NCN: [2025] UKUT 251 (AAC)
Appeal No. UA-2024-001765-GIA

IN THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

BETWEEN

THE CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

BEFORE UPPER TRIBUNAL JUDGE WEST

Hearing Date: 22 May 2025

Decision Date: 28 July 2025

Representation: Mr Craig Dunford KC, counsel, for the Appellant (instructed by the Crown Solicitor's Office, Belfast)

Mr Christopher Knight, counsel, for the Respondent (instructed by the Information Commissioner)

ON APPEAL FROM

Tribunal	First-tier Tribunal (General Regulatory Chamber) (Information Rights)
Tribunal Case No:	EA/2023/0341
Tribunal Hearing Date:	5/3/2024
Tribunal Decision Date:	8/8/2024

Summary of Decision Freedom of Information Act 2000 – legal professional privilege - information notice served under s.51(1)(a) where Information Commissioner has received an application under s.50 – whether information notice under s.51(1)(a) is subject to the requirement that the Commissioner reasonably requires the information as in s.51(1)(b) – whether ambit of the two powers is the same or different – relationship with s.51(5)(a) and (b) which provide that the public authority is not required to furnish the Commissioner with information in respect of legally privileged communications in certain circumstances

Keyword Name **93 Information rights**

93.1 Freedom of information - right of access

93.2 Freedom of information - public authority response

93.3 Freedom of Information - exceptions

93.5 Freedom of information - qualified exemptions

Please note that the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and the Reasons of the Judge follow.

DECISION

The decision of the First-tier Tribunal (General Regulatory Chamber) dated 8 August 2024 under file reference EA2023/0341 does not contain an error on a point of law. Permission to appeal is granted but the appeal is dismissed.

This decision is made under section 11 of the Tribunals, Courts and Enforcement Act 2007.

REASONS

Introduction

1. This is an appeal, with my permission, against the decision of the First-tier Tribunal (Judge Stephen Roper, Tribunal Members Suzanne Cosgrave and Paul Taylor) which sat on 5 March 2024 and which issued its decision on 8 August 2024.

2. In its decision the Tribunal dismissed the appeal of the Appellant, the Chief Constable of the Police Service of Northern Ireland, from the decision of the Information Commissioner ("the IC") dated 22 June 2023 to the effect that, in the exercise of his powers under s.51 of the Freedom of Information Act 2000 ("FOIA"), he required the Appellant within 30 days of the date of the notice to furnish him with the remaining Withheld Information which fell within the scope of the request. To avoid confusion between calling the Appellant the CC and the Respondent the IC, I shall designate the Appellant either as "the Appellant" or as "the PSNI", whilst acknowledging that the Appellant is in fact the Chief Constable of the PSNI.

3. The request sought information concerning records of talks between goldmine companies discussing security costs.

The Background

The Request

4. On 22 May 2020 a multi-part request for certain information was made to the Appellant under FOIA. For the purpose of this appeal the relevant part of the request was:

> "Is there a public record of talks between goldmine companies discussing security costs and can the public see them?"

5. There was a previous appeal in respect of the request, which resulted in a consent order, pursuant to which that part was clarified as meaning:

> "any record of talks between goldmine companies discussing security costs".

6. After that previous appeal, the Appellant issued a further response to the request on 3 September 2021 followed by an internal review on 22 October 2021. The Appellant confirmed that he held information within the scope of the request, but withheld it on the basis of (amongst other exemptions) s.42(1) (legal professional privilege) ("LPP").

7. The Requestor complained to the IC about the Appellant's response to the request, pursuant to s.50. In considering that complaint, the IC contacted the Appellant on 22 December 2022 asking for a full and unredacted copy of the Withheld Information.

8. The Appellant responded to the IC on 13 February 2023, agreeing to provide him with some of the Withheld Information, but stated that the remainder could not be provided because it comprised legal advice, stating:

> "PSNI is not in a position to provide this legal advice to you as we consider it to be legally privileged to PSNI and outside the requirements of the FOIA to provide."

9. In further correspondence between the IC and the Appellant, the latter confirmed that the legal advice (the Withheld Information) did fall within the scope of the request. The Appellant informed the IC again on 13 April 2023 that he was not willing to provide the IC with the Withheld Information.

The Information Notice

10. The IC issued the Information Notice under s.51, stating that he required sight of the Withheld Information in order to assess the legality of the Appellant's response to the request. The IC did not accept the Appellant's position that FOIA does not require him to provide LPP Material to the ICO.

11. Pursuant to the Information Notice, the IC required the Appellant to furnish the Withheld Information within 30 days of the date of the Information Notice.

The Statutory Framework

12. S.1 of FOIA affords the right to request from a public authority whether or not information of a description specified in the request is held by the authority and, if it is held, to have that information communicated to him. That s.1 right is subject to the provisions, in particular, of s.2: s.1(2).

13. The Appellant is designated a public authority by paragraph 61 of Schedule 1 to FOIA.

14. S.2(2) provides the general exception to the right to have the requested information communicated:

> "In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—
>
> (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
>
> (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information".

15. S.2(3) lists those provisions of Part II ("and no others") which confer absolute exemption.

16. S.42 falls within Part II. It is headed "Legal professional privilege" and provides an exemption in the following terms:

> "(1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.
>
> (2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings".

17. S.42 is not listed in s.2(3) as a provision conferring absolute exemption. It is, accordingly, a qualified exemption subject to the public interest balancing exercise mandated by s.2(2)(b).

18. Part IV of FOIA is headed "Enforcement". S.50 provides for the right of a requestor to complain to the IC about the handling of his request by the public

authority and for the duty on the IC to determine that complaint. S.50 provides:

> "(1) Any person (in this section referred to as "the complainant") may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I.
>
> (2) On receiving an application under this section, the Commissioner shall make a decision unless it appears to him—
>
> (a) that the complainant has not exhausted any complaints procedure which is provided by the public authority in conformity with the code of practice under section 45,
>
> (b) that there has been undue delay in making the application,
>
> (c) that the application is frivolous or vexatious, or
>
> (d) that the application has been withdrawn or abandoned.
>
> (3) Where the Commissioner has received an application under this section, he shall either—
>
> (a) notify the complainant that he has not made any decision under this section as a result of the application and of his grounds for not doing so, or
>
> (b) serve notice of his decision (in this Act referred to as a "decision notice") on the complainant and the public authority.
>
> (4) Where the Commissioner decides that a public authority—
>
> (a) has failed to communicate information, or to provide confirmation or denial, in a case where it is required to do so by section 1(1), or
>
> (b) has failed to comply with any of the requirements of sections 11 and 17,

> the decision notice must specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken".

19. S.57(1) provides for the right of appeal to the Tribunal against a decision notice issued under s.50. It is well-established that the Tribunal's jurisdiction on such an appeal is, by the terms of s.58, a full merits appeal which may consider any issue of fact or law, including ones which were not raised with the IC when determining the s.50 complaint.

20. Part IV also provides certain powers to the IC to further his enforcement functions. S.52 permits him to issue an enforcement notice to a public authority which has failed to comply with a requirement of Part I.

21. S.51 provides the IC with a power to issue an information notice in the following terms:

> (1) If the Commissioner—
>
> (a) has received an application under section 50, or
>
> (b) reasonably requires any information—
>
> (i) for the purpose of determining whether a public authority has complied or is complying with any of the requirements of Part I, or
>
> (ii) for the purpose of determining whether the practice of a public authority in relation to the exercise of its functions under this Act conforms with that proposed in the codes of practice under sections 45 and 46,
>
> he may serve the authority with a notice (in this Act referred to as "an information notice") requiring it, within such time as is specified in the notice, to furnish the Commissioner, in such form as may be so specified, with such information relating to application, to compliance with Part I or to conformity with the code of practice as specified.
>
> (2) An information notice must contain—

(a) in a case falling within subsection (1)(a), a statement that the Commissioner has received an application under section 50, or

(b) in a case falling within subsection (1)(b), a statement—

(i) that the Commissioner regards the specified information as relevant for either of the purposes referred to in subsection (1)(b), and

(ii) of his reasons for regarding that information as relevant for that purpose.

(3) An information notice must also contain particulars of the right of appeal conferred by section 57.

(4) The time specified in an information notice must not expire before the end of the period within which an appeal can be brought against the notice and, if such an appeal is brought, the information need not be furnished pending the determination or withdrawal of the appeal.

(5) An authority shall not be required by virtue of this section to furnish the Commissioner with any information in respect of—

(a) any communication between a professional legal adviser and his client in connection with the giving of legal advice to the client with respect to his obligations, liabilities or rights under this Act, or

(b) any communication between a professional legal adviser and his client, or between such an adviser or his client and any other person, made in connection with or in contemplation of proceedings under or arising out of this Act (including proceedings before the Tribunal) and for the purposes of such proceedings.

(6) In subsection (5) references to the client of a professional legal adviser include references to any person representing such a client.

(7) The Commissioner may cancel an information notice by written notice to the authority on which it was served.

(8) In this section "information" includes unrecorded information".

22. An information notice may itself be appealed to the Tribunal, just as a s.50 decision notice may be: s.57(2). The Tribunal's jurisdiction under s.58 is the same full merits appeal.

23. By s.55 and Schedule 3, the IC is granted powers of entry and inspection, including upon application for a warrant. Such a warrant may be obtained where there are reasonable grounds for suspecting that the public authority has failed or is failing to comply with the requirements of Part I, a decision notice issued under s.50, or an information notice issued under s.51: paragraph 1(1). Paragraph 9 of Schedule 3 provides for an exemption in the same terms as that in s.51(5).

24. Any information which has been obtained by the IC must not be disclosed by any member of his staff without lawful authority, on pain of committing a criminal offence: s.132 of the Data Protection Act 2018 ("the DPA").

25. The IC is also afforded various regulatory powers in Part 6 of the DPA. Analogously with the terms of s.51 of FOIA, those powers contain very specific exceptions for particular kinds of LPP material, but not for LPP material more generally. Accordingly:

(1) the information notice power in s.142 is subject to the restrictions in s.143. These include, at (3)-(5), "a communication which is made … in connection with the giving of legal advice to the client with respect to obligations, liabilities or rights under the data protection legislation".

(2) the assessment notice power in s.146 is subject to a similar restriction in s.147(2)-(4).

The Decision of the Tribunal

26. The Tribunal set out its findings in its discussion of the issues as follows:

> "38. We first address some preliminary points before turning to the other issues in the appeal.

39. Both of the parties referred us to various authorities from case law relating to the nature and function of LPP. However, there was no relevant dispute between the parties on the question of LPP itself. The crux of the appeal was whether the Appellant can rely on LPP to refuse to provide LPP Material in respect of an information notice which is issued by the Commissioner pursuant to section 51.

40. The Appellant made it clear that he had not waived LPP in respect of the Withheld Information. The Withheld Information may or may not be protected by LPP, but establishing that was not the purpose of the appeal. Rather, as we have noted, the purpose of the appeal was essentially to determine whether the Commissioner has the power to require, by way of the Information Notice, the production of material in respect of which the Appellant has asserted LPP.

The Exemption Issue

41. The thrust of the Appellant's contention regarding the Exemption Issue (as set out in his grounds of appeal) was, essentially, that section 42 was an exemption which the Appellant could rely on in order to exempt disclosure of the Withheld Information to the Commissioner.

42. In that regard, the Appellant's grounds of appeal sought to rely on the language of section 51(5), to the effect that such section was simply an adjunct to (and not a derogation from) the exemption in section 42 in respect of LPP. In support of this view, the Appellant stated that section 51(5) refers only to any LPP arising in respect of a client's obligations, liabilities or rights under FOIA (including proceedings before the Tribunal).

