First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2017/0232

Heard in London
On 26 February 2018

Before

JUDGE DAVID THOMAS

TRIBUNAL MEMBERS HENRY FITZHUGH AND PIETER DE WAAL

Between

LIAM O'HANLON

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION AND REASONS

NB Numbers in [square brackets] refer to the open bundle

Decision of the Tribunal

The Commissioner, within the latest of 28 days from the date of this decision or the final disposal of any application to appeal she makes, and any subsequent appeal, to the Upper Tribunal, is to disclose to Mr O'Hanlon: (i) the *Summary of FTT Decision* section of the *FOI Policy Knowledgebase* (pages 1-3 of the closed bundle); two internal

emails sent on 16 May 2016 (pp20-23 of the closed bundle); and (iii) paragraph 1 of an internal email sent on 17 May 2016 (p20 of the closed bundle). The remaining disputed information can be withheld.

Introduction

1. This is the appeal by Mr Liam O'Hanlon against the rejection by the Information Commissioner (the Commissioner) on 20 September 2017 of his complaint that she had wrongly refused to disclose certain information to him under section 1(1)(b) Freedom of Information Act 2000 (FOIA).

2. Mr O'Hanlon opted for an oral hearing. A former practising solicitor, he represented himself. The Commissioner was represented by Zoe Gannon of Counsel, instructed by Claire Nicholson of the Information Commissioner's Office (ICO). The Tribunal is grateful to Mr O'Hanlon and Ms Gannon for the helpfulness and conciseness of their submissions, particularly given that they thought that a day, rather than half a day, had been set aside for the hearing. It must be said that the conciseness with which Mr O'Hanlon expressed himself orally stands in marked contrast to the prolixity of his written arguments: as an example only, his skeleton argument ran to 55 pages and it was soon followed by three witness statements totalling (including exhibits) a few hundred pages, in part because he wanted to ensure that the Tribunal had material which the ICO had declined to include in the open bundle. Much of this material, relating to previous appeals brought by Mr O'Hanlon, was at best of only tangential relevance. The Tribunal has nevertheless considered it.

3. The Tribunal will set out the factual background and the history of the present request before considering a jurisdictional question and the substantive merits of the appeal.

4. There was a closed bundle before the Tribunal and a closed session at the hearing, from which Mr O'Hanlon was of course excluded. The Tribunal gave him a gist of what had been discussed during the closed session. At Mr O'Hanlon's urging, the Commissioner had provided him with an index of the closed material. The Tribunal is therefore able to refer to closed documents by title and date. There is no need for a closed decision.

5. As the Tribunal will explain, the Commissioner is a public authority for the purposes of FOIA. The ICO is her office and performs most of her functions. It is not a separate entity in law. Nevertheless, for clarity the Tribunal will sometimes refer to the Commissioner and the ICO separately.

Principal relevant FOIA exemptions

6. As the Tribunal will explain presently, Mr O'Hanlon has brought two previous appeals against the refusal of the Barnet, Enfield and Haringey Mental Health Trust (the Trust) to disclose information to him. In the second appeal (the 2015 appeal), the principal FOIA exemption in play was that contained in section 36(2)(b)(ii):

> *'(2) 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 –*
>
> *...*
>
> *(ii) the free and frank exchange of views for the purposes of deliberation'.*

For the Trust the qualified person (QP), authorised by a minister pursuant to section 36(5)(o)(iii), was its then chief executive, Ms Maria Kane.

7. In the present appeal, the Commissioner relies on section 42(1) FOIA:

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

8. Both sections 36(2)(b)(ii) and 42(1) are conditional exemptions, such that the public interest test in section 2(2)(b) must be applied if they are engaged.

Factual background

9. The ultimate genesis of the request is an incident at a hospital run by the Trust. The essential chronology is as follows:

- **25 May 2013**: Mr O'Hanlon and a friend visited a terminally ill patient at the hospital. There was an altercation with nursing staff over their refusal to call a doctor. Mr O'Hanlon and his friend were asked to leave

- **28 May 2013**: Mr O'Hanlon made a complaint to the Trust, which rejected it. The Trust's report recorded that witnesses considered that Mr O'Hanlon and his friend were aggressive and that the nurses had behaved appropriately

- **2 July 2013**: Mr O'Hanlon made a second complaint, about the investigation into the first complaint. The second investigation reported on **25 October 2013** and agreed that there were defects in the first investigation. It rejected Mr O'Hanlon's substantive allegations but withdrew some of the allegations about his conduct and that of his friend

- Mr O'Hanlon subsequently made a complaint to the Parliamentary and Health Services Ombudsman about the handling of his complaints by the Trust. The Ombudsman rejected the complaint but disclosed some documents to Mr O'Hanlon on the basis that he could not himself disclose them

- **31 October 2013**: Mr O'Hanlon made a FOIA request of the Trust for the relevant Datix Incident Review Form. The request eventually reached the Tribunal [1] because Mr O'Hanlon considered that he had been given the wrong form. That contention was rejected but the appeal was allowed by consent because during the appeal the Trust provided a version of the form with more information

- **26 May 2014**: Mr O'Hanlon made a second FOI request of the Trust, in 14 parts. The Trust provided considerable information but withheld other information, relying on the exemptions under sections 40(2) (third party personal data) and 36(2)(b)(ii). The opinion for the latter exemption had been given, under delegated powers, by the Executive Director of Nursing, Quality and Governance (the Director of Nursing), Ms Saxton, in the absence on holiday of Ms Kane

- **21 October 2014**: Mr O'Hanlon complained to the Commissioner.

- **30 April 2015**: He (the Commissioner at the time was a man) agreed that section 40(2) applied to information identifying individuals. He also held that the Director of Nursing was a 'qualified person' within section 36 and that her opinion was reasonable. The public interest favoured withholding the information

- **26 May 2015**: Mr O'Hanlon appealed to the Tribunal (the 2015 Tribunal). One of his grounds of appeal was that the Director of Nursing was not a QP; another related to the reasonableness of her opinion. He drew attention to guidance issued by the Ministry of Justice (MoJ) under section 45 FOIA (the MoJ guidance), which appeared at odds with the guidance issued by the Commissioner under section 47 FOIA (the Commissioner's guidance). The MoJ guidance reads:

> '***Qualified person***: *The decision under section 36 on whether a disclosure would or would be likely to have the prejudicial or inhibiting effects specified can be taken only by a qualified person. The qualified person cannot delegate this decision making function to others*'.

By contrast, the Commissioner's guidance reads (paragraph 13):

> *'The public authority cannot choose the qualified person themselves; nor can the qualified person delegate the authority to someone else. If there is no one*

[1] EA/2014/2016

currently in that post, and another officer has been formally given that post holder's responsibilities on an "acting" basis, then that officer is effectively the qualified person. This is not the case if the qualified person is simply unavailable for a short time, eg on leave'.

