IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL (INFORMATION RIGHTS)

UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

Appeal No. EA/2010/0115

BETWEEN:

KEITH GORDON

Appellant

and

INFORMATION COMMISSIONER

1st Respondent

and

CABINET OFFICE

2nd Respondent

and

SPEAKER OF THE HOUSE OF COMMONS

Interested Party

HEARD AT LONDON CIVIL JUSTICE CENTRE, ON 14 NOVEMBER 2011

BEFORE

DAVID MARKS QC
TRIBUNAL JUDGE

NARENDRA MAKENJI

DR MALCOLM CLARKE

Representation:

The Appellant: In Person
Christina Michalos (Counsel): For the Cabinet Office

Subject Matter:

Freedom of Information Act 2000 section 42: legal professional privilege; Parliamentary privilege

Cases and other authorities referred to:

Office of Government Commerce v IC [2010] QB 98
Prebble v Television New Zealand [1995] 1 AC 321
R (v Bradley and others) v Secretary of State for Work & Pensions [2007] EWHC 242 (Admin)
Wilson v First County Trust [2004] 1 AC 816
Hamilton v Al Fayed [1999] 1 WLR 1569
Toussaint v AG of St Vincent [2007] 1 WLR 2825
Three Rivers DC v Bank of England (No.6) [2004] UKHL 48
DBERR v O'Brien [2011] 1 Info LR 1097
Szucs v IC (EA/2011/0072)
Mersey Tunnel Users Association v IC [2011] 1 Info LR; (EA/2009/0001)
R V Hamza [2007] QB 659
APPGER v IC (EA/2001/0049-0051)

DECISION

The Tribunal unanimously dismisses the Appellant's appeal against the Decision Notice of the Information Commissioner (the Commissioner) dated 8 May 2012, Reference No.FS50424157

Reasons for Decision

Factual background

1. The Appellant essentially asks for copies of drafting papers and more particularly, instructions to Parliamentary Counsel, as well as at least initially, correspondence with Parliamentary Counsel with regard to certain provisions of the Finance Act 2008, namely, section 37 and Schedule 15. Initially, the Appellant made a tripartite request on 7 September 2011 asking for the following information, namely:

   "1. Repeat request (previous one several years back was unanswered) – a copy of the drafting papers relating to the amendments made during the passage of the 1965 Finance Bill through Parliament to the provision that became FA 1965, s.22(7).

   2. The drafting papers for the provision that became FA 1994, s.191.

   3. The drafting papers for the provisions that became FA 2008, s. 37 and Sch.15."

2. This appeal is concerned with what can be called request 3. On 21 September 2011, the Cabinet Office, being the relevant public authority, responded. It claimed that it did not hold any information falling within the scope of request 1, and in respect of requests 2 and 3, it confirmed that it held the relevant information but considered the

same to be exempt from disclosure on the basis of two sections in the Freedom of Information Act 2000, namely section 35 dealing with Government policy and section 42(1) dealing with legal professional privilege. It is only the latter section that this appeal is primarily concerned with.

3. On 22 September 2011, the Appellant contacted the public authority asking for an internal review. The outcome of the review was communicated to him on 29 September 2011. The review upheld the application of the exemptions in question. It also noted that it had interpreted the request for "drafting papers" as referring to instructions to Parliamentary Counsel. This is the approach that has now formally been taken by the Appellant himself.

4. In his Decision Notice, the Commissioner drew attention to the well-established dual categorisation of legal professional privilege. In general terms, there are two categories, namely advice privilege and litigation privilege. Here, and by common consent, advice privilege is involved. In general terms this privilege is attached to confidential communications between a client and his or its legal advisers. It also attaches to any part of a document evidencing the substance of any such communication even where there is no pending or contemplated litigation. All such information and the relevant exchanges must be communicated in a professional capacity. This means, again in general terms only, that not all communications from a professional legal adviser will attract the privilege. The example given in the Decision Notice is one where informal legal advice is given to an official by a lawyer friend, with the latter acting in a non-legal capacity. An alternative example is where advice is given to a colleague on what could be a called a line management issue: in such a case as in the former example, no privilege will apply. It follows therefore that the communication in question and the relevant exchange need to have been made and effected for the principal or dominant purpose of seeking or giving legal advice. The question of whether such a dominant purpose can be said to exist in any particular case has to be determined equally on a case-by-case basis with reference to the particular documents in question.

5. Specific reference was made in the Decision Notice to the leading case of *Three Rivers DC v Bank of England (No 6)* [2004] UKHL 48, especially at paragraph 41.

6. In the present case the Commissioner determined that the information withheld consists of instructions sent to Parliamentary Counsel. Those instructions were sent by civil servants and the responses provided by Parliamentary Counsel. The *Three Rivers* case to which reference has been made expressly addressed the giving of advice by a Parliamentary Counsel to Government departments in relation to drafting, justifying the position of the privilege.

7. The Commissioner confirmed that he had reviewed the withheld information and was duly satisfied that the relevant privilege applied. This was on the basis as stated that a sufficiently dominant purpose of the documents and information in question related to the seeking of, or provision of, legal advice. Section 42(1) applied. Indeed, the Appellant does not take issue with this analysis, but contends that the relevant competing public interests militate in favour of disclosure.

8. The Commissioner then turned to deal with the public interest arguments in favour of maintaining the exemption. The public authority, i.e. the Cabinet Office, has emphasised that this Tribunal at least in its case law had recognised a strong element of public interest said to be in-built into legal professional privilege. In general terms, the Cabinet Office had argued that were disclosure to be ordered, there could be a significant adverse effect on the process of preparing legislation in the future. This reflected the need for what was called free and frank communications between the lawyers and the Office of the Parliamentary Counsel and those instructing them in the relevant Government departments. The result would be that the drafting of legislation could become less effective, resulting in turn in what was called in the Decision Notice at paragraph 15, a negative impact on the quality of the legislation that is produced.

9. By the time the Decision Notice was issued, the Appellant had laid emphasis on one specific factor which will be revisited below later in this judgment. However, it is important in the Tribunal's view to consider what is the Commissioner's view, at least as expressed in the Decision Notice, of this factor.

10. The issue raised by the Appellant prior to the Decision Notice was that the issue at least that in relation to request 3, was no longer a subject for discussion for any formal change. However the Cabinet Office had responded by saying that those involved in requesting and providing this advice would have an expectation that it would remain confidential until the information became a historical record. This was also reflective of the strong element of public interest built into legal professional privilege.

11. The Cabinet Office had also highlighted the fact that it was unaware of any judicial decision that might suggest that drafting papers, and by this the Tribunal infers that instructions would necessarily be included, with regard to a particular statutory purpose, could be said to be relevant to any issue of statutory interpretation. On the other hand, such authorities as there were, have stated repeatedly that the view of Parliamentary Counsel and other officials in preparing legislation were not a legitimate aid to construction. What was relevant was the intention of Parliament, not the intention of the relevant officials. This meant that in turn, published materials, such as explanatory notes or reports of Parliamentary debate, could in certain cases

be relevant to questions of interpretation. However, all such information of the latter kind was already in the public domain.

