

**PROCEDURAL OFFICER DECISION  
2021/1**

**APPLICATION ON BEHALF OF  
ECO-BAT TECHNOLOGIES  
IN RELATION TO  
THE CMA INVESTIGATION UNDER THE COMPETITION ACT 1998 INTO  
SUSPECTED ANTI-COMPETITIVE ARRANGEMENTS IN THE UK ROOFING  
MATERIALS SECTOR**

**The Application**

1. Eco-Bat Technologies<sup>1</sup> (the Applicant) has requested a review of the decision by the Senior Responsible Officer (SRO) in relation to disclosure of information in the non-confidential version of a decision to be published by the CMA (the Application).

**The SRO's Decision**

2. The SRO for the CMA's investigation in relation to suspected anti-competitive arrangements in the UK roofing materials sector (the Investigation) decided on 22 January 2021 to uphold the decision of the CMA case team in relation to the representations made on behalf of the Applicant about disclosure of information in the final non-confidential infringement decision to be published in the Investigation (the SRO's Decision).

**The Procedural Officer's Process**

3. The Application was made on 29 January 2021.
4. I held a meeting by video conference with the Applicant's legal advisers on 4 February 2021. I held a meeting by video conference with the CMA case team on 9 February 2021.
5. I have considered the representations and information provided in the meetings I held with the Applicant's legal advisers and the CMA case team, together with the information set out in the Application. The CMA case team provided further comments by email on a point discussed at the meeting I held with them. I have also taken account of the SRO's Decision.

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<sup>1</sup> The infringement finding has been issued to H.J. Enthoven Limited (trading as BLM British Lead) and its parent company Eco-Bat Technologies Limited.

## Summary of the Application

6. The Application relates to a request for redactions to be made in a final non-confidential infringement decision to be published by the CMA on the Investigation. It asks for the decisions about disclosure of information set out in the SRO's Decision to be reconsidered.
7. The Application sets out two arguments to support the request for redactions to be made in the final infringement decision:
  - i) there is no permitted purpose for disclosure under section 241 of the Enterprise Act 2002. The Application states:

*'Publication of the Decision is a permitted function under the Competition Act 1998 (Schedule 15 EA 2002), but the specific disclosures are not a necessary part of that function. They are not necessary to describe and find legal liability for the infringement.... the proposed disclosures are not blanket redactions, but a small number of specific, proposed redactions, that do not detract in any way from the Decision's legal or economic analysis.'*
  - ii) disclosure would cause substantial harm to legitimate business interests. The Application states:

*'The proposed redactions all relate to confidential and commercially sensitive company strategy the disclosure of which could substantially harm BLM's [the Applicant's] commercial interests.'*
8. The Application sets out the approach that the Applicant considers should be taken to the assessment of confidentiality. It sets out the reasons why following this assessment the proposed redactions should be considered to relate to confidential information and why disclosure would cause substantial harm to the business interests of the Applicant contrary to the conclusions set out in the SRO's Decision.

## Scope for the Procedural Officer to consider the Application

9. The role of the Procedural Officer in a Competition Act 1998 (Competition Act) case is set out in the CMA Rules.<sup>2</sup> The CMA's view about the scope of complaints within the remit of the Procedural Officer is provided in the Guidance on the CMA's Investigation Procedures (the Guidance)<sup>3</sup> and also in the Procedural Officer content on the CMA's webpage.<sup>4</sup> These each provide the

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<sup>2</sup> The Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014 SI 2014/458, Rule 8(1).

<sup>3</sup> Guidance on the CMA's investigation procedures in Competition Act 1998 cases (CMA8), paragraph 15.4.

<sup>4</sup> [CMA webpage](#).

same four bullet points setting out the issues to which, in the CMA's view, a procedural complaint may relate and which the Procedural Officer is able to review. The second bullet point states that procedural complaints relate to:

- requests for confidentiality redactions of information in documents on the CMA's case file, in the Statement of Objections, in a Draft Penalty Statement or in the final decision.

10. The Application therefore falls within the Procedural Officer's remit.

### **Issues raised by the Application**

11. The Application sets out two arguments to support the request for reconsideration of the SRO's Decision in relation to proposed redactions of information from the final infringement decision (see paragraph 7 above). These arguments were reiterated by the Applicant's legal advisers at the meeting I held with them.

