



**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

Appeal number: EA/2019/0032/P

MR M BOYCE

Appellant

- and -

THE INFORMATION COMMISSIONER

**First
Respondent**

- and -

PARLIAMENTARY AND HEALTH SERVICE OMBUDSMAN (PHSO)

**Second
Respondent**

Before:
**JUDGE MOIRA MACMILLAN
MRS SUZANNE COSGRAVE
MR JOHN RANDALL**

Sitting in Chambers on 7 April 2020 and 27 October 2020

DECISION

1. The appeal is allowed in part.
2. To the extent specified in the substituted Decision Notice below, the requested information is exempt pursuant to Section 42 of the Freedom of Information Act 2000 (FOIA) and the public interest in maintaining the exemption outweighs the public interest in disclosing the material.
3. The Tribunal issues a substituted Decision Notice in the following terms:

The Parliamentary and Health Service Ombudsman (PHSO) shall, no later than 28 days after the promulgation of this decision, disclose the following information to the Appellant:

- (i) page 1 of the relevant document contained in the closed bundle;
 - (ii) paragraph 5 of page 2 of that same document;
 - (iii) the headings at the top of pages 3 and 7 of that same document.
4. The appeal is allowed to the extent stated in paragraphs 2 and 3 above but is otherwise dismissed.

Mode of hearing

5. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with Rule 32 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended.

Bundle

6. The Tribunal considered an agreed electronic bundle consisting of:
 - (a) an open bundle of evidence comprising pages 1 to 153;
 - (b) a supplementary open bundle of evidence comprising pages 1 to 142;
 - (c) a closed bundle comprising pages 1 to 32.

OPEN REASONS

Background

7. On 31 July 2018 the Appellant made a request to the PHSO for information in the following terms:

“In the PHSO Board Open Session Meeting 14 December 2017 it states the following at paragraph 12.8: [Named individual] asked about the legal status of CCT [customer care team] reviews, and what was the basis of a review if it did not constitute a new decision. [Named individual] explained that our legislation did not allow for reviews. There was a risk involved if we did NOT [emphasis mine] follow the legislation. However, if we decided that a review was wrong we needed to be PRAGMATIC [emphasis mine].

Ultimately this was a question of our RISK APPETITE [emphasis mine].

- (1) Please provide all relevant documents (discussions, legal briefing notes, unabridged board meeting minutes, guidance etc.) that the PHSO possess with regard to the legal status of reviews of decisions.*
- (2) Please provide all relevant documents (discussions, legal briefing notes, unabridged board meetings, guidance etc.) that the PHSO possess with regard to Alternative Legal Remedy”.*

8. On 23 September 2018 the PHSO refused the Appellant’s request for information. It stated that the first part of the request related to information that was subject to legal professional privilege (‘LPP’) and was thus caught by the exemption set out in Section 42 FOIA. The PHSO further explained that it was unable to comply with the second part of the Appellant’s request because to do so would exceed the cost limit set out in Section 12.
9. On 24 September 2018 the Appellant complained to the Information Commissioner pursuant to Section 50 FOIA. The Commissioner’s Decision Notice was issued on 14 January 2019, and upheld the PHSO’s reliance on Section 42 in respect of the first part of the Appellant’s request.

The Decision Notice

10. The Information Commissioner upheld the PHSO’s decision to rely on Section 42 as a relevant exemption and concluded that the public interest in favour of maintaining this exemption outweighed the public interest in disclosure. The Commissioner concluded that the requested information met the definition of legal advice privilege and describes it as constituting emails, notes of discussions and legal review. She describes the parties to these communications as being PHSO officers and internal lawyers.
11. The Commissioner reviewed the importance of maintaining legal professional privilege in terms of the requirements of a properly functioning legal system, and noted the approach of this Tribunal in the case of **Bellamy v The Information**

Commissioner & the DTI [EA/2005/0023] “that there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest”. She further concluded that where material covered by LPP is concerned there would always be strong public interest arguments in favour of maintaining the exemption.