43. Various submissions were made by both parties in respect of whether section 42 is overridden, or reduced in scope and operation, by section 51. However, we believe that the issue in question is a relatively straightforward one. It appears to us that the Appellant's arguments relating to the interaction of section 51 and the exemption for LPP under section 42 were based on a fundamental misconception regarding the operation of those sections. This is because section 42 only relates to potential exemptions from the Duty to Inform and the Duty to Disclose, not exemptions relating to any request for information made by the Commissioner under section 51. Section 2 of FOIA, to which we have referred, is entitled "Effect of the exemptions in Part II". Section 42

falls within Part II of FOIA and, in accordance with the relevant provisions of section 2, relates to exemptions from the Duty to Inform and the Duty to Disclose.

44. That interpretation is also supported by section 84, which sets out the rules of interpretation of FOIA. Pursuant to that section, "exempt information" means "information which is exempt information by virtue of any provision of Part II". We recognise that applying that interpretation exactly can give rise to some regrettable results – specifically, that applying it to the use of the term 'exempt information' as set out in any section of Part II of FOIA where that term is used, including section 42(1), gives a circular meaning (effectively, 'exempt information under this Part II means information which is exempt information under this Part II'). However, in our view, the clear intention is that references in FOIA to "exempt information" are to information which (pursuant to section 2) is exempt from the Duty to Inform and/or the Duty to Disclose pursuant to a provision within Part II of FOIA. Another relevant point worth noting is that section 51 does not use the term "exempt information".

45. Accordingly, in our view the Appellant's arguments about the nature and scope of section 42(1) pertaining to an exemption for LPP Material fall at the first hurdle – because section 42 does not apply to information which is requested by the Commissioner under section 51.

46. It follows from the above that the Appellant cannot rely on section 42 to refuse to provide the Withheld Information to the Commissioner.

47. We should note that Mr Dunford accepted in his submissions that section 42 refers to the provision of information to the requesting party, as opposed to the Commissioner. However, that was not the premise set out in the Appellant's grounds of appeal. We deal further with Mr Dunford's submissions on this point further below (paragraph 53 onwards).

The Interpretation Issues

48. The basis of the Appellant's argument (as set out in his grounds of appeal) that FOIA does not, either by express words or by necessary implication, abrogate or override LPP was underpinned by reliance on the operation of section 42.

49. As we have found in respect of the Exemption Issue, section 42 does not operate as an exemption in respect

of information which is requested by the Commissioner pursuant to an information notice issued under section 51. On that basis, the Appellant's grounds of appeal are exhausted.

50. However, submissions were also made on behalf of the Appellant (including in respect of an associated strike out application which was made by the Commissioner in connection with the appeal) regarding the broader premise of whether the Information Notice can require the production of LPP Material (aside from the operation of section 42). These submissions were based on the general principle that LPP is a fundamental right which may only be overridden in specific circumstances.

51. Whilst this was not a specific point raised in his grounds of appeal, the Appellant's position was, in essence, that there was no provision in FOIA at all (not just in section 42) which overrode LPP and on that basis the Commissioner had no power under section 51 to require the production of the Withheld Information. Accordingly, for completeness (and given the potential importance of the issue) we also address the issues around this broader premise.

52. The parties were in agreement that LPP can only be disregarded or overridden in certain limited circumstances (including where it has been waived, which was not applicable in respect of the Withheld Information). The parties also made submissions in respect of the question as to whether a regulator (in this case, the Commissioner) generally had the power to require the production of LPP Material, including by reference to the *Sports Direct* case in which it was argued that there was 'no infringement' of LPP where the applicable LPP Material was required by a regulator (*Sports Direct International PLC v Financial Reporting Council* [2020] EWCA Civ 177 (also reported sub nom. *Financial Reporting Council v Sports Direct International plc* [2021] Ch 457). However, in our view it is not necessary to address this question (nor, indeed, the 'no infringement' principle generally) but rather to focus on the Commissioner's statutory powers, given that the Information Notice was issued pursuant to section 51. We would also note that in the *Sports Direct* case, the regulator (the Financial Reporting Council) had relied on the 'no infringement' proposition because the relevant statutory power regarding the provision of information to it specifically excluded LPP Material.

53. As we have noted, Mr Dunford accepted that section 42 refers to the provision of information to the requesting party, as opposed to the Commissioner. However, he contended that section 42 is relevant and "important" in the context of the appeal, on the basis that it is a recognition and affirmation of the central principle and general application of LPP. He further submitted that this must inform the interpretation of section 51 - and hence FOIA generally, because it must be interpreted as a whole, having regard to its purpose (citing *Barclays Mercantile Finance Ltd v Mawson* [2004] UKHL 51 at [28]).

54. We accept that section 42 has some relevance in recognising the general principle and application of LPP (given that it is a potential exemption to the Duty to Inform and the Duty to Disclose) but in our view there is a caveat to the premise that section 42 'affirms' LPP. This is because that section is a qualified exemption, being subject to the applicable public interest test (as we noted in paragraphs 30 and 31). Accordingly, there have been instances where a public authority has been required to disclose LPP Material which is requested under FOIA notwithstanding the engagement of section 42, because the balance of the public interest test has favoured disclosure of such LPP Material. This was a point which was also made by Mr Knight in his submissions.

55. Mr Dunford further submitted that section 51(5) also affirms the application of LPP in relation to material generated for specific advice on the operation of FOIA. He argued that the express words of section 51(5) are consistent with the "explicit centrality of the general exemption" in relation to LPP contained in section 42. As we have noted, the exemption in section 42 is a qualified exemption and the operation of section 42 in practice results in some LPP Material being disclosed by public authorities. Therefore (in the context of FOIA at least) LPP is not as inviolable as Mr Dunford was essentially seeking to argue.

56. It was also submitted by Mr Dunford that FOIA was able to operate "without access" to LPP Material, which we took to mean operating without the requirement for any public authority to provide LPP Material to a person requesting information, or to the Commissioner. We do not accept that argument, for the same reasons we have given above regarding the operation of section 42 (and

for the reasons we also refer to below). Linked to that point, Mr Dunford also submitted that there was accordingly no basis for the doctrine of 'necessary implication' to apply to FOIA so as to abrogate or override LPP. As the latter point is also predicated on the basis that FOIA does not provide for the disclosure of LPP Material, it suffers from the same flaw as the preceding argument. Mr Dunford also submitted that FOIA itself "explicitly reaffirms LPP" but that is evidently not the case, again for the reasons we have given regarding the operation of section 42.

57. We acknowledge and accept, though, that where an information notice is issued under section 51(1), section 51(5) operates to preclude a public authority from being obliged to supply to the Commissioner any LPP Material which (in broad summary) relates to communications regarding legal advice given in respect of FOIA or in connection with proceedings, including before the Tribunal, under or arising out of FOIA.

58. Therefore, section 51(5) does mean that a public authority may withhold from the Commissioner some LPP Material where it has been served with an information notice, provided that such LPP Material meets the criteria set out in that section. Whilst we have not seen the Withheld Information, the Appellant has confirmed (including in correspondence with the Commissioner in respect of the Request) that it is information falling within the scope of the Request and therefore we find that it does not meet such criteria. Consequently, we also find that section 51(5) is not engaged in respect of the Withheld Information.

59. We now turn to the wording of section 51(1) itself. Mr Dunford submitted that section 51 only empowers the Commissioner to seek, by way of an information notice, information which the Commissioner 'reasonably requires' to enable him to discharge an investigation regarding the operation of section 42 and the application of the associated public interest test. In this regard, Mr Dunford disagreed with the witness's view that an information notice gives the Commissioner an overall entitlement to require the production of LPP Material.

60. We do not agree with Mr Dunford's position on that issue. Section 51(1) clearly provides that the Commissioner may issue an information notice in two separate, alternative, scenarios – either (section 51(1)(a)) where he has received an application under

section 50, or (section 51(1)(b)) where he reasonably requires information for the purposes set out in the sub-sections of section 51(1)(b)). It is only the latter scenario which has the qualification of reasonableness in respect of information which the Commissioner requires pursuant to an information notice.

61. The Information Notice was issued pursuant to section 51(1)(a), in connection with the application from the Requestor which was received by the Commissioner under section 50 regarding the Request (therefore, the first scenario of those referred to in paragraph 60). Accordingly, as we have noted, there is no requirement that the information required by the Commissioner as set out in the Information Notice must be limited to information which is reasonably required. Rather, pursuant to section 51(1)(a), the Commissioner was entitled to require the Appellant to furnish the Commissioner with such information as may be specified in the Information Notice relating to the Requestor's section 50 complaint regarding the Request. This was also explained by the witness and was the context within which the witness was referring to the Commissioner's right to require the production of LPP Material.

62. We interpret section 51(1)(a) as also entitling the Commissioner to request such information as he may specify relating to compliance with Part I of FOIA (or to the code of practice referred to in that section), even if the information notice in question is issued pursuant to section 51(1)(a), as opposed to section 51(1)(b) which specifically refers to such information. However, that interpretation is immaterial to this decision, because the appeal concerns the Information Notice (which only required information relating to the Requestor's section 50 complaint).

63. Sections 51(2) and 51(3) set out certain requirements as to what must be included in an information notice issued under section 51(1). Section 51(4) specifies requirements regarding the timeframe which is included in an information notice for the provision of information pursuant to it. We find (in accordance also with the witness's statement on this point) that the Information Notice met all those requirements.

64. Various submissions were made by Mr Dunford and Mr Knight, in respect of the Information Notice and its

requirement to furnish the Commissioner with the Withheld Information, regarding whether FOIA, either expressly or by 'necessary implication', operates to abrogate or override LPP.

65. Mr Dunford's submissions on that issue were generally based on the premise, as we have already referred to, that LPP is a fundamental right of a basic constitutional character and that FOIA does not operate to reduce or override LPP. In contrast, Mr Knight's submissions were to the effect that FOIA does provide for exceptions to the general principle of LPP – either in the context of section 42 as a qualified exemption or in the context of the information which the Commissioner can request under section 51.

66. We favour the submissions of Mr Knight. This is partly because of the reasons we have already given regarding the operation of section 42 in respect of LPP Material. This is also because we find that the mechanism for information notices under section 51(1) must, of necessity, include the power for the Commissioner to require the production of LPP Material when it is relevant to the section 50 application in respect of which the applicable information notice is issued.

67. Our finding in the preceding paragraph is based on the rationale that it would defeat the relevant purposes of FOIA if the Commissioner was unable to have sight of pertinent information in order to determine whether a public authority has validly applied any of the exemptions set out in Part II. By saying the 'relevant purposes', we mean the duty of the Commissioner to make applicable decisions pursuant to section 50 and the need for the Commissioner to be able to assess pertinent information in order to properly make any such decision.

68. That finding is also based on the need, where applicable, for the First-tier Tribunal to make its own decisions pursuant to section 58 in respect of appeals made under section 57. The First-tier Tribunal has often been required to make determinations on the application of section 42 and in most (if not all) cases it could not properly do so without sight of the relevant material in respect of which LPP is asserted by the public authority.

69. Indeed, in this case we initially considered whether we would need to have sight of the Withheld Information

but we concluded that it was not necessary because it was not relevant to the appeal, for the reasons we referred to in paragraph 40. Had the appeal concerned the application of section 42 in respect of a decision notice issued by the Commissioner pursuant to section 50(3) regarding the Withheld Information, we consider that it would have been necessary for us to see the Withheld Information – this is because we would not be able to assess whether or not it was indeed LPP Material without having sight of it. This links back to our earlier comments to the effect that we do not know whether or not the Withheld Information is indeed subject to LPP.