- **9 July 2015**: The Commissioner lodged his Response, drafted by Counsel, Mr Rupert Paines. In paragraph 41, the Response defended the Commissioner's position with regard to the identity of the QP. The Response argued that, although the guidance said that a QP's role could not be delegated if, for example, an individual was on leave, it also said that, where the putative QP had formally been given the post holder's responsibilities on an acting basis, that would suffice. A statement by the Director of Nursing that she was acting Chief Executive was sufficient. However, the Commissioner intended to make further enquiries of the Trust

- **21 July 2015**: Mr O'Hanlon took issue with this analysis in his Reply. He pointed out that the Response omitted the words 'If there is no one currently in that post' before 'and another officer has been formally given that post holder's responsibilities on an acting basis' in the Commissioner's quote from the Commissioner's guidance. Here, the Trust's Chief Executive remained in post and was simply on short-term leave.

- **1 October 2015**: the Commissioner lodged a further pleading (called a Response to the Appellant's Reply), including this sentence: 'To obviate any concern on this point, the Trust has now provided two further qualified person's opinions signed by the Chief Executive Ms Kane on 31 July 2015. The Commissioner has reviewed their contents and is satisfied that the opinions stated therein are reasonable'

  (It is not clear why there were two new opinions when there only appears to have been one originally. For ease of reference, the Tribunal will refer to the second set compendiously as 'the second opinion')

- **5 October 2015**: the date originally set for the hearing was used for directions, principally to enable the Trust to be added as a respondent. Mr Paines represented the Commissioner. Mr O'Hanlon says the hearing was largely closed

- **19 November 2015**: the Trust lodged its Response. In paragraph 31, it said that the second opinion '[was] provided at the request of the Commissioner; the purpose is in effect to corroborate those given in August 2014, not to replace them'. The request was, it seems, made on 24 July 2015, three days after Mr O'Hanlon's Response. Ms Kane confirmed the Response's assertion in a witness statement

- **9 December 2015**: the Commissioner lodged a further submission (the December 2015 submission). He said: [2] '... the Commissioner intends to revise this paragraph of the Guidance so that the intended meaning is clear'. This followed a statement that 'paragraph 13 is capable of being misinterpreted to preclude delegation in the third situation'. The Commissioner summarised the third situation thus: 'The situation where a formal delegation has taken place during a period of absence (including situations where there is a temporary vacancy in the relevant role), such that the person to whom authority is delegated stands in the shoes of the QP during the period of the QP's unavailability'. Mr O'Hanlon refers to 9 December 2015 as 'the snapshot date' [3]

- **9 March 2016**: the 2015 Tribunal heard the 2015 appeal. The Trust was represented but the Commissioner was not. Mr O'Hanlon represented himself. By the time of the hearing, only three pages of email exchanges remained in issue.

- **30 April 2016**: the 2015 Tribunal gave its decision. It held that section 40(2) applied to various names, job titles and work contact details in the emails. In relation to section 36(2)(b)(ii) and the question whether the Director of Nursing was a QP, the Tribunal recorded [4] that the Commissioner's Counsel 'disagreed with the guidance and told us that there are plans to amend it'. It accepted [5] the Trust's submission that there was 'a distinction between delegating an isolated aspect of the Chief Executive's function such as providing an QP opinion, and someone else assuming the role of the Chief Executive (albeit on a temporary basis) in which case they assume all the powers and responsibilities associated with that role'. The Commissioner's guidance, the Tribunal said, was internally inconsistent: it could make no difference whether a delegate was acting up for a short time or a longer time. Since she had been properly delegated, the Director of Nursing stood in the shoes of the Chief Executive and was able to exercise any powers or functions that the Chief Executive could, including giving an opinion as QP. The Tribunal considered that, although there was doubt about the reasonableness of the Director of Nursing's opinion, the Chief Executive's opinion was both valid and reasonable such that there was no need to determine the reasonableness of the Director of Nursing's Opinion. The public interest favoured withholding the emails in question. It admitted the Chief Executive's opinion as a late exemption. [6]

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[2] Para 19

[3] The first situation is where the QP is a body corporate: delegation is then not possible (see *Guardian Newspapers and Brooke v Information Commissioner and the BBC* EA/2006/0011 and 0013); and the second is where the QP is unavailable but no formal delegation of role has taken place

[4] Para 43

[5] Para 44

[6] See *Birkett v Department for the Environment, Food and Rural Affairs* [2011] EWCA Civ 1606

The Tribunal was critical of the Commissioner's scrutiny of the Trust's claim about the extent of information within the scope of the request it held: considerable further material was identified by the Trust and disclosed during the course of the appeal. To that extent, the Trust was in breach of section 1 FOIA.

- **4 May 2016**: Upper Tribunal Judge Markus refused Mr O'Hanlon permission to appeal. One of his grounds was that the 2015 Tribunal should not, applying *Birkett*, [7] have relied on the second QP opinion. Judge Markus rejected that ground. She did, however, disagree with the Tribunal that the second opinion constituted a late exemption: rather, it supported an exemption which the Trust had always relied on.

The request

10. Mr O'Hanlon made the present request on 12 January 2017 **[103]**. It was long and discursive and invoked a mixture of subsections (a) and (b) of section 1 FOIA: whether information was held and, if so, its disclosure. He explained the background and identified the subject of the request as:

> *'All information brought into existence since 19 March 2015 and held in respect of the consideration and/or implementation and/or communication of possible or intended revisions to paragraph 13 of the above mentioned Guide; to include those data more specifically enumerated below'.*

11. The Guide to which Mr O'Hanlon referred was the Commissioner guidance and 19 March 2015 was the date the current version was issued. He sought confirmation or denial that (a) the ICO had considered revision of the guidance 'in the period in question'; (b) any decision amounting to a settled intention to make any such revision; or (c) the communication of any such decision. At the hearing, Mr O'Hanlon accepted that, since the request was made on 12 January 2017, the period in question extended until then, not 9 December 2015 when the Commissioner put in the December submission in the 2015 appeal. However, he said he was principally interested in the period between 19 March 2015 and 9 December 2015 (his snapshot date).

12. Mr O'Hanlon also requested disclosure of information which (a) evidenced 'that decision' (presumably a decision 'amounting to a settled intention' to revise the guidance); (b) included the wording or draft wording of any possible or intended revision; (c) evidenced the conveying of that decision either internally within the IC or from the ICO to Counsel who drafted the December 2015 submission; or (d) evidenced discussion or consultation undertaken either within the ICO or with others (including the MoJ and any NHS Trust concerning the scope of the wording of the intended revision or any possible alternative forms of any such revision).

[7] The Upper Tribunal decision and that of the Court of Appeal: *Birkett v DEFRA* [2012] AACR 32

13. This was all rather long-winded: what Mr O'Hanlon wanted was documents relating to any decision to revise the guidance along with any subsequent revision (assuming they existed and were held).

The Commissioner's initial response and review

14. At **[106]** is an internal ICO note dated 9 February 2017 by the lead information access officer of the searches undertaken following receipt of the request. It records that part of the file relating to the 2015 appeal was regarded as within scope, notably emails between Sonia Taylor, the ICO's in-house solicitor who had acted in the 2015 appeal, and its Counsel, Mr Paines, and between Ms Taylor and internal ICO clients. A 'policy summary' of the Tribunal's decision on the 2015 appeal was also regarded as within scope.