12. The Commissioner further agreed with the PHSO’s representations to her that the quality of legal advice would be diluted if exchanges of this nature were disclosed into the public domain. She further accepted that this would have a negative impact on the PHSO’s decision making in the future and therefore in its performance of its statutory functions.
13. The Commissioner therefore concluded that the public interest in favour of disclosure in this case is outweighed by the public interest in favour of maintaining the exemption.

Tribunal Proceedings

14. On 9 February 2019 the Appellant appealed to this Tribunal. He submitted detailed grounds of appeal comprising 26 pages, the focus of which is the Commissioner’s application of the Section 2 FOIA public interest test both in general and in the context of his request. These grounds are considered further below.
15. On 11 March 2019 the Commissioner responded to the appeal and provided an open and closed bundle of evidence. At around the same time the Appellant contacted the Commissioner and the Tribunal to identify a further ground of appeal relating to whether LPP had already been waived by the PHSO due to the pre-existing publication of the part of the requested information.
16. On 14 March 2019 the Tribunal issued Case Management Directions, joining the PHSO as a party to these proceedings at the public authority’s request. The Tribunal invited the Appellant to make further submissions, setting out why, in his view, LPP had been waived. The Appellant provided the requested further submissions on 29 March 2019, in a document comprising an additional 52 pages.
17. The PHSO responded to both grounds of appeal on 9 May 2019, and the Commissioner responded to the additional ground of appeal on 21 May 2019.
18. Also, on 21 May 2019, the Appellant alerted the Tribunal and Respondents to his concerns that the PHSO had not revealed all of the information in the scope of his request during the Commissioner’s investigation of his Section 50 complaint. The Appellant highlighted external legal advice, the existence of which had been revealed in a different FOIA request.
19. On 30 May 2019 the Tribunal issued further Case Management Directions, requiring the PHSO to provide the Tribunal and the Information Commissioner with the external legal advice and to make representations as to why it was not within the scope of the request.

20. On 7 June 2019 the Appellant provided a third set of submissions to the Tribunal in the form of an email. He then provided further additional submissions on 10 June 2019, in an additional document headed "Third Submissions", comprising 22 pages and supported by a number of additional documents.
21. On 2 July 2019 the Tribunal issued further Case Management Directions, confirming that it had received the external legal advice, and requiring the Respondents to provide submissions setting out why, in their view, this document was not in scope. The Tribunal further directed that any such submissions should be made in open to the extent possible.
22. On 19 July 2019 the Appellant provided a further set of submissions to the Tribunal headed "Fourth and Final Submissions to the Tribunal".
23. On 22 July 2019 the PHSO served further submissions.
24. On 23 August 2019 the Commissioner informed the Appellant that she intended to serve additional submissions, setting out her view that the additional document was not in scope. The Commissioner's additional submissions were eventually served on 7 October 2019, following further correspondence and a Rule 14 application.
25. On 18 October 2019 the Appellant served a further four pages of submissions headed "Very Last Submissions to the First-tier Tribunal".
26. On 7 April 2020 we commenced a paper consideration of the substantive appeal, pursuant to Rule 32. However, we concluded that some of the documents in the supplementary bundle had not been clearly identified and it was therefore not always apparent which document the Appellant was referring to in his submissions. We were also not confident that all relevant submissions had been compiled.
27. Following further enquiries, the Tribunal reconvened on 27 October 2020 in order to determine the appeal. Since then other commitments, including demands relating to the global pandemic, have resulted in a significant delay in the Tribunal's decision being promulgated. I understand that this has been a matter of concern to Mr Boyce for which I can only apologise.

The Law

28. Section 1 FOIA creates a general right of access to information held by a public authority. This comprises the right:
 - (a) to be informed in writing by the public authority whether it holds information of the description specified in a request, and
 - (b) if that is the case, to have that information communicated in writing.
29. FOIA contains a number of exemptions to a public authority's obligation to provide the information. Section 2 stipulates that, unless an exemption is absolute, any

decision to withhold requested information in reliance on an exemption must be subject to a public interest balancing test (Section 2(2)(b)).

