Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **6 September 2021**

Public Authority: Bank of England
Address: Threadneedle Street
London
EC2R 8AH

Decision (including any steps ordered)

1. The complainant submitted a request seeking multiple items of internal discussions regarding the regulatory treatment of risks in relation to the investment in certain assets by insurance firms.

2. The Commissioner's decision is that the public authority was entitled to rely on the exemptions at section 36(2)(b) as the basis for withholding the disputed information.

3. No steps required.

Request and response

4. The complainant's request was submitted to the public authority on 25 February 2020. The request is reproduced in a confidential annex to this Notice. Given the precision and detail in which the request is set out, it is likely that revealing the text of the request in the open part of this Notice would undermine the public authority's position. The confidential annex will be provided to the public authority only. The Commissioner will not publish the confidential annex along with this Notice.

5. The public authority provided its response on 30 April 2020. It explained that it held certain information within the scope of the request which it considered exempt from disclosure on the basis of the provisions in sections 36(2)(b)(i) and (ii), 36(2)(c), 40(2) and 44(1)(a) FOIA.

6. On 4 May 2020 the complainant requested an internal review of the public authority's decision.

7. The public authority wrote back to the complainant on 10 August 2020 with details of the outcome of the internal review upholding its original decision.

Scope of the case

8. The complainant submitted a complaint to the Commissioner on 14 August 2020. He disagreed with the public authority's refusal to provide the information requested on 25 February 2020. The Commissioner has referred to the complainant's submissions in more detail at the relevant part of her analysis below.

9. During the course of the investigation, the public authority additionally relied on the exemption at section 31(1)(c) FOIA to withhold all of the information held within the scope of the complainant's request and the exemption at section 40(1) FOIA to withhold some of the information.

10. The scope of the Commissioner's investigation therefore was to consider whether the public authority was entitled to withhold the information requested by the complainant on 25 February 2020 (the disputed information) on the basis of the exemptions at sections 31(1)(c), 36(2)(b)(i) and (ii), 36(2)(c), 40(1), 40(2) and 44(1)(a) FOIA.

Reasons for decision

Background

11. The public authority's detailed submission to the Commissioner includes a helpful background to the complainant's request. Some of the more pertinent information is set out below.

12. The requests relate to the Prudential Regulation Authority's (PRA) approach to what is known as the 'matching adjustment' and, in particular, the treatment, for Prudential Regulation Authority's regulatory capital purposes, of Equity Release Mortgages (ERMs) and ground rent receipts.

13. The PRA forms part of the Bank of England. It was established in April 2013 as the UK's prudential regulator of deposit-takers, insurers and major investment firms. The PRA's supervisory activities with respect to insurance firms include overseeing the assets and liabilities on insurance firms' balance sheets in order to assess and help manage risks relating to those firms' abilities to pay out on claims made by policyholders, taking into account the assets or investments that the insurance firm holds. Failure by an insurance firm to meet its liabilities can have financial stability implications.

14. Broadly, the PRA requires insurance firms to establish technical provisions in an amount equal to what they would have to pay to a third party insurer in order to transfer their insurance obligations to that third party. In the context of long-term liabilities (such as annuities) and investments held to match closely the cash-flows associated with those liabilities, insurance firms may seek approval from the PRA to apply an adjustment to the discount rate used to value those liabilities (a 'matching adjustment'). The adjustment to the discount rate is intended to reflect the fact that the return from certain long-term assets includes an element that compensates the investor for the risk that the investment may not be able to be easily and quickly sold without a substantial loss in value at a particular future point in time. Whereas, an insurer intending to hold the asset to maturity (to match a long-term liability) will not, however, be exposed to that illiquidity risk.

15. Equity release mortgages (ERMs) are one type of longer-term asset or investment that can be held by an insurance firm. An insurer can purchase (or use mechanisms to either lend or invest in) a portfolio of ERMs in order to obtain income (or a 'yield') on the investment. The insurance firm will 'match' its investment in the ERMs to longer-term liabilities such as claims made on the firm's annuity policies.

16. Another longer-term asset that insurance firms are permitted to hold is investment in ground rent receipts, being amounts payable by a leaseholder on a leased premises to the freehold owner of the premises.