15. The note records that the information officer discussed with Ms Taylor which items from the 2015 appeal file identified as being within scope were subject to legal professional privilege (LPP) and therefore *prima facie* exempt under section 42(1) FOIA. Ms Taylor advised that the whole file was subject to LPP. The note says: '[Ms Taylor] said that in order to protect the confidentiality of the advice sought, received and discussed about this issue, which is yet to be resolved to the extent that the ICO guidance has not yet been revised, she would be reluctant for any of it to be disclosed under the FOIA'. The information officer then consulted someone else (whose name is redacted) who advised that LPP did indeed apply to all the material, thereby engaging section 42(1), and that the public interest favoured withholding the information.

16. Finally, the note records a conversation with the author (name again redacted) of the summary of the 2015 Tribunal's decision in the ICO's FOI Policy Knowledgebase (the Knowledgebase). The information officer had explained that section 1 of the Knowledgebase (*Summary of FTT Decision*) would be withheld and section 2 (*Summary of ICO Decision*) had already been published on the website. The author had no concern about the disclosure of section 3, which discussed amending paragraph 13 of the Commissioner's guidance.

17. The Commissioner **responded** to the request on 10 February 2017 **[108]**. She explained that there were three broad categories of information considered within scope. The first constituted records relating to the ICO's consideration and handling of the 2015 appeal. All that information was withheld under section 42(1). The public interest favoured withholding the information, principally because the information 'discusses the pros and cons of an approach at tribunal, and therefore the relative strengths and weakness of the published current guidance' and because 'the advice sought and received is "live" (in that the guidance amendment work has not been completed) and "recent", in that the decision of the Upper Tribunal [refusing permission to appeal] was only made on 1 December 2016'. There was a strong public interest in maintaining the confidentiality of communications between client and lawyer.

18. The second category constituted the Knowledgebase. The first section was withheld under section 42(1). The remaining two sections **[115]-[117]** were disclosed. The case officer said that the Commissioner's guidance had not yet been revised (Ms Gannon confirmed at the hearing that that was still the case). An extract from the *Tribunal Decisions Spreadsheet* **[118]** (the third category) was also disclosed, giving brief details about the 2015 appeal and including under the heading *Any work required?* 'Amend wording in s.36 guidance (para 13) to clarify position re Acting QPs'.

19. On 10 February 2017 **[119]**, Mr O'Hanlon sent the information officer an email suggesting that her response did not comply with section 1(1)(a) FOIA, which entitled him to be informed if the ICO did not hold the relevant information, here the Commissioner's stated intention as at 9 December 2015 to revise paragraph 13 of her guidance. In her reply of 17 February 2017 **[120]**, the case officer said that the ICO did hold this information. However, it was caught by section 42(1).

20. On 23 February 2017 **[121]**, Mr O'Hanlon sent a formal **request for a review**. Much of his argument, both in relation to LPP and the public interest test, was predicated on Counsel having misled the Tribunal in the 2015 appeal by asserting in the December 2015 submission that the Commissioner intended to revise her guidance. He also argued that LPP, assuming it applied, had been waived by the submission's referring to the Commissioner's intention to revise the guidance. He also noted, in relation to public interest, that it was the Commissioner who had requested the Trust to procure a second QP opinion.

21. The **review** was sent to Mr O'Hanlon by the Group Manager at the ICO on 24 March 2017 **[126]**. The Group Manager suggested (not quite accurately) that the grounds on which Mr O'Hanlon had requested a review were all predicated on the statement in the December 2015 submission being false. She said it was not false. She had looked more broadly at the application of section 42(1) and had concluded that it was correctly applied because it represented information exchanged between the Commissioner's solicitor, her internal client and Counsel. She adopted the information officer's reasoning on public interest.

Complaint to the Commissioner

22. Mr O'Hanlon submitted a complaint to the Commissioner on 11 April 2017 **[130]**. He repeated his claim that Counsel had misled the Tribunal in the 2015 appeal. Privilege could not apply in those circumstances. If there was no decision at that time to amend the guidance, he was entitled to a denial that the Commissioner held the information. If there was privilege, it had been waived by pleading the intention to revise the guidance.

23. An email from the ICO department which had dealt with Mr O'Hanlon's request to Ms Samantha Coward, senior case officer, on 21 August 2017 **[144]** confirmed that the guidance had not yet been revised (but it would be). It repeated the

arguments why LPP applied, including that the documents in question were created for the purpose of obtaining legal advice or assistance in relation to rights and obligations, specifically for the 2015 appeal and revision of the guidance. The principle of safeguarding the openness in communications between client and lawyer was fundamental. It was in the public interest for the Commissioner to be able to get frank advice from her legal counsel to allow her to make the appropriate decisions with regard to the legislation she regulated. There was a public interest in the public understanding the issues around delegated authority relating to section 36 FOIA but this was outweighed by the public interest in maintaining the confidentiality of legal advice: sharing the advice 'would undermine the confidence in the ICO and its own published guidance and create unintended confusion for those that are working with the section 36 exemption'.

The Commissioner's decision

24. The Commissioner considered the arguments advanced by her office and concluded that the withheld information 'constitutes communications and information exchanged with her internal client and Counsel and so attracts legal professional privilege' (paragraph 15). As the ICO had maintained, the fact that the advice was 'live' (in that the guidance had not yet been revised) and recent argued for applying LPP. It was best to allow the ICO the time and space to consider revision of the guidance without premature disclosure and potential scrutiny. Full and frank legal advice was fundamental to the administration of justice.

The Grounds of Appeal and the Commissioner's Response

25. Mr O'Hanlon's detailed **Grounds of Appeal** were again predicated on the statement in the December 2015 submission being false. [8] In any event, he said that paragraph 15 of the Decision Notice contained an error of law by assuming that communications and information exchanged between a solicitor and her internal client and external Counsel attracted LPP regardless of their content, confidentiality or purpose. [9]

26. Mr O'Hanlon also complained that the Decision Notice skated over the background and failed to mention, for example, that the Commissioner had invited the Trust to issue a second QP opinion during the course of the 2015 appeal.

27. With regard to public interest, Mr O'Hanlon argued [10] that public confidence in the Commissioner and her guidance was irrelevant to LPP. The purpose of LPP

[8] Mr O'Hanlon referred, in paragraph 42, to the ICO's 'tantalising assertion' that the statement in the December 2015 submission was 'not false' which he sought to distinguish from its being true

[9] See para 8 of the Grounds

[10] Para 30

was to further the administration of justice, not to protect the reputation of a public authority.

28. As a remedy, Mr O'Hanlon sought a substituted decision notice on the basis that the December 2015 submission was materially false and LPP could not therefore apply; alternatively, the public interest in disclosing such a falsity outweighed that in preserving LPP.

29. The Commissioner's **Response** referred [11] to the two types of LPP: litigation privilege and advice privilege (see further below). The latter applied irrespective of whether litigation was contemplated, although in fact the majority of the withheld information was created by or for lawyers for the dominant purpose of litigation such that litigation privilege applied to that information (advice privilege applied to all of it). [12]

30. The Commissioner denied that she had acted in any way dishonestly, as would be clear from the closed material. At the time of the December 2015 submission there was an intention to amend the guidance to clarify any ambiguity. That remained the position. She added [13] that, even if she had been dishonest, that would not prevent the LPP exemption being engaged and would only go to public interest.