30. Section 42(1) provides an exemption relating to LPP material in the following terms:

42. Legal professional privilege

(1) *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”.*

31. This is not an absolute exemption and its application is therefore subject to the Section 2 public interest balancing test.

32. Section 57 provides a right of appeal to the Tribunal against a Decision Notice served by the Commissioner under Section 50. The Tribunal’s powers are set out in Section 58 of FOIA, as follows:

If on an appeal under section 57 the Tribunal considers –

(a) *that the notice against which the appeal is brought is not in accordance with the law, or*

(b) *to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

33. We note that the burden of proof in satisfying the Tribunal that the Commissioner’s decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant. The standard of proof is the balance of probabilities.

Submissions and Evidence

Appellant’s submissions

34. The Appellant submits that the Information Commissioner habitually treats the Section 42 exemption as an absolute, rather than a qualified, exemption. He contends that, in recent years, the Commissioner has only once not upheld a decision by a public authority to rely on Section 42 in request for LPP material.

35. The Appellant relies in part on paragraph 16 of the Decision Notice under appeal in which the Commissioner states:

“Where material covered by LPP is concerned there is always going to be very strong public interest arguments in favour of maintaining the exemption simply because of the long-standing, important principle of LPP and the clear and important need for all (not just the public sector) to have access to free, frank and candid legal advice. Only in very exceptional cases can this be overridden when considering where the public interest lies”.

36. The Appellant submits that this approach is contrary both to the language of FOIA and to previous decisions by this Tribunal. He contrasts the Commissioner’s reference above to *“very exceptional cases”* to her decision in the (single) case in which she did not uphold a decision to rely on Section 42, in which she stated that the arguments in favour of disclosure of LPP material needed to be strong, but need not be exceptional.
37. The Appellant raises a number of public interest arguments in favour of disclosure. He refers to two High Court decisions, both of which relate to the powers of the PHSO to reopen investigations once concluded. He submits that these stipulate that the PHSO cannot *“reopen (review) a decision but can reconsider a decision (conduct a fresh investigation)”* and that these must, of necessity, be distinguished as fundamentally different processes.
38. The Appellant further submits that there is considerable public confusion as to the powers of the PHSO to conduct a review and the legality of its processes. He contends that the review process is an unlawful means by which the PHSO seeks to conduct a fresh investigation.
39. The Appellant contends that the PHSO has obtained external legal advice in order to clarify the legal position, and that refusing to make this available perpetuates public confusion about its powers. The Appellant relies in support on the minutes of the December 2017 Board Meeting which led to his information request and in which it is stated that reviews are not legally permissible. He further refers to a previous FOIA response by the PHSO to the Appellant, which he describes as confusing and contradictory.
40. The Appellant takes issue with the Information Commissioner’s assertion that the quality of legal advice would be affected, should such LPP material be routinely disclosed or enter the public domain. He contends that this view supports his submission that the Commissioner regards Section 42 as being a near absolute exemption. He refers to the decision of this Tribunal in the case of **Mersey Tunnel Association v Information Commissioner** which warned against such an approach. The Appellant refers extensively to this decision, which is not, of course, a binding authority.
41. The Appellant submits that there are strong public interest arguments in favour of disclosure, given the PHSO’s lack of transparency about the legal status of its various processes. He refers to previous correspondence with the PHSO and to what he considers to be inconsistent public statements.
42. The Appellant further submits that publication of the legal advice would support the objective of an Ombudsman being a modern, fair and transparent organisation. He

describes the creation of a review process by the PHSO is an obstacle to the ability of parties affected by a PHSO decision to bring judicial review proceedings, since reviews are rarely completed within the three month time limit. The Appellant submits that the High Court may well reject a late application for judicial review, even where this has been caused by the review process. He contends that there is a public interest in understanding why the PHSO has created a review process in circumstances where case law allows it to simply quash a decision and to start a new investigation.