70. We should clarify that, when we use the term 'necessity' in paragraph 66, we do not mean the approach to statutory interpretation of "necessary implication" which was referred to by the parties in their submissions. This is because we find that section 51(1) – in the context of an information notice issued under section 51(1)(a) – expressly covers the entitlement of the Commissioner to seek LPP Material from a public authority. We form this view for the following reasons:

a. Section 51(1) uses express words to the effect that the Commissioner may serve an information notice requiring a public authority to furnish him with 'such information as he specifies in the information notice' relating to an application under section 50.

b. Those express words are not qualified in any way, such as by reference to reasonableness (as is the case, in contrast, for an information notice which is issued under section 51(1)(b)).

c. There is specific recognition of certain LPP Material being excluded from the scope of an information notice issued under section 51(1) – namely in section 51(5) regarding the specific criteria for LPP Material we have referred to (paragraph 57) relating to LPP in connection with advice and proceedings relating to FOIA itself. Therefore had Parliament intended that the scope of an information notice would not extend to any other LPP Material then it would have specified so, rather than referring only to LPP Material meeting those specific criteria.

d. Accordingly, it is clear that the only potential applicable exclusion under FOIA to the duty of a public authority to furnish the Commissioner with any

information specified by him in an information notice is that set out in section 51(5) covering only the LPP Material meeting the specific criteria in that section.

e. It follows that there is no other basis for a public authority to refuse to provide any other information, including any LPP Material falling outside of section 51(5), which is specified by the Commissioner in an information notice.

f. That interpretation is consistent with construing FOIA as a whole, in accordance with the views expressed in the *Barclays Mercantile Finance* case we have referred to, and having regard to the relevant practical implications of the operation of FOIA which we address below.

71. Even if our analysis about the express words of section 51(1) is flawed, then the only feasible alternative must be the "necessary implication" approach to statutory interpretation, for the same fundamental reasons we have given. Applying that alternative approach would result in the same outcome – namely that the Commissioner can, pursuant to section 51(1), compel a public authority to produce LPP Material (other than any LPP Material which falls within the scope of section 51(5)).

72. Part of the rationale behind our conclusions above is that any other finding would make a public authority the sole arbiter of its own compliance with FOIA insofar as it considered that any requested information involves LPP Material. In that alternative scenario, it would follow that the Tribunal itself would also be prevented from making any adequate determination of any such compliance (as the public authority would seek to also preclude the Tribunal from having sight of the LPP Material). In our view, such a state of affairs cannot have been intended by Parliament, as this would mean that whenever section 42 was relied on by a public authority then the Commissioner and the Tribunal could not have sight of the applicable LPP Material in order to determine whether section 42 was engaged, or in turn to properly consider (where applicable) the application of the public interest test. Indeed, if the Appellant was correct that there is no scope under FOIA to require a public authority to produce LPP Material, that would effectively thwart the role and responsibilities of the Commissioner (in making relevant decision notices under section 50) and of the Tribunal (in determining appeals under

section 58) in cases where the public authority relied on section 42 to withhold requested information.

73. Linked to the above, in light of the principles in the Upper Tribunal's decision in *Corderoy v Information Commissioner, Attorney General's Office & Cabinet Office* [2017] UKUT 495 (AAC), it is incumbent on the Commissioner to be satisfied that information which is withheld by a public authority following a request under FOIA is properly exempt from disclosure and not to just accept the assurance of the public authority. This would necessarily require the Commissioner to have sight of the relevant withheld information – which, in the context of section 42, would mean having sight of the applicable LPP Material.

74. Mr Dunford proposed an alternative method pursuant to which, he submitted, compliance with the Information Notice could be achieved; this set out various steps, which the Appellant was "ready, willing and able to take", regarding disclosure of certain details related to the information which was sought by the Commissioner in the Information Notice. Crucially, that proposed method excluded the provision of the Withheld Information. In our view, therefore, that proposed method did not achieve compliance with the Information Notice as propounded by Mr Dunford. In addition to the other reasons we give in this decision (including, in particular, in paragraph 73 regarding the *Corderoy* case), we form this view because:

a. that proposed method would not actually provide the Commissioner with the information which was specifically sought by way of the Information Notice;

b. there is nothing in FOIA (other than section 51(5)) which fetters the discretion of the Commissioner regarding the information sought pursuant to the Information Notice; and

c. accordingly, it is not open to the Appellant to propose alternative means of providing the information requested by the Commissioner and/or to provide lesser information than was requested by the Commissioner.

75. Mr Dunford commented on *Boyce v Information Commissioner & Parliamentary and Health Service Ombudsman* (EA/2019/0032) (which had been referred to by the witness in the context of the public interest test for section 42) and argued, in essence, that that case

supported the Appellant's position that the production of LPP Material to the Commissioner was not necessary in order for the Commissioner to make a decision regarding the engagement of section 42. However, in our view, that argument was self-defeating because Mr Dunford also acknowledged that the Tribunal in the *Boyce* case reached its conclusion following its examination of the closed material furnished in that case. It is evident from the decision in that case (paragraph 81 onwards) that the closed bundle which the Tribunal had sight of included the LPP Material in question. That case also serves to demonstrate how the Tribunal can reach a decision on LPP Material which differs from the view of the public authority (see paragraphs 84 and 85 of that case). This, essentially, illustrates the point we are making above – namely that sight of the information is required to make the necessary determination by the Commissioner and, where applicable, the Tribunal.

76. We would also note that the Appellant has not provided any case law in direct support of its argument that a public authority can refuse to provide LPP Material when issued with an information notice from the Commissioner under section 51(1)(a). Neither has the Appellant been able to refer to any provision of FOIA which expressly negates the duty of a public authority to provide LPP Material which is requested pursuant to any such information notice, other than section 51(5) which, as we have found, is not applicable to the Withheld Information.

77. As we have mentioned (paragraph 40), the Withheld Information may or may not be protected by LPP. Following production of it to the Commissioner pursuant to this decision, it will then be for the Commissioner to determine whether or not the Appellant can rely on section 42(1) to withhold it in respect of the Request. The Commissioner's resulting decision in that regard (which would be made pursuant to section 50(3)) would of course then be afforded the right of appeal pursuant to section 57(1).

Final conclusions

78. For all of the reasons we have given, we find that the Information Notice was lawful and accordingly that the Commissioner was entitled to require the Appellant to furnish the Commissioner with the Withheld Information. Therefore the Appellant was not entitled to refuse to provide the Withheld Information to the Commissioner.

79. We therefore dismiss the appeal."

The Application and Appeal to the Upper Tribunal

27. The Appellant sought permission to appeal from the Tribunal, which was refused on 18 November 2024. It then applied to the Upper Tribunal for permission to appeal on 12 December 2024.

28. On 2 January 2025 I directed a rolled-up hearing of the application for permission to appeal with the appeal to follow if permission were granted and directed the suspension of the Tribunal's decision pending the resolution of the appeal to the Upper Tribunal. I heard the rolled-up application on 22 May 2025 when both parties were represented by counsel, the Cabinet Office by Mr Craig Dunford KC and the IC by Mr Christopher Knight, to whom I am indebted for their able written and oral submissions.

The Grounds of Appeal

29. The Appellant had two grounds of appeal:

(1) the Tribunal was wrong in law in its interpretation of s.51(1) and in particular its conclusion at [60-61] that a notice issued under s.51(1)(a) (as this notice was in terms) is not required to satisfy a "reasonably requires" test

(2) the Tribunal was wrong in law to find that, even if s.51(1)(a) did not expressly cover the IC's power to seek disclosure to him of LPP material which was the subject of a s.50 application, the power extended to LPP material as a matter of necessary implication.

The Appellant's Submissions

30. Mr Dunford KC submitted that in any case where the IC is investigating an alleged failure by a disclosing authority to meet its duties under Part I of FOIA (a "Part I Enquiry"), on a true construction of s. 51(1), he is entitled only to information from that authority which he reasonably requires. This is the case whether the Part I Enquiry has been triggered by an application under s.

50(1) ("Trigger A"), or whether he is conducting the Part I Enquiry pursuant to s.51(1)(b) ("Trigger B").

31. The overall purpose of FOIA, more especially Part I, is to provide for the provision of information by a disclosing authority to an applicant, unless that information is (a) absolutely exempt from disclosure or (b) exempt, unless the public interest in its disclosure outweighs the authority's interest in not disclosing (the qualified exemption).

32. Material covered by LPP (the documentation in issue in this case) is, by virtue of s.42, subject to qualified exemption from disclosure, requiring an authority dealing with a request for its disclosure to undertake the public interest test. Thus, the disclosing authority is the *first* (but not necessarily the *final*) arbiter of whether or not material subject to qualified exemption from disclosure should, following the application of the public interest test, remain undisclosed.

33. The Tribunal at [59-62] interpreted s.51(1) as creating *"…two separate, alternative, scenarios – either (section 51(1)(a)) where* [the ICO] *has received an application under section 50 or (section 51(1)(b)) where he reasonably requires information for the purposes set out in the sub-sections of section 51(1)(b))"*.

34. If the Tribunal's interpretation of s.51(1) is correct:

(1) if the IC is undertaking a Part I Enquiry into an alleged failure by a disclosing authority to meet its Part I duties under s.51(1)(b)(i) - that is, Trigger B - he is entitled only to information from that authority which he reasonably requires;

(2) if, however, he is undertaking a Part I Enquiry commenced by Trigger A, then he has *"…an overall entitlement to require the production of LPP Material"* (see [59]).

35. Since the purpose of a Part I Enquiry is the same, whether commenced by Trigger A or B, there is no rationale for endowing the IC with an *"…overall entitlement to require the production of LPP Material"* for a Part I Enquiry initiated by Trigger A, whilst restricting his access to that material to such of it as he reasonably requires, if the Part 1 Enquiry has been started by Trigger B.

36. In ***R (Andrews) v Secretary of State for Environment, Food and Rural Affairs*** [2015] EWCA Civ 669 (a case requiring the interpretation of the Inclosure Consolidation Act 1801), the Court of Appeal at [33] commented on the exercise of statutory interpretation of modern statutes, per Lord Dyson MR, delivering the judgment of the Court:

> "Even in relation to modern statutes, which are drafted by skilled specialist draftsmen and are assumed to be drafted with precision and consistency, the courts adopt a purposive (in preference to a literal) interpretation so as to give effect to what is taken to have been intended by Parliament. We use the phrase "purposive interpretation" as shorthand for an interpretation which reflects the intention of Parliament. The court presumes that Parliament does not intend to legislate so as to produce a result which (i) is inconsistent with the statutory purpose or (ii) makes no sense or is anomalous or illogical. A purposive interpretation is all the more appropriate in a statute which is couched in language which is less consistent and more imprecise than that generally found in modern statutes."

37. Whether commenced by Trigger A or Trigger B, a Part I Enquiry is the same process, whichever route of initiation brings it into being. To hold, as the Tribunal did, that s.51(1) creates "*… two separate, alternative, scenarios."* means that under one "scenario", the IC's power to require the production of information is limited to that which he reasonably requires (Trigger B), but, under the other "scenario", he has an untrammelled, unqualified power to compel the production of *any* information (including LPP Material) which he elects to seek (Trigger A). The sole distinguishing criterion is the Trigger (A or B).

38. In the words of Lord Dyson MR in ***R(Andrews)***, such a finding makes no sense, is anomalous and lacks logic. If Parliament had intended to create the two-tier system which the Tribunal has found to exist, it could - and should - have done so by using words making that intention clear. Parliament did not do that. It has been suggested on behalf of the IC that s.51(1) employs *"carefully drafted and differentiated language"*: in fact, s.51 was simply transposed from s.43 of the Data Protection Act 1998 ("the DPA 1998") (see paragraph 174 of the Explanatory Note to the Act). Where the information sought by the IC includes LPP Material, since LPP is a right of basic constitutional character (see ***R v Derby Magistrates Court, ex p B*** [1995] 1 AC 48, ***B & ors v Auckland District Law Society & anr*** [2003] UKPC 38; [2003] 2 AC 736), any inroads into, or abrogations from, LPP in a statute require clear words expressing the circumstances in which those inroads/abrogations are to operate.