31. The Commissioner also said that she did not hold any further information within the scope of the request, as Mr O'Hanlon appeared to be suggesting, and had conducted the reasonable search required by caselaw in this regard. [14] It was not for the Tribunal to adjudicate on the adequacy of the search. [15]

32. Mr O'Hanlon' **Reply** dated 24 November 2017 **[36]** is another long document (20 closely-typed, closely-argued pages). There was little which was new but he did make these points. The onus of establishing LPP lay on the Commissioner: it was not sufficient to rely on the fact that documents passed between a lawyer and his lay client (see the recent case of *Serious Fraud Office v Eurasian Natural Resources Corporation Ltd (ENRC)*). [16] By contrast, he accepted that the onus lay on him to show that the Commissioner had intended to mislead the 2015 Tribunal. He was 'certain' that no record of any relevant intention to amend the guidance existed as at 9 December 2015. [17] However, the statement of intention to revise 'was always of marginal relevance to the [2015 appeal] especially as it followed upon, as if to give more weight to, the disclosure of associated legal opinions'. [18] Mr

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[11] Para 15
[12] Para 24
[13] Para 24
[14] *Reed v Information Commissioner* (Information Tribunal) (3 July 2009)
[15] Para 31
[16] (2017) EWHC 1017 (8 May 2017) http://www.bailii.org/ew/cases/EWHC/QB/2017/1017.html An appeal from the decision is due to be heard by the Court of Appeal in early July 2018
[17] Para 13
[18] Para 17

O'Hanlon speculated three propositions: [19] that no one, certainly no one with the requisite authority, held the pleaded intention; that the person closest to holding any such intention was within the ICO's litigation team; and that any intention was a purely personal and possibly unspoken one 'which it was convenient to put into the tribunal litigation, rather than an intention to provide authoritative guidance to the public at large. The phrase "win at all costs" is apt to describe that possibility'. Mr O'Hanlon also said that the Commissioner's Response did not differentiate between advice privilege and litigation advice according to the date of communication. [20]

Preliminary question: jurisdiction

33. As noted, the public authority of which Mr O'Hanlon made his request for information was the Commissioner herself. When she rejected his request, Mr O'Hanlon made a complaint to her, as he appeared bound to do under section 50 FOIA. The Commissioner determined the complaint. On the face of it, this was a clear breach of the principle of natural justice that no one should be judge in her own cause (*nemo iudex in causa sua* in Latin). Or, to put it another way, the Commissioner's decision appeared to be infected by bias. It does not matter whether the Commissioner would be *actually* biased when dealing with a complaint against her own decision: under public law *apparent* bias is enough to condemn a decision. As Lord Hope put it in the leading case of *Porter v Magill*, [21] the question is 'whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the [decision-maker] was biased'. Such an observer might well conclude that there was a real possibility that the Commissioner would be biased when determining a complaint against her own decision.

34. In these circumstances, did the Commissioner have jurisdiction to determine Mr O'Hanlon's complaint? If not, the Tribunal would not have jurisdiction to hear the appeal either, because the Tribunal's jurisdiction is co-terminus with, and parasitic on, the Commissioner's. It has been suggested [22] that the solution in these circumstances is for the Commissioner's investigation to be as thorough and transparent as possible. With respect, that does not meet the jurisdictional problem, because the Commissioner's investigation should be as thorough and transparent as possible in all cases.

35. Neither party had raised the jurisdictional issue in terms (although Mr O'Hanlon had expressed disquiet during the course of the complaint about the objectivity of ICO staff: see below). However, matters of jurisdiction are for the court or tribunal hearing a case: the parties cannot confer jurisdiction where none exists.

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[19] Para 46

[20] Para 87

[21] [2002] 2. AC 357 at 103 (House of Lords

[22] *Ritchie* v *Information Commissioner* EA/2011/0727 http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i547/20110727%20Decision%20EA20110041.pdf

At the outset of the hearing, the Tribunal indicated that it might wish to receive written submissions on the issue after the hearing. In the event, it has come to the clear conclusion that the Commissioner did have jurisdiction and so, therefore, does the Tribunal. Having raised the matter, it is right that the Tribunal should explain its reasoning.

36. The problem arises from the fact that the Commissioner has a dual role under FOIA: she is both, for the purposes of section 3(1) and schedule 1, a public authority to whom requests for information may be made, and also the determiner of complaints brought under section 50 by disappointed requesters. Where the public authority is anyone other than the Commissioner, she can provide independent adjudication. Where she is the public authority, she cannot do so, however objective the staff dealing with the complaint seek to be and whatever systems are put in place to ensure separation between those who made the original and internal review decisions and those who deal with the complaint.

37. The correspondence relating to Mr O'Hanlon's request and the internal review and Decision Notice, and indeed the Commissioner's Response, seek to draw a distinction between the ICO, on the one hand, and the Commissioner, on the other. The request was dealt with in the name of the ICO and the Decision Notice on the section 50 complaint was in the Commissioner's name. This is a false distinction. As explained above, in law there is but one body, the Commissioner, a corporation sole. She is the public authority listed in schedule 1. Her office helps her carry out her tasks but it is not a separate legal entity.

38. In the present case, Mr O'Hanlon understood the problem. In his email sent on 12 July 2017 to Ms Coward, the case officer dealing with the complaint **[140]**, he expressed concern that she had referred in her email of the same day to 'liaising with colleagues' who had dealt with his request. Ms Coward sought to reassure him **[141]** that she would deal with the complaint just like any other but Mr O'Hanlon was not reassured **[142]**. In his Reply **[36, 41]**, he alleges that the Commissioner, on his complaint, paid 'undue deference ... to the ICO's own FOI personnel and that this led to no real scrutiny or impartial investigation ...'. In the correspondence with the ICO he describes a 'clear conflict of interests', heightened by the fact that the reason for his request was his unhappiness about the way with which the Commissioner had dealt with the 2015 appeal and in particular with the parts played by her in-house lawyers and external Counsel. Mr O'Hanlon was concerned that the exemption on which the Commissioner now relied, section 42(1), was being used to conceal wrongdoing in the earlier appeal. Although he does not point this out, the ICO lawyer who acted in the 2015 appeal was asked to give, and gave, her opinion as to whether LPP applied.

39. In those circumstances, Lord Hope's observer might indeed have especial doubt about the ability of the Commissioner to bring independent judgement to bear on the complaint. It is true that, in the particular circumstances, the possibility of

bias arises as much with the original request (and the internal review) as with the complaint. However, bias may often be suspected of a public authority dealing with FOIA requests, if the requested information might, for example, be embarrassing for it. The point of the section 50 process is that it provides independent adjudication, cleansed of any bias on the part of the authority. That was not possible in the present case.

40. Whether the Commissioner has jurisdiction to determine a complaint against her own decision is a question of statutory construction. The particular facts of Mr O'Hanlon's case can help to illustrate the problem but the Tribunal's perspective has to be broader. As with all questions of statutory construction, its task is to ascertain the intention of Parliament from the words used, applying the accepted canons. In truth, seeking the intention of Parliament can be an artificial construct. The reality may be that Parliament did not turn its mind to the set of circumstances with which a court or tribunal is faced. There are over 100,000 public authorities listed in schedule 1 to FOIA. With all but one, no question of a conflict arises on complaints under section 50 and no one may have thought what should happen in the single case. But the Tribunal has to proceed on the assumption that Parliament did form an intention with regard to that case.