#### No permitted purpose for disclosure under section 241 of the Enterprise Act

12. The Application states that the proposed disclosures are not required for the CMA to publish the final infringement decision on the CMA website. It states that although publication of a final decision is a permitted function of the CMA and falls within a gateway for disclosure under section 241 of the Enterprise Act, the specific disclosures of the information identified are not a necessary part of the exercise of that function because they are not necessary to find and describe the legal liability for the infringement. The Application notes that the proposed disclosures relate to a small number of specific redactions that do not detract from the legal and economic analysis in the infringement decision.

13. The Application argues that since disclosure is not permitted there is therefore no need to consider the confidentiality of the information and demonstrate harm to the interests of the Applicant.

14. The Application states that the approach in the SRO's Decision which considers the necessity of disclosure only after an assessment of confidentiality of the information in accordance with section 244 of the Enterprise Act is therefore wrong.

15. At the meeting I held with the Applicant's legal advisers they noted that since the infringements were by object there was no need to explain any economic effects.

Disclosure would cause substantial harm to legitimate business interests

16. The second argument in the Application is that the information concerned is confidential and disclosure in the final infringement decision would harm the interests of the Applicant. The Application sets out the approach that the Applicant considers should be taken to the assessment of the confidentiality of the information. It notes that the CMA must consider common law principles and relevant case law, in addition to the description of confidential information in section 244(3)(a) of the Enterprise Act and CMA Rule 1(1)(a) which are referred to in the SRO's Decision.

17. The Application states:

*'the CMA must also take into account common law principles in relation to confidentiality, namely, that information must either have the "necessary quality of confidence" or be such that there is a "reasonable expectation" that it is confidential.'*

In relation to time limits on confidentiality, it notes:

*'As the SRO acknowledges, there is no time limit for confidentiality. We therefore disagree with the SRO's view that strategy from four or five years ago is inherently less likely to harm BLM's commercial interests than disclosure of ongoing or more recent strategy. The nature of confidentiality, its longevity and potential for commercial harm must be assessed based on the individual facts of the case and "judged in the light of the usage and practices of the particular industry or trade concerned." In non-dynamic industries with long standing business models, long purchasing cycles and limited innovation, in particular those with few suppliers and many powerful buyers, past details of business strategy may remain highly confidential to the present day.'*

18. At the meeting I held with the Applicant's legal advisers, they emphasised the importance of considering the individual facts and circumstances of the industry and party concerned. They noted that the Applicant had co-operated with the Investigation throughout and explained that it was making the Application because of the importance it attached to the confidentiality of the particular information. They also noted that the information had been obtained by the CMA using compulsory powers. There was therefore an obligation on the CMA to treat confidential information with care.

19. The Application provides specific reasons why the information in the proposed redactions should be considered to be confidential under four categories:

- references to CBG, a new entrant
- references to customer type
- references to pricing specifics
- references to commercial strategy.

20. The points raised include arguments related to the industry, including its structure, its static nature, the differentiated strategy towards different customers and the limited number of elements related to pricing. The Application notes in relation to commercial strategy:

*‘the rolled lead industry is not a dynamic one. It is a shrinking sunset business where customer relationships, and how they develop over time, are extremely important, and [redacted].’*

21. Key points made in relation to the four categories of information include the following:

- Concerns about the disclosure of the business model adopted for commercial relationships in the industry [redacted].
- Concerns about the role of a potential new entrant, its structure and business model and speculation about how its position in the market might develop.
- Assumptions in the SRO’s Decision about industry awareness may not be readily made or inferred from the industry context.
- Concerns about disclosure of customer level strategy over time including detailed pricing information. Comparison between the terms agreed with different customers is highly sensitive, based on customer volumes and plans, following detailed negotiation annually. A general impression of possible customer differentiation does not reduce the confidentiality of specific information.
- There is no time limit to the sensitivity of the information because the nature of the method of pricing and the nature of the market have not changed over time: only a few elements affect final pricing, [redacted].
- Pricing adjustments, even though they are not pricing specifics, are important for pricing in the industry and information about adjustments to the increment over the quoted prices [redacted] pricing policy.
- Commercial strategy remains confidential over time because of the static nature of the market. The fact that an individual was going against company instructions in developing commercial strategy does not mean this was not confidential company strategy.
- Approach and strategy to pricing of materials, in particular in the context of additional raw material costs, remains commercially important because of

the nature of the industry. Although information was shared, this was with only a category of customers and is not therefore public.

