Tribunals Service
Information Tribunal

Information Tribunal **Appeal Number: EA/2006/0079**

Information Commissioner's Ref: FS50104386

Freedom of Information Act 2000 (FOIA)

Heard at Procession House, London, EC4

On 27 & 28 September 2007 **Decision Promulgated: 5 November 2007**

BEFORE

INFORMATION TRIBUNAL

DEPUTY CHAIRMAN

David Marks

And

LAY MEMBERS

David Wilkinson

Steven Shaw

Between

FRANK ADLAM

Appellant

And

INFORMATION COMMISSIONER

Respondent

And

H M TREASURY

Additional Party

Representation:

For the Appellant: **Ben Lask, Counsel**
For the Commissioner: **Timothy Pitt-Payne, Counsel**
For the Additional Party: **Jonathan Swift, Karen Steyn, Counsel**

Decision

The Tribunal dismisses the Appellant's Appeal and substitutes paragraph 25 of the Commissioner's Decision Notice with an amended paragraph which provides:

"(1) For the reasons set out in its judgment, the Tribunal finds that the public authority failed to comply with sections 1, 10(1) and 17(1) of the Act in the late provision of the information requested even though the same was claimed to be the subject to a qualified exemption under section 42 of the Act;

(2) The Tribunal finds that with regard to events occurring after the failure referred to in paragraph 16 each of the said breaches referred to in (1) were purely technical and the late provision referred to in (1) was entirely exculpable, the public authority having been found to have taken all reasonable steps in its attempt to locate and/or retrieve and/or extract and/or otherwise provide the information requested;

(3) The Tribunal finds that the provisions of section 42 of the Act are properly engaged with regard to the information requested and referred to above and that in all the circumstances the public interest in maintaining the exemption in question outweighs the public interest in disclosing the said information; and

(4) In the circumstances, no steps need to be taken by the public authority."

Introduction

1. This Appeal raises three principal issues. The first is potentially wide-ranging since it concerns the consequences of the public authority in unwittingly providing an incorrect answer to a request for information in the honest belief that it does not hold any, subsequently to discover that it does. The second raises issues relating to the qualified exemption in section 42 of the Freedom of Information Act (FOIA), and the third deals with an increasingly common problem in practice as to whether a reasonable view and response have been taken by a public authority to the terms of a particular request.

The Request

2. By letter dated 24 March 2005, the Appellant acting by his solicitors, Messrs Laytons, made a request for information in the following terms:

> "In the first budget statement of the Chancellor of the Exchequer made on 2 July 1997, the Chancellor of the Exchequer announced an intention to recoup the full costs of treating road accident victims from insurers. Please furnish all information, costings, advice and other documents whatsoever furnished by the Department of Health to the Chancellor of the Exchequer and the Treasury which may have contributed to the formulation of this intention. We look forward to hearing from you."

The background to the request was a passage found at paragraph 21 of the budget speech of the then Chancellor, Gordon Brown, from the summer 1997 budget in which he had said:

> "We will also act to recoup in full the cost of treating road traffic accidents from insurance companies."

In the wake of this announcement, the Road Traffic (NHS Charges) Act 1999 was introduced. The 1999 Act was repealed in January 2007 save in relation to injuries which occurred before that date by the Health and Social Care (Community Health and Standards) Act 2003, Part 3 of which provides for the recovery of NHS charges where people have received compensation for all injuries, not just for traffic injuries.

3. It seems that in an exchange, in late March 2006, Laytons received an email from the National Archives dated 28 March 2006 in which they advised in response to a query as to whether they held records relating to HM Treasury's budget of July 1997 that "the Treasury departmental files will still be with HM Treasury."

4. There was some delay before the Treasury furnished a response to the request of 24 March 2005 although it is claimed that a response had been made by email in early June. A copy of the emailed request was again sent under cover of a letter of 28 June 2005. The email in question which was of 2 June 2005 was from a John Adams described in due course as a correspondence manager on behalf of the Treasury. He stated simply that "[we] do not hold any information regarding this request."

5. By letter dated 4 August 2005, Laytons asked for further clarification requesting in particular whether the answer provided meant that the Treasury was claiming it had never held any documents or whether it was claimed that it may once have held the document or category of documents but that these were no longer held. The letter of 4 August went on to request, first, details of the Treasury's "policies and procedures in relation to the retention and disposal of documents", and further, on the assumption that the Treasury may once have held the information requested, when such documents would have been destroyed or disposed of, identifying so far as possible the documents concerned and the date, place and method of destruction or disposal.

6. The Treasury again acting by Mr Adams answered by letter dated 13 September 2005. The Treasury claimed that it had carried out a full search but had not found any information nor any record of any relevant document being destroyed. Reference was then made to the policy adopted by the Treasury regarding the retention and disposal of documents as directly reflecting the policy and guidance put out by The National Archives.

7. There then followed a request for an internal review. The original request of 24 March 2005 was not answered within the requisite 20 day period prescribed by the provisions of the Freedom of Information Act, i.e. FOIA.

8. In a subsequent letter dated 3 February 2006, Laytons contacted the office of the Information Commissioner (the Commissioner) pointing out that a similar "complaint" had already been made in respect of a request for information made to the Department of Health. The same letter stressed that the Appellant felt that it was "inconceivable" that the Treasury did not hold "at least some of the information requested". The Treasury responded by letter of 13 March 2006 in the wake of its internal review. The letter was signed by Rosemary Banner as Head of the Treasury's Information Rights Unit. She confirmed that the Treasury did not hold the information requested and that the review had not uncovered any evidence that such information had ever been held. She added:

"As part of the review we commissioned a rigorous and independent search of both our paper and electronic records. We also consulted the Health team, Treasury's Records team and other relevant parts of the Treasury."

The letter went on to recognise what it called its "shortcomings" in the handling of the Appellant's initial request and expressed regret that the Treasury had failed to meet what it called the "timeliness standards" set

out under FOIA and the requirements of the Treasury's own internal standards.

The Commissioner's enquiries

9. In response to a request as to the Treasury's position made by the Commissioner following upon the Appellant lodging a complaint with the Commissioner, the Treasury confirmed to the Commissioner by letter dated 29 June 2006, that the Department of Health had received a request presumably also from the Appellant "as part of a much broader question" which they refused on costs grounds and resulted in the Department of Health advising that "they did not hold information". In addition, the Treasury set out the searches in its electronic document management system which it had made by that stage, by employing a variety of search terms which involved variations on such expressions as "road traffic accidents". "insurers", etc. Furthermore a paper search had revealed nothing. Ms Banner, as the author of the letter, therefore expressed the view that the Treasury, having carried out a reasonable search, did not hold the information.

10. Laytons continued to refuse to accept this finding and again asked the Commissioner by letter dated 25 July 2006, among other things, whether the information said not to be held had ever existed and/or had been disposed of, to which the Treasury again by Ms Banner confirmed that the Treasury's "stance" was that the Treasury "does not hold and had not held, the information requested". She added there was "no evidence that the information requested was ever held by the Treasury and we think it likely that it never existed." She also added that the underlying subject matter of the request, namely the charging of insurance companies "for the cost of road traffic accidents" was "not new" having first been introduced in the 1930s and thereafter reflected in subsequent road traffic

legislation: the only new aspect of the scheme was the budget statement to the effect that the full costs should be recouped.

The Decision Notice

11. The Decision Notice is dated 19 September 2006. At paragraph 10 the Commissioner pointed out in his exchanges with the Treasury that the Treasury had stated that it was possible that given that the budget speech in question was the first following the election of the Labour Government in May 1997, the policy to which the request related could have been formed while that Government was in opposition and such a possibility was advanced by the public authority as a possible reason as to why it did not hold information relevant to the Appellant's request. The Tribunal will return to this explanation and the issues it raises below.