12. This judgment will set out in further detail the more specific contents of the Decision Notice with regard to the balancing of the relevant public interest on request 3. It is sufficient to state at this stage that ultimately the Commissioner determined that the public interest attaching to section 42(1) militated in favour of non-disclosure. It is however fair to point out that in respect of request 3, the Commissioner also stated that he was persuaded by the evidence provided to him by the Appellant that there would appear to be, at the very least, what was called "a lack of clarity" as to the extent to which a request from professional bodies influenced the decision to put *Sharkey v Wernher* (a judgment of the House of Lords) on a statutory footing in the two provisions referred to in the 2008 Act. Details of this rule or principle will be set out below. The Commissioner found that given what he called a lack of clarity and "indeed the potential seriousness of the complainant's allegations" which related to the way the stated legislative change had been announced in or to Parliament, "the Commissioner believes that there is a weighty public interest in disclosure of any relevant information in order to [ensure that there is] a transparency in respect of this specific issue and in particular to clarify the reasoning behind the provisions within section 37, schedule 15."

13. At paragraph 44, the Commissioner stated as follows, namely:

"For the information which was within the scope of request 3, the Commissioner believes that the balance of the public interest is finer given the issues discussed in paragraph 42 [i.e. relating to request 2]. Although disclosure of the requested information could go some way in revealing whether the complainant's concerns might be substantiated [i.e. as to the stated Parliamentary related reasons for the adoption of the legislation] this would not have any impact on the operation of the relevant provisions. For these reasons, and in light of the compelling arguments in favour of maintaining this exemption, the Commissioner has also decided that for request 3 the public interest favours maintaining the exemption".

14. It can be seen from the above that two main issues fall to be considered in this appeal. The first concerns the public interest balance to be struck with regard to section 42 and the legal professional privilege exemption in FOIA. The second concerns the extent to which, if any, what is called Parliamentary privilege could be said to intrude on the way in which this Tribunal, and indeed the Commissioner, should address the issues relating to the public interest balance to be struck with regard to section 42.

15. It is with regard to the second of these issues that the Tribunal has received written submissions on behalf of the Speaker of the House of Commons joined to this appeal as an interested party.

The Grounds of Appeal

16. In his Grounds of Appeal dated 1 June 2012, the Appellant amplifies the grounds of his complaint. He does so particularly in paragraph 5 by saying that as the Commissioner's Decision Notice had noted, concern was raised when in relation to the passage of the Finance Act 2008, the then Economic Secretary to the Treasury told Parliament that the provisions had been requested by "trade and professional bodies".

17. The Grounds of Appeal then state that in the wake of a FOIA request made to the Treasury shortly after such a statement "it was clear that the Minister was mistaken". As the Appellant then claims "since then, there has been – or so it appears to the Appellant, a determined attempt by the Treasury to prevent this matter from being revisited."

18. The Appellant then sets out the legislative background. As referred to above, the 2008 legislation in effect codified a 1955 House of Lords decision, namely *Sharkey v Wernher* [1956] AC 58. Some further discussion will be made about the exchanges between the Appellant and in this regard HM Treasury below. For present purposes, it is sufficient to say that the so-called *Sharkey v Wernher* Rule, if in fact it be a rule as such, in general terms determines or addresses the tax treatment when a taxpayer who is carrying on a trade appropriates an item of trading stock for personal use. To paraphrase the Appellant in his Grounds of Appeal, these provisions can therefore catch the owner of a corner shop who takes a bottle of milk from the fridge. They also can catch property developers who decide to take one of their own buildings as a head office.

19. The Appellant claims, and it seems there is much justification in this, that the correctness or continued reliability of the original decision has been questioned by tax practitioners, including but not limited to, the Appellant himself. The Appellant claims if, as he contends seems likely, and contrary to the Minister's comments, the real reason for the change to the statute was to prevent future challenges to the decision being made by a taxpayer, then there is a proper incentive or justification for seeking release of the instructions to Parliamentary Counsel. The Appellant is a practising barrister. He claims to have had two cases, being one in 2009 and one in 2012 where the Revenue, i.e. the HMRC have in his words "thrown in the towel as soon as it became clear that the correctness of their Lordships' decision was being challenged".

20. In his Grounds, the Appellant makes it clear that he is "not seeking to humiliate or otherwise criticise any individual at the Treasury for what could have been an innocent error". However, as is perhaps clear from what has been said above, he says that the process of Government and the development of tax law "would be best served if the real reasons for the legislation were made clear".

21. In his Grounds of Appeal the Appellant revisits three factors which are already referred to, but in the Appellant's view, not sufficiently weightily in the Decision Notice. The first concerns the number of people affected by the decision, the second concerns the amount of money involved and the third concerns the question of transparency.

22. These issues will be revisited in more detail below, but for the time being, it is enough to say that the Appellant claims first that the number of people affected "must be at least 1 million", second that the amount at stake is "at least tens of millions of pounds each year" and with regard to transparency as is further explained in his witness statement and in further detail below, the stance taken by the Treasury has not been of the level of transparency as the Appellant says "one would expect".

23. Finally, the Appellant disputes that no weight should be given to the fact the advice is apparently relatively recent. Indeed, the Appellant claims that the position is quite the reverse. He claims that "the matter is not on the agenda for any proposed reform". Moreover, the information sought he claims was concerned with the enactment of the statutory provision that passed into law in July 2008 and therefore has to all intents and purposes served its purpose.

24. However, to the Tribunal, it is clear even on the face of the Grounds of Appeal that at the core of the Appellant's contentions is the fact that Parliament was in his words "misled as to the reasons for the legislative change" and "no attempts were made to correct the error even though the error would have been immediately apparent to those advising the minister". In those circumstances, the Appellant claims that the accuracy of statements made to Parliament "is just as (if not more) essential to the legislative process as the instruction given to Parliamentary Counsel".

The law as to section 42

25. Section 42(1) of FOIA provides in relevant part as follows, namely that:

> "(1) Information in respect of which a claim to legal professional privilege … could be maintained in legal proceedings is exempt information".

26. In *Department for Business Enterprise and Regulatory Reform v O'Brien* [2011] 1 Info LR 1097; [2009] EWHC 164 (QB), the High Court considered a number of prior

Tribunal decisions and summarised the relevant principles in the following manner, particularly at paragraphs 34-41 and 53. First, there is as noted above a strong "in-built" public interest in maintaining legal professional privilege. That interest has to be given weight when conducting the balancing exercise which has to be applied with regard to what is a qualified exemption: see paragraphs 35 and 37. Second, there has to be a showing of a clear, compelling and specific justification for the public interest in the disclosure of privileged information such as to outweigh the obvious interest in protecting communications between lawyer and client: see again paragraphs 36-37. Third, even though the privilege can be said to have an in-built weight, that weight can be countered by equally weighty arguments which might be present in favour of disclosure. The High Court made it clear that there is no need to show or identify "exceptional circumstances" in that regard. The only difference between section 42 and other qualified exemptions is the one already referred to, namely that the in-built public interest in non-disclosure itself carries significant weight in the way described. Fourth, any Tribunal considering a case under section 42 should first acknowledge and give due effect to that significant weight, second ascertain whether there are additional particular factors pointing to or in favour of non-disclosure and then, thirdly consider whether those features supporting disclosure are at least of equal weight.