- The nature of the industry with a small number of buying groups would mean these are identifiable even with redactions already proposed.

### **The SRO's Decision**

22. The SRO's Decision sets out the approach for dealing with the request to reconsider the CMA case team's decision:

*'to reject certain of your confidentiality representations for the purpose of publishing a non-confidential version of the infringement decision.'*

It notes the two concerns that have been raised about the decision to reject the confidentiality representations:

*'1. There is no permitted purpose to disclosure of the information in question.*

*2. Even if there were a permitted purpose, the information in question constitutes commercial information whose disclosure might significantly harm BLM's legitimate business interests.'*

The SRO's Decision addresses each of these in turn.

23. The SRO's Decision refers to section 237 of the Enterprise Act which places a general restriction on disclosure of specified information (within the meaning of section 238(1)) other than for one of the permitted purposes set out at sections 239 to 243. Before any such disclosure it notes the CMA must have regard to the considerations in section 244.

24. The SRO's Decision notes that in accordance with section 241(a) the CMA may disclose specified information contained in the infringement decision for the permitted purpose of facilitating the exercise of the CMA's functions under the Competition Act. These functions include the obligation to publish an infringement decision under Rule 10(1)(b) of the CMA Rules.<sup>5</sup> This requires that where the CMA has made an infringement decision, it must without delay publish that decision. This publication is subject to the considerations set out at section 244.

25. The SRO's Decision also refers to the CMA's Transparency and disclosure guidance<sup>6</sup>, stating:

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<sup>5</sup> CMA Rules, see footnote 2 above.

<sup>6</sup> Transparency and disclosure: Statement of the CMA's policy and approach (CMA6), paragraph 3.15.

*'publishing case decisions is a means of enhancing the visibility of the CMA's completed work, and of widening its impact, as well as enabling interested persons to hold the CMA to account.'*

It notes that this will also assist the CMA in the exercise of its functions under the Competition Act.

26. The SRO's Decision explains why the SRO disagrees with the argument that it is not necessary to include the information concerned to describe and find legal liability for the infringement and states:

*'Any specified information contained in the infringement decision has been included for the purpose of explaining how the CMA reached its infringement findings, whether because it provides background context or because it is direct or indirect evidence of the infringements.'*

27. The SRO's Decision sets out the framework provided by section 244 and explains the approach which has been taken by the SRO to each of the categories of information concerned. It states:

*'section 244(3)(a) of the EA02 requires the CMA, before disclosing any specified information, to have regard to the need to exclude from disclosure (so far as practicable), commercial information whose disclosure the CMA thinks might significantly harm the legitimate business interests of the undertaking to which it relates. Where specified information is confidential, i.e. it meets the criterion at section 244(3)(a) of the EA02, section 244(4) of the EA02 also requires the CMA to consider the extent to which disclosure of the information in question is necessary for the purpose for which disclosure is permitted.'*

*I have set out below my assessment of the categories of information identified in your letter against section 244(3)(a) of the EA02. Where I have concluded that the threshold at section 244(3)(a) may be met, I have gone on to consider the extent to which disclosure of the information in question is necessary under section 244(4) of the EA02.'*

28. At the meeting I held with the CMA case team, they explained and reiterated the approach to section 241 and the points set out in the SRO's Decision. They noted the duty on the CMA to publish an infringement decision and the importance of transparency. They also noted that although the Applicant argued that the proposed redactions were small and specific, they in fact related to several hundred pieces of information. This was a practical reason why the CMA case

team considered the confidentiality assessment should be made at the section 244 stage rather than in relation to the permitted function for publication under section 241 as the Applicant had argued.