12. At paragraph 19, the Commissioner stated that he appreciated the Appellant's contention that it was a reasonable belief that the public authority would hold information relating to a budget speech announcement, but noted that the request was only in respect of information supplied to the Treasury as to which the Treasury had advised that it did not hold such information. At paragraph 20, the Commissioner stated that he was satisfied that the Treasury had taken appropriate steps to attempt to locate the requested information, there being no evidence to suggest that such information was held. It followed that although the Commissioner found that the Treasury had failed to comply with the 20 day time limit prescribed by section 10(1) of FOIA, no steps needed to be taken by the Treasury.

Notice of Appeal

13. The Appellant's grounds of appeal are dated 16 October 2006. The material matters set out in those grounds can be summarised as follows:

(1) it was not only “reasonable” to believe or assume that the Treasury would hold the information requested, it was “implausible that it would not” have done so;

(2) the Treasury had not “provided clear and compelling evidence” that it did not hold the information requested; and

(3) no indication had been given by the Commissioner or by the Treasury that any enquiries had been made either of the Chancellor himself or of the Permanent Secretary to the Treasurer (either in office in 1997 or since), or of any other various other officials and so-called representatives within the Treasury.

14. The Commissioner’s reply settled by Mr Pitt-Payne dealt with these arguments effectively as follows:

(1) the Commissioner was satisfied that the Treasury had in fact taken appropriate steps to locate the information requested;

(2) whether or not the Treasury held the information was to be treated as a question of fact and was to be answered by reference to the normal civil standard of proof namely on the basis of a balance of probabilities and not by the application of a more demanding standard reflected in the expression “clear and compelling evidence”; and

(3) the Commissioner understood that there had been searches of both the electronic and paper records by those responsible within the Treasury including the Records’ team which was responsible for older paper records and the Special Advisers’ office; moreover although the Commissioner had not been made aware that the specific individuals referred to, i.e. the Chancellor himself, etc, had been approached, it was unlikely that such individuals including the

Chancellor after a period of eight years or so would retain any direct personal knowledge of the matters in question.

As a consequence of the Commissioner's reply, the Tribunal joined the Treasury as an Additional Party by order dated 7 December 2006.

Further developments following the Decision Notice

15. In late February 2007, and as a result of preparations being conducted by the Treasury's Solicitors office on behalf of the Treasury in connection with the present appeal, it was confirmed that further documentation was discovered as a result of an additional "wild card" search, using terms that broadly related to the recovery of road traffic accident costs. Although the real arguments during the appeal concerned one document, there are in effect two documents which have been considered, if only on the basis that in the one case there has been a decision not to disclose the document in question, whilst in the other case, a redaction has been made of portions of the document in question.

16. The first document, i.e. the one that is undisclosed at the moment, is a letter from the NHS Executive dated 4 June 1997 and addressed to the Treasury. The Treasury has maintained and continues to maintain that the letter in question engages the qualified exemption as contained in section 42 of FOIA which relates to legal professional privilege. This is because the document contains information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.

17. The second document is a letter dated 29 April 1997 sent by the NHS Executive to the Treasury. In this letter the names of the individual recipient and sender have been redacted, together with a section within the fourth paragraph of the letter. Further reference will be made to this letter in connection with other documents that were subsequently disclosed on a voluntary basis by the Treasury. With regard to this

second document, the Treasury has at all times maintained that strictly the letter fell outside the scope of the initial request since it was written before the election of the new Labour Government and therefore before the Chancellor's appointment. The second document was disclosed by the Treasury in response to a separate freedom of information request, made in May 2007, which is not the subject of this appeal. The Treasury conceded that if it had been previously aware of the letter of 4 June 1997, it would not have made the representations in the letter of 23 August 2006, namely that there was no evidence that the information in question was ever held and that it was not "likely" that it ever existed. Further, the Treasury would not have informed the Commissioner that it had been unable identify *any* information that may have contributed to the Chancellor's statement provided by *anybody* or produced by the Treasury. Voluntary disclosure of the other documents just referred to was therefore made.

Events following "voluntary disclosure"

18. The Commissioner submitted a formal set of submissions following the Treasury's disclosure described above. In effect the Commissioner contended:

(1) perhaps not unnaturally the Treasury should have informed the Appellant within the 20 day limit imposed by section 10 of FOIA of its reliance on the section 42 exemption: the same was not done until towards the end of February 2007: the Commissioner therefore invited the Tribunal which of course was then seised of the appeal to consider some suitable amendment or amendments to the Commissioner's Decision Notice;

(2) belated reliance could be placed on the section 42 exemption in the light of the Tribunal's decision in *Bowbrick v Information Commissioner and Nottingham City Council* (EA/2005/0006);

(3) in the light of the contents of the 4 June 1997 letter, the Commissioner was satisfied that section 42 was properly engaged and in the light of another of this Tribunal's decisions, namely *Bellamy v Information Commissioner and Secretary of State for Trade & Industry* (EA/2005/0023) the public interest relating to the maintenance of the exemption outweighed the public interest in disclosure.

19. There then followed a lengthy 22-page witness statement from Ms Banner. Ms Banner gave oral evidence before the Tribunal on the appeal. Further reference will be made to her evidence below, but for the moment, it is enough to say that both her witness statement and her evidence dealt in substance with what she called in her statement general background to the maintenance of records in Government departments together with a survey and description of the Treasury's own systems coupled finally with details of the particular searches and search methods used in respect with the Appellant's request. These actions culminated in the discovery of seven documents which, as she put it in paragraph 64 of her witness statement:

"discuss the policy of recovery of NHS treatment costs following a road traffic accident falling within the time period 14 May 1997 and 30 June 1997."

Mr Brown was appointed Chancellor on 2 May 1997. The two dates referred to mark the period representing the time during which the seven documents were dated. Six fell outside the request in the eyes of the Treasury. The last recorded information on the file which yielded these seven documents (which file was called "Road Traffic Act Charges") did not yield any documents which were regarded as relevant. All the documents were in paper and not in electronic form.

The voluntarily disclosed documents

20. The Tribunal regards it as important to consider the six documents which were disclosed on a voluntary basis by the Treasury in order to be able better to understand the issues which were argued on the appeal.

21. Document No. 1 : this is an email of 13 May 1997 in which a Mike Evershed, then a civil servant working in the Treasury as part of the Health team, informed a person addressed as Nick, believed to be Nicholas MacPherson, then part of the Chancellor's team within the Treasury, that the issue which related to the attempts to improve the NHS recovery of costs under the Road Traffic Acts had been pursued within the Department of Health for some time. He stated that the latest figures which Mr Evershed and his colleagues had from the Department of Health were "£20 million out of a possible £150 million" and that "further management action might increase recovery a bit" adding that:

"the real prizes would come from:

(i) allowing the NHS access to information from the DSS Compensation Recovery Unit;

(ii) increasing the ceiling on charges by more than the cost of inflation."

He went on:

"The problem is that initial advice suggests that both changes would require amendment to the relevant legislation. But together they might yeild [sic] additional income of between £100-£200 million a year."

The note ended with the comment that if the Chancellor wanted a note and/or a short letter" to Mr Dobson, the then Health Minister, Mr MacPherson was to let Mr Evershed know. Reference was also made to what were then relevant Law Commission proposals.

Document No. 2 : this comprises a letter of 14 May 1997 written on Treasury notepaper by Mr Evershed to a Keith Paley at the NHS Executive. In this letter, Mr Evershed wrote:

"I would also be grateful for a copy of your legal advice on access to CRU data, and on raising the ceiling on charges by more than the rate of inflation."

Reference to the CRU was of course a reference to the Compensation Recovery Unit which had been referred to in document No. 1.

Document No. 3 ; this is an email from Mr MacPherson to Mr Evershed dated 30 May 1997 as well as to another recipient confirming that the Chancellor was "very grateful for your note" and that he "would indeed like to write to Frank Dobson" in effect calling on Mr Evershed to prepare the draft.

Document No. 4 : this is the draft in due course produced by Mr Evershed and dated 11 June 1997: it bears the names of several recipients consisting of Treasury Ministers and/or Treasury officials and/or special advisers: the draft reflected the Treasury's concern about the then low level of recoveries suggesting that most of the shortfall:

"could be recovered if the NHS had access to data from the DSS Compensation Recovery Unit which recovers the cost of benefits paid to accident victims".