41. There are certainly indicia in FOIA that Parliament did not intend a complaint against refusal by the Commissioner of a request for information to be made to the Commissioner herself. For example, section 50(3)(b) says that the Commissioner must 'serve notice of [her] decision (in this Act referred to as a "decision notice") on the complainant and the public authority'. It would be odd for the Commissioner to serve notice on herself (in the present case, she sent her decision to the ICO, but as explained above that is the same thing). Similarly, section 50(4)(b) requires the Commissioner, where she concludes that a public authority is in breach of Part 1 of FOIA, to 'specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken'. It would be strange for her to tell herself what she must do.

42. Under section 51, the Commissioner may serve on the public authority an information notice requiring it to provide her with information to aid her deliberations (but, under subsection (5), not where this would breach LPP). Under section 52, the Commissioner may serve an enforcement notice on a public authority in breach of Part 1. Under section 54, where a public authority has failed to comply with a decision notice, an information notice or an enforcement notice, the Commissioner may bring proceedings against it in the High Court or, in Scotland, in the Court of Sessions. Section 55 and schedule 3 give the Commissioner the power to apply for a warrant to enter and search premises. In all these cases, Parliament cannot, it might be argued, have had in mind the Commissioner as the public authority.

43. None of this is determinative, however. It is unlikely that the Commissioner would, in practice, need to use the coercive powers given her by sections 51, 52, 54 and 55 - she can ensure that her staff cooperate - and the oddities arising from section 50(3)(b) and (4)(b) are no more than that. The critical question, it seems to the Tribunal, is whether a disappointed requester would have an alternative means of redress. As a matter of general principle, where there is no right of challenge through a statutory vehicle, a citizen can make an application for judicial review. In principle, a requester denied information by the Commissioner might be able to bring a judicial review. If so, it would not be wholly satisfactory because judicial reviews can be expensive, with a significant fee and the risk of an adverse costs order where a losing claimant is not legally-aided (as would probably be the case with a FOIA challenge). Section 50 complaints, by contrast, are free, with no risk of adverse costs if a complaint is rejected.

44. But, more than that, judicial review would not be available in all the circumstances where a disappointed requester can bring a section 50 complaint. Judicial reviews can only be brought where there has been an error of law. Section 50 complaints, by contrast, can be brought to challenge a finding of fact (for example, whether a public authority holds information) or a judgement, with qualified exemptions, as to where the public interest lies. An error of law for judicial review purposes can include an *irrational* finding of fact or exercise of judgement (*Wednesbury* unreasonableness, as it is known), but that is a high hurdle. A section 50 complainant does not have to overcome such a high hurdle: the Commissioner can simply substitute her own view of the facts or her own judgement.

45. In short: although judicial review would be available for some requesters of information from the Commissioner, it would not be available for all. And, because of fees and costs, it is questionable whether it is an *effective* alternative remedy for any. Parliament cannot have intended that requesters for information from the Commissioner would be left without an effective or any remedy. For this reason, the Tribunal has concluded that, unsatisfactory though the position is, this is a rare case where Parliament intended an exception to the *nemo iudex in causa sua* principle.

46. The Tribunal is fortified in its conclusion by the availability of an appeal to the Tribunal. Appeals against decision notices are a complete rehearing: factual findings can be disputed and new evidence can be introduced. In the unlikely event that a decision by the Commissioner was infected by actual bias, the Tribunal could rectify the position. So it can with apparent bias.

47. A right to information constitutes a 'civil right or obligation', entitling a disappointed requester to a 'fair and public hearing', for the purposes of Article 6

of the European Convention on Human Rights (the Convention). [23] The European Court of Human Rights has consistently held that a contracting state, such as the UK, is not in breach of Article 6 where a higher judicial body can correct a procedural defect of a lower body. The Tribunal can rectify the apparent bias in the Commissioner's decision in the present case.

48. The question of jurisdiction where the Commissioner is the public authority does not appear to have been previously determined. However, in *Colenso-Dunn v Information Commissioner*, [24] Upper Tribunal Judge Wikeley was alive to the problem and appeared untroubled, explicitly because of the option of a rehearing before the Tribunal: [25]

> *'This dual role [of the Commissioner] may only serve to fuel some of the more outlandish conspiracy theories that abound on the internet. Certainly, as the First-tier Tribunal noted in its preliminary decision on this appeal, this conundrum is "an unusual, and unsatisfactory, feature of this area of the law" (at paragraph [1]). So, as the Honourable Member of Parliament for Uxbridge and South Ruislip would doubtless ask, "Quis custodiet ipsos custodies?" Who will watch the watchmen? The answer is that the First-tier Tribunal (General Regulatory Chamber) – or "the Tribunal", previously the Information Tribunal – does (and, on any further appeal, the Upper Tribunal), at least within the limited confines of their respective appellate jurisdictions'.*

49. For these reasons, the Tribunal considers that it does have jurisdiction to determine the present appeal.

The substantive merits of the appeal

LPP in general

50. In *ENRC*, Mrs Justice Andrews gave a helpful summary of the principles of LPP, as derived from jurisprudence both domestic and Commonwealth. The principal domestic case of recent years is the House of Lords decision in *Three Rivers DC v Bank of England (No 6)*. [26] The propositions of particular relevance to the present case set out in *ENRC* and elsewhere are:

- The confidentiality of legal communications is a human right under both Articles 6 and 8 (right to respect for private and family life) of the Convention[27]

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[23] See, for example, *Collectif national d'information et d'opposition à l'usine Melox – Collectif Stop Melox and Mox v. France*; *Selmani and Others v. the former Yugoslav Republic of Macedonia*, para 47; and *Shapovalov v. Ukraine*, para 49

[24] [2015] UKUT 0471 (AAC) https://www.judiciary.gov.uk/wp-content/uploads/2015/08/gia_-702_2014.pdf

[25] Para 2

[26] [2004] UKHL 48, [2005] 1 AC 610

[27] See, for example, *Golder v United Kingdom* (1979-80) 1 EHRR 524 (Article 6) and *Niemitz v Germany* (1993) 16 EHRR 97 (Article 8)

- The onus of establishing privilege is on the party asserting it

- Communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with existing litigation or litigation reasonably in contemplation attract litigation privilege provided the communications are made with the sole or dominant purpose of conducting the litigation and the litigation is adversarial, not investigative or inquisitorial [28]

- Legal advice privilege attaches to all communications passing between a client and his or her lawyers, acting in their professional capacity, in connection with the provision of legal advice which 'relates to the rights, liabilities, obligations or remedies of the client either under private law or under public law' (*Three Rivers (No 6)* per Lord Scott at [38]). There is no need for litigation to be contemplated or in existence [29]

- Legal advice privilege attaches to all the material forming part of the continuum of lawyer/client communications even if each communication does not expressly seek or convey legal advice: *Balabel v Air India* [30]

- The rationale underlying legal advice privilege is that it encourages full and frank communication between lawyers and their clients, which promotes the rule of law and the administration of justice: *Three Rivers (No 6)*. [31] It is therefore an essential prerequisite of the claim to privilege that the communication passing between lawyer and client is confidential: *Three Rivers (No 6)* at [24]. The communication may be confidential even if what is communicated to the lawyer for the purpose of seeking or obtaining the advice is not confidential.