43. The Appellant challenges any assertion that the review process is separate from any reopening of investigations. He contends that the two processes have been conflated over time and are now in effect one and the same.
44. The Appellant further submits that the public interest in publication is broadly held, since anyone within the UK could potentially be subject to actions by a public body supervised by the PHSO, and might therefore be affected by a PHSO review. He relies in addition on the cost of the review process, which he estimates states in 2016-17 was £32,000,000 a year, and submits that there is an important public interest in transparency relating to the use of public funds.
45. In his further grounds of appeal the Appellant submits that LPP has already been waived, since the PHSO has already published conflicting information about the content of its legal advice relating to reviews and the reopening of investigations. He contends that the partial disclosures made have resulted in LPP having been waived. The Appellant relies in support on the PHSO's response to an information request made by another individual, which he submits reveals in part the content of internal legal advice. In particular he relies upon:
 - a. 'Document 5' - internal PHSO correspondence from February 2017 which discusses PSHO guidance on topics including reviews and considers whether a request for a review is a new complaint.
 - b. 'Document 20' which includes a document headed "Briefing Document", which refers to obtaining external legal advice on the subject matter of reopening investigations and additional correspondence that confirms this legal advice was obtained.
46. Neither document discusses the content of the legal advice. However, the Appellant submits that both are sufficient to have waived LPP and should be made available in full, as should external legal advice on the same matter. He also relies on documents created in the course of his own judicial review proceedings against the PHSO.
47. Finally, the Appellant submits that the PHSO has made a number of conflicting public statements, including those in which it has stated that it is not legally permitted to reopen or review an investigation once concluded. He contends that, given the number of contradictory statements made, the public interest concerns he has raised

about PHSO powers cannot be fully addressed through the publication of a further statement.

Information Commissioner's Submissions

48. The Commissioner accepts that Section 42 provides a qualified exemption in relation to LPP material, which is subject to the public interest test set out under Section 2(2)(b) FOIA.
49. The Commissioner relies on the House of Lords decision in **Three Rivers District Council v Bank of England [2004] UKHL 48** for the definition of legal advice privilege, which includes confidential communications between a lawyer and client for the purpose of giving or obtaining legal advice or assistance. She contends that this is not confined to communications in which legal advice is given but extends to "*all material forming part of the continuum of lawyer/client communications, even if each communication does not expressly seek or convey legal advice*". The Commissioner notes that legal advice is not confined to telling the client the law, but also includes advice as to what should prudently and sensibly be done in a relevant legal context.
50. The Commissioner submits that the PHSO sets out clearly the nature of its review process, to which there is no automatic right. This states that the PHSO will consider whether to review a decision in circumstances where it has been shown to have got something wrong, and invites anyone so affected to provide information to the review and feedback team.
51. The Commissioner notes that it is the PHSO's customer care team that invites feedback about the PHSO's services, and that the Board Meeting Minutes that triggered this information request acknowledges that the legislation to which the PHSO is subject does not allow for reviews of decisions.
52. The Commissioner denies that she treats Section 42 as a quasi-absolute exemption. She submits that she considers the application of this exemption on a case by case basis, and while her previous decisions are not in the scope, in every case a decision has been taken by applying the public interest test to the facts of that case.
53. The Commissioner relies on the decisions of the Administrative Court in **R v Derby Magistrates ex parte B [1996] 1 AC 487**, and **R, Morgan Grenville v Special Commissioners [2003], 1 AC 563** to support the contention that there is a strong element of public interest inbuilt into LPP, and that at least equally strong countervailing considerations are required in order to override that inbuilt public interest. She submits that these decisions recognise the importance of a public authority ability to obtain free and frank advice and to give full information to its legal advisers. The Commissioner further relies on the decision of the High Court in **DBERR v O'Brien v IC [2009] EWHC 164 (QB)** which also recognises the inbuilt public interest in the non-disclosure of LPP material, to which there must always be attached significant weight, and which must always be considered in a the public interest balancing exercise. This decision confirmed that significant weight should be given to

the inbuilt public interest in withholding LPP material¹, and that it would be an error of law for this Tribunal to fail to give significant weight to the inherent interest in non-disclosure².