It was also suggested that careful consideration be given to the existing relevant Law Commission proposals.

Document No. 5 : this is an email of 30 June 1997 sent by a Becky Fox on behalf of the Chancellor to Mr Evershed asking that the draft letter be redrafted:

"to distinguish between what would be done under current legislation to solve the problem and what would require additional legislation".

Document No. 6 : this is a further email from Becky Fox dated 30 June 1997 to a lady whose name is Sue, although it is possible that the email was also sent to Mr Evershed, saying that the Chancellor would be meeting with Mr Dobson that afternoon "to talk about a possible budget measure for Health and the issue would probably come up then" confirming that the Chancellor had not written "as such".

22. In the wake of this voluntary disclosure, Laytons wrote to the Treasury with a list of queries and further requests in effect prompted by the disclosures. With respect to the Appellant's position and concerns regarding the appeal, the Tribunal feels that there is little, if any, point served in setting out the contents of these exchanges including the reply which Laytons had generated from the Treasury by letter dated 26 June 2007. Further exchanges relate to the issues canvassed before the Tribunal, save for the content of the second letter referred to above, namely the letter of 29 April 1997 which bore various redactions and as sent from the NHS Executive to the Treasury. That letter was headed "Dear Mike" even though the recipient's name was deleted and was headed: "Road Traffic Act (RTA) Charges – where we are now". The letter referred to the relevant provisions of the Road Traffic Act 1988 which empowered NHS Trusts to claim back the costs of NHS treatment from insurers of third party insured responsible drivers. It also referred to an entity called the National Road Traffic Accident Claims Centre (NARTRACC) described as a private sector debt recovery business working for a number of NHS Trusts and run by the Appellant which had:

"identified a gap of up to £130 million per annum between action and potential income from section 157 [of the Road Traffic Act 1988]"

and to the fact that NARTRACC has proposed that the gap could be "virtually eliminated" if CRU data were employed to target successful claimants. However, the letter also confirmed that since the Law Commission proposals, "the picture had become significantly more complex than it previously appeared" and that "we are effectively in a policy vacuum until new Ministers take office".

The letter ended as follows:

"The above analysis implies that the resolution of the issues will be politically contentious, technically complex, and thus require time to achieve. On the one hand Adlam appears to have revealed a potential for a major increase in NHS income. Against that, for Ministers to espouse the Adlam idea could be represented as a widening of what is an anomaly, albeit a historical one, at odds with the principle of providing NHS hospital services free of charge. Ultimately, a decision will depend on the political instincts of the incoming administration and how Ministers regard the balance of financial and political considerations."

This letter was part of the series of documents disclosed by the Treasury under cover of their letter to Laytons of 26 June 2007 in response to a FOI request made on 15 May 2007. The Treasury nonetheless claimed reliance on section 42 with regard to the principal redacted portion of its contents within the body of the letter and that in all the circumstances public interest militated in favour of maintaining the exemption and prevailed as against any public interest in disclosure.

The Appellant's role

23. The Tribunal was provided with a number of documents by the Appellant which threw light on relevant events which occurred after the date of the Chancellor's announcement. As indicated above, the date of the Appellant's request was in March 2005. From what has already been said

in this judgment, it can be seen that the debate and the Chancellor's announcement reflected a desire by the Government, specifically the Department of Health, to shift the administrative burden from reclaiming NHS costs for treating those injured in road traffic accidents from hospitals to a central body. There were apparently three options: first, to some department or agency under the NHS, the second, to central Government and lastly to a commercial concern. Eventually it was decided that the scheme should be retained within central Government and in particular within the CRU which is part of the Department for Work & Pensions. The evidence suggested that some commercial companies acting on behalf of the NHS charged the NHS a percentage of the money raised and it was therefore thought the CRU would represent far better value.

24. Perhaps not surprisingly in the light of the decision that was eventually taken and the ensuing closure of his business, namely NARTRACC, the Appellant remained and clearly continues to remain, as it was put in correspondence by Laytons, "extremely dissatisfied" not only with the decision, but also with the related decision not to open to the private sector the possibility of carrying out the operations of recovery or to put the issue of recoupment out to tender. The Tribunal was informed that Earl Howe raised the issues with the Government in the Grand Committee of the House of Lords on 5 December 2006. There then followed a letter from Baroness Royall on behalf of the Government to Earl Howe dated 18 December 2006. That letter set out the eventual course that was decided upon as summarised above. However, the Appellant again in the words of his solicitors, was "by no means satisfied" with the explanation offered by Baroness Royall. Again, and not surprisingly, the Appellant has made analogous requests to the one which forms the basis of this Appeal to a number of other bodies including as mentioned above, the Department of Health and the CRU. Without intending any discourtesy or lack of understanding towards or in respect of the feelings experienced by the

Appellant, the Tribunal does not propose to set out the details of the requests and the responses these requests have elicited in any detail. None of the issues in this Appeal are in any way affected by such events.

The evidence

25. The Tribunal heard evidence not only from Ms Banner, but in witness statement form from Keith Paley of the NHS who has been referred to, as well as Michael Evershed. The latter two witnesses were not required by the Tribunal or the parties to attend on the appeal to be cross-examined. The Tribunal was also shown a full copy of the undisclosed letter of 4 June 1997 and an unredacted copy of the second letter referred to above, namely that of 29 April 1997.

26. It is fair to say that Mr Paley added very little to what has been set out above. He admitted he had "little direct recollection" of his written exchanges with Mr Evershed even though as the documents as a whole referred to above show, he described Mr Evershed as "my main point of contact" at the Treasury on the issue of Road Traffic Act charges. He confirmed that at the time of the 4 June 1997 letter, the Department of Social Security and the Department of Health were a single department at least in the sense that they shared resources and obtained legal advice from the same group of legal advisors. He went on to add that at the time of the letter, the Treasury and the Department of Health had what he called "a clear common interest" in relation to the recovery by NHS bodies of the cost of treating road accident victims and that these issues had been under consideration "for some time" certainly since the latter part of 1996.

27. Evidence was also received by the Tribunal from Stephen Albert Parker, the Treasury's Legal Advisor, in the form of a lengthy and detailed witness statement. He, like Ms Banner, was examined during the course of the hearing. In his witness statement, he dealt with great care with what he

called the “general importance of Government departments being able to share legal advice with each other without foregoing the protections of legal professional privilege”. He also explained how several Government departments and agencies are likely to have “a common interest” in legal advice that such other departments of agencies may receive. He also confirmed that normally a Government department would use an in-house lawyer, but that whether or not such a lawyer would be used in any given case would depend on the facts of the case in question. He confirmed, echoing Mr Paley, that the formation and implementation of Government policy would often require Government departments to act jointly which in turn would mean that there would be “invariably” a common interest in the content of the legal advice. He also invoked the doctrine of Ministerial collective responsibility to maintain the confidentiality which had to be respected to ensure that not only Ministers, but also officials should be able to share information and advice, including legal advice, that might be the basis of a collective Government position. He stressed that the fact that in this case the withheld and redacted information was between civil servants at the Treasury and the Department of Health, rather than between Ministers, did not affect the overall position with regard to common interest. He added that common interest was not only in play, but was also a necessity in relation to the formulation and amendment of legislation. In relation to the overall facts concerning this Appeal, as he put it, the Treasury acted as a watchdog over public expenditure, and as he also put it in his witness statement, as such “it has an intimate interest in the potential financial consequences of any proposed change in Government policy” including any policy which will or might result in a saving of public funds. In short, even though a department such as the Department of Health might, or, as here, would have responsibility over a policy in a particular area and would therefore as he put it “take the lead” by performing the majority of the work involved in producing legislation, the Treasury would have “some level of involvement in most Government

legislation". Finally, in support of his overall contention that Government departments have a common interest in each other's legal advice, he claimed that it is to be expected that Government departments "should approach legal issues in a manner that involves consistency and cohesion". The Tribunal did not find that anything that he added in giving his oral evidence detracted from the content and thrust of his witness statement.

