to go against the decisions reached by the FSA and the assurance given by the FSA to Mr Headdon that he would not be prosecuted. It is not for the Tribunal to consider whether that was an appropriate decision. However, the key document in the disputed information is the FSA's review and the Tribunal sees no reason to doubt that that was received in confidence by the SFO and so falls to be

considered within section 44 of FOIA, an absolute exemption considered below. It is certainly justifiable to read paragraph 80 as relating to an accusation of impropriety levelled against the regulator in paragraph 80, although for what is worth a majority of the Tribunal regard the same as being one arguably only of oversight. That however has to be weighed against the serious contention that Mr Headdon, in his turn, was likely to have misled the regulator, such that the regulator could not, as paragraph 80 says, have understood correctly the meaning and intent of the Agreement referred to.

15. At paragraph 97 of the Decision Notice, the Commissioner formally determined that the Vetting Notice be disclosed.

16. In his Notice of Appeal dated 28 March 2011, the Appellant stated as follows, namely that he requested:

"… all written information the Serious Fraud Office (SFO) holds about the collapse of Equitable Life which is not already in the public domain, but in "Steps Requiered [sic]" on page 18 [presumably of the Decision Notice] the ICO requires only the disclosure of the Vetting Note."

17. As the Commissioner rightly points out in his initial Response, the above statement could not, on any view, be regarded as a valid ground of appeal. The Commissioner then sought to strike out the appeal. By a written ruling dated 6 July 2011, the single Tribunal Judge then dealing with the matter, Judge Dhanji, dismissed the application principally on the ground that the Appellant, in substance, was taking issue with the public interest balance applied by the Commissioner and by extension by the SFO with regard to section 30 which is, as well known, a qualified exemption.

18. The same judge had previously directed by a set of directions initially made on 24 May 2011 but varied on 6 July 2011 that the SFO might want to consider "whether it should provide the Appellant with additional information" on the basis of the Appellant's request. On 15 July 2011, the SFO formally responded by confirming that the documents it held did not appear to contain any information about the reinsurance treaty falling within the last part of the initial request.

19. In mid-September 2011, the SFO formally informed the Tribunal that, as previously indicated during an earlier telephone directions hearing, the SFO had already spent "at least 37 hours and 30 minutes" responding to the Appellant's request. It should be noted that after the request and the initial responses were exchanged, the SFO discovered a large volume of additional documentation which, in effect, overtook its assurances until that date about the information it held or did not hold, and also in practical terms, overtook the basis on which the Commissioner had conducted his examination and reached the determinations in his Decision Notice. The SFO held

two CD Roms found in six bankers storage boxes comprising approximately 8,000 pages of documents which it claimed would "involve at least a further 50 hours' work" falling within the relevant Fees Regulations to which reference will be made below. The CD Roms had been located, it claimed, on 16 August 2011. The SFO also confirmed it held, apart from the CD Roms and the materials therein contained, "additional hard copy material" comprising 7 lever-arch files and 2 ring-binders comprising various SFO notes and memoranda "in relation to the progress of the vetting process". It also held correspondence including exchanges with Counsel and members of the Penrose Inquiry and it also held documents from various sources such as exchanges with the FSA and with Equitable Life itself. The SFO also confirmed that a number of further written materials fell "within the first strand of the [the Appellant's] request for information" about the Equitable Life collapse. Reliance was placed on sections 30, 40, 41 (which deals with questions of confidence) and 42, as well as section 44 (prohibited disclosure) of FOIA. To summarise the position as far as this Tribunal is concerned the panel has carefully reviewed and studied the "additional hard copy material" and not the CD Roms. The reasons for this will be explained later and more will also be said about the Tribunal's observations on what it has looked at.

20. In the wake of a further direction from Judge Dhanji, the SFO produced a schedule listing the documents which were not to be disclosed with a corresponding entry or entries showing which exemption or exemptions were relied on as the basis or bases for non-disclosure.

21. In the light of the quantity on information which had been mentioned by the SFO, and in the light of the various directions which had been made, a formal request was made by the SFO to be entitled to rely on section 12 of FOIA with regard to the CD Rom materials alone. The issues raised by that application were addressed in the course of the present appeal as indicated above. It is sufficient to state at this point that no objection was taken by the Commissioner to the application being made on that basis. Indeed, the Commissioner contended that reliance on the various provisions as to costs was in the circumstances of this case, entirely permissible.

22. The Tribunal has therefore considered in private the large quantity of additional information which is on paper as distinct from what is or might be on the CD Roms. Originally, the former was viewed as being in something of a disorganised state, but in due course it was reorganised in accordance with the schedule to which reference is made in this judgment. For what it is worth, the Tribunal took the view that for some documents it was clear that they reflected internal deliberations, including the provision and consideration of legal advice that went towards the more succinct

statement of the position set out in the Vetting Note. There are numerous extensive drafts of that Note and many briefing notes addressed to, or emanating from senior staff that went towards a more considered position taken with regard to that Note. There was a welter of material, including material received from the FSA and from Messrs Lovells, the solicitors to Equitable Life. There were also notes of meetings with all such parties and others from which it was reasonably clear that those documents were all received in confidence, being records of exchanges made in confidence. With regard to other documents such as representations from the public or materials no doubt received from the Penrose Inquiry team, the Tribunal, on the balance of probabilities, infers that such materials were drafts or went towards matters which, in the event, were not published. At least there is no clear evidence before the Tribunal that this kind of documentation did find expression in published form. Nor is the Tribunal able to come to any clear decision about how far, at the time the request was made in the present case, the information that would have been available to the requester would have included material information not disclosed as part of the Penrose Report or as part of the published findings of fact by the Parliamentary Ombudsman. The latter, at least in effect, published material that was duplicated from or reflected the documentation eventually shown to have been held by the SFO in the Ombudsman's findings of fact. At all events, as indicated above, the Tribunal is entirely satisfied that sorting out all such documentation, and certainly the documentation held on the two CD Roms, would have clearly exceeded the costs' limit prescribed by the Regulations.