27. In *Szucs v IC* (EA/2011/0072) especially at paragraph 29, another Tribunal emphasised confidentiality is critical to the effective workings of a relationship between lawyer and client. That Tribunal also pointed out that the importance of such a relationship remains the same irrespective of whether the client is a private or a public authority, to the extent that another Tribunal in *Mersey Tunnel Users Association v IC* [2011] 1 Info LR 1066; (EA/2009/0001) could be said to have taken a different view as to the latter issue.

28. It is also clear that the age of the legal advice will be relevant with regard to the assessment of the strengths of the competing public interests. Clearly, legal advice remains live in every sense if it is still being implemented or relied on as at the date of the request. It may however continue beyond that date to give rise to legal challenges by those who might be said to be otherwise unhappy with the course of action adopted and that too should be had regard to. As both the *Szucs* and *Mersey Tunnel* decisions confirm however, the weight to be attached to such matters will vary on a case-by-case basis. Again, this Tribunal would agree with the thrust of those propositions.

29. The Tribunal would also agree with the general thrust of a point referred to earlier in connection with the matters raised by the Appellant in his Grounds of Appeal. The number of people affected by a decision taken in the wake of legal advice might also

be a relevant factor as indeed can the amount of money involved, and again, reference can be made to both *Szucs* (see paragraph 28(x)) and the *Mersey Tunnel* decision at paragraph 46.

30. In connection with section 42, the Tribunal would also draw attention to a number of other matters, one of which has been referred to above. The first is the use to which the drafting process and in particular, any instructions to Parliamentary Counsel could or might be resorted to or had recourse to should there be any attempt by a taxpayer to persuade a court to adopt a particular construction of the provision involved. The Tribunal would accept that as a general proposition, drafting papers are not a legitimate aid to the construction of statutory provisions which are now in force: see generally *R v Hamza* [2007] QB 659, in particular per Lord Phillips LCJ at para 34.

31. The question of Parliamentary privilege will be dealt with separately below.

The Commissioner's Initial Response

32. The Commissioner, in his Response, not unnaturally confirms the contents of his Decision Notice. However, with regard to the competing public interests, he makes a number of additional points in the light of the Grounds of Appeal.

33. First, he claims that the three factors relied on by the Appellant dealing with the number of people affected, the amount of money concerned and the question of transparency, are no more than "simply different ways of making the same point set out elsewhere in his appeal". The Commissioner claims that these three factors do no more than reflect the need for improved transparency and accountability. The Commissioner accepts that in general terms, these would be factors which tend to show that disclosure is in the public interest albeit that the strength is limited by two matters. First, there is the question of the inability to rely on drafting papers or instructions as a legitimate aid with regard to the construction of a statutory provision. Secondly, there is the apparent fact that the Appellant has on account of information obtained from other FOIA requests been able to draw his concerns to the public's attention in a detailed manner, in particular by means of various articles that he has written in professional journals and periodicals. In other words, the Commissioner claims that it is clear that the Appellant has been able to "make his case without access to the drafting papers or the initial instructions".

34. In revisiting the strength to be afforded to the maintenance of the exemption, the Commissioner drew attention to the Tribunal's decision in *All Party Parliamentary Group on Extraordinary Rendition v IC* (EA/2011/0049-0051). In that case, the Tribunal acknowledged the risk that disclosing legally privileged documents would pose with regard to the construction of material provided to legal advisers: see

general para 195 of that decision. Any similar incursion into a degree of contact between Parliamentary Counsel and the departments they serve would, it was said, "clearly have a detrimental impact on the legislative process".

35. Secondly it is claimed that to allege that the advice is no longer being relied on is to constitute a misplaced criticism. Finance bills are considered each year with the result that legal advice about provisions enacted in 2008 even though now in force would remain "sensitive". In addition, the specific legislative provision on which the advice was given was at least as at July 2012, being the date of the Commissioner's Response, still in force and being applied. In that case, therefore, the Commissioner claims that the advice given is "clearly still live". The Commissioner adds the following, namely:

"Although a decision to legislate has already been taken, whilst the legislation remains relatively new and is being applied regularly, it is submitted that the advice is still being relied on, with the result that the public interest in maintaining the exemption is yet stronger: see *Szucs* at [228(x)]".

The Cabinet Office's Response

36. In its written response dated 20 August 2012, the Cabinet Office as the relevant public authority referred to the Economic Secretary's ministerial statement to the House of Commons made on 20 May 2008. The Cabinet Office explains that the Minister dealing with an amendment tabled in the Committee in respect of the *Sharkey v Wernher* provisions of the relevant Bill by Mark Hoban MP and a query from Mr Hoban as to why the common law or case-based rule was being enacted, informed the House that the "normal types of body that one would expect – the trade associations and the accountancy and legal professions" had in fact asked for that common law or case-based rule to be enacted because of the uncertainty in its operation: see HC Deb 20 May 2008 at columns 308-312.

37. The Cabinet Office then goes on to deal with the Appellant's main contention that the reason for the enactment of the rule in the Sharkey case as given by the Minister was inaccurate. The Cabinet Office maintains that the question of whether or not a Minister's statement of Parliament is accurate or not is not a relevant question arising on the appeal. In any event, it claims that it cannot be considered by the Tribunal as Article IX of the Bill of Rights prevents this tribunal from questioning any proceeding of Parliament, i.e. so-called Parliamentary privilege. Article IX provides that:

"the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.": see generally *OCG v ICO* [2010] QB 98, especially at para 47 ("… the courts cannot consider

allegations of impropriety or inadequacy or lack of accuracy in the proceedings of Parliament …)"

38. The Cabinet Office then turns to section 42 of FOIA and in effect repeats the contentions made by the Commissioner.

Submissions of the Speaker

39. In short written submissions submitted by the Speaker of the House of Commons as an Interested Party dated 22 October 2012, reference is made not only to Article 9 but also to the decision of *Prebble v Television New Zealand Ltd* [1995] 1 AC 321. In that case, Lord Browne-Wilkinson stated that the relevant New Zealand legislation considered in that decision correctly set out the principles in Article 9 in the following manner, namely:

"In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of –

(a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;

(b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or

(c) drawing, or inviting the drawing of, inferences or conclusions, wholly or partly from anything forming part of those proceedings in Parliament": (at page 333 quoting from section 16(3) of the relevant commonwealth Parliamentary Privileges Act 1987)

However, Lord Browne-Wilkinson went on to say as follows at page 337F – G:

"but their Lordships wish to make it clear that if the defendant wishes at the trial to allege the occurrence of events or the saying of certain words in Parliament without any accompanying allegation of impropriety or any other questioning there is no objection to that course."