28. The Tribunal now turns to consider Ms Banner's evidence in further detail. This is because as will be seen, one of the contentions made by the Appellant was directed at the adequacy and scope of the searches in fact conducted by the Treasury. The written statement can perhaps be summarised in the following way, namely:

(1) the Treasury, like all Government departments, is responsible for its own retention and disposal policies; open files are retained for 30 years and those considered suitable for permanent preservation are then in general passed to the National Archives;

(2) there is general guidance within the Treasury as to how records are created by reference to generalised headings such as Treasury Policy, Ministerial Briefings, Advice, Results and Decisions Taken, Key Facts, etc; currently the Treasury holds 500,000 paper files and 2.8 million documents in electronic form;

(3) in 1987, the Treasury introduced a data base called NetIMPRes which although allowing key word searches, does not itself hold records: it is in effect only a catalogue system: moreover it allows searches using three key words and then only in respect of a file title;

(4) after 1995, the Treasury introduced electronic document management systems: the current system is entitled Jigsaw which effectively stores all Treasury electronic records as distinct from

paper records: searching within Jigsaw can be effected by content and by title and the usual search techniques such as Boolean searches can be employed in that respect: basically, Jigsaw stores information by reference to the date or dates of the document, either with respect to the date on which it is first saved to Jigsaw, or to the issued date which reflects if different from the date of the document itself, the date of the document's creation and finally in respect of the so-called amended date reflecting if applicable the most recent version;

(5) Treasury staff might in addition keep other documents on their own electronic system, but there was as Ms Banner put it in her statement, "no fail-safe mechanism for ensuring that all documents are appropriately retained";

(6) there exists an established convention that Ministers of one administration may not be given access to documents of a former administration of a different political persuasion: Ms Banner exhibited a Prime Ministerial reply of January 1980 which set out the parameters of the convention: as will be explained below however the convention exists largely to avoid the embarrassment of a former Minister by revealing his policies and thoughts as to policy to a successor; moreover, there is no neat formula which could be used to reconcile the desired for effect representing the need to avoid embarrassment with the need to ensure that there was a continuation of policy generally;

(7) the initial response to the 2005 request was a search for papers and electronic documents for the period 2 May 1997 to 2 July 1997 to reflect the fact as indicated above that Mr Brown became Chancellor on the former date: it will also be observed that none of the documents described in detail above at paragraph 21 let alone the 4

June 1997 undisclosed letter pre-dated the first of those dates. In any event, the Treasury took the view (as will be confirmed below and as to which the Tribunal respectfully agrees) that the only sensible reading of the request made on 24 March 2005 was necessarily to limit the information, costings, advice, etc furnished by the Department of Health to the Chancellor and "which may have contributed to the formulation" of the intention announced on 2 July 1997, to documents that were or might have been considered by Mr Brown as distinct from any predecessor occupying his position as Chancellor; submissions made to Ministers in May and June 1997 would have been in Jigsaw which had been duly searched as were paper files which were still in use in 1997 through the NetIMPRes system; although all such searches failed to find any relevant information, it was noticed that the Treasury held electronic documents from December 1997, but again by reason of the timing necessarily inferred from the request, such information was not searched;

(8) coupled with the knowledge obtained by Ms Banner and her team from their counterparts in the Department of Health that the latter had no papers relevant to the request, the Treasury duly confirmed on 2 June 2005 that it held no relevant information;

(9) the Appellant's request for further clarification made in early to mid-August 2005 prompted both the Treasury and the Health team to use a similar approach as before, namely the use of a series of key words in both the Jigsaw and NetIMPRes systems: in particular a search was undertaken for budget submissions, but nothing was found either in the form of any such information or in the form of a note that such information had existed but had since been destroyed;

(10) there then followed the internal review in November 2005: the Treasury treated this request as a procedural review in the sense that the process was re-examined as distinct from a consideration of whether a FOIA exemption was engaged and if so to what extent; different search terms were used from those employed in the initial search but although the new searches employed did yield a number of additional documents, none fell within the 1997 timeframe referred to above. In addition, a more thorough search was made of individual officials' own records as well as other specific sources such as personal Ministerial records, but again, no information was found;

(11) however, the fact that further documents were unearthed in the wake of the internal review did cause Ms Banner to believe that the appropriate areas and/or files, etc were being found, but that on account of the narrow timeframe indicated above, no information relating to the terms of the request existed; in the circumstances, Ms Banner accepted the report of those within her team who had conducted the internal review and on reaffirming that the Treasury did not hold any information in question within the terms of the request, she maintained that she considered that the Treasury had conducted a reasonable search;

(12) however, in the course of preparing for the Appeal, and in an effort to replicate the earlier searches, a member of Ms Banner's team added a wild card symbol, in all likelihood in the form of an asterisk, to various combinations of the search terms previously used, e.g. Traffic, Road, Accident, Charges, NHS, etc; this wild card search yielded 88 file titles, 8 of which post-dated July 1997, 79 of which spanned 1980 to April 1997 with the remaining 1 file having a start date of 26 January 1994 but no end date; this last mentioned file was recalled: it had the title "Road Traffic Act Charges", but although

it was not expected to contain any information that might relate to the request, documents 1-6 as described above were revealed together with the undisclosed letter of 4 June 1997;

(13) Ms Banner contends in her witness statement that enquiries made or to be made of individual Ministers and their senior staff on the facts of this case "would clearly go beyond the requirements of reasonable search", since it could not be the case that a response to every request under FOIA, a Government department could be expected or be required to make such enquiries of "every individual who was or may have been involved or may have knowledge of matters dating back a number of years"; she did confirm that in this case, though it was not entirely clear when, though it may well have been after the request for an internal review within the Treasury, the Treasury did make enquiries of the relevant Policy team, the Chancellor's office and the Special Advisors' office.

29. Many of the above issues were revisited by Mr Lask in his cross-examination. Ms Banner confirmed in her answers to him that she and her team had taken the view that the request in this case was seeking information which had been put to or sent to the Chancellor and by implication, his staff, such as to have had or such as might have had an impact on his announced intention. This view could be said to be part and parcel of her evidence in chief that the first relevant date was the date the Chancellor took office. In relation to the 29 April 1997 redacted letter, the Treasury accepted that on its face it bore a date which went outside the timeframe, but the Treasury had and has never contended that the letter fell within the terms of the request, even though it was in due course redacted in the way described above. She added in cross-examination that to have fallen within the request as interpreted by the Treasury, not only did the suggested timeframe apply, but the Chancellor would have

had to have seen the information which it contained or the information was such as might have been considered by him.

30. As will be set out in further detail below, the Tribunal finds that it is important to keep sight of the realities present in this case. If it is accepted that the Treasury took a reasonable view of the scope of the request with particular reference to the timelines running from the date of the Chancellor taking up his office, then admittedly it would follow that the letter of 29 April 1997 would fall outside the request and would in the normal course never have been disclosed. Indeed in her witness statement, Ms Banner reiterated the view that only the non-disclosed letter of 4 June 1997 fell within the terms of the request as interpreted by the Treasury. The letter of 29 April 1997 was only provided by the Treasury in its letter of 29 June 2007 in answer to a further request made by the Appellant in Layton's letter of 15 May 2007. It could be said this last letter was put on an entirely separate basis from that which underlay the initial request. In particular, the letter of 15 May 2007 specifically requested first a copy of the letter of 29 April referred to in Mr Evershed's letter to Keith Paley of 14 May 1997 (i.e. Document No. 2 referred to above) and in relation to a comment on page 4 of the draft letter (i.e. part of Document No. 4 referred to above).

31. Consequently, by letter of 26 June 2007, the Treasury stated that in answer to the two requests which have just been set out above it had identified the letter to 29 April 1997 and that in relation to the redacted passage which occurred in paragraph 4 of the letter, the same constituted legal advice and was therefore covered by section 42.