17. The public authority considers that the complainant is seeking to establish that the PRA's permission for insurance firms to apply a 'matching adjustment' reduction to the value of liabilities matched against ERMs, is not sound and exposes policyholders to a risk that their insurance firm will not be able to recoup sufficient money from their investment in ERMs to meet the policyholders' claims. The complainant is also concerned that particular insurance firms' exposures to risks relating to the reform or abolition of ground rents, means that the firms will not have sufficient funds from their investments to meet the claims of policyholders.

18. Part VII of the Financial Services and Markets Act 2000 (FSMA) will also become relevant in the course of the Commissioner's analysis. Part VII of FSMA establishes a regime for transferring long-term and general insurance business in the UK (Part VII transfers). Part VII transfers are subject to the Court's (rather than the PRA's) approval. The Court may sanction the transfer only if certain conditions are satisfied and the Court considers that, in all circumstances of the case, it is appropriate to do so. Part VII of FSMA prescribes certain statutory functions in relation to insurance business transfer schemes for both the PRA and the FCA. By virtue of section 110 of FSMA, both the PRA and the FCA are entitled to be heard in the proceedings (as are policyholders and other persons who allege that they will be adversely affected by the proposed transfer).

The Disputed Information

19. Broadly, the disputed information comprises of internal discussions from October 2015 to August 2017 in relation to the PRA's approach to the valuation of ERMs and ground rent receipts as assets held by insurance firms for regulatory capital purposes.

20. The public authority has indicated that it considers a small part of the information in the emails supplied to the Commissioner 'incidental' and therefore outside the scope of the complainant's request. The Commissioner considers that all of the information provided by the public authority is in scope of the request.

21. The public authority has explained that although it had been unable to identify information within the scope of item 3 of the complainant's request, it had found the statement referred to in item 3 to be part of item 7 of the complainant's request.

22. The public authority also considers that the information identified in relation to item 10 of the complainant's request is the same as the information held in relation to item 6 of the complainant's request.

23. The Commissioner has not revealed the text of the relevant items of the request in the open part of this Notice for the reasons set out above in paragraph 4.

24. The Commissioner is satisfied with the explanation provided by the public authority pursuant to the information identified within the scope of items 3 and 10 of the request.

Application of Exemptions

25. The public authority has withheld all of the disputed information on the basis of the exemptions at sections 31(1)(c), 36(2)(b) and (c) FOIA. It has additionally withheld some of the disputed information on the basis of the exemptions at sections 40(1), 40(2) and 44(1)(a) FOIA. The Commissioner, at her discretion, initially considered whether the public authority was entitled to withhold the disputed information on the basis of the exemptions at section 36(2)(b).

Application of section 36(2)(b) FOIA

26. The relevant provisions in section 36(2)(b) state:

> "Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—
>
> b) would, or would be likely to, inhibit
>
> i. the free and frank provision of advice, or
>
> ii. the free and frank exchange of views for the purposes of deliberation.."[1]

The Qualified Person's opinion

27. The exemptions at section 36(2)(b) can only be engaged on the basis of the reasonable opinion of a Qualified Person (QP).

[1] The full text of section 36

28. The QP's opinion was sought by the public authority's staff on 26 March 2020. The opinion was issued by the QP on 9 April 2020.

29. The opinion was issued by the Secretary of the Bank of England who the public authority has explained was the QP by virtue of section 36(5)(o)(iii) FOIA[2].

30. The Commissioner is satisfied that the Secretary of the Bank of England who issued the opinion engaging the exemptions at sections 36(2)(b) and (c) was a QP by virtue of section 36(5)(o)(iii) FOIA.

31. The QP explained that the disputed information is associated with an extended internal policy debate on the valuation of ERMs held by insurers as backing for their annuity liabilities. The QP considers that although ground rents remain an open issue, with the publication by the PRA of its Supervisory Statement SS3/17[3], the policy issues around ERMs have now been largely resolved even if the supervisory issues have not. However, the publication of the disputed information would have a chilling effect making people less willing in future to share views, particularly views challenging a settled consensus as was the case here.

32. It was added that disclosure would inhibit the ability of Bank staff to express themselves openly, honestly and completely, or to explore extreme options, when providing advice or giving their views as part of the process of policy deliberation and supervisory policy making. Such a chilling effect on the free and frank exchange of views would impair decision making and the public authority's ability to meet its wider objectives; a further prejudice to the conduct of public affairs as envisaged by section 36(2)(c) FOIA.