40. In *OGC v IC supra* at paragraph 32, Stanley Burnton J as he then was stated as follows, namely that:

"It is clear from the judgment of the Privy Council [in *Prebble*] that in relation to Parliamentary privilege, the law of New Zealand, which was the subject of the judgment, is the same as the law of England and Wales."

41. In addition, at page 332D, Lord Browne-Wilkinson in *Prebble supra* also recognised a wider principle which he put in the following terms, namely:

"In addition to article 9 itself, there is a long line of authority which supports a wider principle, of which article 9 is merely one manifestation, viz. that the courts and Parliament are both astute to recognise their respective constitutional roles. So far as the courts are concerned they will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges: *Burdett v Abbot* (1811) 14 East 1; *Stockdale v Hansard* (1839) 9 Ad & El 1; *Bradlaugh v Gossett* (1884) 12 QBD 271; *Pickin v British Railways Board* [1974] AC 675; *Pepper v Hart* [1993] AC 593. As Blackstone said in his Commentaries on the Laws of England 17th ed (1830) Vol 1, p.163: "the whole of the law and custom of Parliament has its original from this one maxim, "that whatever matter arises concerning either House of Parliament, ought to be examined, discussed and adjudged in that House to which it relates, and not elsewhere""

42. The Speaker then goes on to contend that there are instances in which reference to Parliamentary proceedings have been held not to involve any questioning contrary to Article 9 or indeed any violation of any wider principle of Parliamentary privilege.

43. In *R (Bradley and others) v Secretary of State for Work and Pension* [2007] EWHC 242 (Admin), certain workers applied for judicial review from the Secretary of State for Work and Pensions as to the latter's rejection of certain findings of the Parliamentary Ombudsman. The workers had lost part or all of their final salary pensions when their occupational pension schemes had been wound up. The Ombudsman reported that there had been mal-administration by the Government department in question. The Secretary of State rejected all but one of the Ombudsman's findings. The workers, or one of them at least, challenged the Secretary of State's rejection of the report's findings. The High Court quashed the Secretary of State's rejection of the Ombudsman's finding of mal-administration because on the facts, no reasonable Secretary of State could disagree with that finding. The court declined to quash the remaining rejections by the Secretary of State of the Ombudsman's findings on the facts and on the authorities.

44. The Speaker intervened. The Speaker expressed concern that the use to which the report in question and evidence given by the Ombudsman to the Parliamentary Committee which were apparently to be put in the course of the case, might infringe as the Speaker contended Article 9. The learned Judge dealt with that portion of the Australian Parliamentary Privileges Act, cited above in this judgment, especially in the terms of subparagraph (c) dealing as it does with the drawing or inviting the drawing of inferences or conclusions wholly or partly from anything forming part of

Parliamentary proceedings. At paragraph 32, Bean J said with regard to subsection 7 that it was "extremely wide". He went on as follows, namely:

"It would seem to rule out reliance on or a challenge to a ministerial statement itself on judicial review of the decision embodied in that statement (which was permitted in *R v Secretary of State for the Home Department ex parte Brind D* [1991] 1 AC 696 and to which no objection has been raised in the present case), or to resolve an ambiguity in legislation (*Pepper v Hart* [1993] AC593), or to assist in establishing the policy objectives of an enactment (*Wilson v First County Trust Ltd* [2004] 1 AC 816). It would also prohibit reliance on reports of the Joint Committee on Human Rights which … have been cited in a number of appellate cases in this jurisdiction: a very recent example is *R v F* [2007] EWCA Crim 243 at paragraph 11. As Lord Nicholls of Birkenhead observed in *Wilson*, "there are occasions when courts may properly have regard to ministerial and other statements made in Parliament without in any way "questioning" what has been said in Parliament, without giving rise to difficulties inherent in treating such statements as indicative as the will of Parliament, and without in any other way encroaching upon Parliamentary privilege by interfering in matters properly for consideration and regulation by Parliament alone". I therefore do not treat the text of subparagraph c of the Australian statute as being a rule of English law."

45. The Speaker says that in the circumstances considered in the passage cited above, none of the exceptions can be said to be relevant to the facts in the present case. This is because the Appellant makes reference to proceedings in the House not merely to allege the occurrence of events, but in order purely and self-evidently to raise the possibility that the Minister in question misled Parliament.

46. In one of the cases cited by Bean J, namely *Wilson v First County Trust Ltd*, Lord Nicholls supra had stated at paragraph 67 that:

"… the court is called upon to evaluate the proportionality of the legislation, not the adequacy of the minister's exploration of the policy options or his explanations to Parliament. The latter would contravene article 9 of the Bill of Rights."

The same theme is echoed by Lord Browne-Wilkinson in the *Prebble* decision at page 334C:

"Moreover to allow it to be suggested in cross-examination or submission that a member or witness was lying to the House could lead to exactly that conflict between the courts and Parliament which the wider principle of non-intervention is designed to avoid. Misleading the House is a contempt of the House punishable by the House: if

a court were also to be permitted to decide whether or not a member or witness has misled the House there would be a serious risk of conflicting decisions on the issue."

47. With regard to the public interest balancing test relevant to section 42, the Speaker in his written submissions states as follows:

"If the Tribunal were to accept the Appellant's invitation to assess this matter as part of its assessment of the public interest it would be accepting an invitation to consider whether there was a reasonable possibility that the minister misled Parliament and that the requested information might prove or disprove that. That would amount to

(a) questioning … the truth … or good faith of anything forming part of those proceedings in Parliament;

(b) otherwise questioning … the credibility, motive, intention or good faith of any person; or

(c) drawing … inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament

as described in *Prebble*. This would it is claimed amount to a breach of article 9. Again in the *Prebble* case Lord Browne-Wilkinson had explicitly emphasised at 332D as indicated above that "so far as the courts are concerned they will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges …"

48. It necessarily follows in the Speaker's contention that the Tribunal should disregard any allegation that Parliament may have been misled when assessing the public interest test under section 42.

49. Reliance is finally placed by the Speaker in his written submissions on a passage in *Hamilton v Al Fayed* [1999] 1 WLR 1569. In that case at page 1586, Lord Woolf MR had stated as follows, namely:

"In our view this confirms that the vice to which article 9 is directed (so far as the courts are concerned) is the inhibition of freedom of speech and debate in Parliament that might flow from any condemnation by the Queen's courts, being themselves an arm of Government of anything there said. The position is quite different when it comes to criticisms by other persons (especially the media) of what is said in Parliament." (citing *Pepper v Hart supra* per Lord Browne-Wilkinson)

Lord Woolf then went on to add the following, namely:

"The courts could only have legitimate occasion to criticise anything said or done in parliamentary proceedings if they were called on to pass judgment on any such proceedings; but that they clearly cannot and must not do. Nor therefore should they issue such criticisms on any occasion, for to do so would be gratuitous."