- It is important to distinguish between the two forms of privilege. In *ENRC*, Andrews J said:

> *'Strictly speaking, and despite numerous references in the authorities to lawyer-client communications made for the dominant purpose of litigation as being within litigation privilege, or as covered by litigation privilege as well as legal advice privilege, this is wrong, as Three Rivers (No 6) made plain. If the communication is between client (or the client's agent) and lawyer for the purpose of obtaining legal advice in connection with anticipated litigation, it is covered by legal advice privilege rather than litigation privilege. If the communication is between the lawyer and someone other than the client, it will only be subject to LPP if it satisfies the test for litigation privilege. That is*

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[28] Para 51

[29] Para 61 of *ENRC*. Litigation privilege did not apply in *Three Rivers (No 6)* because the claim to privilege arose out of the non-adversarial Bingham Inquiry into the Bank of England's supervision of BCCI

[30] [1988] 1 Ch 317

[31] at [30] - [35]

so whether the client is an individual, a partnership, an unincorporated association or a corporate entity ...'.

- The essential difference between litigation privilege and advice privilege, therefore, is that the latter involves communications between lawyer (solicitor and counsel) and client whereas the former involves communications with third parties (for the purposes of litigation)

- With a corporate client, the employee with whom the lawyer communicates must be authorised to give instructions and obtain legal advice: that is a question of fact. In *Skandinavisak Enskilda Banken AB v Asia Pacific Breweries (Singapore) Pte Ltd and others,* [32] the Court of Appeal of Singapore said that implied authorisation suffices 'if that function is related to or arises out of the relevant employee's work'. That is also the view of the leading textbook, *The Law of Privilege,* by Thanki, Goodall et al, [33] quoted, with apparent approval, by Andrews J [34]

- The judge said [35] that '[it] might be persuasively argued that the company's in-house lawyers or general counsel would have the necessary authority, by virtue of their office, to seek and obtain legal advice from external lawyers on behalf of the company'

- Privilege will be waived where reference to a document is made in court documents or where the content of legal advice is referred to [36]

- Communications in furtherance of a crime or fraud are not within the ordinary scope of the lawyer-client relationship and are therefore not privileged [37]

- There is no public interest test to be applied in deciding whether communications attract LPP (but see below with regard section 42(1) FOIA).

The categories of documents forming the disputed information

51. As Mr O'Hanlon is aware (because he has an index to the closed bundle), the documents forming the disputed information consists of: (i) the *Summary of FTT Decision* (i.e. the 2015 appeal), part of the Knowledgebase; (ii) communications between the Commissioner's Counsel, Mr Paines, and her solicitor, Ms Taylor, and between Ms Taylor and ICO policy staff between 30 November and 8 December 2015 along with Mr Paines' draft of the submission which became the

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[32] [2007] SGCA 9
[33] 2nd ed, 2011
[34] [83]
[35] [92]
[36] See *Dunlop Slazenger International Ltd v Joe Bloggs Sports Ltd* [2003] EWCA Civ 901
[37] See, for example, *Kuwait Airways Corp v Iraqi Airways Company* [2005] EWCA Civ 286

December 2015 submission; and (iii) internal ICO correspondence following promulgation of the 2015 Tribunal's decision.

52. The Tribunal will consider each in turn.

(a) Knowledgebase

53. As noted above, the Commissioner has disclosed those parts of the Knowledgebase appearing under the headings *Summary of ICO Decision* and *Section 36: QP not available to give opinion*. The former gave a brief summary of the Decision Notice. The latter contained a critique of the Tribunal's decision in the 2015 appeal and suggested that the Tribunal had not understood the meaning the Commissioner was trying to convey in her guidance, which the section then explained. The section concluded: 'We will reword this part of [our] guidance to explain this point more clearly. There is no disagreement of substance between ourselves and the FTT, but given the apparent misunderstanding this point is flagged amber'. 'CW' was given as the policy contact and he seems to have been the author.

54. Since, the section analysed the Tribunal decision and the action which was needed in light of it, the (present) Tribunal expressed surprise that LPP was not therefore claimed. The explanation given was that it was written by a non-lawyer.

55. The Commissioner has withheld the first section of the Knowledgebase document, headed *Summary of FTT Decision*. Although unsigned, it was apparently written by the case lawyer in the 2015 appeal, Ms Taylor. The Tribunal has concluded that the Commissioner has improperly withheld it. The summary does just what the title says: it summarises the Tribunal decision in the 2015 appeal. It attached the decision. Unlike the *Section 36: QP not available to give opinion* section, it attempts no critique of the Tribunal decision and does not suggest the way forward.

56. The potentially applicable specie of LPP is legal advice privilege, not litigation privilege, because the communication in question is from a lawyer to her client. The fact that the communication related to litigation is irrelevant: see *ENRC*. In any event, at the time when the summary was prepared litigation (the 2015 appeal) was neither in contemplation nor in progress. Mr O'Hanlon later made an application for permission to appeal to the Upper Tribunal, but the summary was not written with that application in mind.

57. In the Tribunal's judgment, the summary does not constitute legal advice. Legal advice privilege, axiomatically, presupposes legal advice (relating 'to the rights, liabilities, obligations or remedies of the client either under private law or under public law:' *Three Rivers (No 6)*). As Mr O'Hanlon pointed out, the fact that a document contains a communication from a lawyer to his or her client is not

sufficient: it must contain legal advice. The summary is in the nature of information, not advice.

58. At the hearing, Ms Gannon argued that to summarise a court or tribunal decision requires legal skill and therefore constitutes legal advice. The Tribunal does not doubt that understanding and explaining a legal judgment may indeed require the skill of a lawyer. However, the particular audience is important. The audience here is expert in FOIA. Some of its members would themselves be lawyers. But even the non-lawyers - for example, policy personnel - were quite capable of understanding the 2015 appeal decision, as demonstrated by the fact that a policy employee prepared a critique of it (and could, therefore, have provided the summary).

59. Summaries of Tribunal decisions are no doubt prepared to save the time of those who need to keep abreast of the caselaw. There may be Tribunal decisions which are of such complexity that they need an ICO lawyer to explain them to non-lawyers. However, the Tribunal decision in the 2015 appeal is not one of them. Legal advice privilege presupposes a disparity in relevant expertise between the maker of a communication and the receiver which the communication is designed to address, so that the receiver is equipped to make appropriate decisions. With regard to understanding the 2015 Tribunal decision, in the Tribunal's judgment there is no disparity in expertise between the author of the *Summary of FTT Decision* and its intended audience.

(b) Communications leading up to the December 2015 written submission

60. This category of documents (dated between 30 November and 8 December 2015) consists of (i) communications between Ms Taylor and Mr Paines; (ii) communications between Ms Taylor and senior policy personnel and a senior lawyer within the ICO, Mr Adam Sowerbutts; and (iii) a draft submission prepared by Mr Paines, with comments by one of the policy employees. The draft submission became the December 2015 submission.