39. *Bennion, Bailey & Norbury on Statutory Interpretation (8th ed.)* s.13.5 states:

> *"The presumption against absurdity means that the courts will generally avoid adopting a construction that creates an anomaly or otherwise produces an irrational or illogical result".*

That comment (and others from the 6th edition of *Bennion*) were cited and approved in ***Driver and Vehicle Standards Agency v Rowe*** [2017] EWHC 608 (Admin) at [21]:

> "In terms of the approach I should take to the construction of these provisions I was assisted by reference to *Bennion on Statutory Interpretation* (6th ed) and in particular:
>
> i) Section 195: the plain meaning rule, namely that when the enactment is only grammatically capable of one meaning and on an informed interpretation of the enactment the interpretative criteria raise no real doubt as to whether the grammatical meaning is the one intended by the legislator that grammatical reading should be followed.
>
> ii) Section 265: which states that:

> ***"the court when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended [to produce a result which is just and fair] … [and] should therefore strive to avoid adopting a construction which leads to injustice."*** [the emphasis appears in the case report]
>
> iii) Section 315: which states that the court seeks to avoid a construction which creates an anomaly or otherwise produces an irrational or illogical result.
>
> iv) Section 271: which encapsulates the principle that the court should strive to avoid adopting a construction which penalises a person where the legislator's intention to do so is doubtful. The court, when considering in relation to the facts of the case before it, which construction would give effect to the legislative intention should presume that the legislator intended to observe this principle".

40. S.13.5 of *Bennion* also states:

> "An effective legal system seeks to avoid unjustified differences and inconsistencies in the way it deals with similar matters. As Lord Devlin said, 'no system of law can be workable if it has not got logic at the root of it' (see ***Hedley Byrne v Heller*** [1964] AC 465 at 516)."

41. As to the judgment at [72], the PSNI submitted that:

(1) the public interest test which PSNI comes under a duty to apply under s.42 when considering a request for disclosure of LPP, is more accurately characterised as a weighting exercise, rather than a balancing exercise, because the "balance" is weighted in favour of non-disclosure from the outset, as the cases clearly show: the test is properly regarded and treated as requiring *outweighing* on the side of disclosure sufficient to displace the starting presumption in favour of the maintenance of LPP (see ***Pugh v Information Commissioner & anr*** [2007] UKIT EA_2007_0055 (17 December 2007*)* at [53];

(2) this means the PSNI has to (i) first determine if it actually has the requested information, (2) then determine whether and to what extent the requested information engages s.42 of the Ac; and (3) if s.42 is engaged, undertake the public interest test;

(3) taking this present case as if (a) the requester had requested disclosure of LPP Material; (b) that request had met with a refusal, following the PSNI's undertaking of the public interest test, which (c) the requester accepted or, at least, did not complain about under s.50, if the ICO, of his own motion, subsequently undertook a Part I Enquiry initiated by Trigger B, he would find himself limited to the provision by the PSNI only of the information which he reasonably required to complete that enquiry;

(4) suppose further that, as in the judgment at [72], the ICO, in the course of his Trigger B Part I Enquiry, was not satisfied that s.42 was actually engaged. In such circumstances, it would be for the IC to show that he reasonably required to see material said by the PSNI to be covered by LPP. The PSNI would be entitled to argue that the IC did not have any such reasonable requirement, and in so contending, it could set out what, in its submission, *did* constitute material which it was reasonable for him to require. That is where the alternative method suggested by the PSNI, to which the Tribunal referred in [74], could be employed. That method was for the PSNI to take the following steps:

> (a) identify the issue(s) upon which legal advice was sought;
>
> (b) set out the classes of document/material in which the PSNI asserted (and did not waive) LPP, adapting the procedure for identifying documents which are privileged (but relevant) in the context of discovery/disclosure in High Court civil litigation, as provided in RCJ(NI) O.24 r.5 (the Northern Ireland equivalent of the English CPR 31.10(2)-(9) and CPR PD 31A);
>
> (c) state the date(s) on which the relevant legal advice was sought;

(d) state the date(s) on which any legal advice in response to the said request(s) was received;

(e) state whether the material supplied to the relevant legal advisor included material not subject to LPP and/or already in the public domain (identifying any such material);

(f) set out the decision reached by the PSNI in compliance with its duty under s.2(2)(b), including the date on which that decision was reached, and the level within the PSNI at which it was reached.

(5) if, following the steps set out at (4) above, the IC still considered that he reasonably required sight of LPP material, with the PSNI taking a contrary view, then that impasse would have to be resolved by the Tribunal;

(6) the Tribunal held (wrongly) at [72] that any other finding would have made the PSNI the sole arbiter of its compliance with the Act

(7) it was never argued on behalf of the PSNI that the *Tribunal* could not (if so required in a particular case) see LPP Material: the PSNI's case was and is that the *IC*is not empowered under the Act to sight of LPP Material, unless he can show that he reasonably requires it in order to complete a Part I Enquiry (however triggered). As already noted, if the IC and the PSNI are at loggerheads over whether LPP Material is reasonably required by him, that is a matter for the *Tribunal* to resolve – and the *Tribunal* may well need to see the LPP Material concerned in order to rule upon the point;

(8) in ***Wiseman v HMRC*** [2022] UKFTT 00075 (TC) the First-tier Tribunal (Tax Chamber) was considering a notice which HMRC had issued to Mr Wiseman under paragraph 1 of Schedule 36 to the Finance Act 2008, requiring disclosure of certain documents so that HMRC could check his tax position for the tax year 2002/03. Mr Wiseman appealed against that notice, contending that some of the documents which it sought were subject to LPP. His representatives listed the documents which they considered were covered

by LPP (the similarity to the procedure suggested, but rejected, in this case will be noted). HMRC did not accept that those documents were covered by LPP. Mr Wiseman therefore applied to the Tribunal for resolution of the dispute as to the scope of LPP applying to the documents being sought. It is clear from the report that the Tribunal was provided with copies of the contentious documents in order to see whether those documents (or indeed parts of them) were covered by LPP, and also to consider the possibility of redaction.

42. ***Wiseman v HMRC*** proceeded under a dedicated dispute resolution process (The Information Notice: Resolution of Disputes as to Privileged Communications Regulations 2009 (SI2009/1916)), but the same approach would be available and applicable to resolve the question as to whether LPP material was "reasonably required" by the IC in a Trigger B Part I Enquiry. It is, of course, possible that, in a given case, the alternative method suggested by the PSNI could be employed and might satisfy the IC that the relevant LPP material was not reasonably required.

43. As already noted, a Part I Enquiry is a Part I Enquiry, whether begun by Trigger A or Trigger B. If the PSNI's primary submission, namely that the "reasonable requirement" qualification applies to *any* Part I Enquiry, is accepted, then the PSNI further argues that the Tribunal was wrong to hold in the alternative at [71] that the IChas power by way of necessary implication to compel the production to it of LPP material.

44. The question of necessary implication was dealt with by the Lord Justice Clerk in ***Scottish Legal Complaints Commission v Murray*** [2022] CSIH 46 at [31]-[40]. The headnote to this decision usefully summarises the principles applicable generally on this point:

(1) LPP is a fundamental right (***R v Derby Magistrates Court, B v Auckland***);

(2) any question of LPP being overridden by implication is to be tested by absolute necessity (***R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax & anr*** [2002] UKHL 21; [2003] 1 AC 563);

(3) it must be demonstrably necessary for at least an important aspect of the legislation (***R (Morgan Grenfell & Co Ltd)***);

(4) the principle of legality is important in this connection (***R v Secretary of State for the Home Department, ex p Simms*** [2001] 2 AC 115 at [131] (Lord Hoffman):

> "Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. *In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual* [emphasis added]. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."

(5) the more fundamental the right, the less likely it will be left to implication (***SLCC v Murray*** at [33]).

45. There is only one species of Part I Enquiry. There is no rationale, logic or sense in imputing to Parliament an intention to create an anomalous, two-tier Part I Enquiry where the IC's power to compel an authority to deliver up LPP Material is (a) untrammelled or (b) subject to the qualification of reasonable requirement simply and solely depending on the trigger which starts the enquiry. The IC's qualified power can be used and regulated. There is, therefore, no basis whatsoever for implying an unqualified power to compel production of LPP Material into s.51(1): there is, however, every basis for construing the IC's power under s.51(1) as limited to compelling the

production of information which he reasonably requires, whether the Part I Enquiry being undertaken has been started by Trigger A, or Trigger B.

46. The Upper Tribunal is accordingly invited to grant permission to appeal and to allow the PSNI's appeal on the terms sought in the notice of appeal.

The IC's Submissions

Introduction

47. Mr Knight for the IC opposed the PSNI's appeal and argued that the Tribunal was right to dismiss it. In summary, the s.51 power extends, expressly or by necessary implication from the scheme of FOIA as a whole, to information which is said to attract LPP, subject to the specific and limited exception provided by Parliament in s.51(5). The PSNI's attempt to collapse the distinct provisions within section 51(1) cannot withstand the clear statutory language. The regulatory functions of the IC mandated by FOIA could not operate independently and effectively if the PSNI were correct.

48. The wider DPA provisions were referred to above by way of emphasis as to the, somewhat concerning, wider implications of the PSNI's appeal and because the IC's wider functions have been framed by Parliament in materially the same terms under both FOIA and the DPA. The PSNI is right to note that the original source for the form of s.51 was the equivalent power in s.43 of the DPA 1998; that reflects the deliberate consistency of framing Parliament has adopted.

The Application of the FOIA Regime

49. Some points of general application under the FOIA regime, well understood and routinely recognised by the Upper Tribunal and the First-tier Tribunal, follow from the statutory scheme.

50. First, the nature and scope of the IC's functions under s.50 require him carefully to consider the terms of the public authority's refusal of compliance with the requirements of Part I (and particularly s.1(1)). Depending on the terms of the request, and the explanations afforded in the refusal notice

issued under s.17, the most common issues which the IC will need to consider in the course of his investigation will be:

(1) whether the information in issue falls within the scope of the request at all, or whether other information does so;

(2) whether the information withheld on the basis of an exemption falls within the scope of that exemption, i.e. that the exemption is engaged at all; and

(3) whether, in the case of a qualified exemption (or an exemption which engages an analogous balancing exercise), the public interest balance favours the disclosure of the information or the maintenance of the exemption.

51. Whilst it may not always be necessary to examine the withheld information to assess each of those issues – some of which may be apparent from the terms or context of the request and the response – it will usually be necessary to examine the content of the withheld information to be able to address the totality of those issues.

52. Secondly, the Upper Tribunal has emphasised that the approach of FOIA requires those involved (public authority, IC and Tribunal) to assess requested information on a contents and not a class basis: see ***Department of Health v Information Commissioner*** [2015] UKUT 159 (AAC) at [20-21], [23] and [30-31] in particular. It will be a very rare context in which that contents-based focus in the application of the public interest balance can be carried out by the IC without sight of the withheld information in issue. That is the statutory function of the IC under FOIA. As Charles J held at [66] of ***Department of Health***:

> "The structure of FOIA recognises and reflects the concepts of democratic accountability and institutional competence in that it contains absolute exemptions, qualified exemptions and the executive override in s. 53. *The creation of qualified exemptions gives both the Information Commissioner and the FTT statutory roles as decision makers on the public interest assessment*

> *dictated by s.2(2)(b)* (see ss. 50, 57 and 58 of FOIA). To my mind, this is a powerful indicator, whose strength is increased when the underlying purposes of FOIA are taken into account, that *Parliament has given the Information Commissioner and the FTT the task of (and in terms of institutional competence – constitutional responsibility for) carrying out a critical examination of the evidence and argument on both sides of the public interest balance in determining whether a qualified exemption applies*" (emphasis added).