50. In the circumstances, the Speaker adds that no comment is made at least in his written submissions on the facts of the case as presented by any party. Moreover, the Speakers adds that it is not his intention to speak to prevent the Appellant from the questioning of proceedings in Parliament in any non-judicial forum.

The evidence

51. The Appellant has submitted a 21 page witness statement. In it, he states that he proposed to set out the factual background to his claim for disclosure. At paragraph 6 he refers to the fact that in the course of proceedings of Parliament in the relevant year, namely 2008 "the Minister volunteered a reason for codifying the rule", i.e. the rule or principle in *Sharkey v Wernher*. He adds that it was "clear to me however that the reason the Minister gave was wrong".

52. The same assertion is made in paragraph 8 where the Appellant claims that he suspects that the Minister "was in fact deliberately misbriefed" by those officials who were keen to ensure that "the change for the legislation went through without difficulty". At paragraph 9, he again refers to " … deliberate misconduct" by Revenue officials: the same assertion is in effect repeated in paragraph 11.

53. It is clear to the Tribunal that insofar as it is material, the basis for the Appellant's allegation lies in what he calls his "firm conclusion" that the rule or principle in *Sharkey v Wernher* is wrong. With due respect to the Appellant and even though the Appellant sets out what can be called the legal or commercial views underlying his justification for impugning or impeaching the rule, for reasons which the Tribunal will set out below, the Tribunal feels that it is simply not necessary to refer any further to that justification or the basis for it. It is sufficient to refer at most if further elucidation is needed to an article written and published by the Appellant himself on the subject in Taxation on 24 July 2003.

54. The Tribunal notes however that the Appellant was formerly employed by the Revenue as what he calls a technical adviser. This was in regard to what he calls the tax law review project. Since 2003, he says that he has been one of two representatives of the Chartered Institute of Taxation on the same project's

Consultative Committee. This Committee was involved with a consideration in detail of the draft to what later became the Income Tax Bill relevant to these issues.

55. At paragraph 45, he states the following, namely:

"The problem that I saw was that Parliament had been given one reason for the then legislative proposals, whereas that reason was manifestly false. I considered (and still consider) that Parliament (and through Parliament the public at large) is entitled to know when it has been misled. That is the case whether or not it has been deliberately misled: in my view a corrective statement should have been made at the earliest available opportunity".

56. The Appellant states that on 27 February 2009, he wrote to the then Minister, Mr Ian Pearson MP principally in order to elicit a corrective statement of Parliament. He received no response. He states that no further substantive response was received. Such response that he did receive, he claims "actually side-stepped the issues": see paragraph 67. Nevertheless, the same letter acknowledged that the Minister's statements "could be interpreted [inaccurately]". Although the Permanent Secretary was satisfied that "Parliament was not materially misled. The clear implication was that he acknowledged that Parliament was at least partially misled. In fact, I consider it undeniable that the Minster's statements were inaccurate (emphasis in original)".

57. At paragraph 92 of his witness statement, the Appellant claims that as the Permanent Secretary "effectively admitted to me in his 24 September 2010 letter, there was at least a partial misleading of Parliament". He adds however that "nothing has been done to clarify matters".

58. The Tribunal has also been provided with two witness statements from, or on behalf of, the Cabinet Office. The first is from Elizabeth Gardiner of the Parliamentary Counsel's Office (the OPC). She is a Full Parliamentary Counsel, being the most senior drafting grade, and only one of four team leaders within the OPC which is itself part of the Second Respondent. Her civil service grade is that of Director General and therefore part of the senior civil service. She has 20 years experience in drafting Bills, 12 of them as a senior drafter leading projects and has worked on over 40 Bills.

59. In her evidence, Ms Gardiner explains mainly matters which appear not to be in dispute. She explains the OPC is responsible for drafting all Government Bills that are introduced to Parliament. It also provides related legal, handling and procedural advice to its clients in Government departments. The service the OPC provides therefore is to all Government departments.

60. She confirms that it is usually the sending of formal instructions to the OPC that begins the drafting process. After instructions, there is normally a first draft. She confirms that "candour between instructing departments and OPC plays an essential part in this process". The importance of openness in this context, she claims, is underlined by the content and terms of a lengthy publication which she exhibits to her witness statement entitled "Working with Parliamentary Counsel". This document is prepared by the OPC for Government departments to explain what they can expect of the OPC and what in turn the OPC needs from those departments. She refers in particular to paragraphs 76 and 77 which stress the need for "good communications" and in particular, the need on the part of the relevant department to ensure that the OPC understands such matters as the legislative intentions and the need for clear policy options to be reflected in suitable legislation.

61. Legal advice which is obtained, she claims, may relate to the current application or to the interpretation of legislation or to vulnerability to legal challenge or to ongoing litigation in an area. She claims that it is crucial for this information to be shared with those doing the drafting. This in turn enables there to be a proper understanding of the mischief that legislation is intended to address and to enable the production of a draft that gives legal effect to the policy. Since Parliamentary Counsel are specialists in the drafting of legislation, but not necessarily equally specialised in a specific area of law underlying the individual Bill, it is therefore doubly important that the exchange or exchanges be as candid as possible.

62. Ms Gardiner adds that instructions may also seek legal advice from the OPC. At paragraph 22 she states that:

"Both policy and legal issues in relation to a Bill need to be identified and explored in an environment that enables, fosters and protects a free and frank exchange of views."

At paragraph 23, she claims that were disputed information to be ordered to be disclosed, she strongly believes that this would have "a significant detrimental effect on the preparation of future legislation". In her view, she says "the disclosure of drafting papers in this case would inhibit the open relationship currently enjoyed between OPC and instructing departments". She claims that these views are shared by the three other team leaders at OPC.

63. At paragraphs 24 and 25, she makes the following observations which need, in the Tribunal's view, to be quoted in full, namely:

"24 As I have already mentioned, instructions on a Bill are currently prepared on the basis that the intended readership is limited to the OPC team. They are

prepared on the understanding that the information is likely to remain confidential until it becomes a historical record. If the disputed information is disclosed, the likelihood is that future instructions and correspondence on Bills would be prepared on the basis that there are two likely readers of the information – the officials working on the Bill and the general public. This is in my view very likely to inhibit the full and frank exchange of views that is essential to the preparation of legislation and the recording of advice given. If there is a chance that instructions or correspondence will end up in the public domain I believe that those working on the preparation or legislation are likely to become reticent about exposing areas of doubt or potential problems or matters that could be sensitive in political handling terms. They would also be less likely to share confidential legal analysis and advice if there were a chance that it could be made public and exploited at some stage in the future. Even once the legislation has been passed, advice referred to in the instructions may remain relevant for many years to come.