29. At the meeting, the CMA case team explained the framework provided by Part 9 of the Enterprise Act and the approach taken to the disclosure of information. They noted that the statutory provisions and the CMA Rules had been established by Parliament as a specific regime for handling information. Although the Applicant argued that they should have regard to the common law cases on confidentiality, the specific regime established by Parliament was relevant for disclosure in the context of publishing a Competition Act decision. The CMA case team argued that for example an issue that might be confidential under common law could be disclosed in the particular circumstances of a case because of the provisions of Part 9 where the factors set out in section 244 were applied and it was decided that disclosure would not harm business interests or would meet the necessity test. They also noted that although the common law cases (which were not in the competition law context) were broadly relevant and useful to help inform the CMA's approach, each case and piece of information needed to be considered within its own context.
30. The CMA case team explained why in the context of this industry and the information that had been gathered as part of the Investigation, the conclusions had been reached in relation to confidentiality of the information for which redactions had been sought.
31. The CMA case team also noted that they had followed the CMA's published guidance in the approach that had been adopted in relation to the procedure for handling the confidentiality requests which had been made. The Applicant had been given a reasonable opportunity to make representations and the position of the case team and of the SRO had been set out in correspondence.
32. As noted above (see paragraph 18), the Applicant's legal advisers referred to the fact that the information had been provided in response to the CMA's compulsory investigation powers. I asked the CMA case team for any observations on this point. The CMA case team responded by email following the meeting, noting that they did not consider that the way in which information was obtained during an investigation should have any impact on the way in which that information was assessed when applying the provisions of Part 9 of the Enterprise Act.

## Observations on the Application

33. In handling this Application, I have considered the procedures followed in reaching the SRO's Decision. In particular, I have considered if there has been any error in the legal assessment or whether any of the procedures followed in handling the requested redactions and reaching the conclusions in the SRO's Decision were unfair or unreasonable.
34. In this context, I note the framework provided by the Enterprise Act for balancing the two important issues: the proper treatment of information that has been obtained by the CMA in the course of investigations and the need for appropriate disclosure to explain the CMA's actions in the exercise of its functions. I note also the CMA's policy in relation to transparency which has been set out in guidance<sup>7</sup>:
- 'The CMA is committed to its aims to be open and transparent about the work it does and how it engages with those directly involved in or affected by its work, while seeking to maintain (as appropriate) the confidentiality of information it obtains in the exercise of its functions. It also aims to be reasonable when requesting and handling information, and to protect confidential information in a manner that is appropriate in the circumstances of the case.'*
35. The Application raises a number of issues in relation to the approach to disclosure of information in published infringement decisions. As noted above (see paragraphs 7-8 and 12-21), it presents arguments about the right stage for an assessment of the confidentiality of any information, the harm to the business concerned by publication and the necessity of that publication, in accordance with the Enterprise Act.
36. The first issue relates to the scope of section 241 and the permitted purpose for publication. The Application argues that there is no permitted purpose under section 241 for disclosure of the information concerned. This is because although the Application acknowledges that publication of the infringement decision is a permitted function, it argues that the specific disclosures are not a necessary part of that function.
37. The Application and the SRO's Decision each set out the approach that they have taken to section 241 and how this is considered to fit within the framework for disclosure (see paragraphs 12-15 and paragraphs 23-26 above).

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<sup>7</sup> CMA6, see footnote 6 above, paragraph 2.1.

38. I have considered the approaches that have been set out and reviewed the provisions of Part 9 of the Enterprise Act. I have also taken appropriate account of the Explanatory Notes to the Enterprise Act. I consider that Part 9 provides a scheme setting out different stages in relation to disclosure and the handling of confidential information. This scheme enables the CMA in each investigation to ensure that it can both treat confidential information with appropriate respect and also publish a clear basis for the decisions which are made.

39. In reviewing Part 9, I have considered the parts of the provisions which in my view are of relevance to the Application. I note that at a high level sections 237 and 238 deal with information and that sections 241 and 244 deal with disclosure.

- Section 237 is headed General Restriction and sets out the general restriction on disclosure of specified information which relates to the business of an undertaking.
- Section 238 is headed Information and describes how information is specified information when it comes to the CMA in the exercise of its functions. This includes investigations under the Competition Act.
- Section 241 is headed Statutory Functions. It provides in section 241(1):  
*‘A public authority which holds information to which section 237 applies may disclose that information for the purpose of facilitating the exercise by the authority of any functions it has under or by virtue of this Act or any other enactment’.*
- Section 244 is headed Specified Information: considerations relevant to disclosure. It provides in section 244(1):  
*‘A public authority must have regard to the following considerations before disclosing any specified information (within the meaning of section 238(1))’.*