32. The Tribunal finds that in the circumstances in which the letter of 29 April 1997 was provided, it cannot be said to be as a result of the initial request of March 2005. Not only does Ms Banner take this view by asserting that it did not in the Treasury's view fall within the parameters of the request, but

it was produced as part of the overall exercise of voluntary disclosure conducted by the Treasury in the wake of Laytons' request in May 2007.

33. It follows that the Tribunal is not bound to take any view about the propriety of applying any exemption to the April letter since it has never been conceded by the Treasury that it fell within the terms of the request which gave rise to this appeal. However, the Tribunal agrees the redaction was appropriate given the desirability of acting consistently. This was clearly done on the basis that the Treasury had regarded itself as having to act consistently, or at the very least prudently, in connection with the initial request and with regard to the document which it did admit fell within the terms of the request albeit subject to the qualified exemption in section 42.

34. With regard to the searches and in further answers to questions put to her by Mr Lask, Ms Banner confirmed that no records were kept of all the searches she and the team (being a team eight strong in all, but not all working at any one time with the Appellant's request) had carried out. It followed that she could not be sure that the searches which did unearth the file marked "Road Traffic Act Charges" had not in fact been done prior to the time she described in her evidence. She admitted there had been a delay. It is fair to say that she also in her witness statement expressed regret that the FOIA deadline had not been met with regard to the 20 day provision in section 10. In her oral evidence, she placed some mitigation on the fact that all work of the sort described by her needed to be prioritised. She said that exercises such as the initial search and the internal review represented in effect what she called a compromise between work and resources and that in the circumstances a period of four months in which the internal review was conducted in the present case was not "too excessive". In further answers to questions put to her by the Tribunal, she conceded that in hindsight the Treasury and her team could have "gone back" to Laytons and asked for what she called "better

clarification" and that in the present climate of FOIA requests and related practices, she and her team do "go back" to seek the requisite clarification more often than they had done in, say, 2005.

The issues

35. The first issue is one reflected in terms in the Decision Notice by the Commissioner, namely that the Treasury failed to comply with the time limits prescribed by section 10 of FOIA which provides that:

"(1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly, and in any event not later than the twentieth working day following the date of receipt.

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(3) If, and to the extent that:

(a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or

(b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given."

Subsection (4) envisages the issuance of Regulations prescribing a longer period than the 20 day current period. Indeed subsection (5) in effect authorises any such Regulations to prescribe different days in relation to different cases. No Regulations have been issued pursuant to these provisions save it seems in respect of governing bodies over maintained

schools and other specified educational establishments which are not material to the present case where the 20 day period has been extended to 60 days.

36. Section 17 of FOIA provides in essence that a public authority, which in relation to any request for information is to any extent relying on a claim that information is exempt information, must within that time limit for compliance within section 1(1), i.e. the 20 day period, give the applicant a notice which states that fact, specifying the exemption in question and stating why the exemption applies. Section 17(3) provides that a public authority which in relation to any request for information is relying on *inter alia* a qualified exemption such as section 42 must:

"… either in the notice under subsection (1) [*i.e. the notice otherwise to be provided within the 20 day period*] or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming –

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

At all times the Commissioner has accepted, in the Tribunal's view quite properly, that any and all breaches were not deliberate or, as he put it, non-culpable.

37. Section 1(1)(a) and 1(1)(b) no doubt by now too well known to merit any direct citation, provide first that an applicant is entitled to know whether information is held and if so to have that information communicated to him. Put shortly, the Commissioner contends:

(1) given the belated discovery of the 4 June 1997 letter, the Treasury ought to have informed the Appellant within the 20 day limit that it did hold information; in the event, the Appellant was not told until after 21 February 2007, about two years after the initial request;

(2) equally, within the same period, the Treasury should have expressly invoked the relevant exemption in relation to the letter, namely section 42; much the same contentions are advanced by the Appellant with one additional qualification, namely that at all times in respect of the above breaches, the Treasury also infringed section 1(1) itself. In the present case, the 20 day limit was clearly exceeded with regard to the principal response by the Treasury to the initial request of 24 March 2005 since that response was dated 2 June 2005, clearly outside the prescribed period.

38. Against the above, the Treasury maintains that properly construed, the provisions of FOIA allow for the commission, as in the present case, of an honest and reasonable mistake on the part of a public authority. Thus, as it is put in the Treasury's principal written submissions:

"… although the Treasury accepts the conclusion reached by the Commissioner in his Decision Notice as to its failure to respond to Mr Adlam's request in accordance with the requirements of section 10 of FOIA, further criticism based on events from February 2007 is unwarranted."

39. In particular, issue is taken with the further determination of the Commissioner for obvious reasons not reflected in the Decision Notice that as to the events between June 2005 and February 2005 there was an additional failure by the Treasury in:

(a) failing to inform the Appellant that it held the information it uncovered;

(b) failing to inform the Appellant of the applicability of the exemption under section 42; and

(c) failing to explain the basis on which section 42 was invoked.

As indicated above, the Treasury has not sought to challenge the conclusion in paragraph 25 of the Decision Notice that it initially failed to answer the Appellant's request in time. However, what is now said is that there is no further act of non-compliance with section 10 and/or section 17, or as the Appellant alleges, section 1. This in turn appears to the Tribunal, as well as to the parties, to raise a point of general importance in relation to the practice of dealing with requests under FOIA and whether the provisions of a *bona fide*, i.e. an honest and/or reasonably held but incorrect answer within the 20 day limit constitutes compliance or non-compliance with those provisions.

40. The Commissioner makes a simple contention. He claims that the provision of such an answer represents non-compliance with section 10. The same contention is made with regard to a similar response in the context of section 17.

41. As developed by Mr Pitt-Payne in argument, all the relevant sections attracted an approach which was in effect one of strict liability as he put it. Consequently, if a request was made for information such as to engage section 1, there would be a breach if either the public authority failed to carry out the search or if it did carry out the search, it then proceeded to give a wrong answer or a right answer, though outside the relevant time limit. He added that on the facts of this case, the first search which was subsequently carried out was strictly not necessary. He did however go on to point out that unlike the facts in the present case, were a public authority shown to have embarked upon a systematic series of non-culpable breaches under sections 1 or 10 or 17, or all of them, this would enable the Commissioner to identify cases or types of cases in which he,

the Commissioner, could exercise his powers to make good practice recommendations regarding FOIA, especially with regard to sections 46 and 48.

42. The Tribunal is unwilling to accept that the notion of strict liability is apt. The Tribunal feels that in order to place this issue in context, a realistic view of the machinery of fact must be adopted. Section 1 clearly contemplates that on the making of a request for information, the requester is "entitled" to be informed of the existence of the information, and if it does exist, to have it communicated to him. On any view, the obligation is an absolute one. The language bears no other interpretation on any sensible approach. The Treasury has maintained that the 20 day limit is unduly tight, but that of itself cannot justify any dilution of what is otherwise clearly an absolute obligation. In this respect, attention can be drawn to section 1(3) which provides that if a public authority requires further information in order to identify and locate the information requested, there is no "obligation" to comply with subsection (1). This provision, in the Tribunal's judgment, points clearly not only to the absolute nature of the obligation embodied in section 1(1), but also to an option which enables a public authority at least to postpone its need to comply with that obligation.

43. Section 10(1) deals with the manner in which the obligation set out in section 1(1) is to be implemented. It expressly provides that there must be prompt compliance. This too is the language of what has just been described as an absolute obligation. The notion of, indeed the term, "obligation" itself is in fact employed in section 12 which provides for an appropriate exemption when the cost of compliance exceeds the appropriate limit (currently £600). In particular section 12(2) provides that section 12(1) which addresses the case where a public authority "estimates" that the cost of compliance with the request will exceed the limit:

"… does not exempt the public authority from its obligation to comply with paragraph 1(a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit."

Section 17(5) reinforces the need the abide by the prescribed time limit, even in relation to section 12 (as well as, it will be noted, with regard to a public authority's obligation to inform an applicant that he or it is making a vexatious or repeated request) by stating that as a general rule, subject to certain exceptions in subsection (6):

"(5) A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact."