25 There is no doubt in my mind that a loss of candour between OPC and instructing departments would damage the quality of legislation in the future … in my experience confidentiality and legal professional privilege between OPC and Government departments promotes and enables full disclosure and enables OPC to give full and considered advice on any legislative or drafting issues that arise. I do not think this would happen in a climate where officials are concerned that the issues they raise are likely to end up in the public domain and are writing with one eye on the possible consequences of that happening."

64. The Tribunal is also in receipt of a witness statement of Peter Faherty provided in both open and closed versions. He is a senior civil servant leading the central team in the Corporation Tax, International & Anti-avoidance Directorate within the Business Tax Directorate General of HM Revenue & Customs. He is charged particularly with oversight of the application of tax rules for calculating businesses' taxable trading profits, as well as for providing policy advice to Ministers and for developing new legislation to implement Ministers' policy decisions.

65. In his open statement, he confirms that policy measures to introduce new tax rules or amend the existing tax legislation are enacted every year by an annual Finance Bill. Once a potential policy measure is identified as a candidate for inclusion in the next Finance Bill, two processes need to be completed before the relevant Bill is introduced in Parliament. First, policy advice needs to be formulated and submitted to Treasury Ministers and thereafter instructions are drafted for OPC to draft the

legislation needed to implement the measures. At paragraph 8 he states the following, namely:

"One potential role of policy measures to amend existing tax legislation is to make the tax rules more certain and reduce scope for challenge or dispute, so that the legislation is effective in delivering the Government's intended tax policy, taxpayers can be entirely clear how they should apply the rules, and HMRC can enforce the rules most efficiently and effectively. This was the role of the policy measure included in the Disputed Information."

66. Later in his statement he confirms that confidentiality is important in relation to the exchange between his department and the OPC. In his words, at paragraph 13:

"Confidentiality is important, as it enables us to communicate freely with Parliamentary Counsel, so as to inform them as fully as possible about the context relevant to their drafting work, to enable them to produce legislation that will achieve its purpose as effectively as possible."

67. The same confidentiality, he claims, informs cases in which instructions include details of policy advice to Ministers.

68. In his written statement he also repeats the claim made by Ms Gardiner that the public interest "does not favour the release of instructions to Parliamentary Counsel for drafting legislation in this case". He states the following, namely:

"Indeed release in this case may lead the public to suppose that the instructions and other material comprising the Disputed Information can in some way assist the courts in the interpretation of the legislation at issue, which it cannot. The Bill produced from the drafting process is introduced into Parliament and subject to Parliamentary scrutiny and potential amendment before it is enacted. The parliamentary debates (Hansard) are published and therefore available for public scrutiny. The effect of legislation on the citizen, or the interpretation of the legislation, is determined not by what is contained in the opening instructions to OPC, but by recourse to the legislation itself, as enacted by Parliament and as interpreted by the courts, who can refer to the published Explanatory Note, and in limited circumstances look to Hansard, in considering what Parliament's intention was in enacting the provisions".

69. He describes the disputed information in the present case as comprising the opening instructions to Parliamentary Counsel for the purpose of drafting the 2008 Act. He claims that is clear on the subject of legal professional privilege and also relates to the formulation and development of Government policy. He claims privilege for the entire document. In addition, he claims that it therefore is not amenable to redaction

or partial disclosure because the very essence of the document is the development and formulation of Government policy.

Both Ms Gardiner and Mr Faherty gave confirmed the contents of their statements in person to the Tribunal.

The parties' respective submissions

70. Much of the Appellant's submissions have in effect already been set out above. However, in his final skeleton argument, he firmly and unequivocally contends that his case "can be made out even without reference to the controversial (and, therefore, disputed) evidence", i.e. a reference to the issue regarding Parliamentary privilege. This is because he claims that the "gist of the Minister's impugned statement was effectively reiterated in the Treasury's letter to the Appellant dated 23 July 2008 … and the Appellant can therefore base his case on the contents of that letter rather than the prior statement in Parliament."

71. The letter he refers to is exhibited to his witness statement which has been referred to. In the circumstances, the Tribunal clearly finds it important to revisit the precise terms of that letter. In relevant part, it reads as follows, namely:

"You refer to and sought justification of the Economic Secretary to the Treasury's comments at the Finance Bill Standing Committee, as reported in Hansard (20th May 2008) column 311:

"*We have been asked to legislate on this by the normal types of body that one would expect – the trade associations and the accountancy and legal profession.*"

And you specifically asked for:

- *a list of those bodies who had made such a request (and when the requests were last made)*
- *a list of such bodies who had objected to the proposal announced on 12 March 2008.*

Firstly, the Economic Secretary to the Treasury in her statement was not referring to *Sharkey v Wernher* specifically but to the general background issue that has been raised by the accountancy bodies that there should be no judge-made overrides to accountancy treatment in determining tax outcome. *Sharkey v Wernher* is one such judge-made override and legislating that case law decision into statute removes any uncertainty of the tax treatment.

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Secondly, you asked regarding the bodies that objected to the proposal announced on 12th March 2008:

- *Institute of Chartered Accountants in England and Wales (ICAEW) and CIOT [Chartered Institute of Taxation] were the two organisations that objected to the proposal.*

I hope this clarifies the statement that was made by the EST."

72. In the circumstances, it is important in the Tribunal's view to study precisely the terms in which the Economic Secretary's comments were made.

73. When the relevant Bill that ultimately became the 2008 Act was considered in and by the House of Commons Finance Bill Standing Committee, the Economic Secretary, Ms Kitty Ussher, stated in the aforesaid column no. 311:

"I will take a little step back and diverge from what I was about to say to explain why we are doing this. We have been asked to legislate on this by the normal types of body that one would expect – the trade associations and the accountancy and legal professions – because although the case law has been operating happily for the best part of 50 years, it seems that there is now some uncertainty in the system."

74. In the circumstances and particularly given the repeated assertions to such effect by the Appellant in his witness statement and elsewhere, the Tribunal finds it impossible to regard the Appellant's case as being based on anything other than the words which Ms Ussher, as the Economic Secretary to the Treasury, had uttered and made in Parliament.

75. This characterisation is also manifestly reflected in the Appellant's own Grounds of Appeal which have been addressed above: see in particular paragraphs 5, 7, 14 and 19. Paragraph 14 is perhaps the clearest manifestation of his basic contention where the Appellant states that "a Treasury Minister made a statement in Parliament which turns out to have been false …"

76. In these circumstances, the Tribunal can arrive at no other conclusion but that which is put forward by the Cabinet Office. Article IX is clearly engaged and more significantly, it would be breached if this Tribunal were in any way to question or address what was said in the Australian equivalent of Article 14, namely "the truth, motive, intention or good faith of anything forming part of … proceedings in Parliament". In *OGC v IC supra*, Stanley Burnton J, as he then was, confirmed the basic proposition that Parliamentary privilege precludes a court or tribunal from considering a challenge to the accuracy of anything said in Parliament. This matter is dealt with specifically in paragraph 47 in the following terms, namely:

"Conflicts between Parliament and the courts are to be avoided. The above principles lead to the conclusion that the courts cannot consider allegations of impropriety or inadequacy or lack of accuracy in the proceedings of Parliament. Such allegations are for Parliament to address, if it thinks fit, and if an allegation is well-founded, any sanction is for Parliament to determine. The proceedings of Parliament include parliamentary questions and answers. They are not matters for the courts to consider."