33. The public authority also explained that the issues concerning how risks relating to insurance firms' investments in ERMs, matching adjustment and ground rents should be valued or managed, are complex, and the PRA's position on these issues continues to evolve. It added that the disputed information was part of a process forming part of a policy on ERMs first promulgated by the PRA in 2017. The information was relevant at the time and continues to be relevant to the PRA's approach

[2] A QP within the meaning of section 36(5)(o)(iii) is "any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown."

[3] Solvency II: matching adjustment - illiquid unrated assets and equity release mortgages (July 2017, updated in April 2020)

to its supervision of insurance firms with exposures to ERMs and ground rent assets.

The complainant's position

34. The complainant's submissions challenging the engagement of section 36(2)(b) are summarised below.

35. The majority of the disputed information does not constitute 'free and frank' discussion. Information could be redacted to remove any embarrassing comments made by the public authority's staff. Disclosure would not hinder free and frank discussion of such issues particularly for staff that have left the PRA. Individuals, whose comments form part of the disputed information, were a few of many "who were passionate that the PRA was doing the wrong thing in approving the capital models of such firms. Would they be unhappy that their views were made public? Certainly not, and quite the reverse."

36. Also pertinent to mention at this stage is the complainant's submission that the disputed information is crucial to the policyholders' case, that the Commissioner understands he has been supporting as a 'McKenzie friend', in an ongoing Part VII transfer proceedings (the Part VII transfer proceedings). The matter was remitted to the High Court (from the Court of Appeal) for reconsideration on 2 December 2020 and is expected to be heard later this year.

Is the Qualified Person's opinion reasonable?

37. In determining whether the Qualified Person's opinion (QPO) was a reasonable one, the Commissioner has considered all of the relevant factors including:

- Whether the prejudice relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection, the opinion is unlikely to be reasonable.

- The nature of the information. Whether it concerns an important issue which there needs to be a free and frank exchange of views or provision of advice.

- The QP's knowledge of, or involvement in, the issue.

38. Further, in determining whether the opinion is a reasonable one, the Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. This is not the same as saying that it is the only reasonable opinion that could be held

on the subject. The QPO is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that no reasonable person in the QP's position could hold. The QPO does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.

39. The QP has determined that disclosure 'would' (as opposed to 'would be likely to') prejudice the interests in section 36(2)(b). Guided by the Information Tribunal's observations in Hogan v Oxford City Council & The Information Commissioner[4], the Commissioner considers that 'would prejudice' means there is more than a 50% chance of disclosure prejudicing the interests in section 36(2)(b).

40. The Commissioner considers that the PRA's approach to the valuation of ERMs and ground rents for regulatory capital purposes remains a live issue. The PRA's approach is likely to come under scrutiny during the Part VII transfer proceedings. The disputed information continues to be relevant to supervisory issues around insurance firms' exposure to ERMs and ground rents. In addition, the PRA's position continues to evolve in light of the range of specialist views on what is clearly a complex issue. By way of indicating the range of views, the public authority referred to a recent speech by Charlotte Gerken, Executive Director, PRA Insurance Supervision in which she commented: "The Call for Evidence[5] has drawn a wide range of views on the nature of the MA [matching adjustment] and [the PRA] is committed to working with industry and HMT to deliver meaningful and progressive reform to Solvency II, in line with HMT's objectives for the review."

41. Against this background, it was reasonable for the QP to conclude that there is more than a 50% chance that disclosing the disputed information would inhibit the ability of Bank staff to express themselves openly, honestly and completely when providing advice or giving their views in similar circumstances. The Commissioner also considers that in view of the Part VII transfer proceedings as well as the ongoing debates in relation to the PRA's supervision of insurance firms with exposure to ERMs and ground rents, there is a significant risk that disclosing the disputed information would inhibit the ability of staff to express

[4] EA/2005/0026 & 0030

[5] Solvency II Review: Call for Evidence

themselves freely and frankly in discussions relating to the valuation of ERMs and ground rents for regulatory capital purposes.

42. In assessing the QPO, 'reasonableness' should be given its plain and ordinary meaning. An opinion that a reasonable person in the QP's position could hold would suffice.

43. Although the Commissioner does not consider it to be the case here, it is necessary to also state that in the Commissioner's view, in order to engage the exemptions, the information requested does not necessarily have to contain views and advice that are in themselves notably free and frank. The exemptions at section 36(2)(b) are about the processes that may be inhibited, rather than what is in the information. The issue is whether disclosure would inhibit the processes of providing advice or exchanging views.