40. In my view, the statutory scheme therefore suggests that section 241 is a simple step which permits disclosure of specified information for the exercise of a permitted function. It does not provide any details about what may or may not be disclosed for that exercise or the nature of that disclosure. The precise nature of any disclosure of specified information is then subject to the provisions of section 244 and the considerations that must be taken into account and which it sets out. This is also reflected in the headings for the provisions: section 241 dealing with statutory functions and section 244 dealing with considerations relevant to disclosure. In support of my view, I note also that section 241 provides one of

several gateways for disclosure for permitted purposes which are set out in the Enterprise Act<sup>8</sup>.

41. The Application argues that the proposed disclosures are not a necessary part of the function of publication and are not necessary to describe and find liability for an infringement (see paragraphs 7 and 12 above). For the reasons set out above, I do not consider that section 241 deals with the scope and nature of the permitted function or the details of the information that may be disclosed. The structure of the Enterprise Act allows for those considerations to be taken into account at the section 244 stage.
42. The Application also argues that the proposed redactions are small and specific and do not detract from the legal and economic analysis of the infringement decision (see paragraph 12 above). I note in this context the comments of the CMA case team about the number of proposed redactions (see paragraph 28 above). On a practical level, this supports the approach to the framework set out above. The detail of these proposed redactions, their confidentiality, any harm that might be caused by disclosure and the necessity for disclosure can be considered under section 244.
43. I consider that section 241 provides for disclosure where there is a function to do so rather than a stage for assessment of the information which is to be disclosed. In light of my comments above, I therefore do not consider that the SRO's Decision made any error in the legal assessment of the approach to the framework of the Enterprise Act in dealing with publication and disclosure. Section 241 provides a legal basis for disclosure of information in publishing the infringement decision. The SRO's Decision was therefore correct to consider section 241 provides for disclosure, subject to consideration of the provisions set out in section 244.
44. The second argument in the Application relates to the assessment in section 244. The Application sets out the need to take account of common law principles in addition to the provisions of section 244 and the definition of confidential information in the CMA Rules. It argues that all the proposed redactions relate to confidential and commercially sensitive information, disclosure of which could substantially harm the Applicant's interests.
45. In considering the second argument in the Application, I have taken account of the following issues:

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<sup>8</sup> Enterprise Act 2002 sections 239 – 243.

- the legal framework
- the concept of confidentiality
- the approach that was taken to the considerations in section 244
- the application of those considerations
- the procedures followed.

46. The Application argues that in assessing what is confidential information the common law principles of confidentiality need to be taken into account, in addition to the provisions of section 244(3)(a) and the definition of confidential information in Rule 1 (see paragraphs 16-17 above). The Application argues that the SRO's Decision has not made a proper assessment of what is confidential information, taking account of the particular nature and features of the industry concerned.

47. The CMA case team commented on the common law principles of confidentiality in the context of the Enterprise Act framework at the meeting I held with them (see paragraph 29 above). As set out above, they noted that Parliament had established a specific regime under Part 9 of the Enterprise Act which was relevant for disclosure in the context of publishing a Competition Act decision. The CMA case team also noted that although the common law cases were broadly relevant and useful to help inform the CMA's approach, each case and piece of information needed to be considered within its own context.

48. The SRO's Decision sets out the approach that was taken to the assessment of confidentiality. The considerations in section 244 of the Enterprise Act have been applied, taking account of the nature of the information for which redactions have been requested. The SRO's Decision therefore applies the appropriate statutory framework to the particular circumstances. I note that the SRO's Decision does consider how the concept of confidentiality should be approached. In relation to time limits, for example, the SRO's Decision acknowledges that there should be no automatic assumption that information loses its quality of confidence after a specific period of time.

49. As set out above, the considerations in section 244 are cumulative and allow for disclosure where this is considered necessary for the purpose for which that disclosure is permitted to be made, even where that information may be commercial information and disclosure might harm legitimate business interests. In this context, I note the points that were made by the CMA case team about the specific statutory regime that applies to publication of Competition Act decisions. The common law concept of confidentiality is relevant and may be helpful within

this context but it is the statutory provisions of Part 9 of the Enterprise Act that must be applied before any disclosure is made. I note that the outcome following the application of the considerations set out in section 244 may therefore allow for disclosure in a Competition Act decision of particular pieces of information which might otherwise be considered confidential.