23. The Tribunal has conscientiously attempted to work through the information held in documentary form to satisfy itself as to the extent to which the claimed exemptions other than section 12 are engaged in this case. The exemptions appear, on the face of things, to be entirely justified and the Tribunal so finds. There may be an issue as to the extent to which, if any, the bulk of the material undisclosed in this case overlaps with documentation otherwise in the public domain by dint of the publication of the Penrose Inquiry Report and the Ombudsman's report, but the Tribunal has simply not been in a position to conduct that exercise, and in any event as indicated, on the inspection that the Tribunal has made of the undisclosed information, it is entirely satisfied that on the face of things, the exemptions relied on are properly invoked in the present case.

The Law

24. As indicated above, although reliance was placed initially on section 31 of FOIA, in the event, this appeal is concerned in the main with the following exemptions set out in FOIA, namely sections 30 and 42. In addition, there has been the issue concerning section 12.

25. The first exemption is section 30(1) of FOIA. That provision provides as follows, namely:

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

(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained –

(i) whether a person should be charged with an offence, or

(ii) whether a person charged with an offence is guilty of it,

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

26. It is self-evident that the words "at any time has been held by the authority for the purposes of" are critical. Mr Sanders for the SFO in argument understandably emphasises that expression, pointing out that the SFO relied both on (a) and (b). He refuted any suggestion or argument by the Appellant that no reliance could be placed on (a) since it could be contended that the SFO in the event decided not to conduct an investigation. The Tribunal respectfully agrees with the SFO on this score. It is clear beyond doubt that an investigation was conducted. In such circumstances, both subsection (b) as well as subsection (a) are clearly engaged. The Tribunal was formally informed by Mr Sanders on behalf of the SFO that within the SFO itself, terminology is employed which draws a distinction between, on the one hand, the "pre-investigative" or "vetting" stage of its inquiries and, on the other hand, the "investigative" stage, involving the exercise of the powers afforded to the SFO under the relevant provisions of the 1987 Act, in particular, under section 2. Further reference will be made to those provisions in due course.

27. However, in the Tribunal's clear judgment, the fact that the SFO may use such labels does not in any way conceal the reality that there was, in the case of Equitable Life, an investigation falling squarely within section 30(1). Moreover, such investigation was plainly conducted with a view to the relevant matters being ascertained and/or conducted in circumstances such as might have led to the institution of criminal proceedings. It is sufficient for the purposes of section 30(1) that there is or was an investigation, and such was the position in the present case.

28. It is perhaps convenient at this stage to look more closely at the relevant provisions which apply to the role of the SFO. Section 1 of the 1987 Act established the SFO and the Office of the Director. Section 2 sets out the Director's investigative powers.

By subsection (1), they are to be exercised: "… in any case in which it appears to him [i.e. the Director] that there is a good reason to do so for the purpose of investigating the affairs or any aspect of the affairs of any person".

29. There are then listed those authorities entitled to request the Director to exercise his statutory powers. By subsection (2), the Director is granted powers in effect to compel a person under investigation to answer questions or to furnish the relevant information. That person's entitlement to claim legal professional privilege remains intact as does, in effect, that person's entitlement to rely on any obligation of confidence which he may owe. Section 3 in general terms deals with the circumstances in which information garnered by the SFO may be used and disclosed: there are particular provisions dealing with tax related investigations and prosecutions.

30. Mention should also be made of FOIA section 30(2). In relevant part, it provides as follows, namely:

> "(2) Information held by a public authority is exempt information if-
>
> (a) it was obtained or recorded by the authority for the purposes of its functions relating to –
>
> (i) investigations falling within subsection (1)(a) or (b) …
>
> (b) it relates to the obtaining of information from confidential sources."

Even on the basis of the facts and matters set out earlier in this judgment, it is entirely clear in the Tribunal's judgment that this provision too is engaged in the present case. However, the Tribunal also agrees with the SFO at least, that this exemption adds little, if anything, to the reliance placed on and the claims made in respect of section 30(1). Nor is there any suggestion that a claim based on the exemption set out in section 30(2) is in any material way stronger than the claim or claims made in respect of the earlier subsection.

31. The real issue in the Tribunal's view however, and indeed by common consent, at least on the part of both the Commissioner and the SFO, and in the Tribunal's clear judgment, lies in respect of the competing public interests which are in play with regard to the exemption in section 30(1).

32. The principal factors which need to be considered can best be set out as follows. First, there is an overriding need to have regard to the issue of confidence. In other words, regard must be had to what has been called the need to ensure, sustain and encourage the collection of information in order to initiate and facilitate investigations

and successful prosecutions in the criminal arena. This in turn means that information which is forthcoming in this way should as much as possible remain confidential. Moreover, confidentiality is a necessary requisite with regard to the proper functioning of investigations, particularly investigations that are complex and prolonged. Finally, the maintenance of confidentiality facilitates the tasks of those responsible for the investigation of serious crime. See generally *Taylor v SFO* [1999] 2 AC 177 (HL), especially per Kennedy LJ in the Court of Appeal at pp.184-185 and Millett LJ at page 198 and in the House of Lords per Lord Hoffmann at page 211, also per Lord Hope at pages 218-219.

33. The same considerations have informed a number of decisions in this Tribunal. See e.g. *DTI v Information Commissioner* (EA/2006/0007) and also *Alcock v Information Commissioner* (EA/2006/0022), especially at para 6, and *Armstrong v Information Commissioner* (EA/2008/0026), especially at paragraphs 78 and 93.