The contentions advanced by the Treasury are based on the premise that if the "strict liability" approach is in fact reflected in sections 1, 10 and 17, public authorities would be less inclined, if not disinclined, to comply with requests for information. However, in the Tribunal's judgment, this again fails to take into account the realities of the possible various outcomes which the legislation provides for. Clearly, if an applicant accepts what would otherwise be described as an honest and reasonably held, though inaccurate answer, any breach of section 1(1) and/or the other sections will go unrecorded. The position might of course be different if a further request were made.

44. However, no doubt in an increasing number of cases which come before the Commissioner, particularly in the case of major public authorities such as the Treasury and other large Government departments, at the very least, as in this case, an internal review will be requested and conducted. The Treasury in its written submissions remind the Tribunal of observations in another of the Tribunal's decisions, namely *Bromley v Information Commissioner and the Environment Agency* (EA/2006/0072),

in particular paragraph 13, as to the practical difficulties in being "absolutely" certain that information sought in relation to a request "does not remain undiscovered somewhere within the public authority's records". There is no need to do more than be reminded of the 2 million or so records retained by the Treasury as described by Ms Banner.

45. If again, as in the present case, an internal review does not uncover previously undiscovered information, then it is likely that complaint by a dissatisfied applicant to the Commissioner will prompt such discovery. This might at least initially be in the exchanges between the Commissioner and the public authority, or conceivably as a result of a Decision Notice being issued. The Tribunal feels there is no need to recite the terms of sections 50, 51 and 52 of FOIA in full, save to point out that FOIA clearly charges the Commissioner with a duty to conduct his own investigation into whether or not the public authority has complied with its obligations including those under sections 1, 10 and 17. Particular regard has to be paid as to whether any Code of Practice as prescribed under sections 45 and 46 has been complied with. In other words, it is entirely possible that any as yet undiscovered information will be unearthed during that entire process, nor is it inevitable as the Treasury maintains that belated discovery of information previously not thought to exist necessarily entails a sanction. Section 51 provides that the Commissioner may serve an Information Notice merely requiring the public authority to furnish the Commissioner:

"… in such form as may be so specified, with such information relating to the application, to compliance with part (i) or to conformity with the code of practice as is so specified."

46. Admittedly, section 54 entitles, but does not compel the Commissioner to certify in writing to the court if there has been failure to comply with an Information Notice. However, it is entirely possible that belated discovery

of previously undisclosed information which was honestly overlooked and reasonably believed formerly not to exist, will in the context of a specific case, amply satisfy the Commissioner's concerns.

47. Finally, in terms of the procedures and mechanisms covered by FOIA, if only for the sake of completeness, the Tribunal has powers under section 58 to review a Decision Notice on the grounds that it was wrong in law, or that it involved a wrong exercise of the Commissioner's discretion. The powers of the Tribunal which include the ability to review facts are extremely broad. It can in particular issue a Decision Notice such "as could have been served by the Commissioner" dependant upon the findings it itself makes. There seems no reason why in a suitable case any amended or reissued Decision Notice at the instance of the Tribunal should not make it abundantly clear that no steps need to be taken given the fact that ultimately there has been practical, even if not a wholly technical, compliance with the request.

48. Breach of a provision such as section 1(1) entails no specific sanction. It certainly contains no penal sanction, quite apart from there not being any form of civil remedy available to aggrieved applicants or any other alleged party such as damages or similar relief. The structure of the Act merely addresses, and then only in an entirely flexible way, the various steps with which the relevant entities are charged with implementing FOIA. This is done in order to ensure that respect is paid to the entitlement on the part of an applicant to be provided with information that is requested by him. As both the Treasury and the Commissioner accept, in section 1 the Commissioner is under a duty to take steps to ensure that good practice as a whole is maintained by public authorities as a whole, including but not limited to the public authority in question and to give advice where appropriate. In particular, it is only with the consent of a public authority that the Commissioner may assess whether that authority is following good practice: see section 47(3). By section 48, if it appears to him that

the practice of a public authority in relation to the exercise of its functions under FOIA do not conform within the issued Codes of Practice, he, the Commissioner, can make a practice recommendation to that public authority. The Tribunal feels that it is barely conceivable that such a step would be taken on the basis of an isolated instance, such as occurred in this particular case.

49. The Tribunal now turns to the specific contentions made by the Treasury in support of its overall contention that the provision of an honest, reasonably held, but nonetheless erroneous answer will comply not only with sections 10 and 17 but also by necessary application with section 1(1).

50. First, it is claimed that in accordance with judicial dicta at the highest level, statutory construction should be informed by a purposive approach see e.g. *Barclays Mercantile Business Finance Limited v Mawson* [2005] AC 684, especially at paragraph 28. The Tribunal would agree but not at the expense of linguistic distortion. In any event the Tribunal does not accept that the purpose or purposes underlying FOIA are not met if the obligations set out in section 1 are regarded as absolute in the way indicated above.

51. Second, issue is taken with the Commissioner's contention that the use of the word "inform" in section 1 necessarily meant that the public authority is under an obligation not to "misinform" an applicant which would be the case if any form of inaccurate response was given. In particular, the Treasury contended that an honestly held, though misguided answer could not sensibly be characterised as a form of "misinformation". The Tribunal respectfully disagrees. Any such gloss on what is clearly meant to occur would have entailed the use of clear language to that effect. Such additional language is absent on the face of section 1.

52. Third, reliance is placed on what is said to be a "tight" 20 day period. This has already been alluded to. The Tribunal attaches no weight to the actual time limit. The fact that, as also indicated above, there is a statutory power to vary the period shows that the length of the period is an effectively neutral element in the overall analysis.

53. Fourth, there is said to be an interplay between section 12 and section 1 apparently on the basis that the Commissioner's reading of section 1 will cause, or might cause, more public authorities to rely on section 12 to avoid an overriding obligation to comply with section 1. The Tribunal finds this contention somewhat elusive. The scheme of the Act even as described above in generalised terms shows that there is a series of checks and balances which comes into play whenever an applicant is dissatisfied with the response of a public authority and engages the operation of the Act, e.g. by contacting the Commissioner. If section 12 is relied upon or resorted to by a public authority, the Commissioner and in due course the Tribunal, are charged with the obligation to examine the propriety of reliance upon its terms and indeed, there is existing case law that shows that this in fact does occur.

54. Fifth, it is said that there exists an inconsistency between the nature and content of an absolute type obligation in section 1 on the one hand, and the standard of proof which it is now accepted by all, in accordance with at least one decision of this Tribunal, is to be applied in considering whether or not a public authority holds information, i.e. the civil standard. See e.g. *Bromley v Information Commissioner and Environment Agency* (EA/2006/0072), especially at paragraph 16. The Tribunal finds there to be no such inconsistency. Contrary to the Treasury's contention, there is no logical link as it appears to the Tribunal between the obligation of the public authority to answer in a timeous and unambiguous manner the request that is made of it, and in the process to ensure that the applicant gets the response to which he is statutorily entitled on the one hand, and

on the other the quite separate exercise embarked on by this Tribunal. In the context of an appeal from the Commissioner there will invariably be a great deal of new factual evidence before the Tribunal than there probably was at an earlier stage as provided by the public authority, in order to determine whether in all the circumstances at the relevant time the public authority did in fact hold the information requested.

55. Sixth, it is said that the overall policy of FOIA is the promotion of "the general objective that public authorities should disclose information when and to the extent possible." The Tribunal hardly disagrees with that formulation as a general description but on stricter analysis, it can hardly be said to reflect the unequivocal statutory effect of sections 1, 10 and 17.