44. Furthermore, the exemptions are designed to prevent a chilling effect on internal deliberations by public authority staff which could impair the quality of decision making by the public authority. It is not clear in any event that the complainant has been authorised to speak on behalf of the public authority's staff and others regarding whether they would be happy for their views to be made public.

45. For the above reasons, the Commissioner finds that the public authority was entitled to engage the exemptions at section 36(2)(b) FOIA.

Public interest test

46. The exemptions are subject to the public interest test set out in section 2(2)(b) FOIA. Therefore, the Commissioner has also considered whether in all the circumstances of the case, the public interest in maintaining the exemptions outweigh the public interest in disclosing the disputed information.

Complainant's submissions

47. The complainant's submissions in support of the public interest in disclosing the disputed information are set out below.

48. The public authority has "not addressed the issue of nearly half a million pensioners affected by a potential transfer of their policies from Prudential Assurance Company to Rothesay Life. The information I seek provides strong evidence that these pensioners will suffer severe detriment if the transfer takes place, and pensioners need that information for the forthcoming Part VII transfer Court proceedings to be held later this year (2020) or early next year. Potentially many more pensioners (including myself) are affected."

49. "The key consideration for the Court is whether the security of policyholders is materially diminished by the transfer. The applicants, supported by the PRA and an Independent Expert, will argue that the security is not diminished… I will support the policyholders in arguing that the regulatory model used by Rothesay Life is materially deficient… and that the security of policyholders will be materially diminished after the transfer. My freedom of information request is crucial in supporting the policyholders' case, as it shows, beyond reasonable doubt, that the capital models used by firms such as Rothesay cannot provide any certainty about the policyholder security."

50. "Perversely, [the public authority has] argued that disclosing the information requested would undermine public trust and confidence in regulatory decisions, and that it is not in the public interest to undermine public trust and confidence in regulatory decisions. I.e. they apparently concede that regulatory decisions cannot be trusted, but are unwilling for that fact to be publicly revealed."

Public authority's submissions

51. The public authority's submissions on the assessment of the balance of the public interest are summarised below.

52. In favour of disclosing the disputed information. There is a public interest in how the PRA – as the UK's sole prudential supervisor in respect of insurance firms – discharges its statutory objectives in relation to insurance firms and, in particular in how the PRA addresses the risks to policyholders from firms' investments in ERMs and ground rents.

53. Disclosure could assist in more widespread discussion as to how these risks can or should be valued and addressed and could also assist the public to understand better how the PRA is supervising how insurers manage these risks. The issues concerning how risks relating to insurance firms' investments in ERMs, matching adjustment and ground rents should be valued or managed, are complex, and the PRA's position on these issues continues to evolve. It could therefore be suggested that public debate (including debate amongst specialists) should be promoted further in order to seek to resolve these complex issues.

54. In favour of maintaining the exemptions. Disclosing the nature of a debate on policy matters within the regulator risks undermining settled policy. This in turn could undermine the trust and confidence that firms place in regulatory decisions, not just in relation to the specifics of a particular policy, but also in relation to decisions more generally. This could have implications on the stability of the UK financial system.

55. Disclosure could also inhibit free and frank debate and have a 'chilling effect' on the ability of the public authority, including PRA staff and others (such as external respondents to the PRA's discussion papers and consultation papers from time to time), to express themselves openly, honestly and completely, or to explore the full spectrum of options, when providing advice or giving their views as part of the process of deliberation. This could damage the quality of advice and deliberation and lead to poorer decisions, impairing the public authority's ability to meet its statutory objectives and to supervise effectively prudential risk in line with those objectives.

56. It is to be expected that technical experts engaged on a complex issue such as how to approach risks arising from insurance firms' investments in ERMs would have strong views on the subject, and that such views would be subject to robust challenge and debate before a consensus is reached. However, were the public authority to disclose the disputed information, it could stifle what is still a 'live' debate and inhibit ongoing policy formation by weakening the 'safe space' in which policy makers should be entitled to discuss policy, develop ideas and reach decisions away from external interference or distraction. Further, where debate has been concluded on an issue (which is not the case here), time also needs to be allowed for the decision to embed and settle without the risk of the decision being undermined by the content of earlier free and frank discussions.