53. Thirdly, the Upper Tribunal has previously expressed direct criticism of the IC for adopting an approach in which an assurance from the public authority that an absolute exemption applied (s.23) was accepted, and the information itself was not considered, and the reasons for the assurance not scrutinised: ***Corderoy*** at [90-97]. That criticism would only be heightened in a context where the IC accepted the assurance of a public authority as to the proper outcome of the public interest balance.

54. Fourthly, it is of critical importance in the context of the present appeal that s.42 is a qualified exemption. S.42, read with s.2, is an express statutory abrogation of the usual protection afforded to LPP material.

55. There is extensive authority which recognises and requires an inherent weight to be given to the public interest in maintaining LPP under s.42: see the authorities collated in ***Callender-Smith v Information Commissioner & Crown Prosecution Service*** [2022] UKUT 60 (AAC) at [19-30]. However, as the Upper Tribunal emphasised in e.g. ***Corderoy***, the s.42 exemption is not to be converted into an absolute one and that "a fact sensitive weighing of the competing public interests must be carried out": at [67-68].

56. Although relatively rare, there are as a result cases in which the IC and the Tribunal have found the public interest in disclosure to outweigh the maintenance of the s.42 exemption. By way of example:

(1) where the public authority had, on the facts, waived LPP by analysing public statements against the content of the legal advice: ***Kirkaldie v***

Information Commissioner & Thanet District Council (EA/2006/001, 4 July 2006) at [41].

(2) where legal advice from some 14 years earlier was still being used as the basis for a highly contested and doubtful use of public money, the public interest favoured disclosure: ***Mersey Tunnel Users Association v Information Commissioner & Merseytravel*** (EA/2007/0052, 15 February 2008). The IC and Tribunal saw the legal advice in issue: at [12].

(3) where legal advice has been used to formulate a policy of general application affecting a category of persons' access to legal redress, such that transparency justified disclosure of the underlying advice: ***Platts v Information Commissioner*** (EA/2020/0276, 9 June 2021). The Tribunal considered the withheld information: at [10].

(4) where further the detailed exercise of review of information said to engage s.42 was carried out in ***All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner & Foreign and Commonwealth Office*** [2013] UKUT 560 (AAC) at [129-139].

57. Fifthly, there is no appellate authority on notices issued under s.51 FOIA. However, ***UKIP v Information Commissioner*** [2019] UKUT 62 (AAC) concerned the exercise of the equivalent, and similarly worded, power under s.43 of the DPA 1998. The Upper Tribunal construed the requirement to state what was required and the reasons for that as only requiring a high level of generality, and fell to be considered against the wider context to the notice, including preceding correspondence: at [23-24]. Where the notice had been drafted in an ambiguous and potentially unclear way as to the timeframe it applied to, a fair and objective reading had to be applied in the light of the notice as a whole: at [27]. The fact that the IC could certify non-compliance for contempt proceedings did not mean the notice should be approached as though it were a criminal indictment: at [27]. When considering the exercise of discretion, there was no requirement for the IC to show that there was no less restrictive alternative: at [29-30]. The Upper Tribunal characterised the

decision as a "classic issue of discretion": at [31]. The challenge to the exercise of discretion was dismissed.

The Factual Context to the Notice

58. The Notice under appeal sets out the context in detail, including specifying that it was issued under s.51(1)(a). It describes the multi-part request made under s.1 at [2], the second, presently relevant, part of which is "Is there a public record of talks between goldmine companies discussing security costs and can the public see them", which as a result of the consent order in the earlier appeal (EA/2021/0112) on the same request, at [1(b)], the scope of this request has been clarified to mean "any record of talks between goldmine companies discussing security costs". It explains the history of the handling of the request, and the Consent Order previously entered into in connection with it at [3].

59. The Notice notes the issue of a further response confirming the holding of information in response to the second part of the request, but withholding that information on the basis of s.42(1) (amongst other exemptions) at [4-5]. The requestor made a complaint to the IC about this response under s.50: at [8]. The Notice records that the IC sought all the withheld information in accordance with "his usual practice" from the PSNI, but that the PSNI refused to provide that part of the information over which LPP was claimed: at [7-8]. The Notice explains at [12] the IC's position that sight of the information was required to assess the legality of the PSNI's response to the request, and that the IC does not accept the PSNI's stance that FOIA does not require it to provide LPP material to him: at [12-13}.

60. In essence, the IC's basis for the issue of the Notice was that the refusal of the PSNI to provide the information to him, or to comply with the Notice, was (and is) frustrating his ability of the to fulfil his duty under s.50 to issue a decision notice to the requestor, denying them a definitive conclusion to his investigation.

The Appeal

61. The PSNI does not clearly set out the grounds of appeal it advances against the judgment; it appears that [6] of the UT13 form is intended to do so, although [6(1)] cannot be a ground of appeal as neither the IC nor the Tribunal has ever suggested that LPP was anything other than an important right. As articulated in PSNI's reply, it advances its appeal on two main alternative issues.

62. The first, and now the focus of the appeal, is on the Tribunal's interpretation of s.51(1), and in particular its conclusion at [60-61] that a Notice issued under s.51(1)(a) (as this Notice was, in terms) is not required to satisfy a "reasonably requires" test. This in truth appears to have nothing to do with the withheld information being subject to LPP; it is an argument at large.

63. The PSNI's argument that the issue of a Notice under s.51(1) must meet a test of "reasonably requires" where it seeks LPP material – an argument it advanced for the first time in the course of oral submissions before the Tribunal and which formed no part of its pleaded or written case – is not arguable. The Tribunal was correct in law to dismiss it.

64. The argument requires the Upper Tribunal to ignore the carefully drafted and differentiated language in fact used by Parliament in s.51. S.51(1) creates two distinct threshold conditions for the power to issue a Notice. One of those, in s.51(1)(b), is framed on the basis that the IC "reasonably requires" the information sought. But s.51(1)(a) is, quite deliberately, not so framed. S. 51(1)(a) requires only that the IC "has received an application under s.50". The two subsections are distinguished by an "or". The two distinct bases for a Notice are also reflected in the references to their separate language in the closing part of s.51(1).

65. Furthermore, s.51(2) specifically recognises the distinction between the two subsections, imposing different conditions on the IC depending on whether the Notice is issued under (1)(a) – in which case (2)(a) applies – or under (1)(b), in which case (2)(b) applies.

66. The language is unambiguous, but the distinction derives from the IC's functions under FOIA. When in receipt of an application under s.50, he is adjudicating upon the legitimacy of the denial by a public authority of a person's exercise of their statutory rights. Parliament intended that the IC should have access to any information he wished to have, including in particular the information in dispute, in order to resolve that dispute. In contrast, when exercising regulatory functions outside of the scope of an individual case, in a more thematic or systemic context of the kind set out in s.51(1)(b), the power to require the provision of information is understandably rendered more narrowly. That is a different function, engaging different policy and legal interests and arising in a different, discretionary, context. Parliament understandably distinguished between the cases.

67. That this is the natural and correct meaning of s.51(1) was also held by the Tribunal in ***Cabinet Office v Information Commissioner & Good Law Project*** [2025] UKFTT 306 (FTT), which concerned another appeal against an information notice and in which a similar argument to that now run by the PSNI about the test applicable under s.51(1)(a) was advanced by the Cabinet Office. The Tribunal (UTJ Rintoul presiding) rejected the argument, holding at [38-40] that:

> "38. We are satisfied in the light of the submissions by [counsel for the Commissioner], to an extent accepted by [counsel for the Cabinet Office], that the mischief of sub-Sections (1)(a) and (1)(b) is different. Section 51(1)(a) flows from the Commissioner being given an application under Section 50 which in turn requires him, hence the use of the word "shall", to take specific action to investigate a complaint and to make a decision whether the public authority has dealt with the application in accordance with the requirements of Part 1 of the Act. The circumstances in which the Commissioner can opt not to make a decision are limited to those circumstances set out in sub-Section 50(2) of FOIA.
>
> 39. The circumstances in which Section 51(1)(b) would apply in particular in relation to sub-paragraph (ii) is much wider and would be, for example, as [counsel for the Commissioner] submitted, if the Commissioner

> became aware that a particular exemption was being routinely used, for example, Section 40 to redact all names, which was not justified. There is, we accept, more of an overlap between 51(1)(a) and 51(b)(i).
>
> 40. … We conclude that, as [counsel for the Commissioner] submitted, Section 51(1)(a) was deliberately drafted to be different from (1)(b). We find no ambiguity and we accept the proposition that what the Cabinet Office is seeking to do is to read words into a statute which are not there and which are not necessary for it to make sense. There are clear textual differences as can be seen by the use of the word "or" and the separation out of the two different duties. Further, we accept the proposition that 51(1)[a] relates to a power of the Commissioner which arises in context in an individual case for which a duty to investigate flows."

68. The Tribunal was right so to find in the ***Cabinet Office*** case, and it was right so to find in the judgment here.

69. It is any event apparent on the Tribunal's judgment that it considered that the Commissioner did "reasonably require" sight of the Information to fulfil his statutory functions and determine the s.50 application before him. That, as the Tribunal held at [72-73], [75] and [78], flows from his statutory function under FOIA to act as the independent arbiter of whether information requested engages an exemption, and if so, whether the public interest favours disclosure or maintaining that exemption; and those questions cannot be answered without sight of the content of the requested information. As the Tribunal formulated the point at [75]: "sight of the information is *required* to make the necessary determination by the Commissioner and, where applicable, the Tribunal" (emphasis added).

70. The Tribunal rightly cited in this context the Upper Tribunal's distinct criticism of the IC in ***Corderoy***. That criticism would only be heightened in a context where he accepted the assurance of a public authority as to the proper outcome of the public interest balance, as the Tribunal held at [73].

71. Accordingly, even if the PSNI could arguably show that the Tribunal's interpretation of s.51(1)(a) was wrong in law and that the "reasonably requires" test in s.51(1)(b) was applicable, that would not avail the PSNI because the Tribunal found in any event, in terms, that compliance with the Notice was "required". In other words, any supposed error could not have been material in any event. There is no appeal against that finding (nor could there be) and the PSNI provides no answer to this point.

72. The PSNI otherwise appears to argue – at [6(3)-(4)] – on a secondary, alternative, basis that the Tribunal was wrong to find that, if s.51(1)(a) did not expressly cover the IC's power to seek disclosure to him of LPP material which was the subject of a s.50 application, the power extended to LPP material as a matter of necessary implication. The Tribunal so held at [71], by reference back to its reasoning on the statutory scheme and language of s. 51 in particular at [70], and by reference to the statutory functions of the IC addressed at [72-75]. This argument is specific to LPP material only.

73. In the specific context of information which is said to be covered by LPP, the scope of s.51(1)(a) as extending to such material is clear and express, as the Tribunal rightly held at [70]. The careful and conscious consideration given to the interplay between the exercise of the s.51 power with LPP is evident on the face of s.51 itself, as it is in the similar versions of the equivalent power in the data protection legislation. Parliament created carefully delimited exceptions to the s.51 power in very specific contexts where LPP applies, namely s.51(5)-(6). The evident effect of those drafting choices is that:

(1) if the PSNI were correct and s.51 did not apply to material asserted by the public authority to attract LPP, s.51(5) would be entirely otiose. The PSNI has never been able to articulate what function s.51(5) would serve if it were correct in its argument that s.51 does not extend to LPP material at all.