77. Even though Stanley Burnton J did, especially at paragraph 219, accept that these principles would be subject to some qualification, it is clear to this Tribunal that he nonetheless made it clear that he saw no reason why a court should not receive evidence of Parliamentary proceedings, but only such as might be relevant to questions of fact. However, the Tribunal is equally firmly of the view that the Appellant is not seeking to resort to that avenue in the present appeal. That distinction echoes a passage in *Hamilton v Al Fayed supra* at pages 403-404 where Lord Browne-Wilkinson stated:

"I have stressed this feature of parliamentary privilege because of the way in which this case developed. As will appear, the Court of Appeal seem to have taken the view that parliamentary privilege is mainly relevant to cases where a party applies to strike out a court action on the grounds that the relief claimed in that action in some way trenches on conclusions reached in parliamentary proceedings. Although no doubt such cases may arise, they are, I believe, rare compared with those in which a party to litigation wishes to challenge the accuracy or veracity of something said in Parliamentary proceedings. In such a case, the other party does not apply to strike out the whole of the plaintiff's action: the action will often be about something quite different to that under consideration in Parliament. The other party applies to prevent the giving of that specific evidence or the challenging of a particular witness. If parliamentary privilege is held to exclude such evidence normally the only result (serious though it may be) is that the case is decided in the absence of that evidence."

78. This Tribunal will accept that Parliamentary privilege does not prevent reliance on what may be said in Parliament and during Parliamentary proceedings in order to demonstrate what could be called a motivation and basic tenor of the executive's actions outside Parliament. The Cabinet Office submissions provide a good example of this type of case in the Privy Council decision in *Toussaint v AG of St Vincent and the Grenadines* [2007] 1 WLR 2825.

79. In the *Toussaint* decision, a ministerial statement was used in judicial review proceedings to explain conduct which had occurred outside Parliament, as well as the policy and motivation leading to it. See especially at page 2832 per Lord Mance at

paragraph 17. The Privy Council pointed out in that case that the House of Lords itself on a number of occasions stated that use could be made of ministerial statements in Parliament in judicial proceedings: ibid at para 16. The Privy Council noted the comments made by the Joint Committee on Parliamentary Privilege at paragraph 91 (UK Series 1998-99 HL paper 43-IHL 214-1) to the effect that any contrary view would have "bizarre consequences" which would "hamper challenges to the legality of executive decisions". The Privy Council therefore held in *Toussaint* section 16 of the Privilege Act had to be read subject to the modifications, adaptations and qualifications necessary to enable evidence relating to the ministerial statement in question to be admissible where necessary as in that case, to explain executive action and to enable a judicial review claim to proceed. The *OGC* case at paragraph 62 emphasises the resultant principle, namely that it is important to identify the purpose for which evidence of the relevant proceedings in Parliament is to be relied on. See also Coppel *Information Rights* (3rd ed.) at para 21-005.

80. The Appellant contends that what is in issue here is mere historical fact. Moreover, he claims that what he calls "the essence of her statement" has been repeated in correspondence sent to the Appellant. The Appellant relies in particular on the speech of Lord Browne-Wilkinson in *Pepper v Hart supra* where there is a reference to the case of *Church of Scientology v Johnson* [1972] 1 QB 522 and in connection with which case Lord Browne-Wilkinson it is claimed raised no concern about a passage referred to in Hansard for the purpose of what he said was clarification of a particular fact. The Appellant therefore claims that he does not seek to question what Ms Ussher may have had by way of motive or intention.

81. In addition, the Appellant points to another House of Lords authority, namely *R v Secretary of State for the Home Department ex parte Brind* [1991] 1 AC 696 in support of his contention that courts can be permitted to consider ministerial statements to ensure that Ministers have acted lawfully. The Appellant therefore contends that if a court can invoke or consider Hansard to address the lawfulness of a Minister's actions, then it can surely consider such statements to determine where the balance of the public interest lies when it comes to looking at the content of the Minister's assertions.

82. The Appellant therefore contends that he does not seek to question the motives of the Minister: what she said, he claims, appears to have been the consequence of "inappropriate conduct by her officials".

83. This Tribunal respectfully rejects the Appellant's contentions. The core of the Appellant's argument is the allegation that a Minister has misled Parliament. Even on the assumption that the Minister's officials were at fault in the way alleged or at all, on any basis, the Minister has to accept due responsibility for their actions. What is

clearly in issue here is a challenge upon the truth, motive and good faith of what was said in the course of Parliamentary proceedings.

84. Although the Appellant has appealed on the basis that the competing public interests in the context of section 42, and possibly section 35 which deals with information held by a Government department relating to the formulation of Government policy, in the circumstances of this case, the Tribunal simply cannot go into any public consideration which touches or concerns such an allegation.

85. On the basis that both exemptions are for the moment engaged, the relevant public interest balance test remains that articulated in FOIA, namely, whether "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information": (see section 2(2)(b)). This Tribunal is not going to take into account in any way whatsoever the facts, consequences or possible repercussions of an allegation that a Minister has misled Parliament.

86. The Tribunal will say nothing about any other steps, if any, that the Appellant may be able to take with regard to the allegedly controversial statements by the Minister and which might be open to him with regard to his taking issue either with prior or future proceedings in Parliament, or in any other way, whether judicial or otherwise.

Section 42

87. Section 42 of FOIA concerns information that is protected by legal professional privilege. It provides in relevant part that information "in respect of which a claim to legal professional privilege … could be maintained in legal proceedings is exempt information".

88. In the Tribunal's judgment, and particularly in the light of the evidence of Ms Gardiner and Mr Faherty, there can be no doubt that the privilege involved here is variant of privilege called legal advice privilege, relating as it does to the drafting and preparation of public Bills: see generally, *Three Rivers DC v Bank of England (No 6) supra*. Indeed, as indicated above, this is not disputed by the Appellant.

89. An authoritative guidance as to the applicability and range of section 42 is to be found in *DBERR v O'Brien* supra. The requisite approach is well-established and was reaffirmed by that decision. It reflects an approach invariably adopted by the Commissioner and indeed by this Tribunal in prior decisions. First, the public interest factors in favour of disclosure should be identified, next, there should be identified those public interest factors in favour of maintaining the exemption and, finally, there should be an analysis of whether the latter outweigh the former.

90. It is equally well-established, both in the *O'Brien* case and in prior decisions of this Tribunal that with regard to this particular exemption, there is what is called "an inbuilt public interest". The inbuilt quality reflects the significant weight to be afforded to legal professional privilege with regard to the administration of justice generally: see, e.g. *R v Derby Magistrates' ex parte B* [1996] AC 487, especially per Lord Taylor CJ at p.507D. Nor is there any need to identify an exceptional set of circumstances in order to justify disclosure, e.g. any specific prejudice or harm.