57. Disclosure of part of the disputed information could have a chilling effect on the willingness of individuals to refer information of concern to the public authority under its internal whistleblowing policy (or alternatively to the Bank of England or the PRA in their capacity as 'prescribed persons' under the UK whistleblowing regime[6]). It would raise concerns for individuals that their confidential disclosures could be made available to the public under a freedom of information request. It is integral to an effective whistleblowing policy that individuals trust that their information will be held confidentially. Disclosure would be contrary to the policy underpinning the public authority's whistleblowing regime and would undermine the very principles of transparency and accountability that the whistleblowing regime intends to uphold. It could also result in investigators being less likely to create written records containing their

[6] The Bank of England including in respect of its PRA functions, is a 'prescribed person' within the meaning of the Public Interest Disclosure (Prescribed Persons) Order 2014. This means that individuals who wish to make a 'protected disclosure' under the whistleblowing regime, may make such disclosure to the Bank or PRA where it concerns (in the case of the PRA, for example) a PRA-authorised firm.

free and frank advice or views arising from an investigation if they consider that the record could be made publicly available. This could reduce the extent to which free and frank disclosures are made to decision-makers and therefore reduce the effectiveness of decisions taken by the public authority in light of the investigation of whistleblowing complaints.

58. On the balance between the competing public interest factors. Whilst there is a public interest in publicising information in sufficient detail to enable the public to be satisfied that prudential risks to insurers are appropriately supervised, there is considerable information already in the public domain to address this interest. The PRA has published the following materials[7] in relation to the valuation of ERMs and the use of matching adjustment tools to ERMs:

- PRA Discussion Paper DP1/16 on Equity Release Mortgages (March 2016);
- PRA Consultation Paper CP48/16 on Solvency II (December 2016);
- PRA Policy Statement PS14/17 (July 2017);
- Letter from David Rule: Solvency II: Equity release mortgages (July 2018);
- Solvency II: Equity release mortgages (December 2018);
- Letter from David Rule 'Solvency II: Equity release mortgages - Part 2 (April 2019);
- Solvency II: Equity release mortgages – Part 2 (September 2019);
- PRA Supervisory Statement (July 2017, modified in September 2019 and again in April 2020);
- Brave new world - speech by Sam Woods | Bank of England (March 2021);
- Speech by Charlotte Gerken/Bank of England (April 2021).

59. In addition, the PRA has published the following materials relevant to its approach to ground rent risk:

[7] Some of the materials post-date the complainant's request.

- Consultation Paper (CP) 23/19 'Solvency II (September 2019)
- The PRA Policy Statement covering insurance firms' investment in assets such as ground rents (April 2020).

60. As part of the wider debate, the UK Government has also recently issued a Solvency II Review: Call for Evidence on prudential regulation of the insurance sector which, as has been noted at paragraph 40 above, has drawn a wide range of views on the matching adjustment tool. The public authority will therefore continue to develop its analysis to inform policy development in this area.

61. It is therefore a key factor that the PRA has already taken a wide range of steps to engage the public and satisfy the public interest identified above by publishing a number of discussion papers, consultation papers and policy statements on matters such as ERMs and illiquid unrated assets such as ground rent receipts. These discussions are still ongoing.

62. In addition, the valuation of ERMs in particular still remains a considerable technical challenge and involves the exercise of expert judgement consistent with the PRA's judgment-led approach to supervision. In complex matters such as this, it is to be expected that there will be a range of views amongst specialists as to which is the correct approach to take. The complainant has shared his own views with the public authority and other public bodies. The complainant will also be given an opportunity to air his views as part of the current debates on the review of the Solvency II insurance supervisory regime.

63. The public interest in disclosing information for the purposes of the ongoing Part VII transfer proceedings is a matter for the Court to assess taking into account the matters that the Court is being asked to consider and the evidence needed to support arguments put forward to support those matters[8].

64. Partial disclosure of the disputed information as has been suggested by the complainant would be somewhat arbitrary and risks providing a false impression of the internal debate (which is clearly contrary to the public interest) and would run the risk of impeding policy formulation by policy

[8] The public authority has articulated this position in more detail in support of the application of the exemption at section 31(1)(c) which broadly speaking can be applied to prevent the disclosure of information that a public authority considers is likely to prejudice the administration of justice.

makers who would have no way of knowing ex ante what could be disclosed and what could not.

65. For the above reasons, the public interest in maintaining the exemptions outweigh the public interest in disclosing the disputed information.