54. The Commissioner submits that disclosure of the requested information would not address the public interest transparency raised by the Appellant since it would not provide legal certainty as to the legal status of the PHSO's reviews. She contends that such certainty could only be provided by a court when making a final determination as to whether the PHSO's review process is legally permissible. The Commissioner further submits that disputed information will only show what legal advice the PHSO has received on this issue, and this is insufficient to outweigh the in-built public interest that attaches to LPP material. She contends that the proper way for the Appellant to test the lawfulness of the PHSO review process is by seeking permission to bring a judicial review.
55. The Commissioner submits in addition that there is a strong public interest in safeguarding the openness of communications between a client and their lawyer, in order to ensure that full and frank legal advice can be provided and obtained. She contends that this was recognised by Parliament when drafting FOIA, as Section 42 has not been made a prejudice-based exemption.
56. In terms of whether LPP has been waived through publication, the Commissioner acknowledges that unrestricted public disclosure of LPP material would result in the loss of confidentiality and therefore of legal privilege, and that publication in this context would include disclosure in response to a FOIA request. She submits, however, that a summary of legal advice that does not reveal its substance does not waive LPP.
57. The Commissioner rejects the Appellant's submission that LPP has already been waived. Having reviewed the documents he has produced compared these to the withheld material, the Commissioner describes one as internal correspondence considering whether a review request should be considered as a new complaint and whether it is allowed for under legislation, and the other as email exchanges and briefing notes discussing the receipt of external legal advice. She notes that the latter specifically refers to "*reopening cases post review*". The Commissioner submits that none of the documents provided by the Appellant sufficiently reveals the substance or content of any legal advice to which it refers, or the substance of the withheld information. She contends that LPP has not been waived.
58. Further, and in relation to the external advice, the Commissioner confirms that this was not provided by the PHSO during the Commissioner's investigation of the Appellant's complaint. However, she submits that a distinction can properly be made between the subject matter of the external legal advice referred to above - i.e. the PHSO's ability to reopen investigations post review - and the review process itself. The Commissioner contends that this distinction between the two processes is supported by the High Court cases upon which the Appellant relies, both of which are

¹ Paragraph 53

² Paragraph 48

concerned with the reopening of an investigation by the PHSO rather than the review of a decision.

59. The Commissioner submits that the scope of the Appellant's request is limited to information about the legal status of the review procedure, rather than the legal status of any other post -decision processes the PHSO might follow to address or remedy any issues discovered as the result of a review. She contends, accordingly, that the external advice is not within scope.
60. Having formed this view, the Commissioner has explained that she no longer considers the emails included in the closed bundle to be within the scope of the Appellant's information request. She invited the Tribunal to consider the scope of the request and the withheld information as a preliminary issue.
61. In terms of public interest, the Commissioner submits that disclosure of the requested information would not address the transparency concerns raised by the Appellant, because legal certainty about the status of the PHSO's review process can only be obtained through court proceedings. She contends that disclosure of the requested information would only reveal the legal advice that the PHSO had received on this issue, and that the proper course by which to test the legal status of the review process is to seek permission for judicial review.
62. The Commissioner further submits that the Appellant's assumption that the public more broadly share his interest in undermining the legal status of the PHSO review process is misconceived. This is because it is entirely possible that many such individuals would welcome the PHSO's approach to reviewing decisions through the Customer Care Team, on the basis that this provides a route for a potential remedy without recourse to judicial review proceedings.
63. The Commissioner contends that, on balance, the public interest factors outlined in the Appellant's ground of appeal are insufficient to outweigh the strong public interest in preserving LPP for the reasons set out in her decision notice.

PHSO's Submissions

64. The PHSO adopts the reasoning in the Decision Notice and the Information Commissioner's submissions, including her summary of the law.
65. The PHSO describes itself as a body which deals with concerns which have not been addressed by specified public organisations, and sets out the statutory basis for its activities. It contends that the courts have confirmed the existence of a wide margin of discretion which is available in relation to the conduct of PHSO investigations.
66. The PHSO describes its review process as a feedback process and submits that this should be considered in the context of decisions made at the conclusion of a long complaints process. It concedes that the process, name and duties of the team responsible for the provision of feedback has changed several times but submits that the process is properly described on the PHSO website, which makes clear that

'review' in this context is properly understood to the restricted functions, carried out at the date of request by the Customer Care Team.