61. Once again, if LPP apples, it is legal advice privilege not litigation privilege, even though the communications related to litigation.

62. Mr O'Hanlon has based his whole case on the assumption that the statement in the December 2015 submission about revision of the guidance was false. He believes that no decision to revise had been made and that, at best, the desirability of revision was something which occurred to a member of the ICO litigation team in the 2015 appeal without their having instructions from the Commissioner. Mr O'Hanlon has, of course, not had the benefit of seeing the documents. The Tribunal has and can state unequivocally that they do recognise that the guidance would have to be revised, if only for clarification. Since Mr O'Hanlon has questioned their integrity, it is important to say that the documents reveal that the conduct of Ms Taylor and Mr Paines - solicitor and counsel in the

2015 appeal - is beyond reproach with regard to the passage in question in the December 2015 submission. They had clear instructions to say that the guidance would be revised.

63. The documents clearly contain legal advice communicated by lawyers to their clients. Legal advice privilege therefore *prima facie* applies. However, the Tribunal must consider authorisation and waiver.

64. As Andrews J explained in *ENRC*, for legal advice privilege to apply with a corporate client the person giving instructions and receiving advice on behalf of the client must be authorised to do so. The Tribunal has not seen any evidence that the policy employees involved in the correspondence with Ms Taylor had been expressly authorised by the Commissioner to give instructions and receive advice. However, in the Tribunal's judgment, it does not matter whether they did hold such express authorisation. Both the Court of Appeal of Singapore judgement in *Skandinavisa* and the passage from *Thanki* quoted with apparent approval by the judge indicate that implied authorisation is sufficient. In the Tribunal's judgment, that must be right. In many corporations, authority will be obvious from the position which the relevant employee holds. That is the case here: the positions of the ICO employees giving instructions were Group Manager Policy Delivery and Senior Policy Officer. Within the ICO structure, it is inherent in these positions that the employees would have authority to give instructions and receive advice and the Tribunal accepts that they did. The Commissioner could not be expected to be personally involved in every appeal. The Senior Policy Officer was, in fact, the author of the guidance and therefore eminently suited to give instructions as to its intended meaning and whether a revision was necessary.

65. The Tribunal is satisfied that legal advice privilege applies to this category of documents. The next question is whether privilege has been waived. Ms Gannon, relying on *Mersey Tunnels Users' Association v Information Commissioner and Mersey Travel*, [38] suggested that, in the context of section 42(1), it was more appropriate to consider whether the advice had been disclosed on a restricted or unrestricted basis. The distinction she seemed to draw was between a FOIA disclosure (which is generally considered to be to the whole world) and a limited disclosure to the 2015 Tribunal (in the context of a FOIA dispute about separate information). That is not a valid distinction: Tribunal hearings are for the most part public and, as the Court of Appeal made clear in *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court*, [39] the default position is that, when a document (such as the December 2015 submission) is referred to in open court, it can then be used publicly for other purposes. Indeed, in its decision the 2015 Tribunal

[38] EA/2007/0052 (15 February 2008)

[39] [2012] EWCA Civ 420 [2013] QB 618 . See also *Cox v The Information Commissioner and The Home Office* [2018]UKUT 119 (AAC) (6 April 2018)

recorded that the Commissioner intended to revise the guidance. [40] That decision is available for all to see.

66. The situation in *Mersey Tunnels* was very different. The requester had asked for a copy of Counsel's opinion given to the public authority about the lawfulness of certain payments. The District Auditor, no doubt to assuage the requester's concerns, had shown him the opinion, but on confidentiality terms (such that the requester was not even able to refer to it in his appeal). There is no such restriction here on Mr O'Hanlon's ability to use the Commissioner's statement of her intention to revise the guidance.

67. The question is whether that statement constitutes waiver of the privilege which would otherwise attach to it. That is an objective question: whether the Commissioner intended to waive privilege does not matter. The relevant paragraph in the December 2015 submission read:

> *'The Commissioner acknowledges that, in a case such as the present, paragraph 13 [of her guidance] is capable of being misinterpreted to preclude delegation in the third situation. Two points arise. Firstly, the guidance is just that: guidance. It is not authority on the interpretation of FOIA. Secondly, the Commissioner intends to revise this paragraph of the Guidance so that the intended meaning is clear'*
> (emphasis added).

68. In the Tribunal's judgment, the emphasised sentence does not constitute waiver of privilege. It does not refer to any document in which legal advice is contained. It does not give partial disclosure (the usual position with waiver [41]). It does not say how the guidance should be revised, or even that the legal advice was that the guidance was wrong. [42] It simply recognises that the 2015 appeal had highlighted a possible ambiguity and that the Commissioner therefore intended to revise it. In other words, it does not reveal the content of legal advice in any meaningful sense. As Ms Gannon said in her skeleton argument, the sentence 'is a very limited reference to the Commissioner's policy position'. It would be regrettable if the Commissioner were deterred from being candid about possible shortcomings in her guidance for fear that communications between her and her lawyers would then have to be disclosed. That reflects the sentiment of the Tribunal in *Mersey Tunnels* that '[i]t would be unfortunate if through such partial references [such as a brief summary of the conclusion of the disputed advice without revealing the reasoning or other options considered] privilege were lost, since that result would tend to discourage authorities from revealing even that much'. In the present case, there is not even a brief summary of legal advice in the relevant passage.

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[40] Para 43

[41] See, for example, *R v Secretary of State for Transport ex parte Factortame Ltd* [1997] 9 Admin LR 591 and *Paragon Finance PLC v Freshfields* [1999] 1 WLR 1183 (per Lord Bingham at 1188 F-G)

[42] The 2015 Tribunal seems to have assumed that that was the Commissioner's position – see paragraph 43 of its decision – but it is not clear on what basis

69. Mr O'Hanlon also argued that LPP cannot apply because the Commissioner misled the Tribunal in the 2015 appeal with regard to an intention to revise the guidance. In her Response, the Commissioner suggested that, had there been dishonesty (which of course she denied), it would only have been relevant to public interest.

70. Since the Tribunal has found that the Commissioner was not dishonest, the point is moot. However, had it found that she had misled the 2015 Tribunal, the present Tribunal would have held that that prevented LPP arising. In the same way that the commission of a crime is not within the ordinary scope of the lawyer-client relationship, nor is misleading a judicial body.

(c) Communications post the Tribunal decision in the 2015 appeal

71. This category of documents consists of correspondence between Ms Taylor and her internal client, and between her and Mr Sowerbutts, following receipt of the decision in the 2015 appeal in May 2016.

72. The first item of correspondence, from Ms Taylor to 'Information Tribunal Decisions', is dated 16 May 2016. It is materially identical to the *Summary of FTT decision* section in the Knowledgebase save that the sentence 'This appeal would benefit from a policy review' appears towards the end. The email does not constitute legal advice for the same reason the summary does not. The decision to conduct a policy review had already been taken. Legal advice privilege does not apply (and nor does litigation privilege).