Commissioner's considerations – balance of the public interest

66. The Commissioner's consideration of the balance of the public interest is set out below.

67. If the Commissioner finds that the QPO was reasonable, she will consider the weight of that opinion in the public interest test. This means that the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would (as she has in this case), or would be likely to, occur. However, she will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming her own assessment of whether the public interest test dictates disclosure. The Commissioner considers that she must give weight to the QPO as an important piece of evidence in her assessment of the balance of the public interest.

68. The Commissioner agrees with the public authority's submissions on the public interest in disclosing the disputed information. In particular, although the disputed information is generally 3-4 years old (at the time of the request), it would add some insight (in addition to the information that has been published by the public authority) to how the PRA assesses the risks to policyholders from insurance firms' investments in ERMs and ground rents. The Commissioner cannot comment on whether the disputed information or indeed any other information would be relevant to the Part VII transfer proceedings. It should be acknowledged however that there is also a public interest in all parties to the proceedings being able to present evidence to support their case subject to the rules governing such proceedings.

69. Whilst the QPO does not necessarily imply any particular view on the frequency, severity, or extent of the prejudice to free and frank advice and discussion, it does mean that the Qualified Person does not consider that the prejudice will be so trivial, minor or occasional as to render it

insignificant[9]. The Commissioner has therefore given due weight to the QPO in her assessment of the disputed information.

70. In the Commissioner's judgement, disclosing the disputed information is highly likely to lead to a significant chilling effect on the free and frank exchange of views and provision of advice in relation to the PRA's valuation of ERMs and ground rents for regulatory capital purposes and the PRA's supervisory policies in that regard. As has been noted, this highly complex area continues to generate a range of specialist views as can been seen from the views on the matching adjustment tool in response to the Call for Evidence on prudential regulation of the insurance sector. The PRA's position continues to evolve to meet new challenges to its valuation model and supervisory policies. The Part VII transfer proceedings are likely to result in added scrutiny.

71. Thrusting free and frank internal discussions and advice on the subject into the mix at this time is likely to lead to the public authority's staff expressing their views in a more guarded manner on issues of considerable significance. This is also likely to be the case where matters of comparable significance are under discussion. The quality of decisions taken without the benefit of free and frank deliberations is likely to be poor. There is therefore a strong public interest in preventing such an outcome. Civil servants are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. In the circumstances of this case however, the Commissioner is persuaded that the chilling effect on free and frank discussions is likely to be significant.

72. Furthermore, with such a range of external views on the PRA's regulatory model in relation to insurance firms with exposure to ERMs and ground rents, disclosing internal debates on the PRA's approach could also undermine settled policy positions that the PRA may have taken since those discussions. This is likely to also stifle internal debates for fear that free and frank views expressed in the course of such deliberations could be released prematurely to the detriment of settled policy positions. It is necessary to add that the view that disclosure could undermine public trust and confidence in regulatory decisions does not automatically mean that such decisions cannot be trusted in the first place. It however means that disclosure is likely to erode the private thinking space for rigorous considerations of the PRA's regulatory model

[9] Guided by the Tribunal comments in Guardian Newspapers Ltd and Heather Brooke v IC EA/2006/0011; EA/2006/0013 – Paragraph 92

and also have a chilling effect on free and frank debates and advice pursuant to such considerations.

73. In addition, although it is not relevant to the application of section 36(2)(b), the Commissioner considers that there is a stronger public interest in not circumventing rules governing the disclosure of information pursuant to Part VII transfer proceedings. It is for the Court (in this case the High Court) and not the Commissioner to assess whether any information that the parties to such proceedings wish to present is of evidentiary value in the matter under dispute.

74. For the above reasons, the Commissioner finds that on balance, the public interest in maintaining the exemptions outweigh the public interest in disclosing the disputed information.

75. In view of her conclusions above, the Commissioner has not gone on to consider the application of the remaining exemptions.

Other Matters

76. The Commissioner notes that the public authority is in breach of the provision in section 10(1) FOIA to respond to a request promptly and in any event no later than 20 working days. In addition, the time it took to issue the outcome of the internal review exceeded the Commissioner's guideline of 40 working days in total taking into account exceptional circumstances.

77. However, given the timing of the request, it is all but certain that the public authority's handling of the request would have been affected by the Government's restrictions to contain the spread of Covid-19.

Right of appeal

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

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

    Tel: 0203 936 8963
    Fax: 0870 739 5836
    Email: grc@justice.gov.uk
    Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

79. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

80. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed……

Terna Waya
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