67. The PHSO accepts that Section 42 is a qualified and not an absolute exemption, and recognises the public interest in members of the public fully understanding its policies in relation to the review of decisions. However, it submits that the policy is made sufficiently clear by the PHSO website, and that further assistance and clarification is offered to members of the public by experienced casework staff who are available to provide further explanations when required. It contends that these sources of information are far more likely to provide assistance and transparency to members of the public who wish to understand the review process than publication of the requested information.
68. The PHSO submits that disclosure of the withheld information would significantly limit its ability to seek and obtain legal advice more generally, since the risk of future publication would inevitably impose a constraint on communication.
69. The PHSO further submits that the operation of its review policy is a live issue which continues to be a matter of interest. It contends that there is a real possibility of future litigation seeking to challenge the review process, and that disclosure of LPP material relating to this issue is likely to prejudice its conduct of such a legal challenge. It relies on the Upper Tribunal's decision in Savic v IC, AGO, & CO [2017] UKUT AACR 26, which confirmed that the balance of public interest will be more likely to favour non-disclosure of LPP material in circumstances where it may be used in legal proceedings.
70. The PHSO adopts the Commissioner's submission that publication of legal advice will have fail to meet the Appellant's public interest objective of clarifying the legal status of the review process and increasing transparency. It submits that advice is simply that and is not legally binding, and agrees with the Commissioner that the proper means by which the challenge the legal status of the review process is by way of judicial review.
71. The PHSO strongly refutes any suggestion that privilege has been waived in respect of LPP. It submits that all of the information currently in the public domain and in scope of this request goes no further than mentioning a category of documents. It contends that the language of the Decision Notice under appeal is not capable of waiving LPP and that, in any event, it would not be proper for a third party with whom legally privileged material has been shared as a matter of obligation to be capable of inadvertently waiving privilege in such a manner.
72. The PHSO has made no specific submissions in relation to the external legal advice and the extent to which this is in scope, and relies instead on the Commissioner's submissions. It submits that the balance of public interest in this case is in favour of maintaining legal privilege and therefore upholding its reliance on the Section 42 exemption.

Consideration

73. We are grateful to the parties for their detailed and careful submissions. We consider it appropriate to follow the Commissioner's suggestion of deciding as a preliminary issue the scope of the Appellant's information request and therefore the scope of this appeal.

Scope of information request

74. We have first considered whether a distinction can properly be made between a review carried out by the Customer Care Team and the reopening of a decision and/or consideration of remedies that might follow the identification of an error in a decision.
75. We consider such a distinction in internal PHSO thinking to be apparent from the wording used in the Board Meeting Minutes of December 2017, which refers to "*the legal status of the customer care team reviews, and the basis for such a review if it did not constitute a new decision*".
76. We satisfied that such a distinction is also apparent from the wording used by the PHSO on its website when describing the review process:

"If you think we made the wrong decision

Our decisions are final and there is no automatic right to a review. If you think we came to the wrong decision, it is best to discuss this with the caseworker who handled your complaint first. If they or their manager cannot resolve things they will explain the next steps and can send you the relevant forms to fill in and return to our review and feedback team ..."

77. A distinction between PHSO processes is also recognised to some extent by the Appellant in his submissions. These contend that the review process has become conflated with the process followed by the PHSO when reopening decisions process, and also describe the review process as an unnecessary first step.
78. We note in passing that the language used by the PHSO to describe the review process has changed over time, which may well have contributed to confusion in some quarters. We agree with the Appellant that there is a strong public interest in achieving and maintaining transparency with regard to PHSO powers and processes and have considered this further below.
79. However, having considered all of the information that has been made available to us, both in open and closed, we are satisfied that it is proper to draw a distinction between a review carried out as part a feedback process by the Customer Care Team (the responsible team at the date of the Appellant's request), and other PHSO post-decision processes, such as a decision to reopen an investigation or to consider remedies in the event of a known material error. We note that these processes may follow a Customer

Care Team review, but that there is also scope for these distinct processes to be triggered by other means.