34. In *Breeze v Information Commissioner* (EA/2011/0057), the following passage appears, namely:

> "26. The rationale for the s30(1) exemption is clear. In *Digby-Cameron v ICO* and others EA/2008/0023 and 0025 at paragraph 14, the Tribunal put the matter as follows:
>
> "The general public interest served by the section 30(1) exemption is the effective investigation and prosecution of crime, which itself requires in particular:
>
> (a) the protection of witnesses and informers to ensure that people are not deterred from making statements or reports by the fear that they may be publicised;
>
> (b) the maintenance of the independence of the judicial and prosecution processes; and
>
> (c) the preservation of the criminal court as a sole forum for determining guilt.
>
> In assessing where the public interest balance lies in a section 30(1) case relevant matters are therefore likely to include:
>
> (a) the stage a particular investigation or prosecution has reached;
>
> (b) whether and to what extent the information is already in the public domain;

(c) the significance or sensitivity of the information requested; and

(d) whether there is any evidence that an investigation or prosecution has not been carried out properly which may be disclosed by the information (see: *Toms v Information Commissioner* EA/2005/0027 19.6.06 at para 7 and *Guardian Newspapers v Information Commissioner, Chief Constable of Avon & Somerset* EA/2006/0017 5.3.07 at para 34)."

27. In the context of this appeal we should add as a further requirement to the effective investigation and prosecution of crime –

(d) the importance of ensuring that the police and CPS communicate frankly and fearlessly free of any concern that every recommendation or reservation will be routinely exposed to public scrutiny, if the prosecution fails. In *Taylor v Anderton* (1995) 1 WLR 447, Sir Thomas Bingham M.R. was required to consider whether public interest immunity was attached to reports compiled in police misconduct cases. He said at 465G:

"In very many cases where an investigating officer is appointed, there must be a real prospect of civil, criminal or disciplinary proceedings. I have no difficulty in accepting the need for investigating officers to feel free to report on professional colleagues or members of the public without the apprehension that their opinions may become known to such persons. I can fully accept that the prospect of disclosure in other than unusual circumstances would have an undesirable inhibiting effect on an investigating officer's report. I would therefore hold that the reports of investigating officers in circumstances such as these form a class which is entitled to public interest immunity."

Translated to the environment of FOIA and acknowledging certain differences in the function of reporting unsuspected offences to the CPS, that principle has a prominent role in a case such as this. It is a very significant factor in the weighing of public interests."

35. The Tribunal would endorse the views expressed in yet another Tribunal decision, namely, *Public Prosecution Service of Northern Ireland v Information Commissioner* (EA/2010/0109), particularly at paragraphs 14 and 15, that account should be taken of the need for prosecutors, and in this particular case, the SFO, to have what is called a safe space in which to make their decision without any fear or concern of what are otherwise frank assessments being publicised or broadcast after the event.

The latter course would simply be compromising the ability to make well informed and balanced decisions. This Tribunal would particularly endorse the said Tribunal's conclusion that in order for disclosure to be ordered in such cases public interest factors of at least equal weight would have to be adduced. A general interest in transparency as to a prosecution authority's decisions will not be sufficient. Something substantial and particular to the information would be required: see generally paragraph 15 of that decision.

36. The next factor the Tribunal would wish to underline in the present context concerns the nature and scope of section 3 of the 1987 Act which has been alluded to above. This Tribunal would accept the contention made in the SFO's written submissions that while section 3 regulates the SFO's powers to disclose information, the SFO should in general be entitled to proceed on the basis that it should not disclose information otherwise in accordance with that provision, although admittedly the extent of any implied limitation arising in connection with that principle is perhaps not completely settled for the moment on the authorities. However, in the leading case of *Morris v Director of the Serious Fraud Office* [1993] Ch 372, per Sir Donald Nicholls V-C at pp.380-381, it was observed there seemed to be no justification for implying a general power for the SFO to disclose information obtained in the execution of its compulsory powers confirmed by the 1987 Act, in particular by section 3. As the learned Vice Chancellor said, there is an absence of an express power to make disclosure, and in such circumstances, it is not necessary to imply a similar power in the absence of such an express power.

37. Although the element of transparency referred to in the *Northern Ireland* decision referred to above underlies the importance of a strong degree of public interest in relation to disclosure of information held by a public authority, the fact remains that that particular kind of public interest always has to be measured against the backdrop of the particular disputed information. Ultimately, in the Tribunal's judgment, the issue translates itself into the question of whether there is any evidence to suggest that the SFO has failed in its duties and obligations with regard to the information in question or has otherwise been subject to what can be called some element of improper behaviour: see *Guardian Newspapers Ltd v IC* supra, especially at paragraph 34. More particularly, in the present case, that issue can be further reformulated by considering whether the Vetting Note represents a manifestation of a need to provide a suitable and requisite degree of transparency when viewed in the light and scope of the relevant request.

38. The second exemption relied on is section 42(1). That provides in general terms that information in respect of which a claim to legal professional privilege is made will be exempt information. This too is a qualified exemption. The present case concerns

that type of legal professional privilege which is called legal advice privilege. No litigation need be in prospect. It concerns confidential communications between a client and his or her lawyer for the dominant purpose of seeking or giving legal advice.

39. There is a long and considerable line of authority in this Tribunal and in the High Court which has underlined two principal features of the section 42 exemption, namely, what could be called the inbuilt public interest within the very notion of legal professional privilege itself, and secondly, the strength of that interest. See in particular *Department for Business etc v O'Brien* [2009] EWHC 164 (QB) per Wyn Williams J, see also *Appger v IC & MoD* [2011] UKUT 153 (AAC) at para 77, and in this Tribunal, in particular, *Bellamy v IC and Secretary of State for Trade & Industry* (EA/2009/0070) and *Calland v IC* (EA/2007/0136), especially at paragraph 37.

40. In the present case, the information which is subject to legal professional privilege and which has been identified by the SFO consists of instructions to, exchanges with and advice from Counsel in connection with contemplated legal proceedings, particularly criminal proceedings. The gist of those matters is set out and is clear if nothing else from the Vetting Note.