73. The second item, an email from Mr Sowerbutts, was sent, also on 16 May 2016, in reply to Ms Taylor's. It seeks factual confirmation unrelated to legal advice. Ms Taylor gave the confirmation in the first paragraph of her reply sent on 17 May 2016. That paragraph is similarly not covered by legal advice privilege. However, the other paragraph discusses how the ICO should proceed and does therefore attract legal advice privilege. There has not been partial disclosure of the advice and waiver does not therefore apply. Communications between lawyers, internal or external, can attract LPP. [43]

Public interest

74. Because section 42(1) is a conditional exemption, the Tribunal has to consider where the public interest lies in relation to the closed material to which LPP applies. The same considerations apply to the two categories in question.

[43] *Calland v Information Commissioner & the Financial Services Authority* EA/2007/0136 (8 August 2008)

75. A number of previous cases have remarked [44] that there is already a strong public interest inherent in LPP, because of its importance for the administration of justice and the confidentiality of communications between lawyer and client or pertaining to litigation. It is a human right. For that reason, the courts have resisted attempts to allow for exceptions. In *Department for Business Enterprise and Regulatory Reform v O'Brien and The Information Commissioner,* [45] Wyn Williams J approved the approach consistently adopted by the Tribunal, as summarised in *Calland*: [46]

> *'What is quite plain, from the series of decisions beginning with Bellamy ... is that some clear, compelling and specific justification for disclosure must be shown, so as to outweigh the obvious interest in protecting communications between lawyers and client, which the client supposes to be confidential'.*

76. However, as again has often been noted, the fact that Parliament has chosen to give the exemption qualified status means that it must have contemplated that there would be circumstances in which the strong public interest underpinning LPP had to cede to some other public interest of at least equal weight. It may be said that the ceding is more likely where the communication in question relates to a public law power to revise published guidance than where it relates to a public law duty or power of greater moment or to private law rights and obligations. Even with public law powers of limited import, however, the public interest in protecting relevant communications remains strong.

77. It is particularly strong where, as in the present case, the advice is recent and remains current. [47] The Commissioner still intends to revise the guidance but has not done so. In the future, if and when she does so, the arguments in favour of maintaining privilege may become weaker.

78. Mr O'Hanlon's case on public interest principally centred on what he suspected was the misleading of the 2015 Tribunal. Since there was no misleading, that argument inevitably falls away. It may also be said that there is relatively little public interest in the disclosure of internal discussions about whether to revise a single paragraph in (non-binding) guidance, addressing a technical question about who could act as QP in a particular situation for the purposes of a FOIA exemption. [48] The Tribunal does agree with Mr O'Hanlon, however, that maintaining public confidence in the Commissioner is not a valid argument for

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[44] See, for example, *Bellamy v The Information Commissioner and the Secretary of State for Trade and Industry* EA/2005/0023 (4 April 2006)

[45] [2009] EWHC 164 (QB)

[46] *Supra*

[47] See, in this connection, *Kessler v Information Commissioner and HM Commissioners for Revenue & Customs* EA/2007/0043 and *Kitchener v Information Commissioner and Derby City Council* [2006] UKUT EA 2006

[48] In contrast, for example, with the situation in *Crawford v The Information Commissioner and Lincolnshire County Council* EA/2011/0145 (16 June 2011), where the Commissioner accepted that there was an issue of considerable importance to the public in the local area

withholding the requested information, as the ICO had argued: if the communications in question revealed that the Commissioner had fallen short of expected standards, she would not be entitled to public confidence on a false prospectus.

79. There is one other factor which has troubled the Tribunal. This is that it appears that, during the 2015 appeal, the Commissioner suggested to the Trust that it obtain a second QP opinion. The Tribunal has not seen the correspondence in which the suggestion was made but the Commissioner has not contradicted the assertion by the Trust in that appeal that it was. Indeed, Ms Kane, the Chief Executive, apparently said in her witness statement that the ICO had requested that she provide an opinion in addition to Ms Sexton's. Mr O'Hanlon makes the point that the Commissioner's intervention was shortly after he raised the validity of the original QP opinion.

80. In the Tribunal's judgment, Mr O'Hanlon is right to be concerned about the Commissioner's apparent intervention. Since the Commissioner has an inquisitorial function, it is perfectly proper for her to suggest to a public authority that the existing facts indicate that an exemption on which the authority has not relied might apply, and indeed to find that it does. Similarly, it is perfectly proper for her, in finding against an authority, to rely on arguments which the requester has not put. However, that is qualitatively different from suggesting that a public authority take a step which would, or at least might, lead to the availability of an exemption which was not otherwise available on existing facts. The Commissioner appears here to have suggested the creation of a new factual scenario rather than simply drawing conclusions from an existing scenario. When she did so, she knew that there was a question whether the initial QP opinion was valid and that the Tribunal might decide that it was not.

81. In the event, the 2015 Tribunal, although it accepted that the Director of Nursing was entitled to be the QP, had doubts as to whether her opinion was reasonable.[49] It did not need to decide the question because it held that the second opinion, by the Chief Executive, was both valid and reasonable. That opinion would, presumably, not have been given but for the Commissioner's intervention. It follows that, to put it at its lowest, her intervention might have been crucial in turning a victory for Mr O'Hanlon on the section 36 issue into a defeat.

82. It is not surprising that Mr O'Hanlon should think that, rather than adopting her usual disinterested role during the 2015 appeal - defending her decision with appropriate robustness but with no stake in the outcome - the Commissioner was entering the arena and, in his words, adopting a win at all costs approach. Whether or not this was the motivation, a fresh QP opinion could have diverted attention from the correctness of the Commissioner's guidance. What Mr O'Hanlon regards as the partisanship of the Commissioner no doubt encouraged

[49] See para 49

him in his belief that the Commissioner had no settled intention to revise her guidance when she told the 2015 Tribunal she did.

83. For all that, however, the Tribunal has decided that the Commissioner's conduct in this respect should not tip the public interest scales. There is no causative link between the suggestion of a second QP opinion and the internal discussions in December 2015 (and, to a limited extent, in May 2016) about a need to amend the guidance. Those discussions would have taken place irrespective of whether the Trust had been encouraged to produce a second opinion: Mr O'Hanlon had raised the correctness of the guidance and that issue therefore needed to be addressed. As Mr O'Hanlon acknowledged in his Reply, the statement of intention to revise the guidance was only of marginal relevance to that appeal. The Commissioner was not relying on it for the appeal. That is important because the philosophy underpinning waiver is that a person should not be able to assert LPP when she positively relies on having received particular legal advice.

84. It is also fair to record that, at the hearing, Ms Gannon, on instructions, asked that the Commissioner be allowed to make written representations on this issue if the Tribunal asked for representations on the jurisdiction question. It may be, therefore, that the Commissioner could have said something casting a different light on her apparent intervention.

Conclusion

85. For these reasons, Mr O'Hanlon's appeal is allowed to the extent of some of the disputed information. However, the remainder of the information - including that part in which Mr O'Hanlon was most interested (relating to deliberations about revision of the guidance) - must remain closed. The Commissioner did hold information about revision of the guidance. The decision is unanimous.

Signed

Judge of the First-tier Tribunal
Date: 1 May 2018

Date Promulgated: 2 May 2018