(2) in fact, the particular terms of s.51(5) serve a readily understandable legislative purpose: they provide an exception from the general power in s.51 to require the provision of LPP material where that material would give the IC

an unfair advantage against the authority in a dispute between them: that was the view of the Tribunal in ***Ministry of Justice v Information Commissioner*** (EA/2007/0016, 6 August 2007) at [36] and [39]. The IC could not, faced with an appeal against a decision notice, use s.51 to obtain the authority's legal advice on the merits of that appeal. But that is a very different, and specific, purpose to excluding the ability of the IC to exercise the functions placed upon him by FOIA.

74. Lord Taylor CJ recognised in ***R v Derby Magistrates' Court*** at p.507 G-H, that one of only two exceptions to LPP (the other being the iniquity exception) is that imposed by statute: "Nobody doubts that legal professional privilege could be modified, or even abrogated, by statute". The correct approach to the interpretation of legislation said to have this effect on LPP was reiterated by Lord Hoffmann in ***R (Morgan Grenfell & Co Ltd*** at [8]: "the courts will ordinarily construe general words in a statute, although literally capable of having some startling or unreasonable consequence, such as overriding fundamental human rights, as not having been intended to do so. An intention to override such rights must be expressly stated or appear by necessary implication." Lord Hobhouse addressed the meaning of a necessary implication at [45] in the following terms:

> "A necessary implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation" (original emphasis).

75. In ***R (Black) v Secretary of State for Justice*** [2018] AC 215, Lady Hale held at [36(4)] that Lord Hobhouse's dictum "must be modified to include the purpose, as well as the context, of the legislation".

76. Contrary to the PSNI's assertion at [6(3)], this is not a question of "absolute necessity" (whatever that phrase is intended to mean, which is unclear), and insofar as it was put in those terms in ***SLCC v Murray*** [2022] CSIH 46 at [32] it is not consistent with the highest authorities and, if necessary, should not be followed in this respect. The test is as set out in ***Morgan Grenfell***, read with ***Black***, and as applied in this context by the Privy Council in ***B v Auckland*** at [58-59]. It was helpfully and accurately encapsulated in ***Murray*** at [32] in the formulation that the "implication must be demonstrably necessary for at least an important aspect of the legislation to achieve its purpose".

77. Here, as set out above and as the Tribunal held at [72-75], that test is met by s.51. S.51 must be read in the context of the IC's functions under FOIA and his specific duty to determine a complaint made under s.50 in relation to the handling of a s.1 request for information. This was also the conclusion of the Tribunal in the ***Cabinet Office*** case: at [42], [44-45], [52-53].

78. The Tribunal correctly held at [70] and [72-75] that any test of necessary implication was met. The application of s.51 to information which attracts LPP (but does not fall within the terms of s.51(5)) necessarily follows from the express provisions of FOIA – in particular, ss.1, 2, 42, 50, 51(5)-(6) and 57 – construed in their context and by reference to their purpose. Read with the express language of ss.42 and 2, there is, at the very least, a necessary implication that s.51 has the effect that the Notice sets out and that the Tribunal found.

79. The Tribunal was also, on this footing, plainly right to reject at [74] the suggestions advanced – again for the first time orally by the PSNI at the hearing – of alternatives to compliance which fell short of providing the information in question. The PSNI's grounds do not explain how that rejection constituted an error of law. As in the ***Cabinet Office*** case at [56], the "alternatives" were little more than a rear-guard action to excuse non-compliance.

80. There was accordingly no arguable error of law on the part of the Tribunal in construing s.51(1) as permitting the IC to compel, by issue of the Notice, disclosure to him of information requested under FOIA which is said by the PSNI to engage LPP, in order for him independently to assess whether the qualified exemption in s.42 is engaged, and if it is, the balance of the public interest in all the circumstances of the case.

81. In the circumstances, the Upper Tribunal is invited to refuse permission to appeal or, if permission is granted, to dismiss the PSNI's appeal and to uphold the Notice.

Discussion

82. Having read Mr Dunford KC's skeleton argument and heard his oral submissions, I am satisfied that the grounds of appeal are reasonably arguable and I grant permission to appeal in respect of both of his grounds of appeal, but I am also satisfied that Mr Knight for the IC is correct in his analysis of the position and accordingly I dismiss the substantive appeal.

83. As a matter of statutory interpretation, I am satisfied that the two subsections in s.51(1) are clearly separated and are separated by a disjunctive "or"

> "(1) If the Commissioner—
>
> (a) has received an application under section 50, ***or***
>
> (b) reasonably requires any information—
>
> (i) for the purpose of determining whether a public authority has complied or is complying with any of the requirements of Part I, or
>
> (ii) for the purpose of determining whether the practice of a public authority in relation to the exercise of its functions under this Act conforms with that proposed in the codes of practice under sections 45 and 46,
>
> he may serve the authority with a notice (in this Act referred to as "an information notice") requiring it, within

> such time as is specified in the notice, to furnish the Commissioner, in such form as may be so specified, with such information relating to application, to compliance with Part I or to conformity with the code of practice as specified".

84. There is nothing in the language of s.51(1) to suggest that the "reasonable requirement" stipulation in s.51(1)(b) is and has to be read back into the provision of s.51(1)(a), if the IC has received an application under s.50.

85. That there is a distinction between the two provisions is supported by the different requirements as to the *contents* of an information notice served under s.51(1)(a) as opposed to s.51(1)(b), as set out in s.51(2).

86. In a case falling within subsection (1)(a), the information notice must include a statement simply that the IC "has received an application" under s.50. By marked contrast, in a case falling within subsection (1)(b), the information notice must include a statement—

> "(i) that the Commissioner regards the specified information as relevant for either of the purposes referred to in subsection (1)(b), *and*
>
> (ii) of his reasons for regarding that information as relevant for that purpose".

87. The Appellant is right to note that the original sources for the form of s.51 was the equivalent power in s.43 of the DPA 1998, but as Mr Knight said that reflects the deliberate consistency of framing the legislation which Parliament had adopted.

88. In my judgment, Mr Dunford KC's argument amounts not to statutory interpretation of s.51(1), but an invitation to purported judicial legislation in respect of it. He did not seek to argue a linguistic basis for his distinction. The purposive approach to statutory interpretation of Lord Dyson MR in ***R(Andrews)*** is undoubtedly correct, but if there is no ambiguity on the face of the statute, no inconsistency with the statutory purpose and no anomaly or illogicality, the question of a purposive interpretation as a tool to seek to get

round the plain and obvious meaning of the statutory words cannot arise in the first place.

89. I also accept Mr Knight's arguments which I have set out in paragraphs 52 and 53 above about (a) the statutory functions of the Tribunal and the IC and (b) the criticism which the Upper Tribunal has previously expressed of the IC for adopting an approach in which an assurance from the public authority that an absolute exemption applied was accepted, with the result that the information itself was not considered and the reasons for the assurance were not scrutinised. That criticism would indeed only be heightened in a context where the IC accepted the assurance of a public authority as to the proper outcome of the public interest balance without being able to examine the content of the withheld information to assess that question for himself.

90. As is illustrated by the decision in ***Department of Health,*** FOIA requires those involved (whether the public authority, *the IC* or the Tribunal) to assess requested information on a contents and not a class basis: at [20-21], [23] and [30-31] in particular. I agree with Mr Knight that it will be very rare that a content-based focus of the application of the public interest balance could be carried out by the IC without sight of the withheld information in issue.

91. That, as Charles J held in ***Department of Health*** at [66], is the precise statutory function of the IC, as well as the Tribunal, under FOIA:

> "The structure of FOIA recognises and reflects the concepts of democratic accountability and institutional competence in that it contains absolute exemptions, qualified exemptions and the executive override in s. 53. The creation of qualified exemptions gives *both the Information Commissioner* and the FTT *statutory roles as decision makers on the public interest assessment dictated by s.2(2)(b)* (see ss. 50, 57 and 58 of FOIA). To my mind, this is a powerful indicator, whose strength is increased when the underlying purposes of FOIA are taken into account, that *Parliament* has given *the Information Commissioner* and the FTT *the task of (and in terms of institutional competence – constitutional*

> *responsibility for) carrying out a critical examination of the evidence and argument on both sides of the public interest balance in determining whether a qualified exemption applies*" (emphasis added).

92. I agree entirely that the structure of FOIA is a powerful indicator, the strength of which is increased when the underlying purposes of the statute are taken into account, that Parliament has given *both* the IC *and* the Tribunal the task of (and in terms of institutional competence – constitutional responsibility for) carrying out a critical examination of the evidence and argument on both sides of the public interest balance in determining whether a qualified exemption applies. The essential vice of the Appellant's submissions is that they effectively seek to diminish, if not shut out, the role of the IC in that statutory scheme.

93. Likewise, the Upper Tribunal has hitherto been critical (and rightly so) of the IC on a previous occasion for adopting an approach in which an assurance from the public authority that an absolute exemption applied was accepted, with the result that the information itself was not considered and the reasons for the assurance was not scrutinised. As was said in ***Corderoy*** at [90-95]:

> **"The procedural point - Was the Commissioner entitled to rely on an assurance on behalf of the AGO/CO that the Advice was exempt under section 23(1) FOIA or ought she to have exercised her statutory powers so as to require the Advice to be disclosed to her for her consideration?**
>
> 90. During the hearing, we expressed surprise at the approach taken by the Information Commissioner and through counsel she modified her defence of the approach by accepting that she should have asked for more detail and not accepted the assurance in the terms it was given but she did not accept that it was necessary for her to look at the documents in this case.
>
> 91. We expressed surprise at the approach taken by the Information Commissioner and the other two respondents of respectively seeking and relying on and giving and supporting reliance on such an assurance in

> this case because in our view that approach fell well short of what was required under FOIA.
>
> 92. It follows that we welcome the Information Commissioner's modification of her position but we disagree that it would not have been necessary for her to look at the documents in this case whatever further (and undefined) detail she accepts she should have sought.
>
> 93. A feature of this case is that the Cabinet Office and the Attorney General's Office had come to different conclusions on the application of the absolute exemption in section 23. Without explanation, other than an assertion that it had been wrong, the Attorney General's Office has adopted the view advanced in the assurance given by Mr Jaspert on their joint behalf. Of itself, that disagreement and absence of explanation should have indicated that the seeking, giving and reliance on an unexplained assurance were inappropriate.
>
> 94. However, on the assumption that there had been no difference in the conclusions reached by the two public authorities, we do not understand how it was thought appropriate to seek and offer an assurance that did not address the test being applied by the person giving it, and so his reasons for giving it, in particular regarding the way in which the requests were framed and so the disaggregation of the legal advice proposed.
>
> 95. We acknowledge the resource difficulties of the Information Commissioner but we consider that the course adopted here of effectively permitting the other two respondents to be the decision-maker on the challenge to their stance on the application of the absolute exemption in section 23 is unfair."

94. That criticism would equally apply if the IC accepted the assurance of a public authority as to the proper outcome of the public interest balance without being able to examine the matter for himself.

95. Whilst there is powerful authority which rightly recognises the inherent weight to be given to the public interest in maintaining LPP under s.42, that exemption must not to be surreptitiously converted into an absolute one and "a fact sensitive weighing of the competing public interests must be carried out": see ***Corderoy*** at [67-68].