80. We therefore conclude that the scope of the Appellant's information request was restricted to information about the review process carried out by the Customer Care Team, and that only information which relates to the legal status of this process is in scope for the purposes of this appeal.

The Closed Bundle

Emails

81. Having considered the closed material with care, we agree with the Commissioner's submission that the emails included in the closed bundle are not in scope for the purposes of this appeal.

External Legal Advice

82. We are satisfied that the external legal advice, which was not considered by the Commissioner during her investigation, does not relate to the review process carried out by the Customer Care Team and is therefore not in scope.
83. We make no findings as to whether LPP may have been waived in respect of this material.

Relevant closed material

84. We are satisfied that the undated document comprising pages 1 – 10 of the closed bundle is in scope of the Appellant's information request. We find that this document includes "*advice as to what should be prudently and sensibly done in a relevant legal context*"³ but conclude that the nature of this document is such that not all of it should be viewed as attracting LPP and therefore as coming within the Section 42 exemption.
85. The sections of this document that we consider not to be subject to LPP are as described in paragraphs 2 and 3 above, namely:
- Page 1 of the document, which does not appear to contain any LPP material, but which provides a helpful overview of the PHSO's processes at the date of the information request. We consider this to set the review process in context to some extent and conclude that this information should be made available to the Appellant, to help illustrate the legal status of the post-decision review process.
 - Paragraph 5 of page 2, and the headings at the top of pages 3 and 7, also contain no LPP material and go no further in relation to the existence of legal advice than is apparent from the open papers. We conclude that this information should also be made available to the Appellant.

³ **Balabel v Air India [1988] Chapter 317** approved in **Three Rivers (No 5)**

86. We have reached this conclusion notwithstanding our application of the principle identified in **Balabel v Air India** that not every communication needs to expressly seek or convey legal advice in order to be covered by legal advice privilege.

Public interest test

87. We are satisfied that the remainder of the material in the relevant closed document is subject to legal advice privilege and therefore comes within the Section 42 exemption. We have therefore gone on to consider the public interest test.
88. The Tribunal's usual starting point in this context is as set out in **Bellamy v Information Commissioner & Secretary of State for Trade and Industry (EA/2005/0023)**, which was endorsed by Wyn Williams J in **DBERR v O'Brien v IC [2009] EWHC 164 (QB)**. This acknowledges the general importance of LPP communications, in relation to which

"the in-built public interest in non-disclosure itself carries significant weight which will always have to be considered in the balancing exercise once it is established that legal professional privilege attaches to the document in question... [it] is acknowledged to command significant weight".⁴

89. However, we reject the view expressed by the Commissioner in paragraph 16 of the Decision Notice that only in very exceptional cases can the inbuilt public interest in LPP be overridden when considering where the public interest lies. In our view every case must be considered on its own merits, and it would be an error to seek to limit the application of the public interest test in relation to LPP material so as to give rise to a presumption that only in very exceptional cases would the public interest be in favour of disclosure.
90. We note that it is not the role of this Tribunal in this case to consider the lawfulness or otherwise of the review process, or of any other process carried out by the PHSO.
91. As expressed by this Tribunal in the case of **Bellamy v Information Commissioner**, there may be circumstances in which the Tribunal might reach a different conclusion following the application of the public interest balancing exercise, for example in a case where the legal advice was stale or no longer applied at the date of the public authority's response to an information request. Alternatively, the Tribunal might reach a different conclusion in circumstances where the contrast between legal advice and public policy gave rise to significant additional public interests.
92. We have considered with care all of the public interest arguments in favour of disclosure put forward by the Appellant in the circumstances of this case. As previously noted, we accept his submissions that there is a strong public interest in transparency in relation to decisions made and processes followed by the PHSO. However, we accept the Respondents' submissions that publication of the withheld information is unlikely to achieve this aim. This is because, as noted by both

⁴ Paragraphs 41 & 53

Respondents, this legal advice is just one person's opinion as to the legal status of the review process. It is neither binding and not representative of a definitive view.