41. This Tribunal is entirely satisfied that even though the Vetting Note summarises certain aspects of advice received from Counsel, it cannot in any way be contended that this disclosure and subsequent publication by the SFO pursuant to the direction made by the Commissioner in this case, in any way constitutes some form of waiver insofar as any more detailed underlying advice is concerned. Nor is there any other form of waiver which has been generated as a result of the Vetting Note with regard to any other item of information otherwise caught by and subject to legal professional privilege. The short and conclusive answer to any such suggestion is that the Commissioner determined that reliance on section 42 was at all times fully justified and he has continued so to claim, as has the public authority in question, in the context of this appeal. As the SFO rightly points out in its written submissions, waiver of privilege could hardly be said to have taken place in a case where the Commissioner has expressly found that the public interest in invoking the exemption under section 42 outweighed any public interest in disclosure.

42. As in the case of section 30, the real issue is whether the public interest in maintaining the exemption outweighs the public interest in disclosing the relevant parts of the disputed information otherwise caught by legal professional privilege for the purposes of FOIA.

43. The legal position is well settled. Even important considerations such as openness and transparency, together with accountability and the necessary degree of

contribution to public debate must be viewed against the particular circumstances emanating from the facts of the case in question. The age of the legal advice may be relevant. Although the passage of time will, as a general principle, favour disclosure, legal advice which remains in any sense "live" in the sense of still being relied on, or if it might still continue to be viewed as material in circumstances where a legal challenge might still be made against the decision made by the public authority in question, then such considerations tend generally to militate in favour of maintaining the exemption. The Tribunal in the present case regards these latter factors as being present in the instant appeal: see in particular the *Bellamy* and *O'Brien* decisions mentioned above.

44. One particular and perhaps significant factor which would be likely to influence the balance of competing public interests is whether there is reason to believe that the public authority has in some way misrepresented the advice it received, or whether in some way it could be said that the public authority is pursuing a policy which appears to be unlawful or even where there is some form of clear indication that it ignored unequivocal advice that it otherwise received. Not surprisingly perhaps, the Appellant having not had access to the information in dispute, he cannot make out any case as to whether, and to what extent, the SFO acted in accordance with its legal advice. Having read the documentation however, this Tribunal is entirely satisfied that the appropriate advice was sought, and that having in effect tested what would be likely to be necessary for there to be a successful prosecution at some length, the SFO acted in accordance with the legal advice it received. It necessarily follows that section 42 is appropriately engaged. The usual powerful public considerations in protecting legal professional privilege apply and there is no suggestion, let alone evidence, that unequivocal advice was ignored. Moreover, the disclosure of the Vetting Note has had the effect of giving public reasons for the considered decision not to initiate a criminal prosecution, perhaps to an exceptional extent.

45. Before turning to a consideration of section 12 of FOIA, the Tribunal pauses to note that a particular comment should be made regarding the position of three specific items of disputed information. All the disputed items have been listed in a document usefully produced by the SFO for the purposes of the appeal and entitled in its final form "Reorganised consolidated schedule of disputed information". Item 34 is described as a draft briefing note marked "Restricted" and dating from December 2003. The second item is item 59, and is largely an identical version of a file note from Mr Low to Mr Wardle dated November 2003, summarising the item referred to briefly as item 34 above, and the third are handwritten notes of Mr Low, apparently related to the prior two items.

46. The SFO contends that the information contained in the three items or groups of information above falls within the provisions of section 348 of the Financial Services and Markets Act 2000. This in turn engages the absolute exemption set out in FOIA, section 44, in particular, section 44(1)(a) which confers an absolute exemption in a case where statute elsewhere formally places a bar upon disclosure of information otherwise disclosable.

47. Section 348 need not be recited in full but deals with restrictions on the disclosure of confidential information by the Financial Services Authority. It is well established in this Tribunal that section 348 is an enactment capable of prohibiting disclosure for the purposes of section 44. See e.g. *Slann v Information Commissioner* (EA/2005/0019) and in particular *FSA v IC* (EA/2007/0093 & 0100). This last decision was the subject of appeal to the High Court, but not with regard to the principle for which the SFO claims it still stands, the principle in question being that articulated in paragraph 55 of the FSA decision in this Tribunal. In short, if information relating to the business or other affairs of any person is received by the FSA while carrying out the latter's statutory functions, the same cannot be disclosed without consent. Prohibition is absolute in the sense that no showing of detriment as regards the person to whom it relates or any other person is required. The information which is protected is in effect information which can be said to be of importance to the Regulator for the purpose of the Regulator carrying out its regulatory functions.

48. The Tribunal agrees with the SFO that the three items of information comprising the three items already referred to above in the final consolidated schedule clearly fall within section 348 of the Financial Services and Markets Act 2000. More particularly, the said information is not caught by section 348(4)(b), nor has it been contended, nor has the Tribunal seen any evidence that it is prevented from being confidential by virtue of section 348(2)(c) and (4)(a). The basic information in substance forming the subject matter of all 3 items was obtained by the SFO from a "primary recipient" as that term is used in section 348 of the 2000 Act, namely the FSA. The Tribunal therefore entirely agrees with the SFO that none of the information contained in those three items can be disclosed without the consent of the person or persons from whom the FSA obtained the information and the persons to whom it relates.

Section 12

49. Both the Commissioner and the SFO invited the Tribunal to address issues concerning section 12 of FOIA. The Commissioner also invited the Tribunal to determine what were called the substantive issues under sections 30, 42 and 44 before making any determination with regard to section 12. The Tribunal is content to adopt that course.

50. However, in doing so, it is necessary to refer to evidence submitted on the issue by the SFO. In her written statement submitted on behalf of the SFO and dated 25 November 2011, Ms Davina Banks claims on behalf of the SFO that the information on the CD Roms which have been referred to above and which were discovered on 16 August 2011, is exempt by virtue of section 12. Section 12(1) states that section 1(1) of FOIA does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit. The appropriate limit is defined and addressed in effect by a statutory instrument, in particular, the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004, SI 2004/3244.