96. My conclusion on the construction of s.51(1)(a) and (b) therefore accords with the recent decision of the Tribunal in the ***Cabinet Office*** case at [35-40] (although I have reached my conclusion independently of it):

> "35. We address first the proposition advanced by the Cabinet Office that the power under section 51(1)(a) to issue an Information Notice is subject to a requirement that the Commissioner reasonably requires the information. The submission put is that the response from the Commissioner does not identify any sensible basis on which parliament might have intended Section 51(1)(a) and Section 51(1)(b) to operate differently.
>
> 36. We do not accept this proposition. We bear in mind that as with the exercise of all statutory powers, the discretion to issue a notice pursuant to Section 51 is subject to the usual constrictions on the use of public power including what is normally referred to in shorthand as ***Wednesbury*** unreasonableness, or irrationality. We accept that parliament would have been aware of this when enacting Section 51(1).
>
> 37. Further, the existence of that public law constraint on the use of the power answers the submission that the Commissioner's response is in effect that he is entitled to information regardless of whether it was reasonably required; we see no reason to conclude that the Commissioner is suggesting that the power to request information is not subject to the public law constraint that the power is exercised rationally.
>
> 38. We are satisfied in the light of the submissions by Mr Knight, to an extent accepted by Mr Pitt-Payne, that the mischief of sub-Sections (1)(a) and (1)(b) is different. Section 51(1)(a) flows from the Commissioner being given an application under Section 50 which in turn requires him, hence the use of the word "shall", to take specific action to investigate a complaint and to make a decision whether the public authority has dealt with the application in accordance with the requirements of Part 1 of the Act. The circumstances in which the Commissioner can opt not to make a decision are limited to those circumstances set out in sub-Section 50(2) of FOIA.
>
> 39. The circumstances in which Section 51(1)(b) would apply in particular in relation to sub-paragraph (ii) is

> much wider and would be, for example, as Mr Knight submitted, if the Commissioner became aware that a particular exemption was being routinely used, for example, Section 40 to redact all names, which was not justified. There is, we accept, more of an overlap between 51(1)(a) and 51(b)(i).
>
> 40. We are aware that a similar issue was touched on to a limited extent in *UKIP v Information Commissioner* [2019] UKUT 62 (AAC) but we bear in mind that case related to the DPA, not FOIA, albeit that the relevant provisions are similarly worded. We conclude that, as Mr Knight submitted, Section 51(1)(a) was deliberately drafted to be different from (1)(b). We find no ambiguity and we accept the proposition that what the Cabinet Office is seeking to do is to read words into a statute which are not there and which are not necessary for it to make sense. There are clear textual differences as can be seen by the use of the word "or" and the separation out of the two different duties. Further, we accept the proposition that 51(1)(b) relates to a power of the Commissioner which arises in context in an individual case for which a duty to investigate flows."

97. As Mr Knight (who was one of the counsel in the case) noted, that case was not being pursued on appeal and the Cabinet Office had already complied with the decision.

98. The language of s.51(1)(a) is unambiguous, and different from the language of s.51(1)(b), but I accept that the distinction derives from the IC's functions under FOIA. When in receipt of an application under s.50, he is adjudicating upon the legitimacy of the denial by a public authority of a person's exercise of his statutory rights. Parliament intended that the IC should have access to any information which he wished to have, including in particular the information in dispute, in order to resolve that dispute. The mischiefs at which s.51(1)(a) and s.51(1)(b) are directed are different and their ambit is not the same.

99. S.51(1)(a) applies when the IC receives an individual application under s.50, which requires him to take specific action to investigate the complaint and to make a decision as to whether the public authority has dealt with the

application in accordance with the requirements of Part 1 of FOIA. The limited circumstances in which he can opt not to make a decision are limited to those circumstances set out in s.50(2)

99. That situation stands in contrast to that set out in s.51(1)(b). In contrast, the IC is there exercising regulatory functions outside of the scope of an individual case, in a more thematic or systemic context (for example, if the IC became aware that a particular exemption was being routinely used, say s.40 to redact all names, which was not justified). That is particularly so in relation to s.51(1)(b)(ii) where the IC reasonably requires any information for the purpose of determining whether the *practice* of a public authority in relation to the exercise of its functions under this Act *conforms with that proposed in the codes of practice* under sections 45 and 46. In that case the power to require the provision of information is understandably rendered more narrowly. That, however, is a different function, which engages different policy and legal interests and it arises in a different, discretionary, context. In that context, Parliament understandably distinguished between the two different cases.

100. Mr Dunford KC argued that the strength of the Tribunal's acceptance of that distinction was as a result of Mr Pitt-Payne KC's concession, but it seems to me in the light of the clear statutory language that that concession was rightly made.

101. It seems to me that Mr Knight is right in his submission that s.51(1)(a) is concerned with an adjudicatory function of the IC and s.51(1)(b) with his regulatory function in a wider field, which is therefore more narrowly circumscribed. I do not accept Mr Dunford KC's submission that Mr Knight's distinction between the IC's adjudicatory his and regulatory functions was a triumph of form over substance.

102. The Tribunal in ***Cabinet Office*** at [39] considered that there was more of an overlap between s.51(1)(a) and 51(b)(i). Mr Knight did not accept that there was an overlap and I do not need to decide that point on the facts of this case where the IC was clearly acting under s.51(1)(a), although I incline to the

view that s.51(1)(a) and 51(b)(i) do not overlap in scope and are aimed at different scenarios, the former at an individual case arising under s.50 and the latter (significantly bracketed together with (b)(ii)) concerned with wider issues such as backlogs in dealing with requests, hence the language of the IC reasonably requiring information for the purpose of determining whether a public authority *has complied or is complying* with any of the requirements of Part I of the Act.

103. I do not therefore accept Mr Dunford KC's submission that the inquiry under s.51(1) is the *same* inquiry, initiated only by different triggers, or that the sole distinguishing factor between s.51(1)(a) and s.51(1)(b) was the mode of initiation, and that it was therefore irrational to have two different tests depending on which trigger was pulled. That submission cannot stand in the face of statutory language used by Parliament and in any event I do not, for the reasons set out in paragraphs 98 to 100 above, accept the premise on which it is founded.

104. Nor do I accept Mr Dunford KC's submission that the IC's interpretation of s.51(1)(a) would give him an "untrammelled, unqualified power to compel the production of *any* information (including LPP Material) which he elects to seek" (see paragraph 37 above). As the Tribunal made clear in the ***Cabinet Office*** case

> "36. We do not accept this proposition. We bear in mind that as with the exercise of all statutory powers, the discretion to issue a notice pursuant to Section 51 is subject to the usual constrictions on the use of public power including what is normally referred to in shorthand as ***Wednesbury*** unreasonableness, or irrationality. We accept that parliament would have been aware of this when enacting Section 51(1).
>
> 37. Further, the existence of that public law constraint on the use of the power answers the submission that the Commissioner's response is in effect that he is entitled to information regardless of whether it was reasonably required; we see no reason to conclude that the Commissioner is suggesting that the power to request

> information is not subject to the public law constraint that the power is exercised rationally."

105. I should add that I did not derive much assistance in this context from the ***UKIP*** case, where the matter at hand was only obliquely touched on, but nothing that I have said is in any way inconsistent with what Judge Wikeley said in that case.

106. Recognising that an argument based on the Tribunal itself not being able to see the withheld information would be doomed to failure, Mr Dunford KC proposed an alternative solution, which would have recognised the Tribunal's entitlement to see the material in dispute without the IC having sight of it. Beguilingly though it was presented, I do not consider that Mr Dunford KC's solution based on the decision in ***Wiseman*** assists him.

107. The context in which ***Wiseman*** fell for decision was altogether different from the present case. In ***Wiseman*** an application was made under Regulation 5 of the Information Notice: Resolution of Disputes as to Privileged Communications Regulations 2009 (SI 2009/1916) (the "Regulations") for the resolution of a dispute as to whether certain documents sought from the applicant by HMRC (under Paragraph 1 of Schedule 36 to the Finance Act 2008) were privileged from disclosure by virtue of Paragraph 23 of that Schedule.

108. Tribunal Judge Bailey explained the working of the Regulations as follows:

> **"The relevant part of the Regulations**
>
> 9. Regulation 3 of the Regulations provides:
>
> **3.** These Regulations apply where there is a dispute between HMRC and a person to whom an information notice has been given either—
>
> (a) during the course of correspondence, or

> (b) during the course of an inspection of premises under Schedule 36,
>
> as to whether a document is privileged.
>
> 10. Regulation 5 sets out the procedure to be followed to bring a dispute over whether a document is privileged to the resolution by the Tribunal. That procedure has been correctly followed by the parties.
>
> 11. Regulation 8 provides:
>
> **8.** When an application is made under regulation 5(5) …, the First-tier Tribunal shall—
>
> (a) resolve the dispute by confirming whether and to what extent the document, is or is not privileged;
>
> (b) direct which part or parts of a document (if any) shall be disclosed.
>
> 12. Regulation 7 provides that a person who has received an information notice and complied with the procedure under Regulation 5 shall be treated as having complied with the information notice in respect of any document in dispute until the First tier Tribunal has determined the status of that document.
>
> 13. The role of the Tribunal in this application is to determine which of the disputed documents (or which parts of the disputed documents, as privilege will not necessarily apply to the whole of any document) are subject to privilege. The Tribunal should then provide directions for the disclosure of any documents (or part documents) not subject to privilege."

109. It is immediately obvious that the dispute in ***Wiseman*** arose in an altogether different statutory scheme for an altogether different purpose. As a general principle, it is rarely legitimate or appropriate to read across provisions from one statutory context into another altogether different context, but in my judgment it cannot legitimately be done in the present case. In the case of a dispute between the taxpayer and HMRC as to whether a document is subject to LPP or not, neither party can decide that issue unilaterally for itself in the case of that dispute and the resolution of the dispute can only be essayed by the Tribunal. The procedure under the Regulations for resolution

of the issue by the Tribunal is therefore entirely understandable and appropriate.

110. By contrast, in the case of a FOIA dispute, the dispute between the requestor and the public authority is subject to the scrutiny of both the IC and, on appeal from him, the Tribunal. As I explained in paragraph 92 above, in the case of FOIA Parliament has given *both* the IC *and* the Tribunal the task of (and in terms of institutional competence – constitutional responsibility for) carrying out a critical examination of the evidence and argument on both sides of the public interest balance in determining whether a qualified exemption applies.

111. The fundamental problem with the ***Wiseman*** solution proffered by Mr Dunford KC is that it precludes the IC from seeing the material in question, thus diminishing both his institutional competence and his constitutional responsibility under FOIA and does not recognise the role of both the IC and the FTT as decision makers on the public interest assessment dictated by s.2(2)(b) of the Act.

112. The Tribunal was therefore right to conclude at [74] that the proposed alternative method would not actually provide the IC with the information which was sought under the information notice, that there was nothing save s.51(5) (which did not apply) to fetter the discretion of the IC regarding the information sought pursuant to that notice (subject to the points made in the ***Cabinet Office*** case at [36-37] and accordingly it was not open to the Appellant to propose an alternative means of providing the information requested by the IC or to provide lesser information than that sought by him.

113. Although it is not necessary for my conclusion, I also agree with Mr Knight, as set out in paragraphs 69 and 71 above, that it is any event apparent on the face of the Tribunal's judgment that it considered that the IC did "reasonably require" sight of the information to fulfil his statutory functions and determine the s.50 application before him. That, as the Tribunal held at [72-73], [75] and [78], flowed from his statutory function under FOIA to act as

the independent arbiter of whether information requested engaged an exemption, and if so, whether the public interest favoured disclosure or maintaining that exemption, questions which could not be answered without sight of the content of the requested information. As the Tribunal formulated the point at [75]: "sight of the information is *required* to make the necessary determination by the Commissioner and, where applicable, the Tribunal" (emphasis added).