91. In the words of Wyn-Williams J in the *O'Brien* case at paragraph 53:

> "… it should be that the proper approach for the Tribunal was to acknowledge and give effect to the significant weight to be afforded to the exemption in any event; ascertain whether there were particular or further factors in the instant case which pointed to non disclosure and then consider whether the features supporting disclosure (including the underlying public interests which favour disclosure) were of equal weight at the very least."

92. In *Calland v IC* (EA/2007/0136), the Tribunal found that some clear, compelling and specific justification had to be shown so as to outweigh the obvious interest in protecting communications between the lawyer and his client. In other words, the issue is not the effect of disclosure on a particular relationship: it is the effect that disclosure will have on communications in the future and in general.

93. Clearly, if the advice remains current, the public interest of maintaining the exemption will be thereby increased: see e.g. *Kitchener v IC* (EA/2006/0044). Legal advice can be regarded as current in effect either if it is still being implemented or relied on or if it may be a relevant subject to a future legal challenge: see *O'Brien supra* especially at para 28 and see also *Szucs v IC supra* (EA/2011/0072).

Section 42: the factors in favour of maintaining the exemption

94. The relevant factors have already been referred to in this judgment but they can be usefully summarised here. First, there is the weighty inbuilt public interest referred to in the preceding section of this judgment. Second, there is the overriding necessity to ensure that there is free and frank communication of the kind referred to by Ms Gardiner in her evidence between the OPC and instructing Government departments: see in particular paragraph 16 of her witness statement and the passages quoted from her witness statement in general above. Third, insofar as not addressed by the above-mentioned second factor, there is what can be called the external policy objective which flows from the need to ensure that there is free and frank communication between Parliamentary Counsel and Government departments in general. A given policy has to be properly implemented and this can only happen

when both parties to the relevant exchanges are able to treat the underlying proposals properly, candidly and, in addition, able to understand the full implication of any such proposals.

95. Fourth, and again this may be no more than an overlapping point with both preceding factors, particular regard must be had to the relatively specialised nature and scope of the two basic types of legal exchanges effected between the OPC and the particular Government department. As Ms Gardiner makes clear, a department may often provide extensive advice and assistance with regard to the interpretation of relevant legislation, just as the department may itself seek legal advice from Ms Gardiner's office on such matters as retrospectivity or the power or vires to enact legislation: see again her witness statement, in particular, at paragraph 23. The Tribunal regards this as having been confirmed by Mr Faherty.

96. Fifth and again, stemming from each of the above factors, there is clearly a legitimate expectation of confidentiality on the part of those in Government departments and elsewhere who deal with Parliamentary Counsel in relation to the main aspects of the latter's work. Those who work with Parliamentary Counsel can be expected to believe that the intended readership for the instructions issued to Parliamentary Counsel will remain strictly confidential as between the author of those instructions and the OPC itself. This does no more than reflect the basic tenets of the document which is exhibited by Ms Gardiner, namely "Working with Parliamentary Counsel", particularly at paragraph 132 of that document.

97. Sixth, principally on the basis that Finance Bills are annual occurrences, it can properly be inferred that the provisions relating to the disputed information are still current and/or in force and/or of relevance to what could be said to be the general taxation provision in force at the time of the request.

98. Seventh, both witnesses put forward on behalf of the Cabinet Office agree that disclosure would be likely to cause there to be a highly detrimental and adverse impact, at least on the process of legislative drafting.

Section 42: factors in favour of disclosure

99. The Tribunal now turns to consider those factors which could be said to militate in favour of disclosure. First, and reflecting the terms and effect of paragraph 18 in the Commissioner's Decision Notice, the public authority accepts that in principle there is a public interest in disclosing information which relates to the preparation of legislation. Second, in the light of the preceding factor, the Cabinet Office maintains that formal justification for enacting the legislative provisions in question should be within the scope of public debate, particularly a debate in Parliament. Public debate

is perhaps covered by the first factor, but for the reasons given above and the conclusions reached by the Tribunal with regard to the applicability of parliamentary privilege, it follows that in the context of this case, the factor, although perhaps indicative also of an element of public interest *per se* which relates to debating the issue in Parliament, should be given no weight or, at the very most, extremely limited weight. Third, although the Appellant has stressed the element relating to the amount of money relating to the relevant statutory provisions and to the number of people who might be said to be affected by it, this Tribunal does not accept that these matters, even together, can be said to bear any real weight in terms of public interest as against the substantial interest inherent in the maintenance of this exemption.

100. This is not to say in the Tribunal's view that the exemption under section 42 should be treated as absolute. All the Tribunal is finding in the present case is that recognition should be given to the inbuilt weight inherent in the exemption, but that that inbuilt weight should be displaced only by an equally weighty, or if not more weighty, set of considerations. The Tribunal has inspected the closed material, i.e. the disputed material in this case. Had the said material contained any evidence on untruths, misleading advice or any wrongdoing on the part of officials in their instructions to Parliamentary Counsel, then the Tribunal would have taken those elements into account in conducting the relevant public interest balancing exercise. However, the Tribunal is entirely satisfied that there is no such material in what it has seen.

101. The entire case of the Appellant with regard to the way the public interest should be balanced and applied is based on his belief that the Minister made an incorrect statement of Parliament. He also claimed that she may have been misled by officials. If the same is not already clear from this judgment, this Tribunal is completely satisfied that it cannot in any way consider that matter so that once that element is taken out of the equation, all that are left are generic arguments often found in decisions in this Tribunal dealing with section 42 which, in this particular case at least, cannot be said to be enough to tip the balance in favour of disclosure.

102. The Tribunal pauses here to note that in any event the request was for the briefing given to Parliamentary Counsel, not for sight of a briefing or any form of instruction given to the relevant Minister.

Section 42: balancing exercise: conclusion

103. The Tribunal therefore sees no reason to depart from the relevant determination reached by the Commissioner in his Decision Notice. It is entirely satisfied that the matter was properly and conclusively put and addressed by the Commissioner in his Decision Notice at paragraphs 36 and 37 and can usefully be summarised as follows. First, that withheld information dates from 2008, some 3 years before the request, and in the circumstances, it can properly be said that such advice can be described as recent. Second, the likely consequence of disclosure described by the Commissioner as being a potential chilling effect on the Parliamentary process adds considerable weight to the public interest in maintaining the exemption. The fullness of the instructions given for the purpose of drafting legislation is essential to the legislative process. That process is itself essential to a proper functioning legal system in the parliamentary democracy. This is not to say that the exemption in section 42 should be treated as absolute. It does, however, mean that the inbuilt weight inherent in the exemptions should only be displaced by equally weighty, if not more weighty, considerations.

104. For all the above reasons, the Tribunal upholds the findings of the Decision Notice in this case and dismisses the Appellant's appeal.

Signed

David Marks QC
Judge

Dated: 7 December 2012