51. The SFO is therefore not obliged to comply further with the request insofar as it extends to the information comprised in the CD Roms. The SFO has made it clear that section 12 applies not only to the request insofar as it extends to the information on the CD Roms, but also to what have been called the additional hard copy materials as found on 16 August 2011. The SFO voluntarily agreed to "process" these materials without pressing the claim that they are also exempt.

52. The relevant principles and legal requirements were clearly articulated by Counsel for the Commissioner on the second day of the appeal. He pointed out, quite correctly in the Tribunal's judgment that the appeal has gone on, as he put it "long enough", and that it was important that closure be reached on this particular request.

53. A preliminary consideration is whether or not a public authority needs to seek permission either from the Commissioner and/or from the Tribunal in order to rely on section 12 at all, at least when there has been an initial response or an internal review. As may be clear from what has already been set out above, there is no need in the present case for the Tribunal to make any finding in that regard. An application has been made and the Tribunal therefore agrees that it need only decide whether the SFO's claim to rely on section 12 is, in all the present circumstances, right and reasonable.

54. It has been held in the Upper Tribunal, and indeed this view has been endorsed by the Court of Appeal in *Birkett v DEFRA* [2011] EWCA Civ 1606, that late reliance may be placed on the section 12 exemption "as of right". See also *IPCC V IC* (EA/2011/0222). A contrary view has been expressed by a differently constituted Upper Tribunal in the *Appger* decision, namely *Appger v IC* [2011] UKUT 153 (AAC). The principal rationale for that view is that section 12 does not fall within Part 2 of FOIA and therefore cannot be treated in an analogous fashion to other exemptions. In the *Appger* decision itself and in the result, the Upper Tribunal there refused the public authority's application to place late reliance on section 12. Hence, the need

according to the Commissioner, for a specific application to be made for such a late reliance.

55. The underlying principles, however, are far less contentious: see the *Appger* decision itself, especially at paragraphs 26 and 27, as to what constitutes a reasonable cost estimate for section 12 purposes. In brief, the cost estimate for the allowed activities must be reasonable. In that regard, the Tribunal is entitled to enquire into the various facts or assumptions which underlie the costs estimate. In particular, to recite the relevant principle reviewed in the Upper Tribunal at paragraph 27, the cost estimate has to be "sensible, realistic and supported by cogent evidence …"

56. The SFO refers in its written submissions to the Commissioner's Guidance Note entitled "Using the Fees Regulations (Version 2.1 18/8/11)" which states that it is possible for a public authority, without providing an initial estimate, to search up to the appropriate limit and then refuse to continue the search. The Tribunal has not been provided with any argument as to why that approach should not be adopted in the present case.

57. Account should, and in the Tribunal's judgment, can be taken of the time spent in past work falling within the scope of the relevant Regulations. If such were not the case, public authorities could and would be forced to devote more than the required effort and time and cost in dealing with a FOIA request. This would be contrary to the policy of both the Act itself and the Regulations in question.

58. In the circumstances the Tribunal therefore has no hesitation in acceding to the SFO's section 12 application and thereby adopting and applying the principle that the CD Roms do not need to be searched as part of the present request. Under the case put forward by the SFO, this finding is, if anything, entirely self-evident. It is estimated that the total time so far spent on work falling within the scope of the request is over 70 hours, in fact, 70 hours and 25 minutes. It is further estimated that several more days will be required for such prescribed work as would be needed to peruse the information stored on the CD Roms. Moreover the SFO's claim to rely on section 12 was made promptly on discovering the existence of the CD Roms themselves.

59. Insofar as it could be contended that the *Appger* decision might suggest that account should only be taken of estimated future time when calculating the amount of time for the purposes of section 12, the Tribunal respectfully declines to adopt any such contention. It relies instead on the clear provisions of section 12(1) itself which speaks in terms of: "… the cost of complying with the request would exceed the appropriate limit …" In this Tribunal's judgment insofar as any such finding is material for present purposes, such language and its context are such as to address what can

be called a predictive estimate regarding a final aggregate total of time spent such as to reflect past time spent as distinct from time which is purely prospective.

60. The Tribunal pauses here to observe as already referred to in brief earlier in this judgment that it would be a major forensic exercise which the Tribunal is simply not in a position to attempt to assess how far, at the time of the request in this case, the information that might have been available to the requester would have included material facts not disclosed in what no doubt were voluminous papers not only considered but also published by the Penrose Inquiry, as well as the materials considered and/or published by the Parliamentary Ombudsman. In any event, for the reasons set out above, there is simply no justification in law for the Tribunal to do more than speculate on those and related issues.

Decision Notice

61. The Decision Notice has already been briefly referred to. In addition to section 30, the Commissioner referred to the original exchanges between the SFO and the Appellant in which the SFO formally informed the latter that before it could decide whether a full criminal investigation was justified, it needed to carry out a preliminary investigation to determine that issue and that exercise had in fact been done. The Commissioner then confirmed in keeping with the principles set out above that for section 30(1) to be engaged, the information had to be held for a specific or particular investigation, not for investigations in general.

62. In considering the competing public interests, the Commissioner acknowledged both the need to open up and promote participation in the debate of issues of the day and the importance of transparency. He also considered that the present case did not involve any particular, let alone any fundamental, lack of transparency. He also took into account the large number of people who were affected by the collapse of Equitable Life and accepted that there might be a general argument in favour of disclosure where the subject matter of the requested information would affect anything like a significant group of people.

63. However, as against those elements as set out in the preceding paragraph which might be said to militate in favour of disclosure, he alluded to the possible harm to the investigating process and the need for an authority such as the SFO to maintain confidence with those who were in some way affected by the investigation and related enquiries.