114. It must therefore follow that, even if the Appellant could demonstrate that the Tribunal's interpretation of s.51(1)(a) was wrong in law and that the "reasonably requires" test in s.51(1)(b) was to be imported into s.51(1)(a), that would not avail him because the Tribunal found in any event that compliance with the notice was "required". If that be the case, any supposed error on the part of the Tribunal could not have been material in any event.

115. The second ground of appeal was that the Tribunal was wrong in law to find that, even if s.51(1)(a) did not expressly cover the IC's power to seek disclosure to him of LPP material which was the subject of a s.50 application, the power nevertheless extended to LPP material as a matter of necessary implication.

116. As to that, the correct approach to the interpretation of legislation said to modify or abrogate LPP is that of Lord Hoffmann in ***R (Morgan Grenfell & Co Ltd)*** at [8]:

> "the courts will ordinarily construe general words in a statute, although literally capable of having some startling or unreasonable consequence, such as overriding fundamental human rights, as not having been intended to do so. An intention to override such rights must be expressly stated or appear by necessary implication"

and Lord Hobhouse at [45]:

> "A necessary implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation" (original emphasis).

117. That latter dictum should be read in the light of the judgment of Lady Hale in ***R (Black)*** at [36(4)] that what the latter said "must be modified to include the purpose, as well as the context, of the legislation".

118. In short, the appropriate test for ascertaining whether there is a necessary implication that a statute has the effect of modifying or abrogating LPP is test is as set out in ***R (Morgan Grenfell & Co Ltd)***, read with ***(R) Black***, as applied in this context by the Privy Council in ***B v Auckland*** at [58-59]. Properly interpreted, it is also accurately encapsulated in ***SLCC v Murray*** at [32] that the "implication must be demonstrably necessary for at least an important aspect of the legislation to achieve its purpose". I did not understand the parties to be at odds to any significant extent, if at all, as to those principles or to the principle that the protection of LLP was a fundamental right of a constitutional character or a provision of fundamental significance.

119. When the entirety of ***SLCC v Murray*** at [31-33] is read in context, which relied on both the earlier authorities and in particular the dictum of Lord Hobhouse cited above, I do not understand the Lord Justice Clerk to be asserting a higher or narrower test of "absolute necessity" above and beyond the established tests for importing a necessary implication.

120. I am satisfied that the Tribunal was correct to hold that necessary implication was established in this case for the reasons which it set out at [71] and [72-75]. If the information sought by the IC is denied him, a predicate of the FOIA structure is fundamentally undermined. That consideration is of

foremost importance in concluding that the necessary implication test is made out.

121. If the Appellant were correct that s.51 did not apply by necessary implication to material asserted by the public authority to attract LPP, s.51(5) would be entirely otiose. When I questioned Mr Dunford KC about that, I did not receive a convincing answer. If s.51 does not bite on material asserted by the public authority to attract LPP in the first place, there would have been no point in enacting s.51(5).

122. The particular terms of s.51(5) do in fact serve a readily understandable legislative purpose in providing a limited exception or derogation from the general power in s.51 to require the provision of LPP material where that material would give the IC an unfair advantage against the authority in a dispute between them: that was the view of the Tribunal in ***Ministry of Justice***, which it is worth citing at some length so that the point can be readily understood. In short, the IC could not, faced with an appeal against a decision notice, use s.51 to obtain the authority's legal advice on the merits *of that very appeal,* but that is a very different, and a very specific, purpose to exclude the ability of the IC to exercise the functions placed upon him by FOIA *in one limited context where he would otherwise be given an unfair advantage*.

123. In that context the Tribunal explained that

> **"The DCA's case**
> 20. The DCA's position is that by reason of the exclusion in s 51(5)(a), the Commissioner has no power under 51(1) of the Act to require it to confirm or deny whether it holds advice from the Attorney General on the "public interest" test and its interpretation under the Act because it argues (the emphasis of the words in italics or underlined are those of the DCA):
>
> (1) the object of s 51(5) is to provide public authorities with protection based on legal professional privilege in respect of legal advice about matters in relation to which disputes involving authorities may be ruled upon by the Commissioner and/or the Commissioner may be a party

(on appeal). It ensures that the Commissioner does not obtain an unfair advantage – on the very topics on which he has to rule and/or make submissions – vis-à-vis parties who appear before him and parties against which he makes submissions, by using his powers to allow him to be informed whether they have sought legal advice on those topics and what that legal advice might be. No court or opposing party in ordinary proceedings would have a right to be provided with such information, and Parliament has decided that the importance of the right of a party to protection of confidentiality in relation to his legal advice relevant to matters which are the subject of dispute before and/or with another interested person (be it court or opposing party) is such as to warrant this limitation in such circumstances upon the Commissioner's powers;

(2) this rationale covers both general legal advice received as to the authority's rights and liabilities under the Act (the subject of s.51(5)(a)) and more specific advice in relation to proceedings or contemplated proceedings under the Act (s 51(5)(b)). In each case, a court or opposing party would not be entitled to the information in ordinary litigation, and s. 51(5) provides that the Commissioner (as "court" and, then, opposing party) should not be in any better position. The scheme of s. 51(5) makes it clear that Parliament intended both forms of advice to be covered by the exemption from the Commissioner's powers under s. 51(1);

(3) s.51(5)(a) covers both the advice itself and the information as to whether or not such advice was obtained/is held by the authority;

(4) it is irrelevant whether or not any such advice given by the Attorney General to the Department was given to the Department in its capacity as the department responsible for the Act or in relation to the Department's own liabilities under the Act.

21. These points are developed in turn below.

(1) The object of s 51(5)

22. The DCA submits that the object of s.51(5) is to provide authorities with protection in respect of legal advice about matters in relation to which disputes involving authorities may be ruled upon by the Commissioner and/or the Commissioner may be a party (on appeal):

(1) Having regard to the role of the Commissioner in adjudicating on disputes under the Act, and then potentially being a party to proceedings on appeal, s. 51(5) is concerned to prevent an authority from being required to disclose to the Commissioner legal advice (and information relating to it in the way specified) which may compromise its position before the Commissioner (and hence also potentially against the Commissioner – i.e. on appeal). Whilst such protection is in many ways akin to legal professional privilege, s.51(5) is of broader construction so as to recognise the importance of this principle. For example, unlike s.42, s.51(5) is not limited to legal advice in respect of which a claim for legal professional privilege could be maintained in legal proceedings;

(2) this focus and object of s.51(5) is supported by: (i) the fact that the exemption applies to protect material from disclosure to the Commissioner regardless of whether the Commissioner undertakes not to make onward disclosure of the information to the complainant or third party (as in this case) and (ii) the fact that only legal advice relating to the client's rights and liabilities/proceedings "under this Act" is covered. Where the Commissioner considers legal advice which does not relate to the client's rights and liabilities/proceedings "under this Act", it is not disputed that, as necessary, the Commissioner does have power under s. 51(1) to order provision to him of that advice in order to review the weighing exercise in relation to it under s. 2 and s. 42 of the Act. The point of s. 51(5) is precisely to delimit that power so as to exclude it in relation to legal advice on the very matters on which the Commissioner may have to rule in relation to the public authority as a party ("legal advice to the client with respect to his obligations, liabilities or rights under this Act");

(3) this interpretation (preventing the Commissioner from accessing information regarding legal advice in the limited class of case where the legal advice which has or may have been given is to a party before him and against which he may become an opposing party, and is about the very matters on which he may have to rule or present opposing submissions) is consistent – in that limited sub-category of case - with the absolute nature of the legal professional privilege (which ordinarily means that it cannot be overridden by some other higher public interest) and the particularly compelling public interest which that approach at common law reflects. Certainly, the absolute nature of the privilege has been overridden

in the Act, in that legal professional privilege (s. 42) is not made an absolute exemption in relation to the general category of legal advice. However, the great force of the public interest in preserving confidentiality across that general category has been acknowledged and repeated by courts at the highest level, so that the courts will maintain non-disclosure of legal advice even where the exercise of the privilege may impede the proper administration of justice in the individual case: see e.g. *Three Rivers DC v Bank of England (No 6)* [2005] 1 AC 610, per Lord Scott at paras 25 and 34, per Lord Rodger of Earlsferry at para 54, and per Baroness Hale at para 61. Further, the strength of the public interest in maintaining legal professional privilege is such that it will not be treated as abrogated by general words used in a statute – rather, clear, specific and express language would be required: see *R v IRC, ex p Morgan Grenfell* [2003] 1 AC 563. It is thus unsurprising that, even though Parliament has in the context of the Act abrogated the common law rule to the limited extent of not making the exemption in s. 42 absolute (so that the public interest will fall to be applied – but, of course, reflecting when it is applied the strong public interest in non-disclosure which has been authoritatively identified by the courts), it has at the same time reflected and preserved in absolute terms in s. 51(5) the common law protection against provision of information about legal advice in that limited class of case which concerns those questions in respect of which the Commissioner is "judge" and potential opposing party; this is simply to observe that the limited abrogation of the absolute common law rule in the Act has itself been qualified by way of s.51(5) in the very class of case where the rationale against disclosure of the information to the Commissioner himself is at its most powerful and compelling. Once such information has been disclosed to the Commissioner (who is, in relation to it, a party with an interest), it cannot be undisclosed. The position in respect of this special class of case may be contrasted with the position in relation to legal advice falling outside the context where the Commissioner is himself to be regarded as a party with an interest in the information itself. Where the Commissioner has no interest himself in the topic of the legal advice which has or may have been given, he can properly be regarded as an a impartial adjudicator concerned to decide whether information which does not concern himself or the exercise of his functions should be disclosed into the public domain, and it is as such an impartial and disinterested adjudicator/regulator that it may be

> appropriate for him to require the provision of the information concerned in order to carry out that (impartial) refereeing function (s.51(1)(b)). But where the Commissioner himself has an interest in the subject of the legal advice, that model does not apply, and his powers under s.51(1) are accordingly limited to the extent of his own interest (s.51(5)).
>
> ..."

124. The Tribunal accepted those submissions as to the purpose and ambit of s.51(5):

> **"The Tribunal's findings**
> 36. The Tribunal finds the DCA's arguments as to why the Information Notice is subject to s.51(5) FOIA to be very persuasive. The basis of this limitation or exemption from compliance with an Information Notice is so as not to give the Commissioner an unfair advantage in matters he may be called to rule upon or be a party to.
>
> 37. We accept the DCA's detailed submissions in this case which are set out at paragraphs 22 to 25 above.
>
> ...
>
> 39. The Tribunal appreciates the argument of the Commissioner where LPP is claimed that he may need to inspect privileged materials in order to establish whether or not the exemption is made out. An example might be where a local authority has taken legal advice on a planning appeal which then becomes the subject of a FOIA request. However where the legal advice relates specifically to the Act then s.51(5) comes into play and he cannot inspect the information because of the unfair advantage it may give him."

Conclusion

125. I therefore consider that the information notice was lawful and accordingly that the IC was entitled to require the Appellant to furnish him with the Withheld Information. The Appellant was not therefore entitled to refuse to provide the Withheld Information to the IC.

126. For these reasons I am satisfied that the decision of the First-tier Tribunal (General Regulatory Chamber) dated 8 August 2024 under file

reference EA2023/0341 does not contain an error on a point of law. Although the points raised by the PSNI's application are arguable, and I grant permission in respect of them, the appeal is dismissed.

127. The suspension of the decision of the First-tier Tribunal pending the resolution of the rolled-up application, which I directed on 2 January 2025, will accordingly fall to be lifted, but I will postpone the lifting of the suspension for 1 month after the date on which this decision is issued to the parties to allow the Appellant to make any application relating to an appeal which he may be minded to make.

Mark West
Judge of the Upper Tribunal

Authorised for issue on 28 July 2025