50. I therefore consider that the SRO's Decision properly applied the relevant legal framework and the approach to the concept of confidentiality.
51. The SRO's Decision sets out the approach it takes to the information for which redactions have been requested, considering first if the information falls within section 244(3)(a) (commercial information whose disclosure might significantly harm the legitimate business interests of the undertaking to which it relates) and if so considering next section 244(4) (the extent to which the disclosure of the information is necessary)(see paragraph 27 above). This approach is applied to each category of information for which the Applicant had requested redactions. In relation to certain of the categories of information, the SRO's Decision found there was no need to consider section 244(4) because the threshold of section 244(3)(a) was not met. In relation to information where the SRO's Decision considered that the threshold of section 244(3)(a) was met or the conclusion was finely balanced, consideration was then given to the necessity of disclosure under section 244(4). In making these assessments, the SRO's Decision considered the arguments which had been put forward by the Applicant and also the comments of the CMA case team, taking account of the nature of the market concerned, the position of the Applicant and the relevant circumstances and issues involved.
52. In the Application, it was argued that there were certain assumptions that may not readily be made or inferred from the industry context and that certain conclusions set out in the SRO's Decision were therefore incorrect. In this context, I note that the provisions of section 244 give discretion to the CMA in making the assessment of confidentiality and the necessity of disclosure. Section 244(3) refers to 'the need to exclude from disclosure (so far as practicable)' and section 244(3)(a) refers to 'commercial information whose disclosure the authority thinks might harm the legitimate business interests of the undertaking to which it relates' (emphasis added). The SRO's Decision was based on a reasonable understanding of the industry arising from the Investigation with conclusions reached based on the particular circumstances concerned. I note that the SRO's

Decision applied the considerations in section 244 as appropriate to each category of information, reached conclusions on the basis of those considerations and that those conclusions varied depending on the information concerned. I note also that the SRO's Decision sets out the basis on which the conclusions under section 244 were reached.

53. I therefore consider that the SRO's Decision properly took account of and applied the considerations set out in section 244.

54. I have also considered the procedures that were followed in assessing the proposed redactions and reaching the conclusions set out in the SRO's Decision. In this context, I note that Rule 7<sup>9</sup> sets out the procedures that are to be followed by the CMA in handling information which has been supplied and identified as being information the CMA should treat as confidential. When the CMA proposes to disclose such information, there are certain steps which the CMA is required to take in relation to that information and any representations. I note also that the Guidance sets out the steps in relation to confidentiality before a decision is published.<sup>10</sup>

55. I note the following:

- the SRO's Decision clearly sets out the considerations that were taken into account and the reasoning in relation to each category of information.
- the SRO's Decision addresses particular issues that have been raised by the Applicant, for example in relation to time limits on confidentiality.
- the SRO's Decision sets out the approach to the industry concerned and the information that had been gathered as part of the Investigation.
- the Application provided correspondence which demonstrates that the Applicant had had an opportunity to make representations in relation to proposed redactions and that these were carefully considered. Certain redactions were made.
- At the meeting with the CMA case team, they explained and re-iterated the reason for the decision which had been taken in relation to each category of information, as reflected in the SRO's Decision.
- At the meeting with the CMA case team, they noted that the process had been followed as set out in relevant CMA guidance.

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<sup>9</sup> CMA Rules, see footnote 2 above.

<sup>10</sup> CMA8, see footnote 3 above, paragraphs 13.12-13.

56. I therefore consider that the procedures followed in dealing with the Applicant's proposed redactions and the conclusions set out in the SRO's Decision were fair and reasonable.

57. In dealing with the second argument in the Application, I therefore consider that the SRO's Decision applied the appropriate legal framework and that the procedures followed were fair and reasonable.

58. In light of my comments above, I do not consider that there was any error in the legal assessment in reaching the SRO's Decision or that any of the procedures followed in handling the requested redactions and reaching the conclusions set out in the SRO's Decision were unfair or unreasonable.

### **Decision**

59. After careful consideration, in light of the reasons set out above, I have decided to reject the Application.

**FRANCES BARR**  
**PROCEDURAL OFFICER**

**23 February 2021**