64. He referred to an SFO press statement of 19 December 2005 which was published following upon a careful consideration of the available evidence including the Penrose Report and material held by Equitable Life, and following upon the result of Equitable

Life's case against its previous auditors, and which stated "the Serious Fraud Office confirms that nothing has emerged which would justify a full criminal investigation in to the affairs of the Equitable Life Assurance society …" The said press report also referred to the fact that the events at Equitable Life leading up to its closure had been investigated by Lord Penrose with the latter's report being published in March 2004 adding that the Penrose Inquiry team had "provided considerable assistance to the SFO and the Society has cooperated with the SFO during its work."

65. In the result, the Commissioner determined that the public interest in favour of maintaining the exemption under section 30(1)(a) outweighed the public interest in disclosure, but as indicated above, he also ruled that the Vetting Note be published since it would provide "policyholders and the wider public" with an important insight into what the Commissioner regarded as a significant decision. The Commissioner reached a similar decision as to the competing public interests with regard to section 42.

The Evidence

66. The Tribunal has had the benefit of reading and considering the extensive written evidence as submitted by the previous director of SFO, namely Richard Alderman, and has heard oral evidence, coupled with his own independent witness statement, from Mr Satnam Tumani, a senior civil servant within the SFO currently employed as its Head of Bribery & Corruption & International Assistance. Mr Tumani has worked at the SFO for the last 17 years.

67. Mr Alderman submitted a lengthy open witness statement dated 1 September 2011, coupled with a second witness statement of 25 January 2012. The first witness statement is broken down into a number of separate topics, many of which have already been covered in this judgment. Without in any way failing to acknowledge the care and detail inherent in Mr Alderman's evidence, the Tribunal wishes to focus on some of those matters which have already been noted above. First, Mr Alderman stresses that all not all possible cases are accepted for investigation. After a possible case has been considered, a "vetting decision" is made as to whether it is appropriate for the SFO to commence a formal investigation. Second, the consideration and investigation of the Equitable Life case, and the SFO's subsequent vetting decision in relation to that case, took place prior to Mr Alderman's appointment as director. His understanding was therefore based largely on the Vetting Note. SFO had received complaints about Equitable Life from members of the public from 2001 onwards, both directly and indirectly, as well as from the police and various other authorities. There were ongoing separate investigations conducted by the FSA, the Parliamentary Ombudsman, the Penrose Inquiry and the Treasury Select Committee. The individual within the SFO charged primarily with the investigation was the Head of

Accounting, Mr Low, whose name has appeared above in this judgment, and who reported directly to the director in post prior to Mr Alderman, namely Robert Wardle; they were assisted as indicated above by independent legal advice, particularly in the form of leading Counsel, namely Anthony Hacking QC.

68. A number of criminal offences were considered. The final SFO vetting decision was postponed pending the outcome of certain civil proceedings. Civil proceedings were discontinued towards the end of 2005 without any relevant further evidence emerging and the Vetting Note was "signed off" on or about 3 December of that year. Mr Alderman then sets out the summary of Mr Low's conclusions. The net result was that, in the words of Mr Low, "the appropriate remedy" for the actions of those who controlled Equitable Life "would have been a civil action by the policyholders". Mr Low added that he had never been convinced since studying the Penrose Report "that this was properly a criminal matter". He added that "such a civil case failed to establish any culpability, wrongdoing or fraud".

69. Mr Alderman then confirmed that Mr Wardle accepted Mr Low's advice and decided that there was insufficient evidence to justify a full investigation or prosecution by the SFO. As has been seen, the SFO formally confirmed the overall position in the press release of 19 December 2005.

70. The Tribunal pauses here to note that Mr Alderman deals in his first witness statement with the question of the reinsurance treaty. This has been touched on above, but nothing in Mr Alderman's witness statement in any way, in the Tribunal's firm judgment, alters the observations made above with regard to this particular issue. Mr Alderman formally confirmed that nothing in the possession of the SFO in general identified any material which referred to a document described as a "reinsurance treaty". There were, however, documents which referred to a reinsurance contract, but the ultimate understanding of the SFO was that the reinsurance treaty and the reinsurance contract were different documents.

71. The first witness statement of Mr Alderman ends with his emphasising the effect that disclosure of the information requested could potentially have harmed the SFO's "abilities to return to and reconsider cases in the light of further developments". As against this, he maintains that there appears to be "very little public interest in this material being disclosed by the SFO". He stresses that the involvement of the SFO stopped at the assessment set out in the Vetting Note and, in terms of his own awareness, he adds that "there is no suggestion of any lack of rigour on our part or any legitimate cause for public concern over the way the SFO disposed of the matter".

72. Mr Alderman then submitted a second witness statement in both open and closed forms dated 25 January 2012. He addresses a number of separate issues, not all of which the Tribunal feels are directly material to the present appeal. He addresses that part of the original request which asked for details of the reinsurance treaty, a matter which has already been dealt with. He again stresses the importance of confidentiality for an SFO investigation. He pauses to deal in particular with the need for individual informants, complainants and victims to have confidence that the information they provide will be treated securely, particularly because many people who disclose information are in effect whistleblowers. This in turn leads to a need to ensure that such individuals receive as much protection as possible in the light of their own fearfulness that their own jobs, careers and employability might in some way be adversely affected. It adds that in 2009 with those considerations in mind, the SFO set up a fraud reporting hotline whereby whistleblowers and members of the public could provide information on a confidential basis. He pointed out that this hotline which bears the name "SFO Confidential" is also open to and has been utilised by victims of fraud as well.

73. The additional emphasis provided by this second witness statement is to stress what Mr Alderman calls both the external and the internal aspects of the element of confidentiality to which reference has already been made. The external aspect can be best seen by looking at the type of means of communication such as the SFO confidential hotline referred to above. The internal aspect said further to justify the maintenance of general confidentiality consists in the safe space or private thinking space to which reference has also been made above. As Mr Alderman puts it "investigators should be able to operate entirely unhindered by concerns about the way in which their evolving and provisional thoughts might be manipulated or pre-empted by suspects or read or portrayed in the media or on the internet".