93. While the withheld information might help explain the relationship of the Customer Care Team's review and other PHSO processes, we are satisfied that transparency in this context is best achieved through the public statement of policy on the PHSO's website, in relation to which further clarity can be obtained by contact with experienced PHSO caseworkers.
94. Having considered the nature and content of the withheld material, we find that publication would contribute relatively little to the important public interest in transparency in this context. We have therefore afforded limited weight to this public interest when reaching our decision.
95. We have also considered the Appellant's submission regarding the freestanding public interest in transparency in the context of the use of public funds. We accept that this is an important public interest and have reflected this when reaching our decision. We note that the PHSO does not accept the Appellant's submission as to the cost of the Customer Care Team review process, but find that there must nevertheless be some additional cost involved, which is paid for by members of the public.
96. We also accept the Appellant's submission that the public interest in understanding the PHSO's processes is likely to be broad, due to the number of people who could be potentially affected by a PHSO decision. We consider this to be an important public interest in the context of this case.
97. We have considered but rejected the Appellant's submission that there would be no prejudice to the quality of legal advice given to public authorities should the requested information be published. We are satisfied that this issue has been considered at length by the senior courts, and that the importance of maintaining confidentiality in legal communications is reflected in the inbuilt public interest and the significant weight afforded to the maintenance of LPP, referred to above. We accept the Respondents' submissions that knowledge that legal advice might be made public is likely to restrict both the advice given and the nature of the advice requested by public authorities.
98. We have considered with care whether disclosure of the requested information would cause prejudice to the PHSO in the conduct of future legal challenges. We conclude that it would. We are satisfied from the information before us that, at the date of the PHSO's response to this information request, there was a persisting interest in the Customer Care Team's reviews and other processes, and that there may have been (or may still be) legal proceedings in contemplation. We therefore accept the PHSO's submission that disclosure of the requested information is likely to prejudice its conduct of any such legal challenge. In reaching this conclusion we have considered and applied the guidance provided by the Upper Tribunal in the case of **Savic**:

“35. ... we take the view that if the information sought under FOIA is relevant to, or might be or might have been of use in, existing, concluded or contemplated legal proceedings this adds to the weight of the factors against disclosure because, although FOIA is applicant and motive blind, the disclosure would effectively deny the public authority to whom the FOIA request is directed its right as a litigant in proceedings to refuse disclosure and so cause damage to the manner in which proceedings are, have been or might be conducted, and thus to the administration of justice”.

99. As a consequence, we have afforded significant weight to this public interest against the publication of the requested information.
100. Having considered all of the submissions made by the parties in relation to the public interest for and against publication, we have concluded that, while the Appellant has presented some strong arguments in favour of disclosure, these do not amount to equally strong countervailing considerations so as to override the inbuilt public interest against disclosure of LPP information. We therefore uphold the PHSO’s reliance on the Section 42 exemption, save as set out above.

Has Legal Privilege Been Waived

101. We have considered with care the documents provided by the Appellant, in particular documents 5 and 20. We adopt the Information Commissioner’s analysis of these documents set out at paragraphs 4 to 6 of her 21 May 2019 submissions. We are satisfied that the documents produced by the Appellant concern the PHSO’s processes once the Customer Care Team’s review process has been carried out. Having reviewed the withheld information, we have concluded that none of the documents we have seen waive LPP in the context of this information to any extent.

Conclusion

102. We therefore find on balance that the public interest in maintaining the exemption set out in Section 42(1) FOIA outweighs the public interest in disclosing the remainder of the withheld information contained in the closed bundle.
103. In the normal way, a copy of this decision was sent to the Commissioner and to the PHSO for them to check the draft and make representations as to whether any parts of the decision should not be disclosed. The version of the decision provided to the Appellant and promulgated generally will have been redacted and/or edited if necessary, in the light of such representations.
104. Save as directed above in the context of additional disclosure to be made available to the Appellant, any Rule 14 Order made by the Tribunal in relation to information received in the course of these proceedings should continue without limit of time.

Tribunal Judge Moira Macmillan

Date: 14 April 2021

Promulgated on: 13 May 2021