56. Seventh, the Treasury made a number of observations regarding the general comment made by Mr Pitt-Payne that successive section 10 breaches might lead to a change in practice. Here, the Tribunal has much sympathy with the Treasury's comments that section 10 breaches need not necessarily lead to further guidance under section 48 in the sense that the Commissioner may register his concerns in the Decision Notice. As explained above, utilisation of a Decision Notice is not the only way forward open to the Commissioner. On the other hand, the Tribunal has great difficulty in understanding, let along accepting, how it can be claimed that the more likely consequence of the Commissioner's submissions in the present case is that the significance of a section 10 finding would be regarded as "doing little for the standing of FOIA itself". The Tribunal also fails to understand how a declaration of a breach of sections 10 and/or 17 might in some way be regarded as unfair. The Tribunal finds such arguments almost fanciful, with great respect to the way in which the Treasury advanced them. Indeed, in this case the Treasury has willingly accepted that it has already breached the 20 day limit with regard to the initial reply.

57. The Commissioner has made it abundantly clear that any breach or breaches were entirely non-culpable and that no steps needed to be taken. Ms Banner accepts that the manner in which FOIA requests are now dealt with, as might be expected of a major Government department, have been refined and improved. Indeed, if the Tribunal finds in a case such as the present that there is a technical breach or breaches in such circumstances and in the process confirms that all reasonable steps had been taken, it is inconceivable that any stigma in the sense perhaps contended for could be said to attach to the actions of the public authority. The Tribunal's view is that the Treasury and its contentions can be said with some justification to have necessarily confused a technical breach or breaches with some inevitable accompanying degree of criticism, if not condemnation. For the reasons stated above in connection with the operation of FOIA, the Tribunal respectfully disagrees.

58. On the other hand, and in dealing with the consequences of the Appellant's contentions, the Tribunal finds it difficult to see why the Commissioner has restricted himself only to alleged breaches of sections 10 and 17 alone as being the consequence of the Treasury's letters in issue in September. The Tribunal finds that it must logically follow that if such breaches do attach themselves to the two letters in 2005 in question, it necessarily follows that the letters entailed a breach of the overriding obligation in section 1(1).

59. For the above reasons, the Tribunal respectfully rejects the general contentions of the Treasury that what it called an honest and reasonably held but incorrect answer which it originally provided, can be said to comply with a public authority's obligations under section 1(1)(a) and (b), and on the basis that such answer is given outside the relevant period, the Treasury also failed to comply, not only with section 10, and since an exemption was engaged, but also section 17.

Section 42

60. The issue here is in fact two-fold: first, whether section 42 is engaged with regard to the letter of 4 June 1997, and second, on the basis that the letter did engage the exemption, whether the public interest in maintaining the exemption outweighs any public interest that might exist in favour of disclosure.

61. Section 42(1) provides that:

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

62. There is no dispute between the parties that the Treasury can now rely on the exemption, even though it does so after the issuance of the Commissioner's Decision Notice (see generally *Bowbrick v Information Commissioner* (EA/2005/0006), at paragraph 27). Equally, there is no dispute subject to the fact that the Appellant has not seen the letter of 4 June 1997, that it comprises legal advice sought by the Department of Health and provided to it by a qualified lawyer. The Commissioner and the Treasury contend, and the Tribunal duly agrees, that given the wording of section 42(1), it is irrelevant whether the public authority receiving the report is the person by whom the claim or privilege is or could be maintained. Indeed, that contention was not, it seems, contested by the Appellant. Nor did the Appellant appear to deny the following proposition which the Tribunal also accepts, namely not only the fact that the letter of 4 June 1997 is a communication that attracts the protection, but also the fact that such communication was revealed to a third party and the same was not of itself sufficient to constitute any form of waiver. The critical issue is whether the information remains confidential as between the parties connected with the communication. Again, it does not appear to be contested by the Appellant that the undisclosed information

did not cease to be information attracting legal professional privilege on account of its passage from the Department of Health to the Treasury. The Tribunal accepts the overall effect of the evidence put forward by Mr Parker and referred to above. There clearly was a strong if not overriding degree of common interest between the Department of Health and the Treasury which fortified the degree of confidentiality which had attached itself to the exchange. If further support were needed it is sufficient to point to the undisputed evidence of Mr Paley.

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

"… the Appellant has failed to address sufficient considerations which would demonstrate that the public interest in maintaining the exemption is, in the present case, outweighed by any public interest in justifying a disclosure."

64. The Tribunal respectfully suggests that there was in that passage perhaps an unintentional use of an expression which appears to reverse the real balance which has to be struck. The real balance is whether the public authority in that case had in all the circumstances of the case demonstrated that the maintenance of the exemption outweighed any public interest in disclosure. The fact remains that the sentence recited

above does not in any way impact upon the general principle enunciated in that decision.

65. The Tribunal revisited section 42 in *Shipton v Information Commissioner* (EA/2006/0028), see particularly paragraph 14 (b) and (d). There, the Tribunal stated that section 42 was not an absolute exemption and that if the qualified nature of the exemption is to have any meaning, "there will be occasions when the public interest in disclosure will outweigh the public interest in maintaining privilege. This may arise, for example, when the harm likely to be suffered by the party entitled to legal profession privilege is slight, or the requirement for disclosure is overwhelming." (see paragraph 14(b) and see also the comments at paragraph 14(d)). This Tribunal however is not minded to resile from the formulation put forward in *Bellamy* and insofar as there could be said to be an inconsistency between the two decisions, the Tribunal will apply the principles set out in the *Bellamy* case. See also *Kitchener v Information Commissioner and Derby County Council* (EA/2006/0044) at paragraph 17 which it might be said is somewhat more reflective of the *Bellamy* approach than that in *Shipton* although naturally this Tribunal is not bound by its earlier decisions.

66. The Tribunal now turns to the various factors and matters advanced by Mr Lask in support of the existence of a public interest in this case which are said to be in favour of disclosure. In the Tribunal's view, Mr Lask put forward 6 principal considerations. The first reflected the effect of and consequences flowing from the Chancellor's announcement and perhaps more accurately its aftermath and its effect particularly on the Appellant's business. The short answer is simply that there was no evidence which could be said to relate to this issue put before the Tribunal. In any event it is difficult even adopting a generous view of the facts of this case to see any genuine public element in what is effectively a private complaint.

67. Second, Mr Lask took the Tribunal to what are sometimes called the Government's "12 Guiding Principles" in fact issued by Dr David Clark, the then Chancellor of the Duchy of Lancaster and reflected in *Hansard* in November 1997 being dated 4 November 1997. These Principles set out generalised guidelines which were designed to address the manner in which contracting out is conducted by central Government. It was maintained that one or more of these Principles should have been followed, but again for the reasons given in respect of the previous submission, the Tribunal finds it impossible to see, let alone make any finding about, any weighty public interest made manifest by this contention.

68. Third, it was said that there has here been a failure to go to competitive tender and reference is made to Baroness Royall's letter referred to above. Mr Lask claimed that there had to be an explanation why the costs recovery process did not go out to tender and that the public interest was self-evident given that the matter was discussed and debated in the House of Lords. The Tribunal again remains unconvinced by this submission even though it would accept that there will generally be a public interest in understanding how a Government decision not to go to competitive tender is generally arrived at. However, the letter sent by Baroness Royall can quite justifiably be regarded as providing some explanation as to that particular issue.

69. Fourth, reliance was placed on a report prepared by the National Audit Office entitled "Dr Foster Intelligence Joint Venture between the Information Centre and Dr Foster LLP" (Ref: HC151 Session 2006-2007: 6 February 2007). In paragraphs 23 and 27, reference is made to Government policy which is said to encourage departments to use private sector resources by means of outsourcing public private partnerships and joint ventures "when there is a good case for doing so on value for money grounds". On the basis of this Report, the National Audit Office found that

advertisements might have yielded better value for money returns. Yet again, the Tribunal struggles to see what general public interest there can be said to be in this case, at least in the absence of clear evidence as to what transpired in the wake of the Chancellor's 1997 Announcement. The contention involves the allegation that the CRU had been or was underperforming, or perhaps still continues to underperform. As to this, again, there is simply no material on which the Tribunal could make any form of reasoned finding.