74. Towards the end of his witness statement, Mr Alderman accepts that realistically "by reason of the passage of time and the exhaustive nature of the various inquiries already undertaken", the prospects of further action by the SFO in connection with Equitable Life are "remote". However, he goes on to say that the amount of material about the collapse of the Society was already the subject of considerable volume and material in the public domain and he later focusses inevitably upon the publication of the Vetting Note. He then proceeds to set out examples of what he said was a "significant amount of information" already placed in the public domain, alluding not only to the Penrose Inquiry Report and the report of the Parliamentary Ombudsman, but also to a report known as the Baird Report published on 16 October 2001, being the product of an internal FSA review which examined the way in which the FSA and the Personal Investment Authority carried out their respective regulatory functions in respect of Equitable Life.

75. At paragraph 7.2 of his second witness statement, Mr Alderman articulates seven factors which go, in his view, towards tipping the public interest balance in favour of non-disclosure. The Tribunal finds this check list a useful summary of the various points which, even in this judgment, have been covered to one degree or another. First, there is the importance of confidentiality as to the continued provision of information. Second, there is the related importance of confidentiality to the effect of the internal workings of the investigative process. Third, there is the possible unfair adverse effects of disclosure on those named in the disputed information, and on the scope for the resumption of further inquiries. Fourth, there is the availability of what he called a wealth of detailed information relating to the collapse of Equitable Life already in the public domain. Fifth, there was the fact that, to a large extent, the SFO investigation had concentrated on the earlier reports and reviews and the materials relied on by the authors of those reports. Sixth, there is the absence of credible concerns or doubts regarding the effectiveness, diligence or thoroughness of the SFO's investigation and/or the decision as recorded in the Vetting Note. Seventh, and finally, there is the fact that a different decision by the SFO would have had no realistic prospect of securing restitution or redress for the policyholders. The Tribunal observes that no doubt the Appellant will accept that there never was any question of compensation at the expense of the officers against whom criminal prosecutions might have been brought. The Tribunal accepts that there is an argument, or at least a possibility, that a criminal prosecution would have allowed the defence of regulatory knowledge and complicity to be have been tested in public, though the same is by no means certain, thereby indirectly at least assisting the policyholders, at least to the extent of anticipating the Parliamentary Ombudsman's cause in making a case for compensation by government. This is not, however, a matter on which there has been any material put before the Tribunal nor is there any basis for allowing such speculation to colour the firm conclusions reached by the Tribunal in this appeal.

76. In his first witness statement, Mr Tumani confirms that he was employed by the SFO during the period of its investigation into Equitable Life. Apart from confirming the contents of Mr Alderman's two witness statement, he revisits one or two matters which Mr Alderman had alluded to. First, there is the point referred to above, namely, that there is the potential chilling or inhibiting effect of public disclosure should disclosure in this case be made pursuant to the Appellant's request. Mr Tumani stressed that though it is important that there could be a knock-on detrimental effect on the unhindered way that investigators would normally conduct their enquiry, the fact remained that investigators in the SFO at least were and are always aware of the ultimate possibility that disclosure could occur in the context of criminal proceedings generally, but that any such "discovery" of this kind, was of a very different kind to the wholesale disclosure of every internal document and would certainly not entail uninhibited publication to the wider public akin to disclosure under FOIA.

77. Secondly, Mr Tumani stressed that investigators employed by the SFO were trained and required to maintain proper records. Overall, as he put it, his main concern was that arguments about a so-called "chilling effect" should not be taken too far in this particular context. It was, he said, a question of emphasis or degree.

78. Mr Tumani was cross-examined at some length by the Appellant during the appeal. The cross-examination began with the Appellant claiming that he had a limited number of questions to put to the witness. The first set of questions consisted in effect of a series of assertions that the SFO had never in fact conducted anything like a proper form of criminal investigation. Perhaps not surprisingly in the light of the Vetting Note, if not the other matters which have been alluded to in this judgment already and to which Mr Tumani was privy, he refuted any such suggestion.

79. The contention was next put to him that disclosure of the information sought would not deter people from coming forward. This was coupled with the suggestion put to Mr Tumani that certain personal details could be anonymised. These contentions too were firmly rejected by the witness.

80. The next and third issue involved the assertion that the relevant legislation, i.e. principally the Criminal Justice Act to which reference has been made, does not specify in any way that the SFO should conduct a full criminal investigation only if it considered that there was a possibility of conviction. In answer, Mr Tumani referred again to the Vetting Note. The Director, he said, had a discretion as to which cases he might investigate. Nor was the Vetting Note in any sense a formal and once-and-for-all document. He added as an echo of what is set out above that the reinsurance treaty was something considered by Mr Low in relation to that individual's preparation of the Vetting Note. What the Parliamentary Ombudsman may have said did not, in Mr Tumani's view, take the matter any further.

81. For the record the Tribunal wishes to point out that it was suggested to Mr Tumani that it could have been appropriate for the SFO to investigate the regulators themselves in respect of knowledge or even collusion with regard to an alleged fraud. Mr Tumani stated that it was not out of the question that the SFO could direct its powers of criminal prosecution against individuals acting for the regulators if evidence of active misfeasance, malfeasance or criminal conduct came to light. He did however go on to say that there was no sign of any such criminal activity or related activity in this case. Indeed, the Appellant has not argued that there was, only that if there had been, some form of investigation would have been appropriate. Mr Tumani firmly rejected any suggestion that there was any justification whatsoever to reopen the SFO inquiry either on the basis of the Parliamentary Ombudsman's report or indeed on any other basis.

82. Although the Appellant referred to the Parliamentary Ombudsman's report to establish some findings of fact, he did not otherwise prompt the Tribunal into comparing the Parliamentary Ombudsman's findings with the state of affairs revealed in the disputed information in this case. It is true that the Parliamentary Ombudsman found mal-administration and equally true that at the time of the Appellant's initial request for information, the Government of the day was resistant to any compensation scheme, at least as extensive as the type of scheme apparently recommended by the Parliamentary Ombudsman. The Tribunal is however generally aware that there has been some reversal of that position to the extent that a limited compensation scheme is now accepted in principle. This development does not however bear any relevance to the issues in the appeal. Observations were made by the Appellant and his colleagues during the appeal as to the adequacy of the Parliamentary Ombudsman's approach. No doubt this debate too will continue beyond the confines of this appeal. These matters are simply not matters which the Tribunal feels entitled as a matter of law or evidence in this case either to retrace or to pronounce upon, let alone to influence the clear determination reached by the Tribunal on the merits of the appeal general. Any such considerations that might be said to be reflected in these comments and observations would in any event carry very limited, if any weight, in relation to the balancing test with regard to section 42 and, in the Tribunal's firm view, no weight whatsoever insofar as the information from the FSA at least was protected by criminal sanctions against unauthorised disclosure, thereby attracting the absolute protection of section 44.

83. Whether there is something of a stronger case to be made in respect of the more general exemptions, particularly that in section 30, is also, in the Tribunal's firm view, extremely doubtful. As indicated above, the disputed information is in effect a collection of documents relating to the way in which the SFO developed the position that was eventually crystallised and expressed in the Vetting Note. That Vetting Note exhibits in effect the characteristics and sensitivities set out in the check list provided by Mr Alderman and referred to in connection with his second witness statement. The Note shows parties submitting information in the expectation that it will be treated in confidence. It also shows the internal workings as to the preliminary or half-formed views and the facts that may, or may not, support them being assembled, coupled with the possibility of the unfair effects of disclosure upon those named with the consequent possible prejudice to further inquiries, however unlikely the latter may be. Equally there is much stress on the fact that much information is already in the public domain. It has been noted above in this judgment that the material, as disclosed, does not readily lend itself to a comprehensive cross-checking of whether there are in fact hitherto undisclosed facts. However, the Tribunal made enquiries of Counsel for the SFO during the course of the hearing of the appeal and the confirmation it received from Counsel, who had the opportunity of taking further instruction, has led

the Tribunal to come to the firm view that it had no reason to doubt the effectiveness, diligence, good faith and thoroughness of the preparation of the decisions recorded in the Vetting Note.

84. The Tribunal would concede however that perhaps the only sense in which it could be said that Mr Alderman's check list is of somewhat more limited relevance is his seventh item, namely, that there was no prospect that a different decision by the SFO would have led to a realistic prospect of securing redress for the policyholders. That is certainly true insofar as the exhausted finances of Equitable Life are concerned, as well as the personal assets of any person or entity who or which might have been the subject of criminal charges. The question of compensation has now moved into a larger Parliamentary arena, and as indicated already in this judgment, that arena is not one which this Tribunal can enter, nor does it feel that it needs to.

85. The beginning and end of the present appeal is that it was the purpose of the SFO investigation to establish whether there was a realistic prospect of a successful criminal prosecution. The SFO was not itself conducting an investigation into regulatory failure, and any light-cast on such issues would have been at the very highest incidental. The present decision of the Tribunal is to uphold the Information Commissioner's Decision Notice, thereby confirming that the reasoning in that Notice applies to the larger body of material which has since been produced by the SFO, and it is the inclusion of a consideration of that material that forms the basis of the present decision.

86. It was finally suggested to Mr Tumani that it was in some way appropriate for the SFO to investigate the FSA in respect of an alleged fraud primarily on the basis of the contents of the Vetting Note. Mr Tumani rejected any suggestion that there was any justification whatsoever for reopening the SFO inquiry, either on the basis of the Parliamentary Ombudsman's report or indeed on any other basis.

Conclusions

87. It is clear from the above that the Tribunal is entirely satisfied with the reasons and arguments put forward by the public authority and by the Commissioner. Insofar as not already made clear above, the Tribunal is entirely satisfied that the crucial issue concerns the relative balancing test applicable to the competing public interests. Although the Tribunal accepts and agrees that there is a significant public interest in enhancing understanding about the SFO's decision and the facts concerning the collapse of Equitable Life and also accepts that the passage of time is a factor in that respect, it does not follow that because the SFO decided not to institute charges it should now disclose all the relevant material in connection with that decision,

including evidence and advice received from outside the SFO as well as information on the evolution of decision making within that Office.

88. The main ingredients of the relevant public interest in favour of maintaining the exemption have been outlined above. They relate largely to the safeguarding of the investigative process. In particular, they include and encompass the protection of a safe space for decision making, and the preservation of confidentiality without which the entire process would be prejudiced. These ingredients have very substantial weight. Equally the public interest and the safeguarding of legal advice privilege and legal professional privilege generally remain equally substantial.

89. As the Commissioner put it in his written submissions, the key issue is therefore whether the incremental transparency and understanding which would be achieved through disclosure when compared with what is already in the public domain would equal or outweigh the very substantial public interest in favour of maintaining the exemptions embodied in sections 30 and 42.

90. The Tribunal has mentioned on more than one occasion in this judgment the principle vehicles in which the public understanding has been enhanced by disclosure of matters relating to the collapse of Equitable Life, principally the Penrose Report and the Parliamentary Ombudsman's report. Crucially there is, as has been underlined several times in this judgment, the Vetting Note.

91. Finally, as again noted by the Commissioner in his written submissions and as pointed out in oral argument, there has been nothing brought to the attention of the Tribunal to suggest that the SFO's decision not to bring charges has been subject to any level of public challenge, whether substantial or otherwise, let alone criticism such as to upset the balance of the competing public interest already outlined above.

92. For all the above reasons the Tribunal dismisses the Appellant's appeal and upholds the decision of the Information Commissioner.

[Signed on the original]

David Marks QC
Judge

7 September 2012