70. The fifth consideration focussed on what the Appellant speculated might be in the 4 June 1997 letter. Mr Lask said it might constitute information which did in fact shed light on the genesis of the eventual Government decision. The Tribunal finds that such speculation as to the contents of a withheld document cannot, at least in this case, be regarded as a warrant for discarding reliance on an exemption which otherwise legitimately attaches to the information.

71. Finally, Mr Lask revisited one or more of the prior submissions by contending that it was a matter of genuine public interest for any public authority to be accountable on its decision making and that this was in effect conceded by the Treasury's own stance in this appeal. The Tribunal finds this a difficult contention to grasp, as, it seems, do both the Commissioner and the Treasury. The fact remains that the 1999 Act entrusted the new costs recovery process to the CRU. It remains, at least to the Tribunal, entirely unclear why it is self evidently a matter of public interest whether and if so why this function should be undertaken by the CRU or by a private company or companies. Again, it would have helped to have had some degree of expert analysis on this provided on the part of the Appellant.

72. Out of respect, however, to the Appellant, the Tribunal should point to a number of other considerations canvassed by the Appellant or on his

behalf, principally in the form of written submissions. First reliance was placed on the "age" of the information. Admittedly the policy to act via the CRU was given effect to in 1999 based in part on an earlier announcement in 1997. The Tribunal finds it difficult to see how the age of the information has any relevance to the strong policy reasons which underlie the need in the main to invoke and respect legal professional privilege. As a general legal principle, any information which does attract legal professional privilege retains that quality for all time. Mr Lask referred to the fact that under sections 62 and 63 of FOIA, so-called historical records become historical records after a period of 30 years. So far as they contain otherwise exempt information under section 42, that period would apply, so that such information would no longer be exempt at the end of that time. Mr Lask said that, based on section 63, even with information under 30 years old, the older the information, the weaker the public interest in maintaining the exemption. The Tribunal does not accept that this necessarily means that. The need to protect the public interest "in-built" into the exemption remains in the Tribunal's view and as a general principle undiminished by the passage of time.

73. Finally the Appellant pointed to the fact that the Treasury originally believed that it did not hold the information within in what it viewed as the proper scope at the Appellant's request, coupled with the fact that it did not identify the 4 June 1997 letter until February 2007. To be fair, Mr Lask did not put this at the forefront of his submissions and it is not difficult to see why. The Tribunal's view is that it is impossible to see any, let alone any necessary connection, between the actions of the Treasury with regard to the searches it undertook and the appropriate determination as to the respective public interests at least in the context of the present case.

<u>Whether the searches were reasonable</u>

74. This issue necessitates the prior consideration of the question whether the allegedly reasonable search or searches was or were conducted on the basis of a reasonable view being taken by the Treasury as to the scope of the initial request. It is clear from Ms Banner's evidence that the view was taken that, on its face, the request could only be taken to refer to information which was either put to, or could have been put to the Chancellor, with the necessary consequence that the Chancellor either did employ such information with regard to the announcement he made, or was in a position such that he could have used the information with regard to the announcement he did make.

75. The Commissioner found in paragraph 20 of his Decision Notice that he was satisfied that the Treasury had taken appropriate steps to locate the information requested. Save to comment on what he saw as subsequent breaches of sections 10 and 17 in the aftermath of the Decision Notice, the Commissioner did not retreat from this position on the appeal.

76. The Tribunal is entirely satisfied that no error of law was committed by the Commissioner with regard to this issue save to the extent that it finds that section 1 was necessarily infringed by the Treasury in the wake of the lapse of the initial 20 day period. More pertinently, it does not find that the Commissioner should have exercised his discretion differently in his implicit determination throughout that the Treasury adopted a reasonable approach in attempting to answer the Appellant's request.

77. At the heart of Mr Lask's contentions was the attack on what he saw as the unduly narrow time period attached by the Treasury to its consideration of the request, namely 2 May to 2 July 1997. Mr Lask partly attributed this approach to undue reliance on the Ministerial convention which has been referred to above. The Tribunal finds difficulty with this last contention.

78. First, Ms Banner took the view of the request which arguably was limited to material that was or might have been considered by the Chancellor in the way outlined above during his time in office. Second, the convention is restricted in effect predominantly to the passage or transmission of the personal views of outgoing Ministers to avoid embarrassment at their expense in the event of a new administration. The convention is by no means inflexible as has been noted above. The resultant searches which did unearth the seven documents in question never impinged upon the real domain of that convention. Ms Banner throughout maintained that the only document which fell within the scope of the request as the Treasury saw it, was the letter of 4 June 1997. For all material purposes, the Convention bears no practical relationship to the facts of this case.

79. The Tribunal is therefore entirely satisfied that the Commissioner took a proper view of the Treasury's interpretation of the request, although Ms Banner accepted that were she to receive the same request today, she and her colleagues might seek elaboration of its scope. In the Tribunal's opinion, the Treasury was perfectly entitled to come to the interpretation it did and respond accordingly.

80. The next question is whether the Treasury took all reasonable steps in relation to the searches it conducted and whether the Commissioner's findings that it did so should be upset.

81. What constitutes a reasonable search depends naturally upon what search tools are in fact available. By 2005, the Treasury already had an elaborate system which combined documentary search machinery with an electronic system. There is no suggestion that the systems as a whole were in any way deficient. Indeed, there was no evidence to suggest that the rules as to storage had not been followed. As Mr Pitt-Payne put it, as an applicant, you take your public authority as you find it. Second, as indicated above, whether public authority searches are reasonable

depends at the very least on the terms of the request. Here on any view, the information sought was expressly limited to information which emanated from the Department of Health, and second, it was further limited to information which went towards the formulation of the stated intention in the way which has already been mentioned in this judgment. In the Tribunal's view, the approach adopted by the Commissioner with regard to in effect endorsing that interpretation was entirely justified and the Tribunal respectfully agrees.

82. The next issue is whether the search methodology used by the Treasury was reasonable. Ms Banner described in effect a three-stage process, the first conducted up to August 2005, the second reflecting the internal review and the third, the preparatory stages prior to the appeal. The Tribunal agrees with the Commissioner that at all stages the use of the search terms described by Ms Banner represented an entirely reasonable course to adopt. As noted above, and as submitted by Ms Banner, it is entirely possible that the file within which the 4 June 1997 letter was found had been spotted or noted in the first or earlier stages but was not recalled. On that basis and with the benefit of hindsight and as pointed out by the Commissioner, an error could be said to have taken place. However, the Tribunal agrees that if there was an error, it was not an unreasonable one.

83. Mr Lask took issue with the possible failure to find and/or unearth exchanges between Ministers or at least their top officials, although Ms Banner stated that she felt it inconceivable that this would not have occurred. The Tribunal is not satisfied that there is any evidence of such an omission although it recognises the difficulty of proving omissions. Without injecting a note of unreality in these proceedings, the Tribunal would respectfully point out that it might be appropriate in a case such as this for an Appellant at least to consider the employment of his or its own IT consultant to comment upon technical matters such as the

reasonableness of searches and the techniques employed. This was left to Mr Lask who although he admirably deployed the various arguments in support of his client's case, was faced ultimately with a very detailed description of the processes used by Ms Banner which had at least undergone scrutiny by the Commissioner prior to being examined by the Tribunal.

84. Finally, the Tribunal has reminded itself of the sequence of documents which it has described at length above. On any view, the Tribunal finds that there can be seen to be a thread running through these documents with one leading to the next, etc. This thread might be said with some force to suggest that the documents which were disclosed represented more or less the entire picture which pertained to the background of the request as interpreted by the Treasury. The Tribunal therefore endorses the approach that was taken by the Treasury in this case to undertake the voluntary disclosure since it helped to set the undisclosed document in context and in the way indicated above to show that the information disclosed represented the entirety of the information which strictly related to the proper scope of the request. The Tribunal nevertheless upholds the Commissioner's finding that the 4 June letter was subject to the applicability of the section 42 exemption.

Conclusion

85. For all these reasons, the Tribunal dismisses the Appeal but substitutes a Decision Notice in the way outlined above.

David Marks
Deputy Chairman Date: 5 November 2007